NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 135

21 SEPTEMBER 1999

7 DECEMBER 1999

RALEIGH
2001

CITE THIS VOLUME
135 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

SIDNEY S. EAGLES, JR.

Judges

K. EDWARD GREENE
JOHN B. LEWIS, JR.
JAMES A. WYNN, JR.
JOHN C. MARTIN
JOSEPH R. JOHN, SR.
RALPH A. WALKER
LINDA M. McGEE
PATRICIA TIMMONS-GOODSON
CLARENCE E. HORTON, JR.
ROBERT C. HUNTER
ROBERT H. EDMUNDS, JR.

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Former Chief Judges

R. A. HEDRICK
GERALD ARNOLD

Former Judges

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JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
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EDWARD B. CLARK
HARRY C. MARTIN
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL
WILLIS P. WHICHARD
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CHARLES L. BECTON
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JOHN H. CONNELL

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Kimberly Woodell Sieredzki

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	NARLEY L. CASHWELL	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	ABRAHAM P. JONES	Raleigh
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	A. LEON STANBACK, JR.	Durham
	RONALD L. STEPHENS	Durham
	DAVID Q. LABARRE	Durham
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	D. JACK HOOKS, JR.	Whiteville
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	A. MOSES MASSEY	King
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	CATHERINE C. EAGLES	Greensboro
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	LINDSAY R. DAVIS, JR.[6]	Greensboro
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21	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.	Winston-Salem
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	RONALD E. SPIVEY[7]	Winston-Salem
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	Raymond A. Warren	Charlotte
	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte
	J. Gentry Caudill[8]	Charlotte
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	Timothy L. Patti	Gastonia
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	James W. Morgan	Shelby
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	Ronald K. Payne	Asheville
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Charles C. Lamm, Jr.[14]	Boone
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	J. MILTON READ, JR.	Durham
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LESTER P. MARTIN, JR.	Mocksville
HOLLIS M. OWENS, JR.	Rutherfordton

SPECIAL EMERGENCY JUDGES

MARVIN K. GRAY[20]	Charlotte
JOHN B. LEWIS, JR.[21]	Farmville
DONALD L. SMITH[22]	Raleigh

1. Appointed and sworn in 4 October 2000 to replace Richard B. Allsbrook who retired 1 October 2000.
2. Appointed to the Supreme Court and sworn in 8 February 2001.
3. Elected and sworn in 8 December 2000 to replace Arnold O. Jones who retired 31 August and deceased 6 October 2000.
4. Retired 31 December 2000.
5. Elected and sworn in 2 January 2001.
6. Appointed and sworn in 16 February 2001 to fill vacancy left by Thomas W. Ross who resigned 30 November 2000.
7. Appointed and sworn in 8 February 2001 to replace William H. Freeman who retired 31 December 2000.
8. Appointed to a new position and sworn in 16 February 2001.
9. Position ended 30 September 2000.
10. Position ended 31 December 2000.
11. Appointed and sworn in 9 February 2001.
12. Appointed and sworn in 26 January 2001.
13. Appointed and sworn in 23 January 2001.
14. Reappointed and sworn in 2 October 2000.
15. Reappointed and sworn in 2 October 2000.
16. Reappointed and sworn in 2 October 2000.
17. Appointed and sworn in 8 January 2001.
18. Resigned 26 January 2001.
19. Resigned 30 November 2000.
20. Appointed and sworn in 4 January 2001.
21. Appointed and sworn in 2 January 2001.
22. Currently assigned to Court of Appeals.

DISTRICT COURT DIVISION

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	DENNIS J. REDWING[34]	Gastonia
	JAMES A. JACKSON[35]	Gastonia
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29	ROBERT S. CILLEY (Chief)	Pisgah Forest
	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
	LAURA J. BRIDGES	Hendersonville

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	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva

EMERGENCY JUDGES

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DONALD L. BOONE[38]	High Point
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Fayetteville
WILLIAM A. CHRISTIAN[39]	Sanford
SPENCER B. ENNIS[40]	Graham
J. PATRICK EXUM[41]	Kinston
J. KEATON FONVIELLE[42]	Shelby
STEPHEN F. FRANKS	Hendersonville
GEORGE T. FULLER	Lexington
ADAM C. GRANT, JR.	Concord
LAWRENCE HAMMOND, JR.	Asheboro
ROBERT L. HARRELL	Asheville
JAMES A. HARRILL, JR.	Winston-Salem
PATTIE S. HARRISON[43]	Roxboro
ROBERT W. JOHNSON	Statesville
ROBERT K. KEIGER	Winston-Salem
C. JEROME LEONARD, JR.[44]	Charlotte
EDMUND LOWE	High Point
JAMES E. MARTIN[45]	Ayden
J. BRUCE MORTON	Greensboro
DONALD W. OVERBY	Raleigh
L. W. PAYNE, JR.	Raleigh
STANLEY PEELE	Chapel Hill
MARGARET L. SHARPE	Winston-Salem
RUSSELL SHERRILL III[46]	Raleigh

RETIRED/RECALLED JUDGES

WILLIAM A. CREECH	Raleigh
ROBERT T. GASH	Brevard
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

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1. Appointed to a new position and sworn in 8 January 2001.
2. Appointed to a new position and sworn in 2 February 2001.
3. Retired 3 December 2000 and appointed and sworn in as Emergency Judge 19 December 2000.
4. Elected and sworn in 4 December 2000.
5. Elected and sworn in 4 December 2000.
6. Elected and sworn in 4 December 2000.
7. Appointed and sworn in 17 November 2000 to replace Dwight L. Cranford who was appointed to the Superior Court.
8. Appointed Chief Judge effective 11 January 2001 to replace Albert S. Thomas, Jr. who was sworn in as Judge of the Court of Appeals 5 January 2001.
9. Elected and sworn in 4 December 2000.
10. Appointed Chief Judge effective 4 December 2000.
11. Elected and sworn in 4 December 2000.
12. Appointed to a new position and sworn in 5 January 2001.
13. Appointed Chief Judge effective 1 December 2000.
14. Elected and sworn in 4 December 2000.
15. Elected and sworn in 4 December 2000.
16. Appointed to a new position and sworn in 2 February 2001.
17. Appointed Chief Judge effective 1 October 2000 to replace William A. Christian who retired and was appointed Emergency Judge 2 October 2000.
18. Elected and sworn in 4 December 2000.
19. Elected and sworn in 4 December 2000.
20. Appointed to a new position and sworn in 15 December 2000.
21. Elected and sworn in 4 December 2000.
22. Deceased 31 December 2000.
23. Elected and sworn in 4 December 2000.
24. Elected and sworn in 4 December 2000 to replace Donald L. Boone who retired 30 November 2000.
25. Appointed and sworn in 6 October 2000.
26. Appointed and sworn in as Superior Court Judge 8 February 2001.
27. Elected and sworn in 13 December 2000.
28. Elected and sworn in 4 December 2000.
29. Retired 30 November 2000.
30. Elected and sworn in 4 December 2000.
31. Appointed to a new position and sworn in 8 January 2001.
32. Elected and sworn in 4 December 2000.
33. Elected and sworn in 4 December 2000.
34. Appointed to a new position and sworn in 23 October 2000.
35. Elected and sworn in 4 December 2000.
36. Appointed to a new position and sworn in 26 January 2001.
37. Elected and sworn in 4 December 2000.
38. Appointed and sworn in 14 December 2000.
39. Appointed and sworn in 9 October 2000.
40. Appointed and sworn in 1 December 2000.
41. Appointed and sworn in 28 September 2000.
42. Reappointed and sworn in 8 November 2000.
43. Appointed and sworn in 1 December 2000.
44. Appointed and sworn in 1 December 2000.
45. Appointed and sworn in 19 December 2000.
46. Appointed and sworn in 1 December 2000.

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CONSTITUTION OF NORTH CAROLINA CITED

RULES OF APPELLATE PROCEDURE CITED

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DIXIE L. DEERMAN, PLAINTIFF V. BEVERLY CALIFORNIA CORPORATION, A CALIFORNIA CORPORATION, D/B/A/ BRENTWOOD HILLS NURSING CENTER, AND NOW KNOWN AS BEVERLY HEALTH AND REHABILITATION SERVICES, INC., A CALIFORNIA CORPORATION, DEFENDANT

No. COA98-135-2

(Filed 21 September 1999)

Employer and Employee— wrongful discharge from employment—against public policy—motion to dismiss improperly granted

Taking the allegations of plaintiff-nurse's complaint alleging wrongful discharge from employment by defendant based on her advising a patient's family who solicited her opinion that they should consider changing physicians as true, the trial court erred in granting defendant's Rule 12(b)(6) motion to dismiss because plaintiff's termination was motivated by a reason or purpose that is against public policy since the statements which led to her termination were proffered in fulfillment of her "teaching and counseling" obligations as a licensed nurse. N.C.G.S. § 90-171.20(7).

Appeal by plaintiff from order filed 30 October 1997 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 18 March 1999.

George W. Moore for plaintiff-appellant.

Moore & Van Allen, P.L.L.C., by Randel E. Phillips and Meredith W. Holler, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1990) (Rule 12(b)(6)) of her complaint alleging wrongful discharge from employment by defendant. Upon careful review, we reverse.

Pertinent factual allegations contained in plaintiff's complaint, filed 11 July 1997, included the following:

> 2. The Plaintiff is and was at all relevant times herein a registered nurse licensed by the State of North Carolina.
>
> 3. The Plaintiff was hired by the Defendant as a registered nurse at its Brentwood Hills Nursing Center in Buncombe County, North Carolina on June 25, 1994; the Plaintiff was promoted to the job of Care Plan Coordinator in January, 1995.
>
> 4. The Plaintiff was responsible for managing medical care and treatment for all patients at the Defendant's facility . . . .
>
> 5. Prior to July, 1995, the Plaintiff had never been advised by administrative or supervisory personnel at the Brentwood Hills Nursing Center that her performance was in any way inadequate or incompetent and she was given a promotion shortly before July, 1995.
>
> 6. In July, 1995, the Plaintiff's salary was based on an hourly wage of $16.50 per hour and she averaged approximately 45 hours each week.
>
> 7. In and prior to July of 1995, the Plaintiff was providing nursing services to a patient at the Brentwood Hills Nursing Center; this patient began losing weight, having hallucinations, psychiatric symptoms and acute distress; the Plaintiff documented and reported all of the patient's medical difficulties to the patient's physician; the Plaintiff also attempted to contact the patient's physician by telephone, but the physician would not return her telephone calls; the Plaintiff observed that the patient's condition was deteriorating and that she was in need of a change of treatment.
>
> 8. The Plaintiff was contacted by a member of the patient's family regarding the patient's difficulties and deteriorating condition; after the Plaintiff advised the patient's family as to her concerns, one of the family members asked for the Plaintiff's

advice as to what should be done for the patient and the Plaintiff advised that she would reconsider the choice of physicians in that the appropriate treatment had not been provided for her by her physician.

9. The Defendant, after being advised that the Plaintiff had advised the patient's family that she would reconsider the choice of physicians for the patient, terminated the Plaintiff from her position of employment with the Defendant; the Defendant's agents advised the Plaintiff that her termination was due to her advising the family of the patient that they should consider changing physicians for the patient.

10. The Plaintiff at all times performed her duties responsibly and competently while she was employed as a registered nurse for the Defendant.

11. After her discharge, the Plaintiff attempted to find work as a registered nurse at other facilities in the area with no success.

12. As a result of her discharge, the Plaintiff has lost substantial amounts of income and fringe benefits, including, but not limited to, medical insurance, vacation pay, and retirement benefits . . . .

Plaintiff further alleged that in advising the patient's family concerning choice of physicians, she had complied with the North Carolina General Statutes and the North Carolina Administrative Code regulating the practice of nursing. Therefore, plaintiff continued, termination of her employment by defendant was

> in violation of the strong public policy favoring administering of nursing services to those acutely or chronically ill and the supervising by nurses of patients during convalescence and rehabilitation.

On 15 August 1997, defendant moved to dismiss plaintiff's complaint under Rule 12(b)(6) for failure to state a claim upon which relief might be granted. In particular, defendant asserted that

> [p]laintiff was terminated for vocalizing to a patient's family member her criticisms of the treatment provided to the patient by the attending physician, and recommending to the patient's family member that the family select a different physician. The Defendants' justification and motive as alleged in [plaintiff's complaint] does not violate any public policy of North Carolina . . . .

The trial court granted defendant's motion 30 October 1997, and plaintiff timely appealed.

In reviewing the grant of a Rule 12(b)(6) motion, we must consider whether plaintiff was entitled to relief "under any state of facts which could be presented in support of the claim." *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985). Further, the complaint must be liberally construed, *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987), and all well-pleaded allegations therein taken as true, *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). A Rule 12(b)(6) motion should be granted only if the pleading at issue "fails to allege a sufficient legal or factual basis for the claim, or reveals a fact which necessarily defeats the claim." *Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 261, 488 S.E.2d 628, 630, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997).

The parties herein do not contest plaintiff's employment status as an "at-will" employee.

> [I]n the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party.

Kurtzman v. Applied Analytical Industries, Inc., 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997).

In general, an at-will employee in this state may not maintain a claim for wrongful discharge. *Sides v. Duke University*, 74 N.C. App. 331, 336, 328 S.E.2d 818, 823, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 and *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), *overruled on other grounds*, *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423. However, certain exceptions to this general rule have been recognized; therefore,

> while there may be a right to terminate [at-will employment] for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such [employment] for an unlawful reason or purpose that contravenes public policy.

Sides, 74 N.C. App. at 342, 328 S.E.2d at 826.

Although our courts have enunciated no "bright-line" test for determining if termination of an at-will employee violates public

policy, *see Teleflex Information Systems, Inc. v. Arnold*, 132 N.C. App. 689, 691, 513 S.E.2d 85, 87 (1999), public policy has been defined as

> the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good,

Johnson v. Mayo Yarns, Inc., 126 N.C. App. 292, 296, 484 S.E.2d 840, 842-43, *disc. review denied*, 346 N.C. 547, 488 S.E.2d 802 (1997). Elaborating further, our Supreme Court has observed:

> [a]lthough the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Amos v. Oakdale Knitting Co., 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992) (footnote omitted).

Previous decisions of this State's appellate courts have recognized claims for wrongful termination based upon the public policy exception when an employee alleges termination based upon political affiliation, *see Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474-75 (1996), refusal to violate the United States Department of Transportation's regulations restricting the driving time of truck drivers, *see Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175-76, 381 S.E.2d 445, 447 (1989), refusal to testify untruthfully or incompletely in a court action, *see Sides*, 74 N.C. App. at 343, 328 S.E.2d at 826-27, testifying at an Employment Security Act proceeding, *see Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 41, 370 S.E.2d 423, 426 (1988), or refusal to cash a delinquent borrower's certificate of deposit without the notice to the debtor required by the Uniform Commercial Code, *see Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C. App. 713, 721-22, 478 S.E.2d 809, 814-15 (1996). Nonetheless, any exception to the at-will employment doctrine "should be adopted only with substantial justification grounded in compelling considerations of public policy." *Kurtzman*, 347 N.C. at 334, 493 S.E.2d at 423.

Whether the complaint *sub judice* states a claim for wrongful discharge is dependent upon whether plaintiff's termination because she "advis[ed] the family of [a] patient that they should consider changing

physicians for the patient" violated the public policy of North Carolina as set forth in the Nursing Practice Act (NPA), N.C.G.S. §§ 90-171.19—90-171.47 (1993),[1] and the administrative regulations promulgated thereunder.

G.S. § 90-171.19 expressly provides:

> The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of nursing is *necessary to ensure minimum standards of competency and to provide the public safe nursing care.*

(emphasis added). Further, G.S. § 90-171.21 creates a "Board of Nursing" (the Board) charged, *inter alia,* with setting minimum standards for educational programs preparing persons for licensure under the Act, and with licensing qualified applicants, G.S. § 90-171.23(b)(6), (8). In addition, the Board oversees disciplinary action under the NPA, "caus[ing] the prosecution of all persons violating [provisions of the Act]," G.S. § 90-171.23(b)(7), and is authorized to revoke or suspend the license of a registered nurse or applicant who:

> (4) Engages in conduct that endangers the public health;
>
> (5) Is unfit or incompetent to practice nursing by reason of deliberate or negligent acts or omissions regardless of whether actual injury to the patient is established; [or]
>
> . . . .
>
> (7) Has violated any provision of [the NPA].

N.C.G.S. § 90-171.37 (Supp. 1995).

Finally, included among administrative rules governing the nursing profession are regulations establishing minimum standards for accredited programs of professional nursing, N.C. Admin. Code Tit. 21, r. 36.0300—36.0325 (Dec. 1994), and enumerating the "components of nursing practice," N.C. Admin. Code Tit. 21, r. 36.0224 (Dec. 1994).

The NPA and attendant administrative regulations thus evidence a clear public policy in North Carolina to protect public safety and health by maintaining minimum standards of nursing care. *See*

1. The pertinent provisions of the NPA cited herein and applicable to the case *sub judice* have not been substantively amended by the version of the NPA now in effect.

Winkelman v. Beloit Memorial Hosp., 483 N.W.2d 211, 215-16 (Wis. 1992) (statutes and administrative regulations governing practice of nursing held to represent public policy in wrongful termination action), and *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617, 622 (Mo. Ct. App. 1993) (Missouri NPA and regulations thereunder "reveal a clear mandate of public policy . . . to train and license a person to engage in the safe and competent practice of nursing").

Plaintiff maintains her termination by defendant contravened this public policy, asserting in her appellate brief that

> [b]y terminating [plaintiff], the defendant was preventing her from doing that which she was required to do by North Carolina statutes and regulations as a registered nurse.

Plaintiff specifically references G.S. § 90-171.20(4) which defines "Nursing" as:

> a dynamic discipline which includes the caring, counseling, teaching, referring and implementing of prescribed treatment in the prevention and management of illness . . . .

Plaintiff also points to G.S. § 90-171.20(7) which provides:

> The "practice of nursing by a registered nurse" consists of . . .
>
> a. Assessing the patient's physical and mental health, including the patient's reaction to illnesses and treatment regimens; [and]
>
> . . . .
>
> g. Providing teaching and counseling about the patient's health care . . . .

Lastly, plaintiff cites administrative regulations concerning teaching and counseling about the patient's health care. In pertinent portion, these regulations provide:

> (h) *Teaching and Counseling clients is the responsibility of the registered nurse*, consistent with G.S. 90-171.20(7)g.
>
> (1) teaching and counseling consist of providing accurate and consistent information, demonstrations and guidance to clients, *their families or significant others* regarding the client's health status and health care for the purpose of:
>
> (A) *increasing knowledge;*

(B) *assisting the client to reach an optimum level of health functioning and participation in self care;* and

(C) promoting the client's ability to make informed decisions.

(2) teaching and counseling include, but are not limited to:

(A) *assessing the client's needs and abilities*;

(B) adapting teaching content and methods to the identified needs and abilities of the client(s);

(C) evaluating effectiveness of teaching and counseling; and

(D) *making referrals to appropriate resources.*

N.C. Admin. Code Tit. 21, r. 36.0224(h) (Dec. 1994) (emphasis added) [hereinafter Rule 36.0224(h)].[2]

Plaintiff's public policy argument may thus fairly be summarized as follows: (1) the NPA and regulations of the Board of Nursing describe the practice of nursing as "assessing," G.S. § 90-171.20(7), a patient's health, which entails a "responsibility" to communicate, "counsel," and "provid[e] accurate . . . guidance to clients [and] their families," Rule 36.0224(h); (2) plaintiff's comments which resulted in her termination were proffered in fulfillment of the foregoing responsibilities; and (3) termination of plaintiff for fulfilling her responsibilities as a practicing nurse in North Carolina therefore violated the public policy of this State.

Defendant vigorously retorts that plaintiff's argument is fallacious. Defendant insists the NPA and the regulatory language upon which plaintiff relies "do[] not impose any requirements or express any prohibitions" and that, even should this Court rule to the contrary, the statements of plaintiff which led to her termination were not "required" by the NPA and regulations thereunder. We disagree.

While the language of the NPA and attendant regulations is broad and frequently expressed with a definitional bias, we are not persuaded by defendant's contention that neither the statutes nor regulations issued thereunder "impose any requirements or express any prohibitions" relevant to plaintiff's cause herein. For example, G.S. § 90-171.19 recites the purpose of the NPA and the licensure of

2. This portion of the regulation has not been subsequently amended.

persons in the practice of nursing as being to "ensure minimum standards of competency and to provide the public safe nursing care."

To the foregoing end, the NPA defines the "practice of nursing by a registered nurse" as "[p]roviding teaching and counseling about the patient's health care." G.S. § 90-171.20(7). Explanatory regulations further provide that "Teaching and Counseling clients is the responsibility of the registered nurse" and consists of "providing accurate and consistent information . . . and guidance to clients [and] their families." Rule 36.0224(h). Moreover, the regulations also note that "teaching and counseling include . . . making referrals to appropriate resources." *Id.*

In addition, the Board is required to initiate

> an investigation upon receipt of information about any practice that might violate any provision of [the NPA] or any rule or regulation promulgated by the Board.

G.S. § 90-171.37. The Board is also empowered to take disciplinary action if it determines, *inter alia*, that a nurse "[i]s unfit or incompetent to practice nursing," *id.*, which by statute "includes the caring, counseling, teaching, referring and implementing of prescribed treatment," G.S. § 90-171.20(4), and by regulation incorporates the "responsibility" to "provid[e] accurate and consistent information . . . and guidance to clients [and] their families." Rule 36.0224(h).

The extensive legislative scheme described herein, including regulations adopted thereunder, thus reflects that our General Assembly intended by law to require of licensed nurses a measure of "teaching and counseling," G.S. § 90-171.20(7), so as to "ensure minimum standards of competency and to provide the public safe nursing care." G.S. § 90-171.19. Accordingly, defendant's contention that registered nurses in effect may choose to teach and counsel, but are not obligated to do so by law, misses the mark. In addition, defendant fails to account for the General Assembly's expression of the necessity of ensuring a "minimum" level of "competent" nursing care to provide for the public health. *See id.*

Defendant interjects that plaintiff in any event was not required to advise her patient's family that "she would reconsider the choice of physicians." On the contrary, as observed above, the NPA includes "teaching and counseling" as a function of the practice of nursing. *See* G.S. § 90-171.20(7). As such, plaintiff was obligated under the facts herein to provide "teaching and counseling" to her patient or the

patient's family "regarding the client's health status and health care for the purpose of (A) increasing knowledge; (B) assisting the client to reach an optimum level of health functioning . . . ; [and] (D) making referrals to appropriate resources." Rule 36.0224(h).

Interestingly, had plaintiff allegedly been terminated in consequence of her *refusal* to violate the minimal requirements of her position as described by the General Assembly and the Board, a claim for wrongful termination would clearly lie, *see Coman*, 325 N.C. at 175-76, 381 S.E.2d at 447 (truck driver who refused to violate laws regarding maximum driving hours stated claim for wrongful termination), because our state's public policy mandates "minimum standards of competency" for "safe nursing care." G.S. § 90-171.19. We perceive no legally cognizable distinction between the foregoing circumstance and the allegation that plaintiff was terminated solely for the reason that she *complied* with statutorily and administratively proscribed minimal competency standards. *Compare Sides*, 74 N.C. App. at 342-43, 328 S.E.2d at 826-27 (wrongful termination claim valid where nurse terminated after refusing employer's instructions to lie under oath in violation of state statute prohibiting false testimony); *Williams*, 91 N.C. App. at 41-42, 370 S.E.2d at 426 (valid wrongful termination claim presented where nurse terminated after having testified truthfully under subpoena at unemployment hearing); *Lenzer v. Flaherty*, 106 N.C. App. 496, 514-15, 418 S.E.2d 276, 287, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992) (wrongful termination claim proper where state-employed nurse terminated for reporting patient abuse as mandated by state statute); and *Caudill v. Dellinger*, 129 N.C. App. 649, 656-57, 501 S.E.2d 99, 104 (1998), *aff'd*, 350 N.C. 89, 511 S.E.2d 304 (1999) (valid claim for wrongful termination when forecast of evidence established employee terminated for giving truthful information about employer-district attorney's bank account to State Bureau of Investigation).

We therefore conclude that the allegations of plaintiff's complaint, taken as true, *see Sutton*, 277 N.C. at 98, 176 S.E.2d at 163, and liberally construed, *see Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758, support her contention that the statements which led to her termination were proffered in fulfillment of her "teaching and counseling" obligations as a licensed nurse. Plaintiff was the "Care Plan Coordinator" and "responsible for managing medical care and treatment for all patients at the Defendant's facility," and when one such patient "began losing weight, having hallucinations, psychiatric symptoms and acute distress," plaintiff "documented and reported all of

the patient's medical difficulties to the patient's physician." Nevertheless, her "attempt[s] to contact the patient's physician by telephone" proved uneventful since "the physician would not return her telephone calls." According to the complaint, plaintiff thereafter

> was contacted by a member of the patient's family regarding the patient's difficulties and deteriorating condition; after the Plaintiff advised the patient's family as to her concerns, one of he family members asked for the Plaintiff's advice as to what should be done for the patient and the Plaintiff advised that she would reconsider the choice of physicians in that the appropriate treatment had not been provided for her by her physician.

We deem it significant that plaintiff's comments were not alleged to have been gratuitous, but rather that she was specifically sought out by the patient's family members who solicited plaintiff's opinion concerning "what should be done for the patient," thereby invoking her "responsibility" to "provid[e] accurate and consistent information" to the patient's family, and to "mak[e] referrals to appropriate resources." Rule 36.0224(h).

Particularly in light of the further allegation that plaintiff was unable to reach the patient's physician about the patient's "deteriorating" condition, plaintiff's expression of opinion in response to inquiry by the patient's family as to what *plaintiff* would consider may be regarded as "teaching and counseling" under the NPA and pertinent regulations which was required to fulfill her "responsibility" to "provid[e] accurate and consistent information . . . and guidance to clients [and] their families." *Id.* At a minimum, we cannot say at this juncture as a matter of law that plaintiff's response was *not* required by the laws regulating licensed nurses. *See Wilmoth*, 127 N.C. App. at 261, 488 S.E.2d at 630 ("complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it discloses on its face an insurmountable bar to recovery").

Finally, we believe plaintiff's complaint adequately set forth that her termination by defendant was "motivated by [a] . . . reason or purpose that is against public policy." *See Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). Plaintiff alleged, and indeed defendant does not deny, that plaintiff was fired because of the advice she provided to the patient's family.

In sum, we conclude as follows: If plaintiff, as alleged, was terminated for meeting the minimum requirements of the practice of nursing as established and mandated by the NPA and regulations thereunder, then such termination violated the public policy of this state to ensure the public a minimum level of safe nursing care. Plaintiff's complaint, taken as true, *see Sutton*, 277 N.C. at 98, 176 S.E.2d at 163, and liberally construed, *see Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758, sufficiently alleged such termination, *see Roberts*, 124 N.C. App. at 722, 478 S.E.2d at 815 (whether plaintiff was fired "solely" because she refused "to violate the statutory notice requirement" and was thereby terminated in contravention of public policy is a question for the jury). The trial court therefore erred in granting defendant's Rule 12(b)(6) motion.

In that we have determined plaintiff's complaint adequately alleged she was discharged for complying with minimum requirements of the practice of nursing, we reject defendant's argument that the complaint established as a matter of law the unauthorized practice of medicine by plaintiff under N.C.G.S. § 90-18 (Supp. 1995). That section specifically exempts from activities constituting the practice of medicine "[t]he practice of nursing by a registered nurse engaged in the practice of nursing." G.S. § 90-18(14).[3]

Prior to concluding, we also briefly address defendant's assertion that a decision such as that reached herein might be extended to any employment "regulated or licensed by the state." To the contrary, our ruling is in keeping with the underlying purpose of recognizing public policy exceptions only in instances of "substantial justification grounded in compelling considerations of public policy." *Kurtzman*, 347 N.C. at 334, 493 S.E.2d at 423. The public policy recognized herein, *i.e.*, the protection of public safety and health by ensuring a competent level of nursing care, is equally as compelling as that acknowledged in *Coman*, namely, the protection of "persons and property on or near the public highways." *Coman*, 325 N.C. at 176, 381 S.E.2d at 447.

Reversed.

Judges WALKER and McGEE concur.

3. This section was re-designated in 1997 as G.S. § 90-18(c)(14).

STATE OF NORTH CAROLINA v. MICHAEL LEONARD LUNDY AND RONALD LEE EVANS, DEFENDANTS

No. COA98-1257

(Filed 21 September 1999)

1. Criminal Law— motion to join granted—no error

The trial court did not abuse its discretion in a second-degree murder case by allowing the State's motion to join the two defendants for trial because the State came forward with the evidence necessary to establish the guilt of both defendants, neither defendant put on a defense, and there is nothing in the record to suggest this course of action was forced on either defendant as a result of a position or strategy taken by the other defendant.

2. Homicide— second-degree murder—acting in concert—common plan—sufficient evidence

The trial court did not err by denying defendants' motion to dismiss the second-degree murder charge based on the theory of acting in concert because the evidence viewed in the light most favorable to the State reveals that defendants engaged in a common plan to shoot the victim relating to their joint enterprise of selling crack cocaine.

3. Constitutional Law— speedy trial—second-degree murder—no violation

The trial court did not err in denying defendant Evans' motion to dismiss the second-degree murder charge based on lack of a speedy trial even though his trial was over three and one-half years from the date of his arrest because: (1) the delay was not the result of prosecutorial willfulness or neglect; (2) defendant did not assert his right to a speedy trial until more than three years after his arrest, which does not foreclose his right but does weigh against him; and (3) defendant has not shown that he was prejudiced by the delay, especially given the several other criminal charges he incurred since his arrest.

4. Evidence— drug dealing activities—not bad character—motive

The trial court did not err in a second-degree murder case by admitting evidence regarding defendant Evans' drug dealing activities because it was relevant to show his motive for murdering the victim instead of merely to show his bad character.

5. Criminal Law— requested jury instructions denied—verbatim not required—jury could reasonably infer

The trial court did not err in a second-degree murder case by failing to give defendant Evans' requested jury instruction regarding "mere presence" as it relates to acting in concert because the trial court is not required to give the requested instruction verbatim and the jury could reasonably infer from the trial court's instructions that more than "mere presence" was necessary.

Appeal by defendants from judgments entered 19 September 1997 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 August 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert T. Hargett, for the State.

John F. Oats, Jr. for defendant-appellant Michael Leonard Lundy.

Karl E. Knudsen for defendant-appellant Ronald Lee Evans.

TIMMONS-GOODSON, Judge.

Defendants Michael Leonard Lundy and Ronald Lee Evans appeal from their convictions of second-degree murder in the shooting death of Richard Palmer Evans. Having carefully examined defendants' assignments of error, we conclude that the trial court committed no error.

On 22 January 1994, defendant Evans was arrested and charged with the murder of Richard Palmer Evans ("the victim"), which occurred on the previous evening. Defendant Lundy was also arrested, and he was charged with being an accessory after the fact to the victim's murder. On 21 March 1994, the grand jury returned a true bill of indictment against defendant Lundy on the accessory charge and, on 4 April 1994, indicted defendant Evans for murder. Subsequently, on 24 June 1997, the grand jury also indicted defendant Lundy for the victim's murder.

On 8 May 1997, defendant Evans moved to dismiss the charge against him on the ground that he was denied the right to a speedy trial. The trial court conducted a hearing on the motion and entered an order on 21 August 1997 denying the motion after concluding that there had been no infringement on defendant Evan's right to a speedy trial. The cases against both defendants came on for trial at the 15

September 1997 Criminal Session of Wake County Superior Court, and the State moved to join the offenses against defendant Lundy and to join the cases against both defendants for trial. Although defendants objected to having their charges joined for trial, the judge allowed both motions for joinder.

The evidence presented by the State at trial tended to show the following facts: Defendant Lundy, defendant Evans, and Carl Carlisle were friends and "business associates" from Virginia who came to North Carolina in January of 1994 to sell crack cocaine. Carlisle testified that he and defendant Evans sold drugs out of a location in Walnut Terrace and that defendant Lundy sold drugs out of the victim's home, which was located at 906 South East Street in Raleigh. In return for the use of the victim's home, defendant Lundy agreed to split the sale proceeds with the victim 80/20.

On the night of 21 January 1994, Carlisle drove to the victim's house, where he found defendants Lundy and Evans waiting outside. Defendants approached the vehicle, and in view of both Carlisle and defendant Lundy, defendant Evans reached under the passenger's seat and retrieved a gun belonging to him and defendant Lundy. With the gun tucked in the waistband of defendant Evan's clothing, defendants proceeded to the door of the victim's house. Carlisle parked the car and reached the front porch just as defendant Evans was knocking on the door. When the victim came to the door, defendants confronted him about a $500 shortage in the proceeds from his sale of the drugs. The victim stated that he was dissatisfied with the fee arrangement and wanted to change the split to 60/40. Defendants and the victim argued about the matter for approximately twenty minutes before Carlisle said, "Let's go." As he and defendant Lundy were turning to leave, defendant Evans fired the gun, killing the victim. Defendants and Carlisle fled the scene and drove to a house in Walnut Terrace. Defendants traded clothing, and defendant Lundy disposed of the gun by throwing it into a sewer.

The State also presented the testimony of several witnesses who corroborated Carlisle's account of the events. Cerranz Harrison testified that he was in the victim's house at the time of the shooting and that although he did not see who was on the porch, he recognized the voice of one of the men arguing with the victim as that of defendant Evans. In addition, Arthur Bernard Clinding stated that he too had sold drugs with defendant Evans and that on the night of the murder, defendant Evans told him that he had shot someone. Lastly, the victim's brother, Robert, testified that on the night of the shooting,

defendants Lundy and Evans had been outside on the porch arguing with the victim for approximately fifteen minutes when he saw the flash of a gun firing. He stated, however, that he did not see who did the shooting.

At the close of the State's evidence, defendants moved to dismiss the charges against them, and the trial court denied the motions. Neither defendant presented any evidence in his defense, and the court instructed the jury on the theory of acting in concert. The jury returned guilty verdicts against both defendants on the charge of second-degree murder and found defendant Lundy not guilty of being an accessory after the fact. The trial court found that the factors in aggravation outweighed the factors in mitigation and sentenced each defendant to a term of 45 years imprisonment. Defendants appeal.

DEFENDANT LUNDY

[1] Defendant Lundy's first assignment of error is that the trial judge improvidently allowed the State's motion to join the cases against him and defendant Evans for trial. Defendant Lundy contends that he was denied his constitutional right to a fair trial by reason of this ruling. We must disagree.

The trial judge may properly join for trial charges against multiple defendants when, as in the present case, "the offenses charged are 'part of the same act or transaction' or are 'so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.' " *State v. Fink*, 92 N.C. App. 523, 527, 375 S.E.2d 303, 306 (1989) (quoting N.C. Gen. Stat. § 15A-926(b)(2) (1988)). The judge may likewise join defendants for trial when their offenses "[are] part of a common scheme or plan." N.C.G.S. § 15A-926(b)(2). However, joinder of multiple defendants is improper if it will impair any one defendant's right to a fair determination of his guilt or innocence. N.C. Gen. Stat. § 15A-927(c)(2) (1997). In the end, the decision whether to try multiple defendants jointly is within the solid discretion of the trial judge and will not be overturned on appeal absent manifest abuse of that discretion. *State v. Pendergrass*, 111 N.C. App. 310, 315, 432 S.E.2d 403, 406 (1993). "The test for determining whether a trial judge abused his discretion in joining defendants for trial is 'whether the conflicts in the defendants' respective positions at trial [are] of such a nature that, considering all of the evidence in the case, defendant was denied a fair trial.' " *Fink*, 92 N.C. App. at 528, 375 S.E.2d at 306 (quoting *State v. Green*, 321 N.C. 594, 601, 365 S.E.2d 587, 591 (1988)).

We are satisfied that consolidating the present defendants' charges for trial did not result in any unfair prejudice to defendant Lundy. Here, neither defendant put on a defense, and there is nothing in the record to suggest that this course of action was forced on either defendant as a result of a position or strategy taken by the other defendant. Indeed, given the lack of evidence offered by either defendant, we are unable to discern any conflict in their respective positions that would have denied them a fair determination of their guilt or innocence. We note that "[t]his is not a case where the [S]tate simply stood by and relied on the testimony of the respective defendants to convict them." *State v. Lowery*, 318 N.C. 54, 60, 347 S.E.2d 729, 734-35 (1986). Instead, the State, not defendants, came forward with the evidence necessary to establish the guilt of both defendants. Accordingly, we conclude that the joint trial of defendants did not deprive defendant Lundy of a fair trial.

[2] Defendant Lundy next assigns error to the denial of his motion to dismiss the charge of second-degree murder based on the theory that he was acting in concert with defendant Evans and was, therefore, equally responsible for the victim's murder. It is defendant Lundy's contention that because the evidence tends to show that the shooter acted spontaneously without any encouragement or assistance, the State's evidence was insufficient as a matter of law to show that defendants acted in concert. Again, we disagree.

The law is well settled regarding a trial judge's evaluation of a motion to dismiss a criminal offense.

> "The question for the court in ruling upon defendant's motion for dismissal is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If substantial evidence of both of the above has been presented at trial, the motion is properly denied. . . . In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.
>
> . . . Contradictions and discrepancies in the evidence are strictly for the jury to decide."

State v. Huggins, 71 N.C. App. 63, 66, 321 S.E.2d 584, 586 (1984) (quoting *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1998) (cita-

tions omitted)), *quoted in State v. Childers*, 131 N.C. App. 465, 471, 508 S.E.2d 323, 328 (1998). Substantial evidence, such as that necessary to support a conviction, is that amount of evidence that a rational trier of fact would accept as adequate to find that a particular element exists beyond a reasonable doubt. *Id.*

Defendant Lundy was charged with second-degree murder under the theory that he acted with defendant Evans in taking the life of the victim. "Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Malice exists when "the defendant intentionally takes the life of another without excuse, just cause, or justification." *Childers*, 131 N.C. App. at 471, 508 S.E.2d at 328. "A defendant acts in concert with another to commit a crime when he acts in harmony or in conjunction with another pursuant to a common criminal plan or purpose." *State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987). To be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime. *Id.* All that is necessary is that the defendant be "present at the scene of the crime" and that he "act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* at 159, 360 S.E.2d at 295-96.

Applying the foregoing principles to the evidence in the instant case, we find no error in the trial court's denial of defendant's motion to dismiss. Viewed in the light most favorable to the State, the evidence presented and the inferences logically drawn therefrom show that defendants Lundy and Evans engaged in a common plan to shoot the victim. Both defendants traveled from Virginia to North Carolina pursuant to a joint enterprise to sell crack cocaine. Defendant Lundy recruited the victim to sell drugs out of his home and offered him an 80/20 split of the sale proceeds. The victim, apparently dissatisfied with the fee arrangement, came up $500.00 short on the drug transactions. With defendant Lundy's full knowledge, defendant Evans retrieved a gun belonging to both defendants, and the two returned to the victim's house to confront him about the shortage. An argument erupted between defendants and the victim that lasted approximately twenty minutes. Just as defendant Lundy was turning to leave, defendant Evans pulled out the gun and shot the victim. After fleeing the scene, defendants traded clothing to alter their appearances and defendant Lundy disposed of the gun by throwing it into a sewer.

The cumulative effective of this evidence demonstrates that the trial judge correctly denied defendant Lundy's motion to dismiss, as there was an abundance of evidence to show that he acted in concert with defendant Evans. Therefore, defendant Lundy's assignment of error fails.

DEFENDANT EVANS

[3] Like defendant Lundy, defendant Evans argues that the trial judge erred in consolidating both defendants' cases for trial and in submitting the charge of second-degree murder to the jury on the theory that defendants acted in concert. For the reasons given in our discussion of these issues as they relate to defendant Lundy, we reject defendant Evans' arguments as unpersuasive. We turn then to his argument that the court committed reversible error in denying his motion to dismiss for lack of a speedy trial. Defendant Evans contends that he suffered undue prejudice as a result of the delay of three and one-half years in bringing his case to trial. On the record before us, we must disagree.

The Supreme Court of the United States has articulated a balancing test to determine whether a criminal defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. In applying the test, the court must consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) whether the defendant has been prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972). The issue of whether a transgression of a defendant's right to a speedy trial has occurred is not resolved by any one factor; "rather, the factors must be examined as a whole, 'with such other circumstances as may be relevant.' " *State v. Johnson*, 124 N.C. App. 462, 466, 478 S.E.2d 16, 19 (1996) (quoting *Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). "The test under the speedy trial provision of Article 1, § 18 of the North Carolina Constitution is identical." *Id.*

The first factor, the length of the delay, is essentially a triggering device, as it does not determine whether a constitutional violation has occurred, but may, if the delay is substantial, trigger the *Barker* inquiry. *Id.* In the case under review, defendant's trial did not commence until 1332 days, or 44 months, or over three and one-half years from the date of his arrest. It is our judgment that this delay merits examination of the other three factors. *See State v. Chaplin*, 122 N.C.

App. 659, 471 S.E.2d 653 (1996) (delay of three years enough to trigger inquiry into remaining factors).

As to the reason for the delay, defendant bears the burden of proving that the delay was brought about by neglect or willfulness on the part of the prosecution. *State v. Jacobs*, 128 N.C. App. 559, 568, 495 S.E.2d 757, 763, *disc. review denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). Here, defendant Evans has not met that burden. The record indicates that shortly after his indictment, defendant Evans was bonded out of jail and remained free on bond until this case came to trial. In June of 1994, defendant Evans waived arraignment and entered a plea of not guilty. In the fall of 1994, the prosecutor learned that defendant Evans had been arrested and charged with murder in the State of Virginia. The prosecutor contacted the authorities in Virginia and was advised that it would take anywhere from six to eight months to dispose of the murder charge. Several months later, the prosecutor again contacted the authorities in Virginia and was told that defendant Evans was still in custody there and that it would be several more months before the case was resolved. When the prosecutor again contacted the Virginia authorities in the fall of 1995, he was advised that defendant Evans had been placed on probation pursuant to a plea arrangement.

Mindful of his own congested trial schedule as well as that of defendant Evans' attorney, the prosecutor did not schedule this matter for trial until the week of 23 September 1996. Defendant Evan's counsel, however, moved for a continuance alleging that he needed more time to prepare for trial. The prosecutor attempted to reset the case for October of 1996 but decided against it after a conversation with defendant Evan's counsel who desired to provide the State with exculpatory evidence. In November of 1996, the prosecutor was elected to the position of District Court Judge, and in December of 1996, he was sworn into office. Thereafter, the matter had to be reassigned to another prosecutor and was brought to trial in the fall of 1997. In light of these facts, we are persuaded that the delay was not the result of prosecutorial willfulness or neglect.

Regarding the third factor, we note that defendant Evans first asserted his right to a speedy trial in a motion filed 7 May 1997, more than three years after his arrest. While, "[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial." *State v.*

Flowers, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998).

With regard to the issue of prejudice, we recognize that the objectives of the right to a speedy trial are: " '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *State v. Webster*, 337 N.C. 674, 681, 447 S.E.2d 349, 352 (1994) (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118). The most serious of these aims is the last, "because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Id.* (quoting Barker, 407 U.S. at 532, 33 L. Ed. 2d at 118).

Defendant Evans has not shown that he was prejudiced by the delay. Although he testified that he had to return to the State of North Carolina at least 10 times to appear in court regarding this matter, the trial judge found, and we agree that defendant Evans' personal life was not unfairly affected by the delay, especially given the several other criminal charges he incurred since January of 1994. As to defendant Evans' claim that the delay caused the memories of Robert Evans, the victim's brother, and Cerranz Harrison to fade, we can find no prejudice. First, we note that defendant Evans has failed to show how Harrison's faded memory negatively impacted his defense. Secondly, the record reveals that the testimony of Robert Evans at trial tended to implicate defendant Lundy as the shooter and to suggest that defendant Evans was turning to leave when the shot was fired. As our Supreme Court stated in *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976), "[h]ardly a criminal case exists where the defendant could not make these general averments of impaired memory and lost witnesses." *Id.* at 493, 223 S.E.2d at 361. Therefore, defendant Evans' argument is unpersuasive.

Balancing the *Barker* factors, we hold that defendant Evans was not denied his constitutional right to a speedy trial, and the trial court did not err in denying his motion to dismiss.

[4] Defendant Evans also assigns error to the admission of evidence regarding his drug dealing activities. He argues that this evidence was impermissible character evidence under Rule 404(b) of the North Carolina Rules of Evidence. We cannot agree.

Rule 404(b) of the Rules of Evidence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character

of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive." N.C. Gen. Stat. § 8C-1, Rule 404(b) (Cum. Supp. 1998). Our Supreme Court has reiterated that Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring exclusion if its *only* probative value is to show . . . defendant has the propensity . . . to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

On the facts of the case *sub judice*, we agree with the State's position that the evidence of defendant Evans' drug dealing activities was relevant to show his motive for murdering the victim. The transcript of the evidence reveals that the State's theory at trial was that defendants Evans and Lundy murdered the victim over a fee dispute regarding drug transactions the victim conducted for defendant Lundy. The State's evidence tended to show that the victim wanted a 60/40, rather than an 80/20 split of the sale proceeds and that he had come up $500 short when it was time to pay defendant Lundy for the merchandise sold. The argument resulting in the victim's death occurred when defendants Lundy and Evans confronted the victim about the issue of his fee for selling the drugs, and given that the murder was inextricably tied to the drug activities of both defendants, we hold that evidence of the same was relevant to establish motive for the killing. *See State v. King*, 343 N.C. 29, 468 S.E.2d 232 (1996) (testimony regarding defendant's drug dealings properly admitted under Rule 404(b) to show motive where State contended that victim was killed for stealing cocaine from one of defendant's "lieutenants"). Thus, defendant Evans' assignment of error is overruled.

[5] With his next assignment of error, defendant Evans contends that the court erred in failing to give his requested instruction regarding "mere presence" as it relates to concerted action. During the charge conference and again after the jury requested clarification of "acting in concert," defendant submitted a request for the following instruction: "[M]ere presence at the scene of the crime alone is not sufficient to establish acting in concert. To find the defendant guilty of acting in concert, the State must prove beyond a reasonable doubt that the defendant in fact shared in a common purpose to commit a crime." We agree with defendant Evans that this is a correct statement of the law. *See State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972) (court correctly charged jury that "mere presence of a person at the

scene of a crime at the time of its commission does not make him guilty of the offense, but that if two persons are acting together, in pursuance of a common plan and common purpose . . . and one of them actually does the [crime], both would be guilty within the meaning of the law"). However, we conclude that the trial court properly instructed the jury regarding "acting in concert," and its failure to give the requested instruction verbatim was not error.

"[I]t is well established that a request for a specific instruction which is correct in law and supported by the evidence must be granted at least in substance." *State v. Williams*, 98 N.C. App. 68, 71, 389 S.E.2d 830, 832 (1990). This notwithstanding, "the trial judge is not required to give the requested instruction verbatim." *Id.*

In the present case, the trial judge gave the following charge regarding concerted action:

> Again, I instruct you that for a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit a crime, each of them if actually or constructively present is not only guilty of that crime of second degree murder if the other commits the crime, but he is also guilty of any other crime committed by the other in the pursuance of a common purpose to commit second degree murder or as a natural and probable consequence therefore [sic].
>
> So I charge you, ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, January 21, 1994, the defendant Ronald Lee Evans acting either by himself or acting together with Michael Leonard Lundy, intentionally and with malice killed the victim Richard Palmer Evans with a deadly weapon, it would be your duty to return a verdict of guilty of second degree murder.

From these instructions, the jury could reasonably infer that more than "mere presence" was necessary to find that defendant Evans acted in concert with defendant Lundy. The trial judge made it abundantly clear that to convict defendant Evans of second-degree murder under the theory that he "acted in concert" with defendant Lundy, the jury had to find beyond a reasonable doubt that defendant Evans joined in or shared a common plan with defendant Lundy to commit the offense. We, therefore, hold that the trial court's instruction on the doctrine of "acting in concert" was without legal error.

Furthermore, we have examined defendant Evans' contention that the court erred in failing to require the jury to complete a special verdict sheet designating the theory under which he was convicted and find it to be without merit.

In sum, our review of the record reveals that defendants Lundy and Evans received a fair trial, free from prejudicial error.

NO ERROR.

Judges GREENE and HORTON concur.

HIWASSEE STABLES, INC., GORDON S. CALHOUN AND TINA A. CALHOUN, PLAINTIFFS V. CHRIS CUNNINGHAM, D/B/A CHRIS CUNNINGHAM INSURANCE AGENCY, AMERICAN RELIABLE INSURANCE COMPANY, TEMPLETON & FRANKLIN VETERINARY ASSOCIATES, ZACHARY FRANKLIN, JAIRO ORTIZ, BLOOD HORSE DYNASTY, INC., FRANK L. DIAZ AS ATTORNEY-IN-FACT FOR JAIRO ORTIZ AND BLOOD HORSE DYNASTY, INC., FRANK L. DIAZ, P.A. JURIS DOCTOR AS ATTORNEY-IN-FACT FOR JAIRO ORTIZ AND BLOOD HORSE DYNASTY, INC. AND ENERGY EQUINE INSURANCE AGENCY, INC., DEFENDANTS

No. COA98-973

(Filed 21 September 1999)

Jurisdiction— personal—motion to dismiss improperly denied—minimum contacts not satisfied

The trial court erred by denying defendants' motion to dismiss for lack of personal jurisdiction since minimum contacts were not satisfied because: (1) plaintiffs made the initial contact with defendants in Florida; (2) the contract was performed in Florida; (3) none of the alleged acts of negligence occurred in this forum;(4) defendants never shipped anything to North Carolina beyond the one billing statement and fertility examination certificate form; (5) defendants never solicited business or advertised their services in North Carolina; and (6) while defendants have clients other than plaintiffs that now live in North Carolina, those individuals became clients while they resided in Florida and subsequently moved to North Carolina.

Judge JOHN dissents.

Appeal by defendants Templeton and Franklin Veterinary Associates and Zachary Franklin from judgment entered 16 April 1998 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 May 1999.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and John R. Buric, for plaintiff-appellees.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe, Jennifer Ingram Mitchell and Holly L. Saunders, for defendant-appellants Templeton & Franklin Veterinary Associates and Zachary Franklin.

HUNTER, Judge.

Defendants Templeton and Franklin Veterinary Associates ("TFVA") and Zachary Franklin appeal the trial court's denial of their motion to dismiss for lack of personal jurisdiction.

The evidence presented to the trial court indicates that plaintiffs Gordon Calhoun and Tina Calhoun are adult citizens and residents of Mecklenburg County, North Carolina. Plaintiff Hiwassee Stables, Inc. is a North Carolina corporation with its principal place of business in Mecklenburg County, North Carolina. In December 1995, plaintiffs contracted with Jairo Ortiz and Blood Horse Dynasty, Inc., a Florida resident and Florida corporation, respectively, to purchase a stallion named Nevado for the exclusive and disclosed purpose of using Nevado's semen, through artificial insemination, for a breeding business run in North Carolina. This lawsuit arose after plaintiffs were informed that Nevado's semen was not adequate for artificial insemination and that Nevado could not be used for the purpose for which he was purchased.

Before the purchase of Nevado was finalized, plaintiffs contacted defendant Chris Cunningham, d/b/a Chris Cunningham Insurance Agency ("Cunningham"), of Lincolnton, North Carolina, regarding insurance for Nevado. Plaintiffs presented evidence that Cunningham recommended to plaintiffs that they use TFVA to perform insurance, breeding soundness, and fertility exams, as she had recommended TFVA to her other North Carolina clients. Dr. Zachary Franklin and Dr. Richard Templeton are veterinarians who practice as TFVA, in Miami, Florida, and neither are licensed to practice veterinary medicine in North Carolina. The exams of Nevado were necessary to

determine whether he could be used for breeding and was eligible for insurance.

On 9 December 1995, plaintiff Tina Calhoun called TFVA in Florida requesting their services. Dr. Templeton returned the call to North Carolina and contracted with Ms. Calhoun, informing her that Dr. Franklin would perform the examination. Ms. Calhoun told Dr. Templeton that Nevado would be brought to North Carolina after he was purchased.

Cunningham and Tina Calhoun delivered to Dr. Franklin, in Florida, a fertility examination certificate form ("Form"). This Form was to be completed by the examining veterinarian and delivered to the insurance carrier to assist the insurer in determining whether Nevado could be covered by insurance. Dr. Franklin examined Nevado while he was in quarantine at Miami International Airport. Subsequently, TFVA completed the Form and delivered it to plaintiffs in North Carolina. Based on the results contained in the Form, Cunningham insured Nevado. When the horse was released from quarantine, it was transported by representatives for defendant Jairo Ortiz to the farm of his brother Edgar Ortiz in the Ocala, Florida area. Plaintiffs took possession of the horse at Edgar Ortiz's farm and transported it to North Carolina.

TFVA submitted a billing statement to plaintiffs in North Carolina charging them for services Dr. Franklin provided for plaintiffs in Miami. Plaintiffs paid TFVA for its services with a check drawn on a North Carolina account, which was mailed to defendants in Florida. Defendants cashed the check in Florida.

The evidence in the trial court also disclosed that in December 1995, Drs. Franklin and Templeton were both members of the American Association of Equine Practitioners ("AAEP"). The Equine Connection, an international locator service for AAEP members, placed advertisements in national and international equine publications, including *Practical Horseman* and *Horse Illustrated*, as well as on the Internet. Since before December 1995, plaintiffs received these national magazines at their home in North Carolina. While TFVA has approximately four clients that presently reside in North Carolina, those clients became associated with the defendants when they resided in Florida, and defendants have never performed veterinary services in this state.

Based on its findings of fact, the trial court concluded that the exercise of personal jurisdiction over the defendants is proper

because: (1) the contract entered into between plaintiffs and defendants has a "substantial connection" to this state; (2) solicitation activities were carried on within this state by or on behalf of defendants; (3) the money shipped by plaintiffs in North Carolina to defendants in Florida is considered a "thing of value" pursuant to N.C. Gen. Stat. § 1-75.4(5)(d) (1996); and (4) money was shipped to defendants from North Carolina on their order or direction.

The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. *See Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974); *Parris v. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, *disc. review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the lower court. *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 462 S.E.2d 832 (1995). When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process. *Murphy v. Glafenhein*, 110 N.C. App. 830, 431 S.E.2d 241, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993).

Plaintiffs assert that personal jurisdiction over defendants is proper under N.C. Gen. Stat. § 1-75.4(5)(d), which provides that such jurisdiction is proper, as to local services, goods, or contracts, in any action which "[r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." A money payment is a "thing of value" within the meaning of the long-arm statute. *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978). In *Cherry Baekert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990), this Court held that "[b]ecause defendant directed plaintiff to send his monies to him in Alabama and plaintiff distributed the money from North Carolina," defendant was subject to personal jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4(5)(d). *Id.* at 631, 394 S.E.2d at 655. It was irrelevant that defendant did not specify that payment be sent from this state. *Id.* Likewise, in the present case, defendants directed plaintiffs to send payment due them to Florida, and plaintiffs distributed the payment from North Carolina. Payment was sent from this state in the form of a check drawn on a bank in this state. Based on *Pope* and *Cherry*, we agree that personal jurisdiction is proper under N.C. Gen. Stat.

§ 1.74.4(5)(d); therefore, we need not address plaintiff's arguments regarding additional long-arm statutes. Our inquiry now turns to whether the exercise of personal jurisdiction satisfies the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Due Process Clause of the Fourteenth Amendment operates to limit the power of a state to assert *in personam* jurisdiction over a non-resident defendant. *Helicopteros, Nacionales v. Hall*, 466 U.S. 408, 413, 80 L. Ed. 2d 404, 410 (1984) (*citing Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878)). In order for personal jurisdiction to exist, a sufficient connection between defendant and the forum state must be present so as to make it fair to require defense of the action in the forum state. *Kulko v. California Superior Court*, 436 U.S. 84, 91, 56 L. Ed. 2d 132, 141, *reh. denied*, 438 U.S. 908, 57 L. Ed. 2d 1150 (1978). The pivotal inquiry is whether the defendant has established "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend '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)). The factors used in determining the existence of minimum contacts include " '(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.' " *Cherry*, 99 N.C. App. at 632, 394 S.E.2d at 655-56 (*quoting New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159, *affirmed per curiam*, 326 N.C. 480, 390 S.E.2d 137 (1990)). To effectuate minimum contacts, a defendant must have acted to purposefully avail itself of the privileges of conducting activities within this state, thus invoking the benefits and protection of our laws. *International Shoe*, 326 U.S. at 319, 90 L. Ed. at 103. Additionally, the relationship between defendant and North Carolina must be such that defendant "should reasonably anticipate being haled into court" in this state. *Cherry*, 99 N.C. App. at 632, 394 S.E.2d at 656 (*quoting Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986)). In considering the foreseeability of litigation, "the interests of, and fairness to, both the plaintiff and the defendant must be considered and weighed." *Dillon v. Funding Co.*, 291 N.C. 674, 678, 231 S.E.2d 629, 632 (1977). As the United States Supreme Court has explained, the

> "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random,"

> "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person . . . ." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985) (citations omitted) (emphasis in original).

This Court has held that a continual contractual business relationship, rather than one or two isolated transactions, is sufficient to establish *in personam* jurisdiction. *Harrelson Rubber Co. v. Layne*, 69 N.C. App. 577, 317 S.E.2d 737 (1984). However, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection to this state. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E.2d 782. Our Supreme Court held that a single contract had a substantial connection to North Carolina when (1) defendant contacted plaintiff, whom defendant knew to be located in North Carolina, thus the contract for the manufacture of shirts was made in North Carolina; (2) defendant was told the shirts would be cut in North Carolina, and defendant agreed to send its personal labels to plaintiff in North Carolina to be attached, thus defendant was aware that the contract would be performed in this state; and (3) shirts were manufactured and shipped from this state; and (4) after defendant became dissatisfied with the shirts, it returned them to this state. *Id.*

Unlike the circumstances in *Tom Togs*, the plaintiffs in the present case made the initial contact with defendants in Florida. The contract was performed in Florida, and none of the alleged acts of negligence occurred in this forum. Defendants did forward the Form and mailed a billing statement here, and subsequently received one thing shipped from this state—a check as payment for their services. Defendants never shipped anything to this state beyond the one billing statement.

In *Stallings v. Hahn*, 99 N.C. App. 213, 392 S.E.2d 632 (1990), this Court held that *in personam* jurisdiction could not be constitutionally exercised when defendant placed an advertisement for the sale of her car in a national monthly magazine distributed in this state, returned the call of plaintiff to North Carolina, plaintiff mailed a $200.00 cashier's check to defendant in Pennsylvania, and defendant subsequently returned the deposit check to plaintiff by mail to North Carolina. The present case is very similar to *Stallings*; however,

unlike *Stallings*, competent evidence does not support the findings of the trial court that advertisements were circulated and solicitation activities by or on behalf of the defendants were carried on within this state.

The evidence indicates that Cunningham testified that she never recommended TFVA to plaintiffs or solicited plaintiffs on TFVA's behalf. Drs. Templeton and Franklin testified that they had never solicited business or advertised their services in North Carolina. Under the name The Equine Connection, the advertisements at issue merely provide a telephone number for an individual to call if he or she wishes to obtain information about equine veterinarians in their area of the United States. Therefore, the advertisement does not advertise the defendants' services in this forum. As shown by the affidavit of Marv Jahde, the individual responsible for the advertisements, in order for the defendants to receive a referral, an individual must first initiate contact with The Equine Connection and then must request information about veterinarians in the Miami, Florida area. While plaintiff Gordon Calhoun testified that he was referred to TFVA upon calling The Equine Connection, he admitted that upon calling, he stated that he was moving to the Miami area. The referral letter at issue originated in Shawnee Mission, Kansas and was sent to Mr. Calhoun in North Carolina only because he specifically requested information about veterinarian services in the Miami, Florida area. Therefore, the letter did not amount to solicitation by or on behalf of defendants in this state.

Similarly, the VetQuest service at issue helps Internet users locate veterinary services. While a Web browser may inquire and obtain information about TFVA and other veterinarians on this Web site, no evidence indicated advertisements or solicitation by or on behalf of the defendants occurred therein. We note that Internet Web sites are, by nature, passive. They can only be browsed upon the instigation of the Internet user. While some "interactive" sites may result in direct communication and possible transactions between the Internet user and the Web site owner, no evidence indicated direct communication or transactions occurred between plaintiffs and defendants in the present case. In addition, the service in question did not go "on-line" until June of 1996 and was not available at the time plaintiffs contracted with these defendants for the performance of insurance examinations. Based on the foregoing, we hold that competent evidence does not support the findings by the trial court that defendants solicited or advertised in this state.

While defendants have clients other than plaintiffs that now reside in North Carolina, those individuals became defendants' clients while they resided in Florida, and subsequently moved to this state. Defendants have only performed services for them in Florida, and have never performed veterinary services for anyone in North Carolina. While the convenience of plaintiffs would warrant this state as the appropriate forum, the convenience of defendants would warrant Florida as the appropriate forum. Additionally, defendants' business is located in Florida, the alleged negligent activity took place in Florida, and witnesses and evidence would be most easily discoverable in that forum.

It is uncontradicted that as the defendant in *Stallings*, the defendants in the present case returned the call of plaintiffs to North Carolina and entered into a contract with them, sent two communications (Form and billing statement) directed into this state, and received payment from North Carolina. However, the communication by the defendant in *Stallings* included not only the returned check, but also a direct advertisement in a magazine circulated within this state. We have previously held that defendants in the present case did not advertise or solicit their services in this forum. The record reveals no evidence that they purposely availed themselves of the privilege of conducting activities within this forum. Therefore, while the quantity is the same, the quality of defendants' contacts with this state is substantially less than those of the defendant in *Stallings*. This Court ruled that the defendant in *Stallings* was not subject to *in personam* jurisdiction. To render TFVA and Dr. Franklin subject to *in personam* jurisdiction would go against the precedent established by this Court in that case. Based on the foregoing, we hold that the contacts in this case do not rise to the level of satisfying the constitutional minimum under the Due Process Clause in order to justify the exercise of personal jurisdiction. Accordingly, the order of the trial court is reversed.

Reversed and remanded.

Judge TIMMONS-GOODSON concurs.

Judge JOHN dissents.

Judge JOHN dissents.

I respectfully dissent. Unlike the majority, I believe the trial court's findings of fact are supported by competent evidence, albeit

controverted, are thereby conclusive on appeal, *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 541, 356 S.E.2d 578, 582, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987) (trial court's findings of fact conclusive on appeal if supported by competent evidence), and sustain its conclusion that defendants' contacts with this State were sufficient such that exercise of personal jurisdiction "over [them] does not violate the due process clause of the Fourteenth Amendment of the United States Constitution." *See New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159 (1989), *aff'd per curiam*, 326 N.C. 480, 390 S.E.2d 137 (1990) ("existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice") (citation omitted). Accordingly, I vote to affirm the trial court.

ROBERT EARL DALTON D/B/A B. DALTON & COMPANY, PLAINTIFF v. DAVID CAMP, NANCY J. MENIUS AND MILLENNIUM COMMUNICATION CONCEPTS, INC., DEFENDANTS

No. COA98-1330

(Filed 21 September 1999)

1. **Employer and Employee— breach of duty of loyalty—summary judgment improper—going beyond merely preparing to compete**

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court erred in granting summary judgment for defendant Camp on the breach of duty of loyalty claim because there is a genuine issue of material fact as to whether Camp went beyond merely preparing to compete.

2. **Employer and Employee— breach of duty of loyalty—summary judgment proper—merely preparing to compete**

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment for defendant Menius on the breach of duty of loyalty claim because her activities while employed by plaintiff were mere preparations to compete.

3. Unfair Trade Practices— Unfair and Deceptive Trade Practices Act—summary judgment proper—employer-employee relationship not covered

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment for defendant Camp on the unfair and deceptive trade practices claim because the Unfair and Deceptive Trade Practices Act does not cover employer-employee relations, and Camp's conduct primarily occurred during his employment with plaintiff.

4. Unfair Trade Practices— Unfair and Deceptive Trade Practices Act—summary judgment proper—conduct not unfair and deceptive under facts presented

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment for defendant Menius on the unfair and deceptive trade practices claim because although her conduct after her resignation would apply to Chapter 75, her conduct of forming a competing business, obtaining financing for that business, and soliciting plaintiff's clients after she left plaintiff's employment does not amount to unfair and deceptive trade practices on the facts presented.

5. Unfair Trade Practices— Unfair and Deceptive Trade Practices Act—summary judgment proper—company acted solely through employees

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment for defendant Millennium Communication Concepts on the unfair and deceptive trade practices claim because it acted solely through Camp and Menius, and their actions did not constitute an unfair and deceptive trade practice.

6. Wrongful Interference— tortious interference with prospective advantage—summary judgment improper—still employed—not legitimate exercise of own rights

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court erred in granting summary judgment in favor of defendant Camp on the tortious interference

with prospective advantage claim because if Camp competed while still employed by plaintiff, then Camp was not acting in the legitimate exercise of his own rights, but instead to gain an advantage for himself at plaintiff's expense.

7. Wrongful Interference— tortious interference with prospective advantage—summary judgment proper—adverse acts after left employment

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment in favor of defendant Menius on the tortious interference with prospective advantage claim because she did not act adversely to plaintiff's interests until after she left his employment, and at that time she could freely compete with him.

8. Wrongful Interference— tortious interference with prospective advantage—summary judgment proper—competitor

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment in favor of defendant Millennium Communication Concepts on the tortious interference with prospective advantage claim because it was never more than a competitor to plaintiff and a competitor has the privilege to induce another party not to renew or enter into a contract with another as long as the competitor solicits legally and does not gain an unfair advantage at the other's expense.

9. Conspiracy— summary judgment proper—mere conjecture—must show common agreement and objective

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court did not err in granting summary judgment for all three defendants on the conspiracy claim because plaintiff relies on mere conjecture and has shown no facts sufficient to support the allegation of defendants' common agreement and objective.

10. Damages— summary judgment properly denied—evidence of anticipated profits—not overly speculative

In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and

their new corporation, the trial court did not err in denying defendants' motion for summary judgment on the issue of damages because the testimony from plaintiff's expert witness on anticipated profits was not overly speculative and is admissible to aid the jury in estimating the extent of the injury sustained.

Appeal by plaintiff from judgment entered 13 July 1998 by Judge H.W. Zimmerman, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 16 August 1999.

Moser Schmidly Mason & Roose, by Stephen S. Schmidly and Andrew K. McVey, for plaintiff-appellant.

Wyatt Early Harris & Wheeler, L.L.P., by William E. Wheeler, for defendant-appellees.

EAGLES, Chief Judge.

This appeal arises out of a former employer's allegations of unfair competitive activity by employees and their new corporation.

Plaintiff Robert Earl Dalton d/b/a B. Dalton & Company engages in the business of selling advertisements and publishing employment magazines. In July of 1993, plaintiff obtained the rights to publish the employment magazine for Klaussner Furniture Industries, Inc.(KFI) for a three-year period. The agreement called for Klaussner to pay all print charges of $3,575.00 per issue. Plaintiff then hired defendant David Camp as his General Manager. Plaintiff gave Camp full responsibility for the KFI publication. Plaintiff later acquired rights to publish several other employee magazines and gave full responsibility to Camp for those publications. Camp alleges that at the time of his initial employment, plaintiff promised that he would offer Camp an ownership interest in the company in the near future. In December of 1995, plaintiff hired defendant Nancy Menius. Both defendants were at-will employees and neither had "a covenant not to compete" with plaintiff.

In March of 1994, plaintiff published the first issue of KFI's magazine *Inside Klaussner*. Plaintiff continued to produce the magazine over the next three years. KFI officials expressed satisfaction with the plaintiff's efforts.

On or about 15 January 1997, plaintiff and both defendant Menius and Camp entered discussions with KFI officials about renewing the publication agreement. Among the topics discussed was a price

reduction that KFI expected to receive from plaintiff. Plaintiff said he would "get back to" KFI. Plaintiff alleges that the parties left this meeting with an understanding that the current publishing relationship would continue. Immediately following the meeting, Camp engaged in the first of a series of discussions with KFI's representative, Mark Walker. Plaintiff alleges that many of these discussions took place while Camp was at KFI's place of business in connection with his duties as plaintiff's general manager. Defendants respond that Walker initiated each conversation and that Camp never pressured Walker to do business with him.

In February 1997, plaintiff alleges Menius engaged in several conversations with her fellow employee, Camp, about forming a competing company. Defendants claim that no "serious" conversations took place until after defendant Menius resigned on 28 February 1997. Following her resignation, both defendants prepared a business plan for defendant Millennium Communication Concepts, Inc. (MCC). In March 1997, defendants submitted their business plan to a lending institution and represented Camp to be a former employee of plaintiff. On 13 March 1997, Menius incorporated MCC with defendants being the sole officers, directors, and shareholders. Also in March, MCC entered into a written publishing contract with KFI. This contract gave MCC the exclusive right to publish *Inside Klaussner* for twenty months beginning in May 1997. The contract called for KFI to pay the printing costs of $3,245.00 per month and to pay all production costs of $1,227.00 per month. Camp signed the contract on behalf of MCC while still employed by plaintiff. On 26 March 1997, Camp resigned from plaintiff's employment and informed plaintiff of his activities. Subsequently, MCC obtained the business of several of plaintiff's other customers.

Plaintiff sued Camp, Menius, and MCC alleging breach of the fiduciary duty of loyalty, conspiracy to appropriate customers, tortious interference with contract, interference with prospective advantage and unfair and deceptive trade practices under Chapter 75. Judge Peter M. McHugh dismissed plaintiff's claim for tortious interference with contractual and business relations on 12 September 1997. Prior to trial on the remaining claims Judge H.W. Zimmerman, Jr. granted defendants' motion for summary judgment on 13 July 1998. Plaintiff appeals from the order granting summary judgment only.

Plaintiff contends that the trial court erred in granting summary judgment, arguing that there were genuine issues of material fact concerning defendants' actions. Summary judgment is properly granted

"if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). All of the evidence is viewed in the light most favorable to the nonmoving party. *Coats v. Jones*, 63 N.C. App. 151, 303 S.E.2d 655 (1983), *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). The movant bears the burden of proving the absence of any genuine issue of material fact. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 348 S.E.2d 772 (1986).

I. Breach of the Duty of Loyalty

[1] We first consider plaintiff's claims for breach of the duty of loyalty. One may create a confidential or fiduciary relationship with another by instilling a special confidence in him. *See Speck v. N.C. Dairy Foundation*, 311 N.C. 679, 685, 319 S.E.2d 139, 143 (1984), citing *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). The existence of such a relationship binds the individual to act with good faith and loyalty towards the one instilling confidence. *Id; Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 470, 500 S.E.2d 732, 736, *disc. review allowed*, 349 N.C. 232, 514 S.E.2d 271 (1998). An employee must faithfully serve his employer and perform his duties with reasonable diligence, care, and attention. *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 453, 358 S.E.2d 107, 109 (1987). Where an employee deliberately acquires an interest adverse to his employer, he is disloyal. *In Re Burris*, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965).

Plaintiff claims that summary judgment is inappropriate because there is a genuine issue of material fact as to whether Camp breached his duty of loyalty. We agree. Plaintiff placed Camp in the position of General Manager and gave him sole responsibility over plaintiff's publications. The evidence shows that defendant Camp was responsible for editing, designing, and publishing plaintiff's magazines. Additionally, defendant Camp handled the payroll, checkbook, and accounts dealing with the plaintiff's publications. His responsibilities necessarily included some "one on one" contact with customers including monthly contacts with KFI's representatives. Plaintiff argues that by this pattern of dealing he instilled special confidence in Camp. Accordingly, plaintiff contends that Camp was required to be loyal to plaintiff.

Plaintiff presented evidence that defendant Camp began discussions with Mark Walker of KFI, while still plaintiff's employee. Those conversations all occurred while Camp was on official business for plaintiff. In those discussions, Camp expressed dissatisfaction with the plaintiff and raised the possibility of forming his own company. Walker and Camp also considered the possibility of Camp publishing KFI's magazine. The talks culminated in the signing of an exclusive publication agreement between Camp and KFI. This signing took place before Camp left plaintiff's employment. Camp did not disclose to plaintiff his adverse activities prior to resigning his employment. Menius and Camp went to talk with another of plaintiff's customers, Acme-McCrary, while plaintiff still employed Camp. Menius admitted that she and Camp solicited Acme-McCrary's business.

Defendants argue that *Fletcher, Barnhardt & White, Inc. v. Matthews*, 100 N.C. App. 436, 397 S.E.2d 81 (1990), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 411 (1991) controls here. However, *Fletcher* dealt with the situation where the employee had merely prepared to compete with his employer. *Id.* at 441, 402 S.E.2d at 84. This Court stated that merely forming a company is not enough to find a breach of a fiduciary duty. *Id.* From plaintiff's forecast of the evidence, it appears that Camp's actions went beyond merely forming a company. Therefore, plaintiff has presented a genuine issue of material fact as to whether Camp went beyond merely preparing to compete. If Camp, while he was plaintiff's employee, was actually competing without plaintiff's consent, then he has breached his duty of loyalty. *See Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 439 S.E.2d 797(1994); *In re Burris*, 263 N.C. at 795, 140 S.E.2d at 410. Therefore, summary judgment was improper.

[2] Plaintiff argues that he has presented a genuine issue of material fact as to whether Menius breached her duty of loyalty. We disagree. At the most, plaintiff has shown that Menius discussed forming a new company with Camp while plaintiff employed her. There was no showing that Menius talked with Walker one on one prior to her leaving plaintiff's employment nor any showing that she was bound by a covenant not to compete. Plaintiff acknowledges that Menius engaged in most of her questioned conduct after she left plaintiff's employment. Menius's activities while employed by plaintiff may be best described as mere preparations to compete. Merely preparing to compete is not a breach of the duty of loyalty. *See Fletcher*, 100 N.C. App. at 441-42, 397 S.E.2d at 84. Therefore, summary judgment was proper as to Menius.

II. Chapter 75 Unfair and Deceptive Trade Practices

[3] Plaintiff argues that he has presented a genuine question of material fact as to defendants unfair and deceptive trade practices. We disagree. Chapter 75 of the North Carolina General Statutes establishes a cause of action for unfair methods of competition or unfair or deceptive acts in or affecting commerce. N.C.G.S. § 75-1.1 (1994). Chapter 75 protects businesses as well as consumers. *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). However, our Supreme Court has expressly stated that the Unfair and Deceptive Trade Practices Act "does not cover employer-employee relations." *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991) (citing *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982)).

Camp's conduct primarily occurred during his employment with plaintiff. In fact, it was Camp's employment relationship with plaintiff that placed him in the position to negotiate with Walker. It follows that Camp's conduct was not within the purview of Chapter 75. *See Sara Lee Corp.*, 129 N.C. App. at 473, 500 S.E.2d at 738. Therefore, summary judgment was proper as to Camp.

[4] We next consider the unfair and deceptive trade practice claim as to Menius. While this is a closer question, we also conclude that summary judgment was proper as to Menius. Chapter 75 only applies to Menius's conduct after her resignation became effective on 28 February 1997. *See Hajmm Co.*, 328 N.C. at 593, 403 S.E.2d at 492. Whether a practice is unfair or deceptive depends on the facts of each case and the impact on the marketplace. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403(1981). An act is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious. *Process Components, Inc. v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 366 S.E.2d 907, *aff'd*, 323 N.C. 620, 374 S.E.2d 116 (1988). Here plaintiff has shown that Menius formed a competing business, obtained financing for that business, and began to solicit plaintiff's clients after she left plaintiff's employment. We hold that this conduct does not amount to unfair and deceptive trade practices on the facts presented.

[5] We likewise conclude that summary judgment was proper as to MCC. In this case, MCC acted solely through Menius and Camp. Because the actions of Menius and Camp may not constitute an unfair and deceptive trade practice under the laws of this state, we conclude

that MCC was also not liable. Therefore, summary judgment for MCC was proper.

III. Interference With Prospective Advantage

[6] Defendants argue that plaintiff has failed to preserve this issue for appeal. This argument has no merit. On 12 September 1997, Judge Peter McHugh dismissed plaintiff's claim that sought damages for interference with contractual and business relations with KFI. However, Judge McHugh denied defendants' motion to dismiss as to the plaintiff's claim for interference with prospective advantage as to KFI. Judge H.W. Zimmerman, Jr. later granted defendants' motion for summary judgment which included plaintiff's claim for prospective advantage. While plaintiff failed to appeal Judge McHugh's motion to dismiss on the interference with contractual and business relations claim, plaintiff did appeal Judge Zimmerman's order regarding his claim for interference with prospective advantage. Accordingly, we hold that plaintiff has preserved this issue.

In order to maintain an action for tortious interference with prospective advantage, plaintiff must show that defendants induced KFI to refrain from entering into a contract with plaintiff without justification. Additionally, plaintiff must show that the contract would have ensued but for defendants' interference. *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917, *disc. rev*iew *denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). Defendants must not be acting in the legitimate exercise of their own right, "but with a design to injure the plaintiff or gain some advantage at his expense." *Owens v. Pepsi Cola Bottling Co. of Hickory, N.C., Inc.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992).

Here the depositions and pleadings have shown that KFI had a positive reaction to plaintiff's efforts with KFI's magazine. In his deposition, Walker testified that KFI had no complaints or problems with either the publication, quality, or distribution of *Inside Klaussner* during the time that plaintiff produced it. Plaintiff has presented evidence showing that all parties left the 15 January 1998 meeting with the understanding that plaintiff would continue with the production of KFI's magazine. Additionally, there is no question that plaintiff continued to produce KFI's magazine beyond the terms of the original contract. Clearly, plaintiff has presented a genuine issue of material fact as to whether the continuing relationship between KFI and plaintiff would have persisted and whether Camp's actions induced KFI to refrain from renewing its contract.

The final issue is whether the defendants as a matter of law were justified in their actions. Defendants allege that Camp had an unqualified right to compete and therefore he could solicit business away from plaintiff. This argument impermissibly ignores Camp's ongoing duty to plaintiff as the general manager of plaintiff's company. *See McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. at 453, 358 S.E.2d at 109; *Sara Lee Corp.*, 129 N.C. App. at 470, 500 S.E.2d at 736.

To compete with an employer without consent constitutes a breach of the duty of loyalty. *See Long*, 113 N.C. App. at 604, 439 S.E.2d at 802. When one deliberately acquires an interest adverse to his employer, he has breached his duty of loyalty as well. *Id.* If, as plaintiff alleges, Camp competed while still employed by plaintiff, then Camp was not acting in the legitimate exercise of his own rights. *See Owens*, 330 N.C. at 680, 412 S.E.2d at 644. Rather, Camp acted to gain an advantage for himself at the plaintiff's expense. *Id.* We have already ruled that there is a genuine issue as to whether Camp was competing or merely preparing to compete against plaintiff. Therefore, summary judgment was improper as to Camp on this claim as well.

[7] As to Menius, we hold that the trial court properly granted summary judgment. Plaintiff has presented no evidence that Menius solicited any of plaintiff's business while plaintiff employed her. Additionally, there is no evidence that a covenant not to compete covered Menius. At most, plaintiff showed that Menius prepared to compete prior to leaving plaintiff's employment. *See Fletcher, Barnhardt & White, Inc. v. Matthews*, 100 N.C. App. 436, 397 S.E.2d 81 (1990). Since Menius did not act adversely to plaintiff's interests until after she left his employment, she could freely compete with him. *See Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 222-23, 367 S.E.2d 647, 652 (1988); *Childress v. Ableles*, 240 N.C. 667, 84 S.E.2d 176 (1954). Therefore, summary judgment was proper.

[8] We also hold that the trial court properly granted summary judgment as to MCC. MCC was never more than a competitor of plaintiff. A competitor has the privilege to induce another party not to renew or enter a contract with another. *Id.* This is true as long as the competitor solicits legally and does not gain an advantage unfairly at the other's expense. *Owens*, 330 N.C. at 680, 412 S.E.2d at 644. To hold otherwise would stifle competition. *See Peoples Sec. Life Ins. Co.*, 322 N.C. at 223, 367 S.E.2d at 652. Since MCC's relationship to plaintiff has never been anything but as a competitor, it never owed any

duty to plaintiff. Therefore, MCC could freely compete and solicit plaintiff's customers without penalty.

IV. Conspiracy

[9] Plaintiff next alleges that he has presented sufficient evidence to overcome the motion for summary judgment as to his conspiracy claim. We disagree as to all three defendants.

There is no cause of action for civil conspiracy per se. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981); *Henderson v. LeBauer*, 101 N.C. App. 255, 260-61, 399 S.E.2d 142, 145, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991). However, an action does exist for wrongful acts committed by persons pursuant to a conspiracy. *Id.* This claim requires the showing of an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way that results in damages to the claimant. *Id.* Additionally, the claimant must present evidence of an "overt act" committed by at least one conspirator committed in furtherance of the conspiracy. *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. If a party makes this showing, all of the conspirators are jointly and severally liable for the act of any one of them done in furtherance of the agreement. *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987).

A party may establish an action for civil conspiracy by circumstantial evidence, however sufficient evidence of the agreement must exist "to create more than a suspicion or conjecture in order to justify submission of the issue to a jury." *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. After careful examination of the record before us, we conclude that plaintiff has not forecast sufficient evidence to present a genuine question of material fact as to conspiracy. Here plaintiff relies on mere conjecture and has shown no facts sufficient to support their allegations of a common agreement and objective. At his deposition, plaintiff testified that he had no evidence that Menius and Camp conspired with one another. He stated that he had nothing more than "suspicion." Accordingly, the trial court properly entered summary judgment for the defendants.

V. Damages

[10] Defendants argue that plaintiff has not forecast evidence of a genuine issue as to his damages. In order to recover, plaintiff must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the damages with a reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C.

534, 546, 356 S.E.2d 578, 586, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Where a party has alleged business losses caused by intentional tortious conduct, the appropriate inquiry is whether the consequences were the natural and probable result of the defendants' conduct and not whether the consequences were within the parties' legal contemplation. *Steffan v. Meiselman*, 223 N.C. 154, 159, 25 S.E.2d 626, 629 (1943). As long as the evidence is not remote or speculative, evidence of anticipated profits is admissible to aid the jury in estimating the extent of the injury sustained and not as the measure of damages. *See id.* at 159, 25 S.E.2d at 629-30. Parties may also show damages by proving the usual profits of a regularly established business prior to the tortious conduct. *Id.*

Taking all inferences in favor of the non-moving party, we conclude that the plaintiff has presented sufficient evidence of damages to survive a motion for summary judgment. Plaintiff's expert witness testified that plaintiff had suffered from eighty five to ninety thousand dollars in losses as the result of defendants' conduct. She based this conclusion on revenues earned by plaintiff prior to the conduct of defendants and on evidence of possible future revenues. We conclude that this evidence is not overly speculative and is sufficient to withstand a motion for summary judgment. *See id.*

Affirmed in part, reversed in part, and remanded.

Judges WALKER and McGEE concur.

REGINALD L. FRAZIER, PLAINTIFF v. MAUREEN DEMAREST MURRAY, HENRY C. BABB, JR., JAMES LEE BURNEY, AND THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR, DEFENDANTS

No. COA98-446

(Filed 21 September 1999)

1. Tort Claims Act— only claims against the state—no liability for individual officers—Disciplinary Hearing Commission—statutory authority to enforce disbarment by criminal contempt

The Industrial Commission did not err in dismissing plaintiff's claims against the individual defendants under the Tort

Claims Act for false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress based on defendants' exercise of the Disciplinary Hearing Commission's statutory authority to enforce an order of disbarment by criminal contempt powers because the Tort Claims Act applies only to claims against the state, and not for the liability of individual officers.

2. Tort Claims Act— jurisdiction of Industrial Commission— not for intentional acts—Disciplinary Hearing Commission—statutory authority to enforce disbarment by criminal contempt

The Industrial Commission did not err in dismissing plaintiff's claims against defendant Disciplinary Hearing Commission under the Tort Claims Act for false imprisonment and intentional infliction of emotional distress based on defendants' exercise of its statutory authority to enforce its order of disbarment by criminal contempt powers because the Tort Claims Act does not give the Industrial Commission jurisdiction to award damages based on intentional acts.

3. Tort Claims Act— negligence—public duty doctrine bars— Disciplinary Hearing Commission—statutory authority to enforce disbarment by criminal contempt

The Industrial Commission did not err in dismissing plaintiff's claims against defendant Disciplinary Hearing Commission under the Tort Claims Act for negligent infliction of emotional distress based on defendants' exercise of its statutory authority to enforce its order of disbarment by criminal contempt powers because negligence claims arising in the performance of duties for the public at large are barred by the public duty doctrine unless the claim falls within the exceptions of a special relationship or a special duty.

Judge TIMMONS-GOODSON concurs in part and dissents in part.

Plaintiff appeals from decision and order entered 14 January 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 February 1999.

Michaux & Michaux, P.A., by Eric C. Michaux, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for defendant-appellees.

HUNTER, Judge.

Plaintiff Reginald L. Frazier appeals from a decision by the North Carolina Industrial Commission dismissing his complaints against Maureen Demarest Murray, Henry C. Babb, Jr., James Lee Burney and the Disciplinary Hearing Commission of the North Carolina State Bar for false imprisonment, intentional infliction of emotional distress and negligent infliction of emotional distress.

The Disciplinary Hearing Commission disbarred the plaintiff from the practice of law on 6 November 1989. Plaintiff's license to practice law has not been reinstated. When allegations were made that plaintiff continued to practice law, the Disciplinary Hearing Commission attempted to have the Craven County District Attorney prosecute the plaintiff for the unauthorized practice of law. The district attorney refused to take action against the plaintiff. The Disciplinary Hearing Commission then requested that Superior Court Judge D. Marsh McClelland hold plaintiff in criminal contempt. Judge McClelland found no legal basis to enforce the disbarment order by a contempt proceeding and ruled that the Disciplinary Hearing Commission was without authority to punish plaintiff for contempt. The State Bar did not appeal the ruling.

On 10 August 1994, in response to allegations that plaintiff was still practicing law, the State Bar filed a show-cause motion, requesting that the Disciplinary Hearing Commission issue an order commanding plaintiff to appear and show cause as to why he should not be held in criminal contempt for continuing to practice law in violation of the 1989 disbarment order. Murray, chair of the Disciplinary Hearing Commission, issued the show-cause order ordering plaintiff to appear on 3 October 1994. Both the motion and the order were served on plaintiff by certified mail and by personal service of the Craven County Sheriff's Department.

Murray, Babb and Burney conducted the show-cause hearing. Plaintiff was not present, but was represented by Fred Williams. The Disciplinary Hearing Commission found plaintiff guilty of sixteen counts of criminal contempt. The Disciplinary Hearing Commis-

sion sentenced plaintiff to thirty days in jail and a fine of $200.00 for each of the sixteen counts. The Disciplinary Hearing Commission requested that the sentences be consecutively served, resulting in a combined sentence of 480 days in jail, $3,200.00 in fines and costs.

Plaintiff was arrested and incarcerated on 25 January 1995. Pursuant to a writ of habeas corpus issued by the United States District Court for the Eastern District of North Carolina, plaintiff was ordered released on 13 November 1995. That Court made the following disposition:

> Accordingly, this court orders the issuance of a writ of habeas corpus releasing Mr. Frazier from the conviction and sentence heretofore imposed by the Disciplinary Hearing Commission of the North Carolina State Bar, unless within 30 days from the entry of this order, the DHC affords Mr. Frazier notice of his right to appeal to the Superior Court of Wake County upon the times and terms provided for in the General Statues of North Carolina.

Frazier v. French, No. 5:95-HC-463-BO, (E.D.N.C., filed Nov. 25, 1996) slip op. at 13. The Disciplinary Hearing Commission gave notice and plaintiff appealed to the Wake County Superior Court. The appeal is now pending in that forum.

Plaintiff filed a complaint under the Tort Claims Act, N.C. Gen. Stat. § 143-291 (1999), against individual defendants and the Disciplinary Hearing Commission alleging false imprisonment and the intentional infliction of emotional distress. The Disciplinary Hearing Commission filed a motion to dismiss on behalf of all defendants pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2) and (6) and on behalf of the defendants as individuals under Rules 12(b)(4) and (5). Plaintiff filed an amended complaint to include negligent infliction of emotional distress. The amended complaint was authorized in an order by Commissioner Bernadine S. Ballance. The Disciplinary Hearing Commission filed a motion to dismiss the amended complaint. Commissioner Ballance denied the Disciplinary Hearing Commission's motion. After a hearing, the Industrial Commission entered an order on 14 January 1998 reversing Commissioner Ballance and granting the Disciplinary Hearing Commission's motion to dismiss all claims. Plaintiff appeals.

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[1] Plaintiff's sole argument on appeal is whether the dismissal by the Industrial Commission of plaintiff's claims under N.C. Gen.

Stat. § 1A-1, Rules 12(b)(1), (2), (4), (5) and (6) was reversible error. We conclude that the dismissal was proper.

Plaintiff argues that the Industrial Commission's reversal of Commissioner Ballance's order and the Industrial Commission's dismissal of plaintiff's claims pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), (4), (5) and (6) was reversible error not supported by applicable law or the record. Specifically, plaintiff argues that he was entitled to pursue his remedies before the Industrial Commission and that the dismissal of his claims against both the individual defendants and the Disciplinary Hearing Commission under Rule 12(b)(1), (2), (4), (5) and (6) was in error. Defendants counter that only agencies can be sued under the Tort Claims Act and the Industrial Commission had no jurisdiction to review the determinations of the Disciplinary Hearing Commission.

Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against state departments, institutions and agencies for personal injuries or damages sustained by any person as a result of the negligence of a state officer, agent or employee acting within the scope of his employment. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983). The Industrial Commission must decide whether the alleged wrong:

> [A]rose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. . . .

N.C. Gen. Stat. § 143-291(a) (1999). The Tort Claims Act embraces only claims against state agencies. *Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968). In order to recover under the Tort Claims Act it is essential that plaintiff's affidavit identify the allegedly negligent employee and set forth the negligence relied upon, N.C. Gen. Stat. § 143-297 (1999); *Ayscue v. Highway Commission*, 270 N.C. 100, 153 S.E.2d 823 (1967). However, the Tort Claims Act "does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 886 (1997). Therefore, the Industrial Commission properly dismissed all claims against the individual defendants according to Rule 12(b)(1) and (2). Summonses were not processed against these defendants so the dismissal pursuant to Rules 12(b)(4) and (5) was proper against

the individual defendants as well. There is no liability for individual officials as the Tort Claims Act applies only to claims against the state.

[2] Plaintiff brings forth claims of false imprisonment, intentional infliction of emotional distress and negligent infliction of emotional distress against the Disciplinary Hearing Commission. The Tort Claims Act does not give the Industrial Commission jurisdiction to award damages based on intentional acts. *Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 577 (1956). Injuries intentionally inflicted by employees of a state agency are not compensable under the Tort Claims Act. Intentional acts are legally distinguishable from negligent acts. *Id.* Thus, the Industrial Commission correctly dismissed the claims of false imprisonment and intentional infliction of emotional distress against the Disciplinary Hearing Commission.

[3] As for negligent infliction of emotional distress, that claim, too, was properly dismissed. The claim is barred by the public duty doctrine.

Tort liability for negligence attaches to the state and its agencies under the Tort Claims Act only "where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a). Our Supreme Court has made it clear that the Tort Claims Act incorporates existing common law rules of negligence, including the public duty doctrine. *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711, *reh'g denied*, 348 N.C. 79, 502 S.E.2d 836, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998). In *Stone*, the Court stated:

> Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. . . . If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*. The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person could be liable. Thus, the plain words of the statute indicate an intent that the doctrine apply to claims brought under the Tort Claims Act.

Id. at 478-79, 495 S.E.2d at 714 (citations omitted) (emphasis in original).

Under the public duty doctrine, a governmental entity exercising its statutory powers is ordinarily held to act for the benefit of the general public rather than for the benefit of any individual, and, therefore, cannot be held liable for negligence in performance of, or failure to perform, its duties. *Stone*, 347 N.C. at 482, 495 S.E.2d at 716.

The Disciplinary Hearing Commission clearly had authority to discipline and disbar plaintiff. N.C. Gen. Stat. §§ 84-28, 84-28.1 (1995). N.C. Gen. Stat. § 84-28.1(b) authorizes the Disciplinary Hearing Commission to "hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council." N.C. Gen. Stat. § 84-28.1(b) (1995). Moreover, the General Assembly intended to vest the Disciplinary Hearing Commission with the statutory authority to enforce its order of disbarment by criminal contempt powers comparable to those of the general courts of justice. N.C. Gen. Stat. § 84-28.1(b1) provides that "[t]he disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, acting through its chairman, *shall have the power to hold persons, firms or corporations in contempt as provided in Chapter 5A.*" N.C. Gen. Stat. § 84-28.1(b1) (emphasis added). Chapter 5A outlines the criminal contempt powers of the general courts of justice. Since the Disciplinary Hearing Commission was acting within its statutory authority in exercising its contempt powers, any claim for negligence in the performance of its duties would come within the public duty doctrine.

There are two recognized exceptions to the public duty doctrine, both of which are narrowly applied. The exceptions exist where (1) there is a special relationship between the injured party and the state; and (2) where the state creates a special duty by virtue of an express promise to the injured individual, the state fails to perform the promise, and the individual's reliance on the promise is causally related to the injury suffered. *Hunt v. Dept. of Labor*, 348 N.C. 192, 197, 499 S.E.2d 747, 750; *see Stafford v. Barker*, 129 N.C. App. 576, 577, 502 S.E.2d 1, 2, *disc. review denied*, 348 N.C. 695, 511 S.E.2d 650 (1998) (quoting *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991)). Neither exception is applicable to this case.

"In order to survive the application of the public duty doctrine, the plaintiff's allegations must fit within an exception to the doc-

trine." *Lovelace v. City of Shelby*, 133 N.C. App. 408, 412, 515 S.E.2d 722, 725 (1999). The "special relationship" exception must be specifically alleged, and is not created merely by a showing that the state undertook to perform certain duties. *See Derwort v. Polk County*, 129 N.C. App. 789, 793, 501 S.E.2d 379, 382 (1998). To determine whether there is a special relationship, the Court must consider whether the state's duty flowed to the plaintiff or the public at large, and where the duty is statutory, the Court looks at the language of the statute to determine whether the duty is intended to protect individuals or the public at large. *Hasty*, 348 N.C. at 198, 499 S.E.2d at 750. There can be no doubt that the statutory duties of the State Bar and its Disciplinary Hearing Commission in disciplinary matters are intended for the protection of the public from unworthy practitioners. *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938). To properly allege the " 'special duty' exception, the complaint must allege an 'overt promise' of protection by defendant, detrimental reliance on the promise, and a causal relation between the injury and the reliance." *Lovelace*, 133 N.C. App. at 412-13, 515 S.E.2d at 725 (citation omitted).

Plaintiff has not alleged any set of facts which, taken as true, create a special relationship between plaintiff and the Disciplinary Hearing Commission nor does the complaint allege the elements of any special duty owed plaintiff by the Disciplinary Hearing Commission. Therefore, the public duty doctrine bars plaintiff's Tort Claims Act claim against the Disciplinary Hearing Commission for negligent infliction of emotional distress and the claim was properly dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *See Stone, supra* ("If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*."), N.C. Gen. Stat. § 143-291(a).

Affirmed.

Judge MARTIN concurs.

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Judge TIMMONS-GOODSON concurs in part and dissents in part.

I agree with the majority that plaintiff's claims against the individual defendants and the Disciplinary Hearing Commission ("DHC") of the North Carolina State Bar for false imprisonment and intentional infliction of emotional distress were properly dismissed.

However, I do not agree that plaintiff's claim against the DHC for negligent infliction of emotional distress was barred by the public duty doctrine and properly dismissed. Therefore, I must respectfully dissent from the portion of the majority opinion which affirms the Industrial Commission's dismissal of that claim.

The majority asserts that the General Assembly *intended* to vest the DHC with criminal contempt powers. I disagree and, like Judge McClelland, am unable to detect any statutory authority which would allow the DHC to punish by contempt a disbarred attorney for the unauthorized practice of law. Therefore, in my opinion, the DHC is subject to liability because it clearly acted beyond its authority.

The duties of the DHC are delegated to it by the Council of the North Carolina State Bar ("Council"). N.C. Gen. Stat. § 84-28.1(b) (1995). The Council is "vested . . . with the authority to regulate the professional conduct of licensed attorneys." N.C. Gen. Stat. § 84-23 (1995). Therefore, it is clear that the authority of the DHC extends only to licensed attorneys. The DHC may not exceed that authority which has been granted to it by the Council. The power of the DHC to "hold persons, firms or corporations in contempt as provided in Chapter 5A" does not apply to non-lawyers. N.C.G.S. § 28.1(b1).

In addition, a well-settled principle of statutory interpretation is that a particular statute controls over a general one. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966).

> Where one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms . . . , the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto.

State v. Leeper, 59 N.C. App. 199, 202, 296 S.E.2d 7, 9, *disc. review denied*, 307 N.C. 272, 299 S.E.2d 218 (1982).

Therefore, even if N.C.G.S. § 84-37 is construed to be in conflict with N.C.G.S. § 84-28.1(b1), the former is controlling. Section 84-37 specifically addresses the issue of the unauthorized practice of law. Section 84-28.1(b1), on the other hand, is a generalized statement regarding the DHC's power to hold people, firms or corporations in contempt. As section 84-37 makes reference to the particular situation in issue, the DHC must comply with the mandate that actions to enjoin unauthorized practice be brought in superior court:

The venue for actions brought under this section shall be the superior court of any county in which the acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in the action reside or in Wake County.

N.C. Gen. Stat. § 84-37(c) (1995) (emphasis added).

The DHC acted improperly in holding plaintiff in contempt in a forum other than superior court. Therefore, the DHC was not acting pursuant to a statutory duty, and the public purpose doctrine does not shield it from liability for its negligent acts.

Taking all the allegations and averments of plaintiff's complaint and amended complaint as true, and liberally construing those allegations and averments, I believe the allegations are sufficient to support the negligent infliction of emotional distress claim. Accordingly, I would reverse the Industrial Commission's dismissal of plaintiff's claim of negligent infliction of emotional distress against the DHC and in all other regards affirm.

STATE OF NORTH CAROLINA v. BARRY DOUGLAS CLAPP

No. COA98-1099

(Filed 21 September 1999)

Evidence— motion in limine—habitual impaired driving—driving while license revoked—operation of vehicle

The trial court did not err by allowing the State's motion in limine to prohibit the introduction of evidence by defendant that the vehicle he was alleged to have been operating was not operable in a case involving habitual impaired driving and driving while license revoked because the State's evidence was sufficient to show defendant operated the vehicle in the presence of a police officer.

Judge GREENE concurring in the result.

Appeal by defendant from judgment entered 16 October 1997 by Judge James D. Llewellyn in New Hanover County Superior Court.

Certiorari allowed 26 February 1998 for defendant. Heard in the Court of Appeals 17 August 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Jonathan P. Babb, for the State.

Thomas S. Hicks for defendant-appellant.

TIMMONS-GOODSON, Judge.

Barry Douglas Clapp ("defendant") was indicted and subsequently convicted of Habitual Impaired Driving and Driving While License Revoked. The State's evidence at trial tended to show the following. On 2 March 1997 prior to 3:00 in the morning, defendant entered the Islander Kwik Mart ("Kwik Mart") in Carolina Beach. John McDade ("McDade"), Kwik Mart employee, observed that defendant was bobbing and weaving. McDade later noticed that defendant was sitting in the driver's seat of a car in the parking lot, apparently asleep. The car engine was running and the car was blocking the gas pumps at the Kwik Mart. McDade called the Carolina Beach Police Department.

A few minutes later, Officer John Knoll of the Carolina Beach Police Department arrived. After speaking with McDade, Officer Knoll approached the car in which defendant was seated wearing the seat belt. Officer Knoll shined his flashlight in the car and commanded defendant to wake up. Defendant did not wake up, however, until Officer Knoll reached through the partially open window and tugged defendant's shoulder.

When defendant awoke, Officer Knoll told him that he needed to talk to him. Defendant stated that he was not driving and then said, "Let me pull over." Defendant put the car in forward gear and the car rolled forward. Officer Knoll commanded defendant to stop the car. Defendant put the car into park, but subsequently put the car into forward gear again and the car moved forward. Officer Knoll repeated his command that defendant stop the car. Defendant stopped the car, but then put it into forward gear a third time, causing Officer Knoll to command him a third time to stop the car.

Defendant exited the car and accompanied Officer Knoll to the patrol car. Officer Knoll noticed that defendant was unsteady on his feet, his clothing was mussed, his eyes were glassy and bloodshot, his speech was slurred, and he had a moderate odor of alcohol on his breath. Defendant told Officer Knoll that his name was "Buddy D.

Clemmons" and that his date of birth was "June 25, 1954." Officer Knoll later determined that information was not correct.

Officer Knoll took defendant to the police department where defendant refused all field sobriety tests as well as the Intoxilyzer 5000 breath test. Defendant admitted that he was seated behind the steering wheel of the car with the motor running and that he put the car in gear. Defendant denied that he was under the influence of alcohol but indicated that he took medicine, specifically tranquilizers. He denied that he had been drinking and also that he had been driving. Finally, defendant admitted that he had previously been convicted of three charges of Driving While Impaired, Larceny, Possession of Cocaine, two charges of Driving While License Revoked and Disorderly Conduct.

Defendant's evidence tended to show the following. On 1 March 1997, David Clapp, defendant's brother, helped defendant move from St. Joseph's Street to Harbor Avenue. Defendant had consumed two beers at around 11:00 that evening and had taken medication around midnight. Defendant takes the prescription medication, Elavil, for back and neck injuries he sustained in an auto accident. The medication causes him to become sleepy, have slurred speech and red and glassy eyes.

During the early morning on 2 March 1997 shortly before defendant was arrested, David Clapp left defendant in the car at the Kwik Mart and walked back to Harbor Avenue. David Clapp left the Kwik Mart on foot in order to get a battery pack to start the car, which had been switching off when he put it into gear. After his brother left, defendant went into the Kwik Mart, bought a sandwich and a soda, returned to the car and fell asleep. When Officer Knoll awakened him, defendant stated that he was not driving the car. He was wearing the seat belt because the car had automatic seat belts. When defendant put the car into gear, he was attempting to show the officer how the car would switch off and he did not intend to go anywhere.

Defendant did not give the officer the name "Barry D. Clemmons," but instead the officer misunderstood defendant when he gave his name. At the police department, defendant was unable to perform the sobriety field tests because of his physical condition. He refused to take the breathalyzer test because his brother once registered .02 on the test after having consumed no alcohol. Defendant requested a blood test.

After deliberations, the jury found defendant guilty of Habitual Impaired Driving and Driving During Revocation and not guilty of Hindering and Delaying a Public Officer. On 16 October 1997, Judge James D. Llewellyn entered judgment on the jury verdict. The trial court sentenced defendant to a minimum term of sixteen (16) months and a maximum term of twenty (20) months in the North Carolina Department of Correction for Habitual Impaired Driving. Additionally, the trial court sentenced defendant to sixty (60) days in the Department of Correction for Driving During Revocation, to run at the expiration of the sentence imposed for Habitual Impaired Driving. Defendant did not appeal. Defendant filed a Petition for Writ of Certiorari which was granted by this court on 26 February 1998.

On appeal, in his only assignment of error, defendant argues that the trial court committed error by allowing the State's motion *in limine* to prohibit the introduction of evidence by defendant that the vehicle he was alleged to have been operating was not operable. Defendant further argues that this error was prejudicial and entitles him to a new trial for the offenses of Habitual Impaired Driving and Driving During Revocation. We cannot agree.

A ruling on a motion *in limine* is within the sound discretion of the trial court and will only be disturbed on appeal in the case of a manifest abuse of discretion. *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745-46 (1995). Such a motion operates to "exclude anticipated prejudicial evidence before such evidence is actually offered in the hearing of a jury." *Id.* at 746, 459 S.E.2d at 745. A motion *in limine* may be granted to "prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial." *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980).

A party must preserve a motion *in limine* for appeal as "[r]ulings on motions *in limine* are preliminary in nature and subject to change at trial[.]" *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). In the case *sub judice*, defendant preserved for appeal his challenge to the State's motion *in limine* by introducing evidence out of the presence of the jury that the car was not operable.

Defendant argues that evidence that the car he was driving was not operable would have tended to disprove that the car was a vehicle, thereby rebutting one of the elements that the State had the bur-

den to prove. In order to establish a case of Driving While Impaired or Driving During Revocation, the State must prove that defendant drove a vehicle. A person is guilty of the offense of Impaired Driving if he "drives any *vehicle* upon any highway, any street, or any public vehicular area . . . (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1 (1993) (emphasis added). A person commits the offense of Driving While License Revoked if he "drives any *motor vehicle* upon the highways of the State while the license is revoked." N.C. Gen. Stat. § 20-28(a) (Cum. Supp. 1998) (emphasis added).

A vehicle is defined as "[e]very device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power . . . ." N.C. Gen. Stat. § 20-4.01(49) (Cum. Supp. 1998). More specifically, a motor vehicle is defined as "[e]very vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle." N.C. Gen. Stat. § 20-4.01(23) (Cum. Supp. 1998).

In the case *sub judice*, defendant admitted that he was sitting behind the wheel of an automobile while the motor was running, that he put the car into drive three times and that the car moved forward on each occasion. Defendant's evidence that the car was not functioning properly prior to this incident does not negate the fact that it was a vehicle. Defendant demonstrated in the presence of a police officer that the car in which he was seated was a device in which a person might be "transported or drawn upon a highway" for purposes of North Carolina General Statutes section 20-4.01(49). N.C. G.S. § 20-4.01(49) (Cum. Supp. 1998). In addition, a car is clearly a motor vehicle as it is "designed to run upon the highways" for purposes of North Carolina General Statutes section 20-4.01(23). N.C. G.S. § 20-4.01(23) (Cum. Supp. 1998*)*; see *Peoples Savings and Loan Assn. v. Citicorp Acceptance Co.*, 103 N.C. App. 762, 766, 407 S.E.2d 251, 253, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991) (concluding a mobile home is a motor vehicle even after it is affixed to realty because it is designed to run upon the highways).

We do not reach the question of whether a car that is inoperable can be considered a "vehicle" because defendant did in fact operate the car. An operator of a car is defined as "[a] person in actual physical control of a vehicle which is in motion or which has the engine

running." N.C. Gen. Stat. § 20-4.01(25) (Cum. Supp. 1998). The terms "operator" and "driver" are synonymous. *Id.* This Court has held that where a defendant sat behind the wheel of the car in the driver's seat and started the engine, there was sufficient evidence to show that the defendant was in actual physical control of a vehicle. *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). "[T]he State's evidence was sufficient to show that the defendant 'drove' a vehicle within the meaning of G.S. 20-138.1. Defendant's purpose for taking actual physical control of the car and starting the engine is irrelevant." *Id.* at 407, 335 S.E.2d at 70.

We conclude that the trial court committed no error by allowing the State's motion *in limine* to prohibit the introduction of evidence by defendant that the vehicle he was alleged to have been operating was not operable where defendant operated the vehicle in the presence of a police officer. As such, defendant's assignment of error fails.

Defendant raised five assignments of error on appeal. However, defendant failed to bring four of them forward in the brief. Therefore, the following assignments of error are deemed to be abandoned pursuant to our appellate rules: (1) the denial of the trial court of defendant's motion for directed verdict at the end of the State's evidence; (2) the failure of the trial court to intervene *ex mero motu* to prohibit the introduction of inadmissible evidence of defendant's previous criminal record; (3) the denial of the trial court of defendant's motion to dismiss the offense of Driving While Impaired at the end of all the evidence; and (4) the entering of judgment by the trial court against defendant for a conviction of Habitual Driving While Impaired when the jury failed to find defendant guilty of that offense and the trial court failed to conduct a hearing before the trial outside the presence of the jury that the defendant could admit, deny, or remain silent as to the previous convictions that enhanced his conviction of Driving While Impaired to a felony. N.C.R. App. P. 28(b)(5).

For the reasons stated herein, the record shows that defendant received a trial free from prejudicial error.

NO ERROR.

Judge HORTON concurs.

Judge GREENE concurs in the result.

Judge GREENE concurs in the result.

I believe the trial court committed error in allowing the State's motion in limine. I, nonetheless, join with the majority because the error was harmless.

The offenses with which Defendant was charged, driving while impaired and driving while license revoked, required the State to prove that Defendant was driving a *vehicle* upon a highway, street, public vehicular area and a *motor vehicle* upon the highways, respectively. N.C.G.S. § 20-138.1(a) (1993) (impaired driving); N.C.G.S. § 20-28(a) (Supp. 1998) (driving while license revoked). This required the State to show that the 1989 Dodge Colt in which Defendant was found was "self-propelled" or capable of transporting a person or property upon a highway. N.C.G.S. § 20-4.01(49) (Supp. 1998); N.C.G.S. § 20-4.01(23) (Supp. 1998). Defendant was therefore entitled to present evidence on this issue, *see State v. Marshall*, 105 N.C. App. 518, 525, 414 S.E.2d 95, 99, *disc. review denied*, 332 N.C. 150, 419 S.E.2d 576 (1992) (accused in criminal case has right to defend against State's accusations), and have the matter determined by the jury. The allowance of the motion in limine denied Defendant of this right.

The issue presented in this case is quite different from that presented in *State v. Fields*, 77 N.C. App. 404, 335 S.E.2d 69 (1985). In that case, this Court held that one seated in the driver's seat of a motor vehicle, with the engine running, is the driver of that vehicle for purposes of section 20-138.1(a). In *Fields*, there also was no dispute that the vehicle in which the defendant was seated was in fact a "vehicle" within the meaning of section 20-138.1(a). In this case, Defendant disputes that the Dodge Colt was a "vehicle" or "motor vehicle" within the meaning of the pertinent statutes.

I, however, do not believe Defendant is entitled to a new trial. The evidence suppressed would have tended to show only that the Dodge Colt would not move "if the head lights were on."[1] All the evidence showed that the Dodge Colt was capable of moving "if the head lights were off" and did move forward once it was put in gear by Defendant in the presence of the arresting officer. The question for the jury was whether the Dodge Colt was capable of moving, with *or* without the head lights switched on. The exclusion of Defendant's evidence therefore was harmless. *See* N.C.G.S. § 15A-1443(b) (1997).

1. The proffered evidence was that the alternator on the Dodge Colt was defective and that when the head lights were switched on, the engine would stop.

STATE OF NORTH CAROLINA v. JUAN JARRELLE CRUMBLEY

No. COA98-1078

(Filed 21 September 1999)

1. Evidence— hearsay—medical diagnosis or treatment

Hearsay statements may be admissible under N.C.G.S. § 8C-1, Rule 803(4) if those statements are made for the purpose of medical diagnosis or treatment. Factors properly considered to determine whether statements have been made for the purpose of medical diagnosis or treatment include whether the examination was requested by persons involved in the prosecution of the case, the proximity of the examination to the victim's initial diagnosis, whether the victim received a diagnosis or treatment as a result of the examination, and the proximity of the examination to the trial date. The key factor is whether the statements resulted in the child receiving medical treatment and/or diagnosis.

2. Evidence— hearsay—medical treatment exception—child sexual abuse victim—statements to social worker

The statements of a child sexual abuse victim to a social worker (Womble) were admissible as hearsay statements made for the purpose of medical diagnosis or treatment where Womble did not interview the child at the request of persons involved in the prosecution of defendant but as part of her duties as an emergency investigator for Social Services; the interview took place approximately twenty months prior to trial and in close proximity to the child's initial diagnosis and treatment; and, although Womble's investigation ended one day before another social worker made medical appointments for the child, Womble's role as the initial investigator played a crucial role in the process that Social Services used to determine whether to pursue medical treatment and the statements resulted in the child receiving treatment.

3. Evidence— hearsay—medical treatment exception—child sexual abuse victim—statements to social worker

Statements of a child sexual abuse victim to a social worker (Melendez) were admissible as hearsay statements made for the purpose of medical diagnosis and treatment where Melendez did not interview the victim at the request of anyone involved with the prosecution of defendant but as part of her duties as a social

worker; the interview took place approximately twenty months prior to trial in close proximity to the child's initial diagnosis and treatment; and the child received medical diagnosis and treatment as a result of Melendez's interviews.

4. Evidence— sexual abuse of child—expert testimony—admissible

The trial court did not err in a prosecution for first-degree statutory rape, first-degree statutory sexual offense, and indecent liberties by admitting testimony from a pediatrician and the Director of the Child Sexual Abuse Team at Wake Medical Center that the victim had been sexually abused where the doctor based her opinions on her own exam of the victim, extensive personal experience examining children who have been sexually abused, knowledge of child sexual abuse studies, and a colleague's notes from an interview with the child. She did not base her opinions on speculation or conjecture, but on adequate data. N.C.G.S. § 8C-1, Rule 702.

5. Sentencing— defendant's presence—alteration between oral rendering and written judgment

A sentence was vacated where defendant was present in open court when concurrent sentences were rendered in an oral judgment, but not when a written judgment was entered which provided that the sentences would run consecutively. This substantive change could only be made in defendant's presence, where he would have an opportunity to be heard.

Appeal by defendant from judgments dated 6 May 1998 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 17 August 1999.

Attorney General Michael F. Easley, by Associate Attorney General Allison Smith Corum, for the State.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by Thomas R. Sallenger, for defendant-appellant.

GREENE, Judge.

Juan Jarrelle Crumbley (Defendant) appeals from a jury verdict finding him guilty of taking indecent liberties with a child, first-degree statutory sex offense, and first-degree statutory rape.

The trial court rendered the following sentence in open court and in the Defendant's presence, on 6 May 1996: a minimum prison term of 19 months and maximum prison terms of 23 months for taking indecent liberties with a child; a minimum prison term of 288 months and maximum prison term of 355 months for first-degree statutory sex offense; and, a minimum prison term of 288 months and maximum prison term of 355 months for first-degree statutory rape. The trial court did not indicate whether the sentences would run consecutively or concurrently.

The trial court later entered a written and signed judgment on 6 May 1996. The written and signed judgment imposed the same length of sentence as previously rendered, but further stated the sentences would run consecutively. There is no indication in the record that Defendant was present.

The State presented evidence that on 9 September 1996 Defendant was living with his girlfriend, Teresa Crumbley (Mrs. Crumbley), and Mrs. Crumbley's seven-year-old daughter, A.J. At the time of trial Mrs. Crumbley and Defendant were married. While A.J. and Defendant were alone at their residence on 9 September 1996, Defendant came into A.J.'s bedroom and pulled off her clothes. Defendant then stuck A.J. with a nail "in [her] privates." Defendant also used his fingers to stretch her private parts "so he could really stick it [the nail] in there."

Deborah Barnes (Barnes), A.J.'s aunt, arrived at Defendant's residence on 9 September 1996 and heard A.J. screaming. When Barnes entered the residence, she saw Defendant coming out of A.J.'s bedroom while zipping up his pants. Barnes then went into A.J.'s room and found A.J. in her bed and "her panties were half up." A.J. was nervous and shaking. On 10 September 1996 Barnes reported the incident to Sherry Beard (Detective Beard), a detective for the Wilson County Sheriff's Department.

Detective Beard contacted the Wilson County Department of Social Services (Social Services) to report the incident. Social Services then contacted Brenda Womble (Womble), an emergency investigator with Social Services, to investigate the report. Womble went to Defendant's residence on 10 September 1996 to determine whether A.J.'s presence in the residence with Defendant placed her at a high risk for harm, and to determine whether A.J. should be taken into protective custody. Womble testified she interviewed A.J. at the residence, and A.J. told her Defendant "did bad things to her" and

"tries to make [her] take [her] clothes off." She also testified A.J. told her Defendant "puts his hand in her pants" when in the bedroom and in the living room. Womble determined A.J. should be separated from Defendant, and A.J. went to stay at her grandmother's home. Womble also contacted Becky Melendez (Melendez), a social worker in the Child Protective Services Unit of Social Services, and Melendez was assigned to A.J.'s case. On 10 September 1996, Womble met Melendez at A.J.'s grandmother's home and Melendez began her investigation.

Melendez interviewed A.J. on 10 September 1996 and 11 September 1996. Melendez testified A.J. told her during those interviews Defendant "had been touching her in places that he shouldn't be touching her, and she wanted it to stop." She also testified A.J. pointed to the vaginal area of a doll to indicate where Defendant had been touching her, and A.J. placed the hand of a male doll on the vaginal part of a female doll. Melendez determined from her interview A.J. would need medical treatment. Melendez therefore made an appointment for A.J. to see a sexual abuse specialist at Wake Medical Center. Since A.J. could not be seen at Wake Medical Center until 18 September 1996, Melendez also made an appointment for A.J. to see a pediatrician prior to the appointment at Wake Medical Center.

The trial court qualified Denise Everette, M.D. (Dr. Everette), a board-certified pediatrician and the Director of the Child Sexual Abuse Team at Wake Medical Center, as an expert in the field of child sexual abuse. Dr. Everette performed a physical exam on A.J. on 18 September 1996. She testified she has examined over 2500 children for sexual abuse, and her exam of A.J. revealed a narrow rim of hymen. She stated in her experience a narrow hymen in a young girl is consistent with penetration of some type. She testified she sees significant abnormal findings of a narrow hymen in 35 percent of the children she examines for sexual abuse. Of that 35 percent, approximately 20 percent have findings similar to the findings in A.J.'s case. Dr. Everette stated she could never completely rule out the possibility a child had been born with a narrow hymen.

In addition to her physical examination of A.J., Dr. Everette consulted notes from an interview of A.J. conducted by a colleague from the Child Sexual Abuse Team at Wake Medical Center. She also has reviewed the results of other doctors' studies on child sexual abuse. Dr. Everette testified in her opinion A.J. had been penetrated, and this penetration could have been digital or penile. She also testified in her opinion A.J. had been sexually abused.

The State introduced into evidence a signed statement made by Defendant on 27 November 1996 at the Wilson County Sheriff's Department. Defendant admitted in the statement he "sexually touched" A.J. on three different occasions. Defendant further admitted he had penetrated A.J. with his finger and his penis.

Defendant, however, testified he had never touched A.J. in any inappropriate way. Defendant also testified his written statement of 27 November 1996 was false, and he had given the statement in exchange for Detective Beard's promise to help him receive a lower bond.

Mrs. Crumbley testified on behalf of Defendant that she did not notice any changes in A.J. on or after 9 September 1996, and that A.J. did not disclose any abuse to her. Defendant's parents and minister testified Defendant had the reputation in the community for being a peaceful person.

The issues are whether: (I) the statements made by A.J. to Womble and Melendez were admissible under the Rule 803(4) hearsay exception; (II) Dr. Everette's opinions were inadmissible on the grounds they were based on speculation; and (III) the entry of a criminal sentence, in the absence of Defendant, constitutes a valid sentence.

I

[1] Defendant argues the trial court erred by allowing social workers Womble and Melendez to testify regarding hearsay statements made to them by A.J. during the course of their investigation. We disagree.

Hearsay statements may be admissible under Rule 803(4) if those statements are made for the purpose of medical diagnosis or treatment. N.C. Gen. Stat. § 8C-1, Rule 803(4) (1992). Statements made to an individual other than a medical doctor may constitute statements made for the purpose of medical diagnosis or treatment. *State v. Smith*, 315 N.C. 76, 84-85, 337 S.E.2d 833, 840 (1985) (children's statements to their grandmother regarding a sexual assault were admissible under Rule 803(4) because their statements "immediately resulted in their receiving medical treatment and diagnosis"); *see also State v. Figured*, 116 N.C. App. 1, 12, 446 S.E.2d 838, 845 (1994), *disc. review denied*, 339 N.C. 617, 454 S.E.2d 261 (1995) (child's statements to a social worker regarding sexual abuse were admissible under Rule

803(4) since the statements were made for the purpose of medical diagnosis or treatment).

Factors properly considered to determine whether statements have been made for the purpose of medical diagnosis or treatment include:

> (1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date.

State v. Jones, 89 N.C. App. 584, 591, 367 S.E.2d 139, 144 (1988). The key factor to consider, however, is "whether the statements resulted in the child receiving medical treatment and/or diagnosis." *State v. Rogers*, 109 N.C. App. 491, 503, 428 S.E.2d 220, 227, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1108, 128 L. Ed. 2d 54 (1994).

Womble

[2] Womble did not interview A.J. at the request of persons involved in the prosecution of Defendant, but as part of her duties as an emergency investigator for Social Services. The interview took place approximately twenty months prior to trial. In addition, the interview took place in close proximity to A.J.'s initial diagnosis and treatment. *See Re Lucas*, 94 N.C. App. 442, 446, 380 S.E.2d 563, 566 (1989) (child's statements to mother admissible under Rule 803(4) when statements led to child receiving medical attention within fourteen days). Womble interviewed A.J. on 10 September 1996, and A.J. received an initial diagnosis on 18 September 1996. A.J. also received medical treatment sometime between 10 September 1996 and 18 September 1996.

Although Womble did not make any medical appointments for A.J., A.J. did receive medical diagnosis and treatment as a result of her interview with Womble. Womble conducted an initial interview of A.J. to determine whether immediate action was needed to protect A.J. Womble's initial interview revealed additional investigation was necessary, and Womble contacted Melendez to continue the investigation. Womble then met Melendez at A.J.'s grandmother's home on the evening of 10 September 1996, and Melendez took over the investigation. Although Womble's investigation ended one day before Melendez made medical appointments for A.J., Womble's role as the

initial investigator played a crucial part in the process that Social Services used to determine whether to pursue medical treatment for A.J. The statements resulted in A.J. receiving medical treatment within eight days from the date of the interview. The statements A.J. made to Womble were therefore admissible as statements made for the purpose of medical diagnosis or treatment.

Melendez

[3] Melendez did not interview A.J. at the request of any persons involved with the prosecution of Defendant, but as part of her duties as a social worker in the child protective services unit of Social Services. The interview took place approximately twenty months prior to trial. In addition, the interview took place in close proximity to A.J.'s initial diagnosis and treatment. Melendez interviewed A.J. on 10 September 1996 and 11 September 1996, and A.J. received an initial diagnosis on 18 September 1996. A.J. also received treatment sometime between 10 September 1996 and 18 September 1996.

Further, A.J. received medical diagnosis and treatment as a result of Melendez's interviews with A.J. Melendez determined based on her interviews that A.J. needed medical assistance. Melendez made an appointment for A.J. to see a doctor at Wake Medical Center on 18 September 1996, and to see a pediatrician sometime between 10 September 1996 and 18 September 1996. The statements that A.J. made to Melendez were therefore admissible as statements made for the purpose of medical diagnosis and treatment.

II

[4] Defendant argues the trial court erred by allowing expert testimony by Dr. Everette that in her opinion: (1) A.J.'s narrow hymen could have been caused by digital or penile penetration, and (2) A.J. had been sexually abused. He contends these opinions are based on speculation or conjecture, did not therefore assist the trier of fact, and should not have been admitted into evidence.[1] We disagree.

Rule 702 of the North Carolina Rules of Evidence provides that expert testimony may be made in the form of an opinion. N.C. Gen. Stat. § 8C-1, Rule 702 (Supp. 1998). Rule 702 does not, however, allow opinion testimony based on inadequate data. *See State v. Rogers*, 323

1. Defendant argues in his brief that Dr. Everette's testimony expressing her opinion that A.J. had been sexually abused was inadmissible on the ground it states a legal conclusion. This is a contention abandoned by Defendant at oral argument before this Court and we therefore do not address it.

N.C. 658, 664, 374 S.E.2d 852, 856 (1989); *see also Pulley v. City of Durham*, 121 N.C. App. 688, 693, 468 S.E.2d 506, 509 (1996) (doctor's opinion was not speculation and was therefore admissible under Rule 702 when "there was competent evidence in the record to show that [the doctor] based her opinion on her own observations of plaintiff, combined with her study of materials and her discussions with other professionals"); *State v. Clark*, 324 N.C. 146, 160, 377 S.E.2d 54, 62-63 (1989) (opinion of an expert was properly excluded when the expert stated his opinion was "purely speculation" and "conjecture").

The record indicates Dr. Everette based her opinions on her own exam of A.J., extensive personal experience examining children who have been sexually abused, knowledge of child sexual abuse studies, and a colleague's notes from an interview with A.J. She did not base her opinions on speculation or conjecture, but on adequate data. Her opinions are therefore admissible as expert testimony under Rule 702.

III

[5] Defendant argues the trial court erred by imposing sentences, to run consecutively, on Defendant when Defendant was not present. We agree.

The sentence actually imposed in this case was the sentence contained in the written judgment. *See Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 ("Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment."), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). The Defendant had a right to be present at the time that sentence was imposed. *See State v. Beasley*, 118 N.C. App. 508, 514, 455 S.E.2d 880, 884 (1995); *see also State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) ("The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial."); *State v. Bonds*, 43 N.C. App. 467, 474, 259 S.E.2d 377, 381 (1979) (vacating judgment entered while accused was not present), *on reh'g*, 45 N.C. App. 62, 262 S.E.2d 340, *appeal dismissed and disc. review denied*, 300 N.C. 376, 267 S.E.2d 687, *cert. denied*, 449 U.S. 883, 66 L. Ed. 2d 107-08 (1980). Because there is no indication in this record that Defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment.

In so holding, we reject the State's argument that Defendant was present because he was present in open court at the time the sentence was originally rendered by the trial court. Had the trial court not altered its sentence, we would agree with the State. In this case, the legal effect of the oral judgment was that the prison sentences would run concurrently. N.C. Gen. Stat. § 15A-1354(a) (1997) (if court does not specifically state that multiple sentences will run consecutively, sentences must run concurrently). The written judgment actually entered by the trial court specifically provided that the sentences would run consecutively. This substantive change in the sentence could only be made in the Defendant's presence, where he and/or his attorney would have an opportunity to be heard.

Trial: No Error.

Sentence: Vacated and remanded.

Judges TIMMONS-GOODSON and HORTON concur.

IN THE MATTER OF: RAYMOND MATTHEW LEFTWICH, A MINOR CHILD BORN AUGUST 9, 1987, AND DAVID EDWARD AYERS, JR., A MINOR CHILD BORN SEPTEMBER 1, 1989.

SURRY COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER V. HELEN LOU LEFTWICH, RESPONDENT-MOTHER, AND DAVID EDWARD AYERS, SR., RESPONDENT-FATHER

No. COA98-1567

(Filed 21 September 1999)

Termination of Parental Rights— sufficiency of evidence

There was clear, cogent, and convincing evidence of neglect and the probability of its repetition at the time of a termination proceeding for an order terminating respondent-mother's parental rights given the evidence of past neglect in conjunction with the special needs of the children and evidence that respondent had made no advancements in confronting and eliminating her problem with alcohol.

Appeal by respondents from order entered 23 September 1997 by Judge Otis M. Oliver in Surry County District Court. Heard in the Court of Appeals 17 August 1999.

Francisco & Merritt, by H. Lee Merritt, Jr., for petitioner-appellee.

Donnelly & Dirusso, by F. Christian Dirusso, and Charles R. Briggs, for respondents-appellants.

Ann Anderson, Guardian ad litem.

TIMMONS-GOODSON, Judge.

This case involves proceedings terminating the parental rights of Helen Lou Leftwich ("respondent-mother") and David Edward Ayers, Sr. ("respondent-father") (collectively, "respondents") with respect to minor children Raymond Matthew Leftwich ("Matthew"), born 9 August 1987, and David Edward Ayers, Jr. ("David"), born 1 September 1989, on the basis of neglect. Respondents contend that the evidence was insufficient as a matter of law to establish grounds for termination of their parental rights. Having carefully examined the record, we affirm the order of the trial court.

The evidence of record tends to show that respondent-father has been in the custody of the North Carolina Department of Corrections (DOC) since May of 1990, following convictions of armed robbery, second-degree rape, incest, and kidnapping. During his incarceration, respondent-father obtained his GED, and since January of 1996, he has participated in a work-release program allowing him to be gainfully employed while imprisoned. From his earnings, the sum of $472.00 per month has been withheld and forwarded to the Clerk of Superior Court of Surry County as child support for the minor children. Respondent-father has visited the children frequently since 1995, when they came into the custody of the Surry County Department of Social Services (DSS). He also attended foster care agency review meetings at the DSS office in January of 1996 and January of 1997. Upon his release from the DOC, respondent-father intends to resume living with his wife, respondent-mother, and his plan for the minor children is that they reside with both respondents.

The evidence further shows that respondent-mother has a history of chronic alcohol abuse, which resulted in the removal of the minor children from her custody in August of 1992. On or about 4 August 1992, respondent-mother, the sole caretaker of the children, became intoxicated and passed out, thereby leaving her two-year old child, David, to wander outside of the residence until 12:00 a.m. Following this incident, DSS filed a juvenile petition seeking to have the chil-

dren declared abused, neglected, and dependent, and by order entered 29 September 1992, the children were adjudicated to be abused and neglected and were placed in the custody of their maternal grandmother. In June of 1993, the children were returned to the custody of respondent-mother, and DSS monitored the placement with respondent-mother until 30 March 1995, when DSS was released of further monitoring responsibility by order of the court.

Approximately six weeks later, however, on 20 May 1995, law enforcement officers found the minor child, David, running down Worth Street with no clothing at approximately 12:00 a.m. When the officers brought the child home, no one responded to their knocks at the front door. The officers then went around to the back door, and finding it open, entered the home, where they found respondent-mother passed out on the bed. When she was finally aroused, respondent-mother stated that she did not know the whereabouts of David. She said that she had a babysitter helping her, but she was unaware that the sitter had left. Two quarts of homemade brandy were found on the kitchen table and the house was in disarray. DSS thereafter filed a petition alleging that the children were neglected, and on 11 July 1995, the court entered an order adjudicating the children to be neglected. The children have remained in the custody of DSS since 21 May 1995.

From June of 1995, respondent-mother and DSS have entered into a series of service agreements designed to address and eliminate her alcohol abuse problem, the goal of the agreements being to return the minor children to respondent-mother's custody. In order to accomplish this goal, respondent-mother agreed to confront her alcohol problem and to obtain appropriate counseling and treatment. She further agreed to develop and demonstrate appropriate parenting skills and to attain a financial position that would enable her to support herself and the minor children.

On 5 September 1996, a DSS caseworker, Mary Summerlin, visited the home of respondent-mother and observed her to be in an intoxicated condition. Summerlin transported respondent-mother to a hospital emergency room, and according to the results of a blood alcohol test administered at the hospital, respondent-mother's blood alcohol level was .24. Summerlin tried to convince respondent-mother to voluntarily enter a residential treatment program for her alcohol abuse, but she refused. Later, in November of 1996, respondent-mother's substance abuse counselor at Surry-Yadkin Area Mental Health

Authority (SYAMHA), Ingle Armstrong-Sloop, recommended that she enter a residential substance abuse treatment program, but respondent-mother again declined. Although she attended weekly substance abuse counseling and a number of Alcoholics Anonymous (AA) meetings from June of 1995 until November of 1996, respondent-mother's unwillingness to enroll in a more intensive treatment program resulted in the termination of her counseling through SYAMHA. There is no evidence that respondent-mother has resumed any form of alcohol abuse counseling or treatment since November of 1996.

On 20 November 1996, DSS filed a petition to terminate respondents' parental rights as to the minor children. The matter came on for adjudication at the 10 February and 6 March 1997 Juvenile Sessions of Surry County District Court. The trial court entered an order on 15 May 1997 concluding that the minor children were neglected as that term is defined in section 7A-517(21) of the North Carolina General Statutes. The court further concluded that the children had been in foster care for more than twelve months and that respondents had failed to make reasonable progress to correct those conditions that led to the removal of the children or to show a positive response to DSS's diligent efforts to return the children to their custody. Thereupon, the court decreed that the grounds set forth in DSS's petition seeking termination of respondents' parental rights indeed existed.

A dispositional hearing upon the petition for termination of parental rights was held on 4 September 1997. Following this hearing, the court entered an order on 23 September 1997 finding that there had been no changes regarding respondent-mother's condition since the 6 March 1997 hearing and that respondent-father's plan for the minor children continued to be reunification with himself and respondent-mother upon his release from prison. Based on these findings, the court concluded that "[i]t [was] in the best interest of the minor children that the parental rights of [respondents] be terminated." From the order terminating their parental rights, respondents appeal.

Respondents raise four assignments of error on appeal; however, as to three of these assignments, respondents have failed either to argue them in their brief or to cite any authority supporting them. Accordingly, these assignments, which relate to respondent-father, are deemed to be abandoned, N.C.R. App. P. 28(b)(5), and our discussion is limited to the sole remaining assignment of error, wherein

respondents argue that the evidence did not support a finding of neglect by respondent-mother or the probability of its repetition at the time of the termination hearing. Based on our examination of the record, we must disagree.

"The termination of parental rights statute provides for a two-stage termination proceeding: [N.C. Gen. Stat. § 7A-289.30 (1995)] governs the adjudication stage, and [N.C. Gen. Stat. § 7A-289.31 (1995)] governs the disposition stage." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). At the adjudication stage, the party petitioning for termination of parental rights must demonstrate by clear, cogent, and convincing evidence that one or more of the grounds warranting termination, as set forth in section 7A-289.32 of the North Carolina General Statutes, exist. *Id.* at 247, 485 S.E.2d at 614. Once the court has determined that grounds for terminating parental rights are present, the court then "moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *Id.* at 247, 485 S.E.2d at 615.

Under section 7A-289.32, the court may terminate parental rights upon a finding that the child is a "neglected child" within the meaning of section 7A-517(21) of the General Statutes. N.C. Gen. Stat. § 7A-289.32(2) (Cum. Supp. 1999). Section 7A-517(21) defines "neglected juvenile" as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7A-517(21) (Cum. Supp. 1999). To terminate parental rights based on neglect, the court must find evidence of neglect at the time of the termination proceeding. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984).

> During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights under N.C.G.S. 7A-289.32(2) and 7A-517(21) is present at that time. The petitioner seeking termination bears the burden of showing by clear, cogent and

> convincing evidence that such neglect exists at the time of the termination proceeding.

Id. at 716, 319 S.E.2d at 232 (citations omitted). "Termination of parental rights for neglect may not be based solely on past conditions which no longer exist." *Young*, 346 N.C. at 248, 485 S.E.2d at 615. Nevertheless, " 'a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect.' " *Id.* at 250, 485 S.E.2d at 616 (quoting *Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231).

Relying on our Supreme Court's holding in *Young*, 346 N.C. 244, 485 S.E.2d 612, respondents argue that there was insufficient evidence before the trial court to show neglect and the likelihood of its repetition on the part of respondent-mother. Respondents contend that while there may have been past neglect by respondent-mother, at the time of the termination proceeding, she had made significant efforts to improve her lifestyle, which efforts the trial court chose to ignore. However, our review of the record reveals that at the time of the termination proceeding, respondent-mother had not made any meaningful progress in eliminating the conditions that led to the removal of her children. Although the evidence does suggest that respondent-mother attended weekly substance abuse counseling and regular AA meetings from June of 1995 to November of 1996, the evidence shows that she continued to abuse alcohol and that she refused to enroll in a residential treatment facility as recommended by her substance abuse counselor and a DSS caseworker. Indeed, because of her refusal to enter a more intensive treatment program, her treatment through SYAMHA was terminated in November of 1996, and there is no evidence that she resumed any form of substance abuse counseling or treatment since that time.

In addition to the lack of improvement in respondent-mother's lifestyle, the trial court considered the September 1992 and July 1995 adjudications of neglect in determining whether there was sufficient evidence of neglect to authorize termination of respondent-mother's parental rights. *See Young*, 346 N.C. at 250, 485 S.E.2d at 616 (stating that court may consider prior adjudication of neglect in ruling upon petition to terminate parental rights). It is significant that in both instances, neglect was based upon respondent-mother's failure to properly care for and supervise the children due to her alcoholism. Furthermore, there was evidence before the court in the form of Guardian Ad Litem Reports which showed the effects of such neglect

on the children. Both boys received developmental evaluations following their 1992 placement in DSS custody. Matthew, who was 6 years old at the time, had not been toilet-trained, and he was found to be mildly retarded, socially deprived, and in need of speech therapy and dental care. David, who was 3 years and 9 months old, also was not toilet-trained and his only words were "shut up" and "Mom." David was found to have both mental and language delays and was also in need of dental care. Both children had no experience with basic toys, Play-Doh, or crayons, and although respondent-mother received monthly social security benefits for the children, they had no toys and were frequently dressed in inappropriate clothing. Given the evidence of past neglect in conjunction with the special needs of the children and the evidence that respondent-mother has made no advancements in confronting and eliminating her problem with alcohol, we are convinced that there was clear, cogent, and convincing evidence of neglect and the probability of its repetition at the time of the termination proceeding to support the order terminating respondent-mother's parental rights.

Based upon all of the foregoing, the order of the trial court terminating respondents' parental rights is affirmed.

AFFIRMED.

Judges GREENE and HORTON concur.

BARBARA B. NOLAN, INDIVIDUALLY AND AS TRUSTEE OF BARBARA B. NOLAN TRUST, PLAINTIFF v. PARAMOUNT HOMES, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. STO CORPORATION; LADD EXTERIOR WALL SYSTEMS, INC.; CAROLINA BUILDERS CORPORATION; AND CEDAR ROOFS OF RALEIGH, INC., THIRD-PARTY DEFENDANTS

No. COA98-1352

(Filed 21 September 1999)

Statute of Limitations— statute of repose—real property improvements—substantial completion—last act or omission

Summary judgment was properly granted for defendant based upon the statute of repose in an action for breach of implied warranties of habitability and workmanlike construction

arising from the construction and sale of a house where a certificate of compliance was issued for the house on 6 June 1991 and plaintiff brought her action on 23 October 1997. Under N.C.G.S. § 1-50(a)(5)(a), plaintiff has the burden of showing that she brought her action within six years of either the substantial completion of her house or the specific last act or omission of defendant giving rise to the action. The house was substantially completed upon issuance of the certificate of compliance since it then could be used for its intended purpose and, since all of defendant's claims relate to defendant's construction of the house, defendant's last act giving rise to this action must have occurred while defendant was constructing the home. Work on the punch list was not the last act and did not constitute substantial completion because that work did not give rise to the cause of action and there is no evidence that the items on the list prevented or materially interfered with plaintiff using the home as a residence. References in prior cases tending to support the proposition that N.C.G.S. § 1-50(a)(5)(a) runs from the date of sale are dicta.

Appeal by plaintiff from judgment entered 25 August 1998 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 23 August 1999.

Spears, Barnes, Baker, Wainio & Whaley, L.L.P., by Jessica S. Cook and Alexander H. Barnes, for plaintiff-appellants.

Brown, Todd & Heyburn, P.L.L.C., by Julie M. Goodman, for defendant and third party plaintiff-appellee.

Smith, Helms, Mulliss & Moore, L.L.P., by Gary R. Govert, for defendant and third party plaintiff-appellee.

No brief filed for third party defendant-appellee Sto Corporation.

No brief filed for third party defendant-appellee Ladd Exterior Wall Systems, Inc.

No brief filed for third party defendant-appellee Carolina Builders Corporation.

No brief filed for third party defendant-appellee Cedar Roofs of Raleigh Inc.

EAGLES, Chief Judge.

This appeal considers the question of what event triggers the running of the real property improvements statute of repose N.C.G.S. § 1-50(a)(5)(a) (Supp. 1998).

This lawsuit arises out of defendant Paramount Homes Inc.'s construction and sale of a house to plaintiff Barbara B. Nolan. Defendant is in the business of building and selling houses. In the spring of 1991, defendant built a house at 3411 Fairway Lane in Durham, North Carolina, for speculation. On 6 June 1991, the Durham City-County Inspections Department issued a Certificate of Compliance for the house. The certificate stated that the house was in substantial compliance with applicable building and zoning ordinances. On 9 December 1991, plaintiff Barbara Nolan purchased the house from defendant. Defendant completed work pursuant to a punch list sometime in March or April of 1992.

On 23 October 1997 plaintiff filed suit alleging that defendant was negligent and breached its implied warranties of habitability and workmanlike construction. On 8 January 1998, defendant moved for summary judgment alleging that the applicable statute of repose, N.C.G.S. § 1-50(a)(5)(a) (Supp. 1998), bars plaintiff's claim. The trial court granted defendant's summary judgment motion. Plaintiff appeals.

These facts present the question of what event triggers the running of the real property improvements statute of repose. Our research disclosed no controlling precedent in North Carolina. *See Cage v. Colonial Building Co.*, 337 N.C. 682, 448 S.E.2d 115 (1994); *Duncan v. Ammons Construction Co.*, 87 N.C. App. 597, 361 S.E.2d 906 (1987); *Colony Hill Condominium I Assoc.* v. *Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 485 (1985). The instant case is before us on a motion for summary judgment. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, N.C.R. Civ. Pro. 56(c) (1990); *Robinson, Bradshaw & Hinson P.A. 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 650 (1998). We must take all inferences in favor of the nonmoving party. *Id.* The running of a statute of repose presents a purely legal question. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 872 (1983).

The North Carolina real property improvement statute of repose provides:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C.G.S. § 1-50(a)(5)(a). Plaintiff has the burden of showing that she brought this action within six years of either (1) the substantial completion of the house or (2) the specific last act or omission of defendant giving rise to this cause of action. *See Sink v. Andrews*, 81 N.C. App. 594, 597, 344 S.E.2d 831, 833 (1986).

N.C.G.S. § 1-50(a)(5)(c) defines "substantial completion" as being "that degree of completion of a project, improvement or specified area or portion thereof upon attainment of which the owner can use the same for the purpose for which it was intended." An owner of a residential dwelling may use it as a residence when the appropriate government agency issues a final certificate of compliance. *See* N.C.G.S. § 153A-363 (Supp. 1998); N.C.G.S. § 160A-423 (1994). The owner may then utilize the residence for the purpose which it was intended and the home is substantially completed under N.C.G.S. § 1-50(a)(5).

The Durham City-County Inspections Department issued a certificate of compliance for the house on 6 June 1991. The certificate of compliance noted that the house was a single family dwelling. It also stated that defendant had constructed the house in compliance with all applicable building and zoning ordinances. Under this certificate of compliance an owner could utilize the property as a residence on 6 June 1991. *See* N.C.G.S. § 153A-363; N.C.G.S. § 160A-423. Since it could be utilized for its intended purposes, upon issuance of the certificate of compliance, we hold that the house was "substantially completed" for purposes of N.C.G.S. § 1-50(a)(5) on 6 June 1991. Therefore, defendant substantially completed the house in question more than six years before plaintiff filed her claim.

Plaintiff argues that defendant did not actually substantially complete work on the house until it had completed the work done on the punch list in March-April 1992. We are not persuaded. N.C.G.S. § 1-50(a)(5) clearly states that as soon as the property may be used for its intended purpose, it is substantially completed. There is no evi-

dence in this record that the items on the punch list prevented or materially interfered with plaintiff using the house as a residence. Therefore, defendant substantially completed the home on 6 June 1991 and not when it completed the work on the punch list.

N.C.G.S. § 1-50 does not define "last act or omission." However, the plain language indicates that the statute of repose "clock" begins to run from the specific last act or omission giving rise to the cause of action. Section 1-50(a)(5)(a). Plaintiff must establish a direct connection between the harm alleged and that last specific act or omission. Plaintiff attempts to make this connection with her claim for the breach of the implied warranty of workmanlike construction. Under this warranty, the builder-vendor warrants that it constructed the house in a workmanlike manner and that the house is free from major structural defects at the time of sale or the taking of possession whichever occurs first. *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). Plaintiff argues that her action for breach of an implied warranty of workmanlike construction did not arise until defendant sold the house to her. Since defendant cannot breach this warranty without the act of sale, plaintiff claims that defendant's last act giving rise to this action is necessarily the sale of the house and not the completion of construction.

We are not persuaded by plaintiff's argument. Unlike a statute of limitations, a statute of repose will begin to run when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985); *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999). The statute serves as "an unyielding and absolute barrier" preventing a plaintiff's claim even before his cause of action accrues. *Black*, 312 N.C. at 633, 325 S.E.2d at 475. If plaintiff fails to file within the prescribed period, the statute gives defendant a vested right not to be sued. *Colony Hill*, 70 N.C. App. at 394, 320 S.E.2d at 276.

Our courts have made it clear that a statute of repose may operate to cut off a defendant's liability even before an injury occurs. Plaintiff's alleged injury occurred at the earliest on 23 October 1997 when defendant sold her the house. However, defendant's last act giving rise to this action took place when it completed construction on 6 June 1991. Plaintiff alleges that defendant breached the implied warranty of habitability, implied warranty of workmanlike construction, and that defendant negligently constructed the house. Plaintiff points

particularly to the construction of the home's walls as being deficient. These claims all relate to defendant's improper construction of the home. Any act or omission giving rise to a claim must have occurred while defendant was constructing the home. Accordingly, we hold that N.C.G.S. § 1-50(a)(5) began to run on the last day that defendant performed construction relating to the harm alleged and not on the day of sale.

Here defendant completed construction on 6 June 1991. On that day, Durham City-County Inspections Office issued its certificate of compliance. Defendant did not engage in any construction after that date. Thus, the statute began to run on 6 June 1991. Since plaintiff did not file her action until 23 October 1997, the statute of repose bars her claim.

Plaintiff argues that the courts of our state have already held that N.C.G.S. § 1-50(a)(5)(a) runs from the date of sale. *See Cage v. Colonial Building Co.*, 111 N.C. App. 828, 833, 433 S.E.2d 827, 830, (1993), *rev'd*, 337 N.C. 682, 448 S.E.2d 115 (1994); *Duncan*, 87 N.C. App. at 600, 361 S.E.2d at 909; *Colony Hill*, 70 N.C. App. at 395, 320 S.E.2d at 276. Upon a careful examination of these cases, we conclude that our courts have never previously decided this issue. We further conclude that any reference in these cases tending to support plaintiff's proposition is mere dicta. *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985).

In *Duncan*, defendants completed construction on a home sometime prior to the purchase date of 10 September 1979. *Duncan*, 87 N.C. App. at 598, 361 S.E.2d at 907. On 14 May 1986, plaintiffs filed suit against the contractor alleging injuries related to faulty construction. *Id.* In affirming the trial court's order for summary judgment based on the statute of repose, the *Duncan* court stated, "Defendants in the present action completed construction on plaintiffs' home prior to 10 September 1979. Plaintiffs had an outside time limit of six years from that date, or until 10 September 1985, to bring an action for negligent construction." *Id.* at 600, 361 S.E.2d at 909.

We note that the *Duncan* court did not decide whether the defendants' last act for purposes of the statute of repose was the completion of construction or the sale of the house. *Id.* Resolution of that issue was unnecessary to the court's decision because plaintiffs' claim failed under either date. *Id.* Therefore, we conclude that *Duncan* is not helpful concerning the running of the statute of repose. *Trustees of Rowan Tech.*, 313 N.C. at 242, 328 S.E.2d at 281.

Likewise, we conclude that we are not bound by *Colony Hill*. This Court decided *Colony Hill* under an earlier version of the real property improvements statute of repose. *See* 1963 N.C. Sess. Laws c. 1030. Plaintiffs claimed defendants owed them a continuing duty because of the defendants' continuing ownership interest in the property. *Colony Hill*, 70 N.C. App. at 395, 320 S.E.2d at 276. Without deciding the effect of a continuing ownership interest on the statute of repose, the *Colony Hill* court discounted plaintiffs' argument. *Id.* In *Colony Hill*, the defendants conveyed away the alleged ownership interest more than six years from the time of filing. *Id.* Since that alleged ownership interest did not have any bearing on the outcome of *Colony Hill* we are not persuaded that the statute of repose ran from the date of sale.

Finally, we hold that *Cage* does not bind us here. In *Cage*, plaintiff sued the defendant general contractor on 25 January 1991 for defective construction of a house she bought on 7 December 1984. *Cage*, 337 N.C. at 684-85, 448 S.E.2d at 116. This Court held that N.C.G.S. § 1-52(16) (1991) applied giving plaintiff a ten year statute of repose. *Id.* at 685, 448 S.E.2d at 117. In noting that plaintiff's claim fell within the statute of repose, this court stated "Plaintiff's filing was also well within the ten year statute of repose which began to run on 7 December 1984 when defendant sold the townhouse to plaintiff." *Cage v. Colonial Building Co.*, 111 N.C. App. 828, 833, 433 S.E.2d 827, 830 (1993), *rev'd*, 337 N.C. 682, 448 S.E.2d 115 (1994). The Supreme Court reversed, holding that N.C.G.S. § 1-50(a)(5)(a) applied giving plaintiff a six year statute of repose only. *Cage*, 337 N.C. at 685-86, 448 S.E.2d at 117. The Supreme Court then held that defendant's conduct occurred more than six years before plaintiff brought her claim. *Id.* In so holding, the Court did not specify the conduct of defendant to which it was referring. *Id.* Both the date of sale and implicitly the completion of construction took place outside of the six year period. *Id.* at 684, 448 S.E.2d at 116. Therefore, this opinion sheds no light on whether N.C.G.S. § 1-50(a)(5)(a) runs from the date of sale or the last day of construction.

Plaintiff argues alternatively that defendant's completion of the work on the punch list constitutes the last act or omission. We are not persuaded by this argument. A careful examination of the punch list shows that defendant did not perform work related to the harm complained of here. In order to constitute a last act or omission, that act or omission must give rise to the cause of action. Here, the work on the punch list did not give rise to this action and therefore does not constitute defendant's last act or omission.

For the reasons stated, we hold that the trial court's entry of summary judgment for defendant is affirmed.

Affirmed.

Judges WALKER and McGEE concur.

EDWARD DAVIS, EMPLOYEE, PLAINTIFF v. EMBREE-REED, INC., EMPLOYER; JEFFERSON-PILOT INSURANCE CO., CARRIER; DEFENDANTS

No. COA98-1395

(Filed 21 September 1999)

1. **Workers' Compensation— disability—Form 21 presumption—not rebutted**

   Plaintiff's jobs as a substitute teacher and doorman lasted only a few weeks, were thus correctly found to be temporary by the Industrial Commission, and were not sufficient to rebut the presumption of disability created by a Form 21 agreement.

2. **Workers' Compensation— maximum medical improvement—sufficiency of evidence**

   There was evidence to support the Industrial Commission's finding in a workers' compensation action that plaintiff had not reached maximum medical improvement where a doctor had expressed his opinion that a skin graft would be necessary for a complete healing of plaintiff's foot and had released plaintiff to work only with certain restrictions.

3. **Workers' Compensation— witness credibility—province of Industrial Commission**

   The Industrial Commission did not err by deferring to plaintiff's accounts of his job location efforts; this was a matter of witness credibility within the sole province of the Commission.

Appeal by defendants from Opinion and Award filed 16 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 August 1999.

Cox, Gage & Sasser, by Charles McB. Sasser, for plaintiff-appellee.

Morris, York, Williams, Surles & Barringer, by G. Lee Martin, for defendant-appellants.

GREENE, Judge.

Embree-Reed, Inc. (Employer) and Jefferson-Pilot Insurance Company (Carrier) (collectively Defendants) appeal from the Opinion and Award of the North Carolina Industrial Commission (Commission) awarding Edward Davis (Plaintiff) benefits for temporary total disability and temporary partial disability.

Plaintiff sustained a compensable injury when a 120-pound drill was dropped onto his left foot on 18 April 1994. A Form 21 agreement, executed by all the parties, was approved by the Commission on 23 June 1994 wherein Defendants agreed to pay compensation to Plaintiff for "necessary weeks." Subsequently, Defendants filed a Form 24, Application to Terminate Benefits, alleging Plaintiff was no longer disabled within the meaning of the Workers' Compensation Act (the Act).

In an Opinion and Award by Chairman J. Howard Bunn, Jr., filed on 16 June 1998, the Full Commission rejected[1] the Form 24 application and ordered Defendants to pay Plaintiff temporary total disability compensation from 25 September 1996 to 1 April 1997 and temporary partial disability compensation from 2 April 1997 until further orders of the Commission. In support of the Award, the Commission entered the following pertinent Conclusions of Law:

> 1. . . . In order to rebut the Form 21 presumption, the [D]efendants had the burden in proving that there was suitable work available to the [P]laintiff that the [P]laintiff could obtain with due diligence. Defendants have failed to sufficiently or convincingly meet [their] burden in proving that [P]laintiff is no longer disabled as a result of the April 18, 1994 compensable injury by accident for the time period from September 25, 1996 to April 1, 1997. Plaintiff's earnings in temporary jobs as a substitute teacher and a laborer at the Blue Rodeo was not sufficient or convincing

1. The Commission did approve the Form 24 application "with regard to suspension of benefits for the time period," while Plaintiff was incarcerated. This, however, is not an issue on appeal and is not addressed in the opinion.

proof to successfully rebut the presumption of [P]laintiff's temporary total disability during this time period.

The Commission entered the following pertinent Findings of Fact:

3. Between April 18, 1994 and January 25, 1995, [P]laintiff underwent three surgeries . . . on his left foot . . . .

4. On January 25, 1995, . . . [Plaintiff was released] to return to work with . . . [some] restrictions . . . . At that time, Dr. [Thomas C.] Freidrich thought [P]laintiff had reached maximum medical improvement with regard to his left foot.

. . . .

8. On September 25, 1996, Dr. [Ronald C.] Gaylon released [P]laintiff to return to work. Dr. Gaylon's September 25, 1996 medical record is inherently contradictory as to whether P]laintiff had been released without restrictions. In light of the re-evaluation of [P]laintiff's left foot by Dr. Freidrich discussed below as well as the fact that Dr. Gaylon knew that Dr. Freidrich had given [P]laintiff a twenty percent disability rating to his left foot, the undersigned find that Dr. Gaylon intended to release [P]laintiff with the restrictions set forth by Dr. Freidrich on January 25, 1995.

. . . .

10. On February 11, 1997, Dr. Freidrich re-evaluated [P]laintiff's left foot, and he was . . . of the opinion that a skin graft over the wound . . . would allow this area to heal completely. Dr. Freidrich was still of the opinion that [P]laintiff continued to be able to only do work with restrictions. . . .

11. Plaintiff had not reached maximum medical improvement with regard to his left foot injury.

. . . .

15. From April 18, 1994 through the date of the . . . hearing in this matter, [P]laintiff was only able to obtain temporary jobs . . . . Plaintiff's accounts of his job location efforts are accepted as credible and convincing . . . .

16. Defendants have not identified any suitable employment that [P]laintiff could obtain if he diligently sought such employment.

The pertinent evidence reveals that after being injured, Plaintiff underwent two surgeries, one on 25 May 1994 and one on 5 July 1994, to repair nerve damage to his injured left foot. After these surgeries, Plaintiff underwent a scar revision surgery on 20 October 1994 to repair the unhealed wound from the previous surgeries. All three of these surgeries were performed by Dr. Freidrich. On 25 January 1995, Dr. Freidrich released Plaintiff to return to work with the following restrictions: no climbing, no squatting, and no wearing of high-top boots. At that time, Dr. Freidrich thought Plaintiff had "probably" reached maximum medical improvement with regard to his left foot.

On 19 June 1995, Plaintiff returned to see Dr. Freidrich, seeking treatment for continuing problems with swelling and bleeding in his left foot. During this visit, Dr. Freidrich noted that although Plaintiff had undergone three surgeries, "unfortunately he had not done very well." He noted Plaintiff's nerves "had not yet recovered," it was "doubtful they would see much further recovery," but it "would be nice if they could get Plaintiff's wound closed." Dr. Freidrich recommended Plaintiff receive a skin graft over the open wound on his left foot in order to allow the wound to heal completely. On 31 July 1996 Dr. Gaylon performed a "surgical removal of a painful keloid scar" on the Plaintiff's left foot. Dr. Gaylon signed a medical report indicating that Plaintiff had "no work restrictions" after 25 September 1996. On that same report, he indicated that Plaintiff did have "work restrictions to prior his surgery."

On 11 February 1997, Plaintiff returned to see his original orthopedic surgeon, Dr. Freidrich, who found Dr. Gaylon's surgical procedure had left Plaintiff with "predictably bad results." Dr. Freidrich found Plaintiff had been left with a surgical wound which had not closed and remained open. He was still of the opinion a skin graft over the wound on Plaintiff's left foot would allow this exposed area to heal completely and until the healing occurred, Plaintiff could only work under the restrictions previously given.

From February 1995 to the end of April 1995 Plaintiff worked as a substitute teacher in the Gilmer County School System in Georgia. In August of 1995 Plaintiff worked two weekends as a doorman at the Blue Rodeo Bar.

The dispositive issues are whether: (I) Defendants rebutted the presumption of Plaintiff's continuing disability; and (II) there is com-

petent evidence to support the Commission's finding of fact that Plaintiff had not reached maximum medical improvement.

I

[1] A properly executed Form 21 agreement, approved by the Commission, entitles the employee to a presumption that he is disabled and this presumption continues until rebutted by the employer. *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). "The employer may rebut the presumption of continuing disability 'through medical and other evidence,' " *Stamey v. N.C. Self-Insurance Guarar. Ass'n*, 131 N.C. App. 662, 665, 507 S.E.2d 596, 599 (1998) (quoting *In Re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 368 (1997)); *Harrington v. Adams-Robinson Enterprises*, 349 N.C. 218, 504 S.E.2d 786 (1988) (*per curiam*), "including evidence 'that suitable jobs are available to the employee and "that the [employee] is capable of getting one," taking into account the employee's "age, education, physical limitations, vocational skills, and experience." ' " *Stamey*, 131 N.C. App. at 665-66, 507 S.E.2d at 599 (quoting *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446 (1997) (quoting *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386)). The *employer may not rebut the presumption of continuing disability* by showing that the employee is capable of earning pre-injury wages in a *temporary position. Daughtry v. Metric Construction Co.*, 115 N.C. App. 354, 358, 446 S.E.2d 590, 593, *disc. review denied*, 338 N.C. 515, 452 S.E.2d 808 (1994) (emphasis added).

In this case, the parties executed a Form 21 agreement approved by the Commission, thus entitling Plaintiff to a presumption of disability. Defendants claim they met their burden of rebutting this presumption and point to the substitute teaching and doorman jobs. We disagree. These jobs lasted only a few weeks and were thus correctly found to be "temporary" by the Commission. As such, they are not sufficient to rebut the presumption of disability. Defendants presented no evidence of other job opportunities available to Plaintiff.[2]

2. Defendants also contend the Commission "failed to follow proper law" with respect to what evidence is necessary to rebut the Form 21 disability presumption. Although the language used by the Commission in Conclusion of Law number one does not precisely track the case law, it does constitute a fair summary of the law. Furthermore, in the absence of a clear indication that the Commission was misinformed about the law, we will assume the Commission was aware of the applicable law. *See Allen v. Allen*, 65 N.C. App. 86, 88, 308 S.E.2d 656, 658 (1983), *disc. review denied*, 310 N.C. 475, 312 S.E.2d 881 (1984) (proceedings appealed from are presumed to be correct until contrary is shown).

II

[2] Defendants next contend the Commission's finding that Plaintiff had not yet reached maximum medical improvement is not supported by competent evidence in the record. We disagree.

Defendant does not dispute that the Commission's findings are binding on appeal if they are supported by competent evidence. *Franklin*, 123 N.C. App. at 204, 472 S.E.2d at 385. In this case, Dr. Friedrich, after seeing Plaintiff on 11 February 1997, expressed the opinion that a skin graft was going to be necessary before a complete healing of Plaintiff's foot would occur and released Plaintiff to work only with certain restrictions. This evidence supports the finding that Plaintiff had not reached maximum medical improvement.

[3] Defendants finally contend that the Commission erred in deferring to Plaintiff's "accounts of his job location efforts." This is a matter of witness credibility and is within the sole province of the Commission. *Id.* (Commission may reject all or part of any witness's testimony); *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990) (Commission may assign more credibility and weight to certain testimony than other testimony); *Church v. Mickler*, 55 N.C. App. 724, 733, 287 S.E.2d 131, 136 (1982) (credibility of witness to be resolved by the fact finder).

Affirmed.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. DANIEL M. TROGDEN

No. COA98-1122

(Filed 21 September 1999)

1. Appeal and Error— supplemental brief—not timely

A supplemental brief was not considered where it was filed more than nine months after the printed record was mailed and defendant did not timely seek an extension of time.

2. Evidence— prior sexual behavior of victim—child's sexual acts

The trial court did not err in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian by excluding testimony relating an instance of sexual behavior by the victim. Rule 412 prohibits introduction of evidence of a complainants's sexual behavior during prosecution of a rape or sexual offense unless such evidence is relevant; moreover, any error was harmless because other children testified to sexual abuse by defendant and there was other evidence establishing that the victim had prior knowledge of sexual matters and the ability to fabric allegations.

3. Witnesses— cross-examination—no prosecutorial misconduct

The State's cross-examination of defendant's father in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian did not constitute prosecutorial misconduct where the prosecutor's statements did not rise to the levels of insult, degradation or pervasive badgering held to constitute prosecutorial misconduct in *State v. Sanderson*, 336 N.C. 1.

4. Witnesses— cross-examination—defendant conferring with attorney—no prosecutorial misconduct

There was no prejudicial error in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian in the State's cross-examination of defendant concerning whether defendant's family had gone over information with their lawyers. The State's cross-examination did not suggest that defendant improperly discussed the case with counsel or family members.

5. Criminal Law— *Anders* appeal—inappropriate

An *Anders* appeal was inappropriate where defendant argued four assignments of error, indicating a belief that the appeal was not wholly without merit.

Appeal by defendant from judgment entered 10 October 1997 by Judge Carl L. Tilghman in Wayne County Superior Court. Heard in the Court of Appeals 18 August 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Celia Grasty Lata, for the State.

Adrian M. Lapas for defendant-appellant.

LEWIS, Judge.

Following indictment by a grand jury on twenty-seven counts, defendant was convicted on eight counts of taking indecent liberties with a child, four counts of first degree statutory sex offense, and two counts of sexual activity by a custodian in Wayne County Superior Court. We find ample evidence to support the findings of guilt by the jury on all charges. Defendant appeals, making three arguments.

[1] At the outset we note that defendant attempted to file a supplemental brief more than nine months after the printed record on appeal was mailed, significantly in excess of the thirty days allowed by Rule 13(a) of the Rules of Appellate Procedure for filing an appellant's brief. Defendant did not timely seek an extension of time to file his brief and because this Court and the appellant are bound by the Rules of Appellate Procedure, *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999), the supplemental brief will not be considered.

[2] Defendant's first argument on appeal is that the trial court's exclusion of evidence concerning alleged prior sexual behavior of the victim was reversible error. Defendant sought to introduce evidence by "T", a nine-year-old child, that six weeks prior to being placed in the Trogden home, T saw "M", the victim in this case, performing fellatio on T's younger brother and forcing the child to reciprocate the act. The trial court denied defendant's motion after hearing argument that Rule 412 barred introduction of the evidence in question. N.C. Gen. Stat. § 8C-1, N.C.R. Evid. 412 (1992).

Rule 412 prohibits introduction of evidence of the complainant's sexual behavior during prosecution of a rape or sex offense unless such evidence is relevant. Sexual behavior is defined by Rule 412(a) as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." The excluded testimony illustrates an instance of sexual behavior between M and another child, which was not the sexual act at issue in the indictment on trial.

Relevant evidence is defined in Rule 412(b) as any evidence of sexual behavior which:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

Without a determination by the court that the sexual behavior is relevant under Rule 412(b), no such evidence may be introduced in any trial of a charge of rape or a sex offense. *Id.* § 412(d).

Defendant sought to admit T's statements referencing M's past sexual behavior under Rule 412(b)(2) at trial. This is not the type of evidence offered for the purpose of showing that the acts charged were not committed by defendant under Rule 412(b)(2). *State v. Bass*, 121 N.C. App. 306, 310, 465 S.E.2d 334, 336 (1996). As the trial court noted, since M testified at trial that defendant showed him how to perform sexual acts, defense counsel was not prohibited from cross-examining M concerning the way in which he learned to do such acts, so long as the cross-examination did not refer to specific acts.

Defendant also argues that beyond the four categories of elevance listed under Rule 412, evidence of M's prior sexual behavior was relevant to show that M had prior knowledge of sexual matters and therefore had the ability to fabricate testimony regarding abuse by the defendant. This Court addressed a similar argument in *Bass*.

In *Bass*, the trial court excluded statements by a child victim indicating that she had been similarly abused by her uncle three years earlier. *Id.* at 308-09, 465 S.E.2d at 335-36. On appeal, defendant argued that the evidence was relevant to show that the child had requisite knowledge to fabricate testimony about her abuse by defendant. This Court stated in *Bass*:

> Defendant's contention is contrary to Rule 412 and unsupported by the law of this jurisdiction. To agree with defendant's contention would be to substantially restrict the effect of Rule 412, and allow admission of a wide variety of previous sexual activities over Rule 412 objection.

Id. at 311, 465 S.E.2d at 337. Accordingly, we conclude that M's testimony is not relevant and therefore inadmissible.

Even if it was error to exclude this evidence, it was harmless. It is not sufficient for the defendant to merely allege error. He must show that absent the trial court's allegedly erroneous exclusion of evidence, a different result would have obtained. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986) (citing N.C. Gen. Stat. § 1A-1, N.C.R. Civ. P. 61).

The State's evidence tended to show that M and seven other children testified as to some experience of sexual abuse by defendant; the testimony of eight adult witnesses corroborated the children's evidence. Defendant conceded at trial that there was substantial evidence as to every element of each crime charged. Furthermore, the jury heard testimony from defendant and from a social worker that M was sexually molested in earlier years by a babysitter. The evidence of M's prior sexual behavior was not necessary to establish that M had prior knowledge of sexual matters and hence the ability to fabricate allegations against defendant. We therefore find that a determination by the trial court to admit evidence of M's past sexual behavior would not have produced a different outcome and there was no reversible error.

[3] Defendant also argues that two aspects of the State's cross-examination constituted prosecutorial misconduct. The defendant first labels as prejudicial the following dialogue between the prosecutor and defendant's father:

> Q. How did you feel about [M]? Did you love him?
>
> A. Yes, ma'am.
>
> Q. But you're willing to destroy him in order to save your son, aren't you? [Objection; overruled]
>
> A. [Witness does not answer]

Q. You can go in and you can tell this jury that you saw him humping a dog, . . . you do not care about [M], you can trash him to save your son? [Objection; overruled]

Q. I'll withdraw that. That's all. [Defense counsel asks to strike; denied]

T. at 1120-21. Defendant principally relies on *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994), to argue that the prosecutor degraded and brought the witness into ridicule or contempt. We disagree.

In *Sanderson* the court found that during the cross-examination of an expert witness, the prosecutor "insulted her, degraded her, and attempted to distort her testimony," *id.* at 11, 442 S.E.2d at 40, and "maligned, continually interrupted and bullied" her, *id.* at 15, 442 S.E.2d at 41. The prosecutor in *Sanderson* attempted to distort the expert's testimony by "insist[ing] on yes or no answers to compound, convoluted questions, then cut[ting] her off before she could explain." *Id.* at 13, 442 S.E.2d at 40.

The prosecutor's statements in this case did not resemble those statements of the prosecutor in *Sanderson*, and did not rise to the levels of insult, degradation or pervasive badgering held to constitute prosecutorial misconduct in *Sanderson*. The cross-examination focused on the witness' credibility, given that he is the defendant's father. This assignment of error is dismissed.

[4] Defendant also complains that the trial court allowed the prosecutor to improperly question defendant during cross-examination. The allegedly improper questioning is as follows:

Q. Now, Mr. Trogden, you used some notes before lunch to testify by. Could I see your notes, please?

A. Sure.

Q. Now, let me see. Your mother used notes when she testified too; is that correct?

A. To dates.

Q. Yeah. And how about your father? Did he use notes when he testified?

A. I don't believe so.

Q. Who all did you go over this information with?

A. I did that last night myself.

Q. Okay. You didn't go over this with your lawyers; is that what you're telling us?

A. I said [I] was in my cell when I did it.

Q. Well, did you go over the information—[Objection; overruled]

Q. You did not go over this information with your lawyers?

A. That's correct . . .

Q. Okay. Have you gotten together with your lawyers and your family back there to talk about what everybody was going to say?

A. No. We had talked about all the plea bargains you had to offer.

T. at 1224-26. Defendant contends that the prosecutor's questions seriously undermined defendant's credibility and "denigrate[d] in front of the jury that right to fully discuss and prepare defendant's case." We disagree.

The State's cross-examination did not suggest that defendant improperly discussed his case with counsel or family members to prepare for trial. We note that the scope of cross-examination is a matter within the sound discretion of the trial judge, *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 this cross-examination. N.C. Gen. Stat. § 15A-1443(a) (1997). This assignment of error is dismissed.

[5] The defendant next asks us to review the record pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), to determine whether any error occurred which would require a new trial. Generally, an appellant's attorney should ask this Court to search the record for error pursuant to *Anders* "only where counsel believes the *whole appeal* is without merit." *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (emphasis added). Counsel for defendant, however, has argued four assignments of error, indicating his belief that defendant's appeal is not wholly without merit. An *Anders* review is inappropriate in this case. Otherwise, counsel could make assignments of error and perfunctorily tack on a request for an *Anders* review.

No error.

Judges MARTIN and HUNTER concur.

ALLSTATE INSURANCE COMPANY v. JESSICA A. RUNYON CHATTERTON, WALLACE NICHOLS, CONNEY T. CATHEY, ADMINISTRATOR OF THE ESTATE OF ZACHARY DUANE CATHEY, WILLIAM SKIPPER AND PAMELA SKIPPER

No. COA98-1416

(Filed 21 September 1999)

1. **Insurance— homeowner's policy—exclusion—boating accident**

The trial court did not err in a declaratory judgment action by excluding a boating accident from a homeowner's policy where plaintiff-insurer had shown the existence and applicability of a policy exclusion applying to watercraft and defendants contended that the exclusion did not apply because they had declared the watercraft as required by the policy in that their agent had previously written a boatowner's policy and had all of the information concerning the boat. The term "declare" is neither technical nor ambiguous and requires affirmative action by defendant; the agent's mere knowledge that plaintiffs owned a boat which would otherwise be excluded did not amount to a declaration by plaintiffs that they intended that the boat be covered.

2. **Insurance— exclusion—grounds stated in denial letter—sufficient**

An insurance company did not waive a policy exclusion by not asserting it in the denial letter where the letter clearly placed defendants (the policy holders) on notice of the grounds asserted for denial. Plaintiff was not required to anticipate the exception to the exclusion which defendants asserted.

Appeal by defendants Runyon Chatterton, Nichols and Cathey, Administrator, from judgment entered 12 August 1998 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 25 August 1999.

Morris York Williams Surles & Barringer, by R. Gregory Lewis, for plaintiff-appellee Allstate Insurance Company.

Ball, Barden & Bell, P.A., by Ervin L. Ball, Jr., for defendant-appellant Wallace Nichols.

Long, Parker & Warren, P.A., by W. Scott Jones for defendant-appellants Jessica A. Runyon Chatterton and Conney T. Cathey, Administrator of the Estate of Zachary Duane Cathey.

MARTIN, Judge.

Plaintiff Allstate Insurance Company (hereinafter "Allstate") brought this action seeking a declaratory judgment that it does not provide coverage, under a homeowners' insurance policy issued to defendants William Skipper and Pamela Skipper, for the underlying claims of the remaining defendants arising out of a boating accident which occurred on 3 May 1992 on Lake Lure in Rutherford County. On that date, William Skipper was operating a 17 foot motorboat powered by a 150 horsepower outboard motor when he collided with a smaller boat occupied by Wallace Nichols, Jessica Runyon Chatterton, and Zachary Duane Cathey. The collision resulted in Zachary Cathey's death and injuries to Jessica Runyon Chatterton and Wallace Nichols.

At the time of the collision, defendants Skipper were insured under two policies of insurance issued by Allstate: a boatowners' policy with liability coverage limits of $100,000, and a homeowners' policy with liability coverage limits of $100,000. Allstate paid its limits of liability under the boatowners' policy, but denied coverage under the homeowners' policy, claiming the incident was excluded from coverage by the terms of the policy. In its complaint in this action, Allstate asserted the following exclusion contained in the Skippers' homeowners' policy:

> Section II—Exclusions
>
> 1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> f. arising out of:
>
> (1) the ownership, maintenance, use, loading or unloading of a watercraft described below;. . . .

Watercraft:

(4) powered by one or more outboard motors with more than 25 total horsepower if the outboard motor is owned by an insured. But, outboard motors of more than 25 total horsepower are covered for the policy period if:

(a) You acquire them prior to the policy period and:

(I) you declare them at the policy inception; . . . .

Defendants answered, asserting that the foregoing exclusion does not apply because the Skippers declared the watercraft for insurability at the inception of the homeowners' policy.

The trial court concluded that the homeowners' policy did not provide coverage for the claims arising out of the 3 May 1992 collision and entered judgment in Allstate's favor. Defendants Jessica Runyon Chatterton, Wallace Nichols and Conney T. Cathey, Administrator of the Estate of Zachary Duane Cathey, appeal.

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[1] Allstate maintains that the incident was excluded from coverage by the watercraft exclusion to the homeowners' policy; defendants contend the exclusion does not apply because the Skippers declared the boat for insurability at the inception of the policy. This Court has held that the burden is upon the insurer to establish the existence and applicability of a policy provision excluding coverage; the burden is upon the insured to prove the existence of an exception to the exclusion which is applicable to restore coverage. *Home Indemnity Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 494 S.E.2d 774 (1998). In this case, there is no dispute that these claims arose out of the Skippers' ownership and use of a watercraft powered by an outboard motor of more than 25 horsepower which was owned by the Skippers prior to the inception of the policy. Thus, Allstate has shown the existence and applicability of its policy exclusion and the dispositive question is whether defendants have proved that the Skippers declared the boat on their homeowners' policy so as to come within the exception to the exclusion.

The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction. First of all, the policy is subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation. *Trust Co. v. Ins. Co.*, 276 N.C.

348, 172 S.E.2d 518 (1970). In such cases, the policy must be construed in favor of coverage and against the insurer; however, if the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written. *Id.* Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language. *Id.* Nontechnical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning. *C.D. Spangler Const. Co. v. Industrial Crankshaft and Engineering Co., Inc.*, 326 N.C. 133, 388 S.E.2d 557 (1990). Use of the ordinary meaning of a term is the preferred construction, and in construing the ordinary meaning of a disputed term, it is appropriate to consult a standard dictionary. *Id.*

Defendants contend the Skippers "declared" the boat to Allstate's agent, Norris Tisdale, at the inception of the homeowners' policy because Tisdale had, at that time, all of the information concerning the boat since he had previously written the boatowners' policy for them. The term "declare" is neither technical nor ambiguous; it is defined in the American Heritage College Dictionary as: "1. To make known formally or officially. 2. To state emphatically or authoritatively; affirm. 3. To reveal or make manifest: show . . . ." *The American Heritage College Dictionary* (Third Edition 1997). Each of these definitions requires an affirmative action on the part of the declarant. No such declaration is shown by the evidence in this case.

The evidence shows that the Skippers purchased the boatowners' policy several months before they purchased the homeowners' policy at issue in this case. William Skipper testified that the only conversation he recalls having with Tisdale occurred when he purchased the boatowners' policy from Allstate through Tisdale in May 1986. When the Skippers subsequently purchased a new home in January 1987, Mr. Skipper testified that they not only purchased homeowners' coverage on the new home, but also "switched all of our car insurance, everything, to Allstate." This testimony cannot serve to support a finding of a declaration to cover the boat on the homeowners' policy, because the boat was already insured by Allstate. Purchase of the homeowners' policy was arranged through discussions between Tisdale and Pamela Skipper, who did not testify. Tisdale testified that he wrote the boatowners' policy for the Skippers in May 1986, obtaining from William Skipper all of the information required for the issuance of that policy. He testified that he did not recall the specific

discussions which occurred at the time he wrote the homeowners' policy in January 1987, but testified that the Skippers did not request to add the boat to the homeowners' policy. Had they made such a request, he would have recommended against it because such coverage would have been duplicative to that which they already had under the boatowners' policy. Moreover, if the Skippers had wanted additional liability coverage for the boat when they purchased the homeowners' policy, Tisdale testified that it would have been less expensive to increase the limits of liability of the boatowners' policy than to add the boat to the liability coverage afforded by the homeowners' policy.

Thus, there is no evidence to support a finding that, at the time they purchased the homeowners' policy, the Skippers stated or manifested to Allstate their intent to insure the boat under the homeowners' policy. We specifically hold that Tisdale's mere knowledge, at the time he issued the homeowners' policy, that the Skippers owned a boat which would otherwise be excluded from coverage thereunder, did not amount to a declaration by the Skippers that they intended that the boat be covered by the homeowners' policy.

[2] Defendants also argue that Allstate has waived the policy exclusion because it did not assert the exclusions as grounds for denying coverage in its denial letter. This contention is without merit. The denial letter stated

> Personal Liability and Medical Payments to others do not apply to bodily injury or property damage arising out of watercraft powered by one or more outboard motors with more than 25 horsepower if the outboard motor is owned by an insured.

The denial letter clearly placed defendants upon notice of the grounds asserted by Allstate for denial of coverage and is the same exclusion relied upon by Allstate in this action. Allstate was not required to anticipate, in its denial letter, the exception to the exclusion which defendants asserted in their counterclaim.

The trial court correctly concluded that Allstate had proven the existence of a relevant exclusion to coverage, that defendants had not proven the existence of an exception to the exclusion which would restore coverage, and that the Skippers' Allstate homeowners' policy does not provide coverage for the 3 May 1992 incident. The judgment of the trial court is affirmed.

Affirmed.

Judges LEWIS and HUNTER concur.

FITZGERALD S. HUDSON, PLAINTIFF v. SUSAN W. HUDSON, DEFENDANT

No. COA98-1337

(Filed 21 September 1999)

Pleadings— compulsory counterclaim—claim for money owed—previously filed domestic action

An order dismissing a complaint was affirmed and the matter remanded where plaintiff's claim for money owed was a compulsory counterclaim to defendant's previously filed claim for fraud in her domestic complaint. Plaintiff's claim arose out of the same transaction or occurrence as the pending fraud claim, and, although the trial court was correct in dismissing plaintiff's claim, it should have granted plaintiff leave to file the claim as a counterclaim in the pending domestic action.

Appeal by plaintiff from order entered 1 July 1998 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 17 August 1999.

Porter & Steel, PLLC, by Charles L. Steel, IV and Susan H. Hargrove, for plaintiff-appellant.

Robinson & Lawing, L.L.P., by Norwood Robinson, C. Ray Grantham, Jr. and H. Brent Helms, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Plaintiff Fitzgerald S. Hudson appeals from an order denying his motion under Rule 60(b) of the North Carolina Rules of Civil Procedure for relief from an order dismissing his complaint. Having carefully examined the issues raised on appeal, we affirm the dismissal of plaintiff's claim, but we modify the order of the trial court to grant leave to plaintiff to file his claim as a counterclaim in defendant's pending domestic action.

Plaintiff filed an action against defendant Susan W. Hudson on 9 January 1998 in the Superior Court of Wilson County seeking to collect money due and owing on two promissory notes (hereinafter, "the Notes"). Plaintiff and defendant were husband and wife, and defendant executed the Notes during the course of the parties' marriage. On 17 March 1998, defendant filed a motion to dismiss plaintiff's complaint, alleging, *inter alia*, that the trial court lacked jurisdiction over the subject matter. In support of the motion, defendant asserted that the Notes were the subject of a pending domestic action instituted by defendant on 29 December 1997 against plaintiff for post-separation support, alimony, attorney's fees, fraud, breach of fiduciary duty and constructive trust, and equitable distribution. Defendant further averred that the court lacked jurisdiction because, pursuant to section 7A-244 of the North Carolina General Statutes, plaintiff's suit on the Notes "involved a domestic matter" and, therefore, should have been brought in the district court division.

On 19 March 1998, defendant's counsel sent a letter and a Request to Calender to the Clerk of Court for Wilson County asking that defendant's motion to dismiss be placed on the 13 April 1998 calender. Defendant's counsel also served plaintiff's counsel with a Notice of Hearing for 13 April 1998. Plaintiff's counsel concedes that he received copies of the Request to Calender and Notice of Hearing for 13 April 1998, but he contends that he subsequently received a "Final Calender" from the Wilson County Clerk of Court which he understood to show that defendant's motion would be heard on 20 April 1998. Thus, when the matter was called for hearing before Judge Frank R. Brown on 13 April 1998, plaintiff's counsel was absent. The court then issued an order allowing defendant's motion to dismiss, citing the failure of plaintiff's counsel to appear and offer argument in opposition to defendant's motion as a basis for granting the motion.

Thereafter, plaintiff filed a motion under Rule 60(b)(1) of the Rules of Civil Procedure for relief from the 13 April 1998 order dismissing plaintiff's complaint. The motion stated that the absence of plaintiff's counsel from the 13 April 1998 hearing on defendant's motion to dismiss was due to the fact that plaintiff's counsel had received a Final Calender "indicating" that the motion would be heard on 20 April 1998. Plaintiff's motion for relief came on for hearing on 8 June 1998, and by order dated 1 July 1998, the trial court denied the motion, stating that although plaintiff had shown excusable neglect in failing to appear on 13 April 1998, the court lacked subject matter

jurisdiction pursuant to section 7A-244 of the General Statutes. Plaintiff filed timely notice of appeal.

On appeal, plaintiff assigns error to the trial court's failure to set aside the order of dismissal based on its determination that it lacked jurisdiction of the subject matter under section 7A-244 of the General Statutes. Plaintiff contends that section 7A-244 does not apply to the present set of facts, because the statute does not specifically list an action to enforce a promissory note as one that is appropriately heard in the district court division as a domestic relations matter. Plaintiff further argues that under our Supreme Court's holding in *Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 40 (1975), section 7A-244 is not a jurisdictional statute. We need not, however, reach plaintiff's contention regarding the applicability of section 7A-244 to this case, because we conclude that plaintiff's claim was a compulsory counterclaim in defendant's previously filed domestic action and, therefore, was properly dismissed.

Rule 13(a) of the North Carolina Rules of Civil Procedure provides as follows regarding compulsory counterclaims:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if
>
> (1) At the time the action was commenced the claim was the subject of another pending action, or
>
> (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

N.C. Gen. Stat. § 1A-1, Rule 13(a) (1990). "The purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve 'all related claims in one action, thereby avoiding a wasteful multiplicity of litigation[.]' " *Gardner v. Gardner*, 294 N.C. 172, 176-77, 240 S.E.2d 399, 403 (1978) (quoting Wright and Miller, Federal Practice and Procedure § 1409, p. 37 (1971)). Determining if a partic-

ular claim "arises out of the same transaction or occurrence" as that which serves as the basis for an opposing party's claim requires consideration of "(1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions." *Brooks v. Rogers*, 82 N.C. App. 502, 507-08, 346 S.E.2d 677, 681 (1986). In addition to a common factual background, there must be "a logical relationship in the nature of the actions and the remedies sought." *Id.* at 508, 346 S.E.2d at 681.

We are satisfied that, in the instant case, plaintiff's claim for money owed is a compulsory counterclaim with regard to defendant's previously filed claim for fraud. In her domestic complaint, defendant contends that plaintiff persuaded her to borrow money from him and to execute the Loan Agreement and Notes to pay off debt encumbering real property she inherited from her father. Defendant claims that plaintiff fraudulently represented to her that he would never enforce the loans but would, instead, use them as a tax write-off on the couple's joint tax return. As relief, defendant seeks punitive damages and rescission of the instruments. In plaintiff's subsequent cause of action, he contends that the Loan Agreement and Notes were duly executed and that despite his having demanded payment of the sums owed under the instruments, defendant has failed and refused to make any such payment. Plaintiff seeks to recover the amount owed, plus interest and costs. In light of these facts, we conclude that plaintiff's claim "arises out of the same transaction or occurrence" as defendant's pending fraud claim. Moreover, since plaintiff's claim existed at the time defendant filed her action, since it does not require for its adjudication "the presence of third parties of whom the court cannot acquire jurisdiction," N.C.G.S. § 1A-1, Rule 13(a), and since the exceptions to Rule 13(a) do not apply, we hold that plaintiff's claim is properly denominated a compulsory counterclaim. *See Brooks*, 82 N.C. App. 502, 346 S.E.2d 677 (1986) (holding that investor's fraud claim against financial advisor was compulsory counterclaim in advisor's prior pending action for money owed on loans to investor); *Moretz v. Northwestern Bank*, 67 N.C. App. 312, 313 S.E.2d 8 (1984) (concluding that action for unfair and deceptive trade practices asserting that defendant willfully failed to satisfy condition precedent on promissory note constituted a compulsory counterclaim that should have been brought in prior action to recover money on same note). We proceed now to the issue of what becomes of plaintiff's claim.

Regarding the treatment of compulsory counterclaims in marital disputes, the Supreme Court, in *Gardner*, 294 N.C. 172, 240 S.E.2d 399, held as follows:

> Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under Rule 13(a), may not be prosecuted during the pendency of the prior action but must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action. The claim, however, will not be barred by reason of Rule 13 (a) if it is filed after final judgment has been entered in the prior action.

Id. at 181, 240 S.E.2d at 406. This Court has stated, nonetheless, that "the option to stay the second action should be reserved for unusual circumstances." *Brooks v. Rogers*, 82 N.C. App. 502, 507, 346 S.E.2d 677, 681 (1986). Thus, although the trial court was correct in dismissing plaintiff's claim, the court should have granted plaintiff leave to file the claim as a counterclaim in defendant's pending domestic action. We, therefore, remand this case for the trial court to enter such an instruction. Furthermore, given our determination that plaintiff's claim was properly dismissed, we need not address defendant's cross-assignment arguing that the court improperly concluded that "[p]laintiff had shown excusable neglect in failing to appear for hearing on April 12, 1998."

Based upon the foregoing, the order dismissing plaintiff's complaint is affirmed and this matter remanded to the Superior Court for entry of an instruction permitting plaintiff leave to file his claim against defendant as a counterclaim in defendant's earlier filed domestic action. If defendant's action has proceeded to judgment by the time this case is remanded, plaintiff's claims should proceed to trial in the Superior Court.

AFFIRMED AND REMANDED.

Judges GREENE and HORTON concur.

IN RE: ESTATE OF MAGGIE FREEMAN FERGUSON

No. COA98-1331

(Filed 21 September 1999)

1. **Wills— caveat—fiduciary relationship between testator and propounder**

The trial court did not err in a caveat proceeding by not submitting to the jury the issue of a fiduciary relationship between the testator and propounder where the testator executed a power of attorney naming propounder attorney-in-fact contemporaneously with the execution of the will and delivered the power of attorney to propounder more than 18 months later. The record did not contain any evidence that propounder served as testator's attorney-in-fact at the time testator executed her will.

2. **Wills— caveat—undue influence**

The trial court did not err in a caveat proceeding by not instructing the jury that the propounder bore the burden of proving that he had not exercised undue influence over the testator in the execution of her will where, as a matter of law, a fiduciary relationship did not exist between testator and propounder at the time testator executed her will.

3. **Evidence— hearsay—harmless error**

The admission of hearsay testimony in a caveat proceeding was harmless error where the propounder testified that hospital personnel had told him that one of the caveators had removed testator's power of attorney from the hospital without consent. The evidence merely indicated that the caveator was concerned about the medical care choices being made by propounder and caveators have not shown that a different result would have occurred had the evidence been excluded.

Appeal by Caveators from judgment and order of Probate in Solemn Form dated 15 June 1998 by Judge Forrest Donald Bridges in Madison County Superior Court. Heard in the Court of Appeals 17 August 1999.

Harrell & Leake, by Larry Leake, for caveator-appellants.

Long, Parker & Warren, P.A., by Robert B. Long, Jr. and Philip S. Anderson, for propounder-appellee.

GREENE, Judge.

Robert Donald Banks (Banks), Heather Banks, and Tysa Banks (collectively Caveators) appeal from a judgment by jury finding the paper writing dated 3 November 1986 and submitted to the Madison County Superior Court for probate by Marvin Ball (Propounder) to be the Last Will and Testament of Maggie Freeman Ferguson (Testator).

Testator died on 23 March 1996. Following Testator's death, Propounder submitted a document dated 3 November 1986, entitled the Last Will and Testament of Testator, for probate. On 28 May 1996 Caveators filed a caveat contending the paper writing dated 3 November 1986 was not the Last Will and Testament of Testator. The caveat further alleged if Testator did sign the paper writing her signature was obtained by undue influence. Caveators then filed and the trial court granted a motion to amend the 28 May 1996 caveat to further contend that a paper writing dated 10 February 1996 was the Last Will and Testament of Testator.

Propounder presented evidence that on 2 November 1986 Testator telephoned Propounder and asked him to meet her the following day at Ponder's Auto Supply (Ponder's), a business where Testator had purchased vehicles in the past. She stated she had some papers she wanted notarized and Propounder met her at Ponder's the following day. Testator told Conley Goforth (Goforth), a notary at Ponder's, she had some papers she wanted notarized, and Testator removed a will and power of attorney from her pocketbook. Three individuals witnessed Testator's signature on the will, and Goforth notarized the power of attorney and the will. Testator then returned the executed documents to her pocketbook, and she did not give a copy of the documents to any of the parties present.

Propounder testified that around June 1988 Testator brought a will and power of attorney to his home. The will was in a sealed envelope, and Testator instructed Propounder to deliver it to Larry Leake (Leake), Testator's attorney, in the event of her death. She also instructed Propounder not to use the power of attorney, appointing him as her attorney-in-fact, unless she became sick. The will remained in a sealed envelope until Propounder delivered it to Leake following Testator's death. The will and power of attorney were dated 3 November 1986.

Caveators presented evidence that Testator did not disclose who had prepared the will and power of attorney she signed on

3 November 1986 and did not disclose when the documents were prepared.

Testator was admitted to St. Joseph's Hospital (Hospital) on 19 March 1996 and Propounder informed Hospital that he held a power of attorney for Testator. He delivered a copy of the power of attorney to Hospital and was later asked for a second copy. Propounder testified, over the objection of Caveators, that Hospital personnel told him Banks had removed Hospital's copy of the power of attorney from Hospital without consent. Hospital informed Testator she would require surgery to survive; however, she would not consent to surgery. When Testator became unresponsive Propounder, acting as her attorney-in-fact, also would not consent to surgery, and Testator died at Hospital on 23 March 1996.

At the close of the trial, Caveators requested and the trial court refused to give the following jury instruction:

> Where there is a fiduciary relationship between the testator and a beneficiary, and the holding of a power of attorney creates such a fiduciary relationship, the law presumes fraud or undue influence unless that presumption is rebutted. The burden of proof is upon [Propounder] to rebut such presumption.

The trial court also refused to submit an issue to the jury as to whether a fiduciary relationship existed between Testator and Propounder when the will was executed. In rejecting this request, the trial court acknowledged that its ruling "amounts to a granting of the motion for a directed verdict on this point." The jury found the paper writing dated 3 November 1986 and submitted to probate by Propounder was the Last Will and Testament of Testator, and was not obtained by undue influence.

The issues are whether: (I) the issue of a fiduciary relationship between Testator and Propounder should have been submitted to the jury; (II) the jury should have been instructed that Propounder bore the burden of proving the absence of undue influence; and, (III) Propounder's testimony of statements made by Hospital personnel was inadmissible hearsay resulting in harmful error.

I

[1] Caveators argue the trial court erred in failing to submit to the jury the issue of a fiduciary relationship between Testator and Propounder. We disagree.

The trial court is required to submit to the jury those issues "raised by the pleadings and supported by the evidence." *Johnson v. Massengill*, 280 N.C. 376, 384, 186 S.E.2d 168, 174 (1972). An issue is supported by the evidence when there is substantial evidence, considered in the light most favorable to the non-movant, in support of that issue. *See Dixon v. Taylor*, 111 N.C. App. 97, 103-04, 431 S.E.2d 778, 781 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

In this case, Caveators contend that Testator's power of attorney appointing Propounder attorney-in-fact creates a fiduciary relationship between Testator and Propounder. *See McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616 (1943) ("[I]n certain known and definite 'fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud.' " (quoting *Lee v. Pearce*, 68 N.C. 76, 81 (1873))). The evidence is that Testator executed a power of attorney naming Propounder attorney-in-fact contemporaneously with the execution of her will. Testator delivered the power of attorney to Propounder around June 1988, more than eighteen months after the execution of the will. The record does not contain any evidence that Propounder served as Testator's attorney-in-fact at the time Testator executed her will. *See In re Will of Atkinson*, 225 N.C. 526, 529-30, 35 S.E.2d 638, 640 (1945) (trial court's jury instruction that a power of attorney creates a fiduciary relationship between principal and attorney-in-fact held error when the power of attorney did not exist when the will was executed). The issue of whether Testator and Propounder shared a fiduciary relationship based on Testator's appointment of Propounder as her attorney-in-fact therefore should not have been submitted to the jury.

II

[2] Caveators argue the trial court should have instructed the jury that Propounder bore the burden of proving that he had not exercised undue influence over Testator in the execution of her will. We disagree.

When a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises and the propounder must rebut that presumption. *See In re Will of Atkinson*, 225 N.C. at 530, 35 S.E.2d at 640. In this case, the trial court found, and we agree, that as a matter of law a fiduciary relationship did not exist between

Testator and Propounder at the time Testator executed her will. The trial court therefore did not err by failing to instruct the jury that Propounder bore the burden of proof regarding the issue of undue influence.

III

[3] Caveators argue the Propounder's testimony that Hospital personnel told him Banks had removed Testator's power of attorney from Hospital without consent was inadmissible hearsay. We agree that Propounder's testimony was inadmissible hearsay; however, we find admission of this testimony was harmless error.

"A party asserting error must show not only that error has been committed, but also that a different result would have ensued had the error not occurred." *Boyd v. L. G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405, 405 S.E.2d 914, 920, *disc. review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991); *see also* N.C.R. Civ. P. 61. We do not believe Caveators have shown that a different result would have occurred had the objectionable evidence been excluded. Indeed, the evidence merely indicates Banks was concerned about the medical care choices being made by Propounder and wanted to make sure Propounder had the authority to make those choices. Accordingly we reject Caveators' argument made to this Court that this evidence showed Banks to be a "vile" person and therefore prejudiced the jury against him.

Caveators assert two other arguments in their brief to the Court and we do not address them because they either are not supported by an assignment of error in the record, N.C.R. App. R. 10(a) (appellate court will consider only arguments supported by assignment of error), or not properly raised in the trial court. N.C.R. App. P. 10(b)(2) (appellant must raise objection to jury charge at trial).

No Error.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. TANYA WATTS GENTRY

No. COA98-1225

(Filed 21 September 1999)

Sentencing— habitual driving while impaired—use of prior convictions

Sentences for impaired driving and habitual impaired driving were remanded where the trial court enhanced the impaired driving conviction through points for prior convictions and those same prior convictions were the basis for the habitual DWI charge. Although being an habitual felon is a status and driving while impaired is a substantive offense, that is a distinction without a difference. The legislature has recognized the basic unfairness and constitutional restrictions on using the same convictions both to elevate a sentencing status to that of an habitual felon and then to increase the sentencing level and it is reasonable to conclude that the same legislature did not intend that convictions which elevate misdemeanor driving while impaired to the status of felony habitual driving while impaired would again be used to increase the sentencing level. It is basic learning that criminal laws must be strictly construed and any ambiguities resolved in favor of defendant.

Appeal by defendant from judgment entered 11 March 1998 by Judge L. Todd Burke in Davidson County Superior Court. Heard in the Court of Appeals 24 August 1999.

On 31 December 1997 an officer from the Lexington Police Department stopped defendant for speeding and for running a stop sign in the City of Lexington, North Carolina. While speaking with defendant, the officer smelled a strong odor of alcohol, noticed that defendant appeared to be confused, and formed the opinion that defendant was impaired due to consuming alcoholic beverages. The officer arrested defendant and transported her to the local police station, where an intoxilyzer breath test indicated that defendant had a .15 blood-alcohol content. The officer found that defendant had been convicted of three prior offenses of driving while impaired (DWI) within the past seven years, and charged her with habitual DWI in violation of N.C. Gen. Stat. § 20-138.5. Defendant was also on supervised probation on a charge of DWI at the time of her arrest. Defendant waived indictment, signed a bill of information, and pled guilty as

charged on 11 March 1998. At sentencing, the State presented defendant's criminal record which included four previous misdemeanor convictions, a prior felony conviction, and the three prior DWI convictions. The DWI convictions were the same charges which formed the basis for the habitual DWI charge. Over the objection of defendant, the trial court took into consideration for sentencing purposes all of defendant's seven prior misdemeanor convictions, which included the three prior DWI convictions. The trial court calculated that defendant had 10 prior record points: seven points for the seven misdemeanors, two for the felony charge, and one point for committing the charged offense while on probation. Based on the 10-point record level, the trial court found defendant to be at prior record level IV, and sentenced her within the presumptive range to a minimum and maximum term of twenty-one months and twenty-six months respectively. Defendant appealed.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Jeffrey J. Berg for defendant-appellant.

HORTON, Judge.

Defendant argues on appeal that the trial court erred at her sentencing hearing in assigning points to defendant's three prior DWI convictions, because those same three DWI convictions were the basis for her habitual DWI charge. We hold that the action of the trial court was error, and remand this case for a new resentencing hearing.

Before imposing a sentence under the Structured Sentencing Act, the trial court must determine the prior record level, if any, of a defendant pursuant to N.C. Gen. Stat. § 15A-1340.14 (1997). The statute provides, in pertinent part:

> (a) Generally.—The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section.
>
> (b) Points.—Points are assigned as follows:
>
> . . . .
>
> (5) For each prior Class A1 or Class 1 misdemeanor conviction or prior impaired driving conviction under G.S. 20-138.1, 1 point . . . .

(6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.

(7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

. . . .

(c) Prior Record Levels for Felony Sentencing.—The prior record levels for felony sentencing are:

(1) Level I—0 points.

(2) Level II—At least 1, but not more than 4 points.

(3) Level III—At least 5, but not more than 8 points.

(4) Level IV—At least 9, but not more than 14 points.

(5) Level V—At least 15, but not more than 18 points.

(6) Level VI—At least 19 points.

Id. "Once the total number of points is calculated pursuant to G.S. 15A-1340.14(b), the prior record level is determined by comparing the point total calculated to the range of point totals corresponding to each prior record level as listed in G.S. 15A-1340.14(c)." *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996).

Here, defendant's criminal record consisted of seven prior misdemeanor convictions, three of which were DWIs, and one prior felony conviction. In the record, there is a standard worksheet the trial court used to calculate defendant's points accumulated from the prior convictions. In compliance with N.C. Gen. Stat. § 15A-1340.14(c), the total number of points is then matched with the appropriate record level to determine the appropriate sentence. In calculating defendant's total number of points, the trial court arrived at a figure of ten points, seven of which were from her prior misdemeanor convictions. Of those seven convictions, three were from the prior DWI convictions. The ten points place defendant at a prior record level IV, which

carries a presumptive sentence of 20-25 months. By contrast, the next lower level (III) carries a presumptive sentence of 17-21 months.

Defendant argues that the State used her three prior DWI convictions to prove an element of the offense of habitual driving while impaired, a felony which carries a higher punishment than the maximum of 150 days for misdemeanor DWI. Defendant contends that "it is contrary to the laws of this state" to use again the DWI convictions to add points to her prior record level and thereby increase her sentence.

The habitual impaired driving statute, N.C. Gen. Stat. § 20-138.5, is silent on the issue of whether prior DWI convictions which were used to establish this felony charge may again be considered and assigned points at sentencing. To resolve this issue, we must therefore look to the intent of the legislature.

> The cardinal rule of statutory construction is that "the intent of the legislature controls the interpretation of a statute." In determining legislative intent, we "should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." We must insure that "the purpose of the legislature in enacting [the statute], sometimes referred to as legislative intent, is accomplished."

Bethea, 122 N.C. App. at 627, 471 S.E.2d at 432 (citations omitted).

We find some guidance in that portion of the Structured Sentencing Act which provides for the sentencing of persons found to be habitual felons. Under our statutory scheme, "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon." N.C. Gen. Stat. § 14-7.1 (1993). "Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). The obvious legislative purpose of the habitual felon statute is to increase sharply the punishment for those persons who continue to commit serious offenses in violation of our criminal laws. N.C. Gen. Stat. § 14-7.6, which governs the sentencing of persons found to be habitual felons, provides that "[i]n determining the prior record level, *convictions used to establish a person's status as an habitual felon shall not be used.*" N.C. Gen. Stat. § 14-7.6 (Cum. Supp. 1998) (emphasis added).

In construing the habitual felon statute, this Court has previously held the following:

> The chief limitation on the use of G.S. 15A-1340.14 is found in G.S. 14-7.6, which states that "[i]n determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." G.S. 14-7.6 (1994). This provision recognizes that there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions. *A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's prior record level pursuant to G.S. 15A-1340.14(b)(1)-(5). G.S. 14-7.6 establishes clearly, however, that the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time.*

Bethea, 122 N.C. App. at 626, 471 S.E.2d at 432 (emphasis added). Obviously, our legislature recognized the basic unfairness and constitutional restrictions on using the same convictions both to elevate a defendant's sentencing status to that of an habitual felon, and then to increase his sentencing level. We believe it is reasonable to conclude that that same legislature did not intend that the convictions which elevate a misdemeanor driving while impaired conviction to the status of the felony of habitual driving while impaired, would then again be used to increase the sentencing level of the defendant.

The State argues that being an habitual felon is a status, while felony driving while impaired is a substantive offense. We do not find that the distinction requires a different result. In both instances, a defendant commits a violation of our criminal laws, has committed three offenses of the same class within the past seven years, and has his punishment sharply increased as a result of the consideration of those prior offenses. We find the distinction urged by the State to be one without a difference. Further, whatever doubt there may be must be resolved in favor of the defendant. It is basic learning that criminal laws must be strictly construed and any ambiguities resolved in favor of the defendant. *See State v. Pinyatello*, 272 N.C. 312, 314, 158 S.E.2d 596, 597 (1968) (penal statutes are construed strictly against the State and liberally in favor of the private citizen with all conflicts and inconsistencies resolved in his favor); and *State v. Scoggin*, 236 N.C. 1, 10, 72 S.E.2d 97, 103 (1952).

We reverse and remand the case to the trial court for resentencing at record level III.

Reversed and remanded for resentencing.

Judges GREENE and TIMMONS-GOODSON concur.

ROZANNE CALDERWOOD, EMPLOYEE, PLAINTIFF v. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, EMPLOYER; TRIGON ADMINISTRATORS, CARRIER, DEFENDANTS

No. COA98-1033

(Filed 21 September 1999)

Workers' Compensation— injury in usual course of work— labor and delivery nurse

An Industrial Commission opinion and award denying compensation to a labor and delivery nurse was reversed where the nurse injured her shoulder while lifting the leg of a heavy patient. There was a complete lack of evidence to support findings that plaintiff's injuries occurred while performing her usual employment duties in the usual way; the fact that her job responsibilities included assisting patients who received epidurals resulting in a total block was not dispositive. There was no evidence that plaintiff's regular work routine required lifting the legs of women weighing 263 pounds who had received epidurals resulting in total blocks.

Appeal by plaintiff from Opinion and Award filed 26 March 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 August 1999.

Cecil R. Jenkins, Jr. for plaintiff-appellant.

Morris, York, Williams, Surles & Barringer, L.L.P., by Anna L. Baird, for defendant-appellees.

GREENE, Judge.

Rozanne Calderwood (Plaintiff) appeals from the Opinion and Award of the North Carolina Industrial Commission (Commission) in

favor of The Charlotte-Mecklenburg Hospital Authority (Defendant-Hospital) and Trigon Administrators (Defendant-Carrier).

On 2 October 1995, Plaintiff worked for Defendant-Hospital as a Staff II Nurse in Labor and Delivery. She had worked there for eleven years prior to October 1995. Plaintiff's work duties included monitoring labor patients, circulating patients for deliveries and C-sections, recovery room care, and care of newborns. Plaintiff testified that at about 12:30 p.m. on 2 October 1995, she admitted a patient for labor induction. Dr. Newman, M.D. (Dr. Newman) ordered an epidural for the patient and Wes Robinson, M.D. (Dr. Robinson) administered the epidural. The patient remained uncomfortable after the epidural, so Dr. Robinson rebolused the epidural two or three times and gave the patient I.V. Stadol for pain.

At 4:30 p.m., Dr. Newman advised Plaintiff the patient was ready to start pushing; however, the epidural had caused a total block. In other words, the patient was unable to move her legs and consequently was unable to assist in the delivery. To assist the patient in her delivery Plaintiff lifted the patient's right leg with her left hand, until the patient was able to grab behind her thigh, and conducted perineal massage using her right hand. Plaintiff repeated this procedure during contractions for thirty minutes. The patient's husband lifted her left leg.

Plaintiff testified that her work frequently required her to assist patients in delivery and this sometimes involved assisting patients in the lifting of their legs. She stated, however, in this case the patient's leg was unusually heavy because the patient was five feet, three inches tall, and weighed 263 pounds. In addition, this delivery was unusual because the patient could not assist with lifting her legs. Plaintiff testified this delivery was the first time she had, with this employer, been responsible for lifting the leg(s) of a patient during a delivery without receiving any assistance from the patient.

In the evening after the 2 October delivery, Plaintiff noticed an ache in her left shoulder, and two days later she reported this to her supervisor. On 17 January 1996, Plaintiff underwent arthroscopic surgery which revealed a partial thickness tear in her left rotator cuff. She has not returned to work for Defendant-Hospital or any other employer since the surgery.

Denise White (White), Plaintiff's supervisor and the nurse manager for obstetrical and neonatal services at Defendant-Hospital, tes-

tified that about 75 percent of labor and delivery patients at Defendant-Hospital receive an epidural, and about 80 percent of the patients deliver vaginally. She further stated the range of patients in labor and delivery vary from "[v]ery young, very old, very small, very large." The desired effect of an epidural "is that [the] patient to be able to have relief for the pain but yet still feel some pressure so they can push." While patients do not usually have a total block, a total block "can occur," although White could not state "how often that occurs." She further stated "a patient may have a very heavy epidural where they have heavy legs," and lifting a patient's legs during delivery is a "job expectation."

White testified concerning the events that took place on 2 October 1995, as follows:

> Q: Have—the events that [Plaintiff] described on October 2nd, 1995, are those typical events within the usual course and scope of this employment or was there something unusual?
>
> A: All of the things that she described could happen during the course of labor and delivery, the pushing, the epidural with the heavy block versus a light block. Those are all things that could happen within the course of the interpartum period. Like I said, that's a very varied—it's hard to give a normal or typical, but those are all things that could happen during labor.

The Commission made the following pertinent findings of fact and conclusions of law:

Findings of Fact

> 13. . . . Plaintiff's injury occurred while performing her usual employment duties in the usual way. . . .
>
> 14. While [P]laintiff did suffer some bodily injury on October 2, 1995, the injury was not a result of any unforeseen or unusual event and is therefore not a compensable injury by accident.

Conclusions of Law

> 1. On October 2, 1995, the [P]laintiff sustained an injury on the job that was not an injury by accident . . . .
>
> 2. Plaintiff's work related injury is not compensable.

3. Plaintiff, not having carried her burden of proving an injury by accident and resulting disability, is not entitled to compensation under the Workers' Compensation Act.

The Commission therefore denied Plaintiff's claim for compensation.

The dispositive issue on appeal is whether there is competent evidence in this record to support the finding that Plaintiff's injuries "occurred while performing her usual employment duties in the usual way."

Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if it is caused by an "accident," and the claimant bears the burden of proving an accident has occurred. *See* N.C. Gen. Stat. § 97-2 (6) (Supp. 1998); *Morrison v. Burlington Industries*, 304 N.C. 1, 13, 282 S.E.2d 458, 467 (1981) (claimant has the burden of showing an injury arising from an accident during the scope of employment has occurred). An accident is "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (citations omitted). An accident therefore involves "the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Id.*

"In an appeal from a decision by the Industrial Commission, the scope of review is limited to a determination of whether the Commission's findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings." *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 316, 283 S.E.2d 436, 437-38 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982). This Court therefore is bound by findings of fact based on competent evidence "even though the record contains evidence that would support contrary findings." *Smith v. Burlington Industries*, 35 N.C. App. 105, 106-07, 239 S.E.2d 845, 846 (1978). The Commission's findings of fact may be set aside, however, when "there is a complete lack of competent evidence to support them." *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980).

In this case, there is a complete lack of competent evidence to support the findings that Plaintiff's injuries "occurred while performing her usual employment duties in the usual way," and were "not a result of any unforeseen or unusual event." The undisputed evidence is that Plaintiff had never in her eleven years of work with Defendant-

Hospital assisted a patient in child delivery where she was required, without any assistance from the patient, to lift the leg(s) of the patient, especially a patient weighing 263 pounds. The fact that her job responsibilities did include assisting patients who received epidurals resulting in a total block is not dispositive. The question is whether her regular work routine required lifting the legs of women weighing 263 pounds who had received epidurals resulting in total blocks, *see Gladson v. Piedmont Stores*, 57 N.C. App. 579, 580, 292 S.E.2d 18, 19 (1982) (injury caused by interruption of employee's "regular work routine" constitutes accident); *Gabriel v. Newton*, 227 N.C. 314, 317-18, 42 S.E.2d 96, 98 (1947) (injury caused by overexertion constitutes accident), and there is no evidence that it did. Accordingly, the Opinion and Award of the Commission is reversed.

Reversed and remanded.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. RUSSELL L. DORSEY

No. COA98-1233

(Filed 21 September 1999)

1. **Criminal Law— insanity—expert testimony—credibility for the jury—no directed verdict**

In a case involving assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err by failing to direct a verdict of not guilty based on defendant's expert testimony stating defendant was insane because even if the evidence of insanity is uncontroverted, the credibility of that testimony is for the jury and thus precludes the entry of a directed verdict.

2. **Appeal and Error— preservation of issues—voluntariness of statement—constitutional issue—not raised at trial**

In a case involving assault with a deadly weapon with intent to kill inflicting serious injury, defendant failed to argue at trial about the voluntariness of his statement to a detective that "there was no second knife," and therefore, this issue cannot be raised on appeal.

Appeal by defendant from judgment dated 24 April 1998 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 24 August 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins, for the State.

Delores Jones Faison, for defendant-appellant.

GREENE, Judge.

Russell L. Dorsey (Defendant) appeals a judgment reflecting a jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury for which he received a sentence of 151 months to 191 months in prison.

Before trial Defendant gave notice of his intent to raise insanity as a defense and pleaded not guilty. At trial the State's evidence, in summary form, tends to show that on 9 November 1996, Sharon L. Perry (Ms. Perry) was stabbed by Defendant, her boyfriend. A knife was found at the scene of the attack. As a consequence of the attack, Ms. Perry sustained multiple wounds to her left side, left flank, face, neck, chest, left shoulder, right arm, and right hand, with the most serious being lacerations to the diaphragm and colon. Ms. Perry remained hospitalized for five days and stayed out of work for approximately one month. After Defendant was arrested, he was advised of his constitutional *Miranda* rights and indicated he did not want to answer any questions without the presence of an attorney. While Defendant was waiting in the processing area of the police department to be fingerprinted, Detective Paul Harrington (Detective Harrington) had a conversation with other officers regarding organizing a search for an additional knife. The conversation took place in the presence of the Defendant. Upon hearing the conversation, Defendant spontaneously stated "there was no second knife."[1]

Defendant presented the testimony of Thomas Stack, Ph.D. (Dr. Stack), a clinical psychologist. Dr. Stack testified the admission notes of Cherry Hospital on 20 November 1996 suggested Defendant was quite psychotic and disorganized. He determined Defendant had previously been diagnosed as suffering from schizophrenia as early as 1990 with a history of psychotic and bizarre behavior and being out of touch with reality. Dr. Stack was of the opinion it was "highly likely at

1. At trial, Defendant objected to this testimony on the ground his *Miranda* rights had been violated. The trial court overruled the objection.

the time of the crime [D]efendant was actively psychotic and did not know fully what he was doing."

At the end of the State's case and again at the end of all the evidence, Defendant moved to dismiss the case on the ground the State "had failed to show any . . . intent . . . to kill." At the end of all the evidence Defendant also moved to dismiss the case on the ground the State had failed to rebut the testimony of Dr. Stack that Defendant was insane at the time of the assault. All these motions were denied.

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[1] The dispositive issue is whether Defendant's expert testimony that he was insane entitled him to a directed verdict of not guilty based on his insanity defense.

Defendant argues he was entitled to a directed verdict of not guilty, based on his insanity, because he offered expert testimony that he was insane and the testimony was not contradicted by the State. We disagree.

Every person is presumed sane and the "burden of proving insanity is properly placed on the defendant in a criminal trial." *State v. Leonard*, 296 N.C. 58, 64, 248 S.E.2d 853, 856 (1978). Thus, "[i]f no evidence of insanity be offered the presumption of sanity prevails." *Leonard*, 296 N.C. at 65, 248 S.E.2d at 857. If evidence of insanity is offered by the defendant, even if un-controverted, the credibility of that testimony is for the jury and thus precludes the entry of a directed verdict for defendant on insanity. *Id.* (diagnosis of mental illness by expert is not conclusive on issue of insanity); *see Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979) (directed verdict for party with burden of proof proper only when credibility is "manifest as a matter of law").

In this case, Defendant offered expert testimony that he was insane at the time of the assault. This evidence does not entitle Defendant to a directed verdict on the insanity issue, as the credibility of that testimony is for the jury. This is so, even in the absence of any testimony, lay or expert, from the State to contradict Defendant's expert testimony.[2] Accordingly, the trial court correctly denied Defendant's motion for directed verdict on this issue.

Defendant also moved for directed verdict on the grounds the State had failed in its burden of proving all the elements of the crime

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2. State offers it did present lay testimony on the issue of Defendant's sanity. We need not review that evidence for its sufficiency.

charged, particularly the element of assault with "intent to kill." Defendant's sole argument in support of this motion was that he could not form this intent to kill because of his insanity. As we have held that insanity was properly an issue for the jury, the trial court correctly denied this motion.

[2] Defendant finally argues in his brief to the Court that his statement to Detective Harrington that "there was no second knife" was inadmissible because it was not voluntarily given, a Fourteenth Amendment issue. *See State v. Johnson*, 304 N.C. 680, 683, 285 S.E.2d 792, 794 (1982) (citing *Rogers v. Richmond*, 365 U.S. 534, 540-41, 5 L. Ed. 2d 760, 766 (1961)). At trial, Defendant argued the statement was inadmissible on the ground his *Miranda* rights were violated, a Fifth Amendment issue. *Miranda v. Arizona*, 384 U.S. 436, 467, 16 L. Ed. 2d 694, 719 (1966). The voluntariness of the statement was not an issue raised at trial and thus cannot be raised in this Court. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). We do not address the *Miranda* issue, as that matter is not argued by Defendant in his brief. *See State v. Davis*, 68 N.C. App. 238, 245, 314 S.E.2d 828, 833 (1984). Accordingly we do not address either issue.

No error.

Judges TIMMONS-GOODSON and HORTON concur.

STEVE H. BAILEY, ADMINISTRATOR OF THE ESTATE OF CODY ADAM BAILEY, AND APRIL DAWN BAILEY AND STEVE H. BAILEY v. KENNETH D. GITT, M.D., THOMAS J. VAUGHN, JR., M.D., MT. AIRY OB-GYN CENTER, INC., NORTHERN HOSPITAL OF SURRY COUNTY, AND NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY

No. COA98-1406

(Filed 21 September 1999)

Appeal and Error— mootness—underlying negligence claim dismissed

Plaintiffs' appeal of a directed verdict in their wrongul death action was dismissed as moot where the trial court granted a directed verdict for defendants on most of plaintiffs' claims arising from the death of their stillborn child but left open the possibility of a recovery of damages for funeral expenses and nominal

damages, keeping alive the underlying issue of negligence; plaintiffs voluntarily dismissed with prejudice all claims not previously dismissed; and plaintiffs then appealed the directed verdict. Claims for particular kinds of damage cannot exist without an underlying claim of negligence or fault and plaintiffs' voluntary dismissal with prejudice renders this appeal moot. Plaintiffs abandoned their appeal from the directed verdict by failing to argue it on appeal.

Appeal by plaintiffs from judgments entered 20 May 1998 by Judge H. W. Zimmerman, Jr., in Surry County Superior Court. Heard in the Court of Appeals 25 August 1999.

Maready Comerford & Britt, L.L.P., by W. Thompson Comerford, Jr., and Martha Marie Eastman, for plaintiff-appellants.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendant-appellees.

MARTIN, Judge.

Plaintiffs brought this action alleging that the negligence of defendants proximately caused the wrongful death of their stillborn son, and sought damages for wrongful death, negligent infliction of emotional distress, and punitive damages. At the close of plaintiff's evidence, defendants moved for and were granted a directed verdict dismissing plaintiffs' claims for emotional distress, punitive damages, and all damages recoverable under the wrongful death statute except funeral expenses and nominal damages. Plaintiffs then submitted to a voluntary dismissal with prejudice as to "all claims which had not previously been dismissed by the Court pursuant to defendants' motion for directed verdict." Plaintiffs appeal the directed verdict; defendants move to dismiss the appeal on grounds that the issues raised thereby are moot.

To bring an action under G.S. § 28A-18-2 (the wrongful death statute), a plaintiff must allege a wrongful act, causation, and damages. Negligence is a "wrongful act" upon which a wrongful death claim may be predicated. See, e.g., *Coleman v. Rusidill*, 131 N.C. App. 530, 508 S.E.2d 297 (1998). Therefore, a defendant may be entitled to a directed verdict on a wrongful death claim if the plaintiff fails to provide adequate proof of negligence. N.C. Gen. Stat. § 1A-1, Rule

50(a). In addition, claims for certain kinds of damages can be dismissed by the trial court as too speculative. *Greer v. Parsons*, 331 N.C. 368, 416 S.E.2d 174 (1992) (holding that dismissing claims for pecuniary loss and loss of companionship for a stillborn child was appropriate because "an award of damages covering these kinds of losses would necessarily be based on speculation rather than reason."). Dismissal of claims for certain types of damages by the trial court does not necessarily dismiss the underlying allegation of negligence upon which the wrongful death claim is predicated; however, a claim for negligence cannot be split into its various kinds of damages. *Smith v. Red Cross*, 245 N.C. 116, 95 S.E.2d 559 (1956). Therefore, claims for particular kinds of damage cannot exist without an underlying claim of negligence or fault.

In the present case, the trial court granted a directed verdict in favor of defendants with respect to plaintiffs' claims for loss of companionship, pain and suffering, pecuniary damages, and punitive damages, holding that these claims were too speculative because the child was stillborn. However, by leaving open the possibility of recovery of damages for funeral expenses and nominal damages, the court kept alive the underlying issue of negligence for determination by the jury. Plaintiffs then voluntarily dismissed with prejudice "all claims which had not previously been dismissed by the Court pursuant to defendants' motion for a directed verdict." These dismissed claims included plaintiffs' claim for nominal damages, damages for funeral expenses, and the underlying claim of negligence.

A voluntary dismissal with prejudice is the same as a judgment on the merits, *Miller Bldg. Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 497 S.E.2d 433 (1998), and when there has been a judgment on the merits on an issue of negligence, any appeal concerning a directed verdict on issues predicated upon that negligence is rendered moot. *Bullard v. N.C. National Bank*, 31 N.C. App. 312, 229 S.E.2d 245 (1976) (a jury's verdict of no negligence on the part of agent doctors relieved their parent corporation of any respondeat superior liability, and rendered moot any assignment of error to the trial court's directed verdict for the parent corporation).

Therefore, plaintiffs' voluntary dismissal with prejudice of the issue of negligence, upon which all of their claims were based, renders this appeal moot, and precludes us from ruling on any of the other issues raised by the parties in regards to the wrongful death claim.

> When pending an appeal . . ., a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

Parent-Teacher Assoc. v. Bd. of Education, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969).

Plaintiffs have abandoned their appeal from the directed verdict dismissing their claim for negligent infliction of emotional distress by failing to argue it on appeal. N.C.R. App. P. 28(b). Accordingly, this appeal must be dismissed.

Dismissed.

Judges LEWIS and HUNTER concur.

ZELMA BOWEN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA98-1335

(Filed 21 September 1999)

Appeal and Error— assignment of error—not proper—appeal dismissed

Plaintiff's appeal was dismissed where her assignment of error did not plainly state the statutory authority that defendant allegedly exceeded, the procedure defendant violated, or the errors of law committed; stated three errors in one assignment; and failed to provide clear and specific record or transcript references relating to each alleged error. N.C. R. App. P. 10(c).

Appeal by petitioner from order filed 17 July 1998 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 17 August 1999.

Pamlico Sound Legal Services, by M. Jason Williams, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Grady L. Balentine, Jr., for the State.

GREENE, Judge.

Zelma Bowen (Plaintiff) appeals from a 14 July 1998 Superior Court order affirming a 2 January 1998 decision of the North Carolina Department of Health and Human Services (Department), which found Plaintiff ineligible for assistance under the State-County Special Assistance for Adults Program (Special Assistance).

Plaintiff applied for Special Assistance in September 1995, and Department denied Plaintiff's claim on 13 March 1997 on the ground that her "income exceeds the allowable limit to receive assistance."

The dispositive issue is whether Plaintiff's assignment of error complied with Rule 10(c) of the North Carolina Rules of Appellate Procedure.

Plaintiff's sole assignment of error states: "The trial court erred in finding the decision of the Defendant/Respondent was within the statutory authority of the agency, was made upon lawful procedure, and was not affected by error of law." Assignments of error must "state plainly, concisely and without argumentation the legal basis upon which error is assigned," N.C.R. App. P. 10(c)(1); *see also* N.C.R. App. P., Appendix C, Table 4, and each assignment of error must "so far as practicable, be confined to a single issue of law." N.C.R. App. P. 10(c)(1). An appellate court may dismiss an appeal for failure to follow the Rules of Appellate Procedure. N.C.R. App. P. 25(b), 34(b)(1).

In this case, Plaintiff's assignment of error does not plainly state the statutory authority that Department exceeded, the procedure Department violated, or the errors of law Department committed. *See Kimmel v. Brett*, 92 N.C. App. 331, 334-35, 374 S.E.2d 435, 436-37 (1988) (assignment of error that trial court erred by allowing prejudicial testimony found insufficient under Rule 10 because the assignment failed to state the specific basis upon which appellant assigned error). Plaintiff's assignment of error also states three separate errors in one assignment in violation of Rule 10(c). Finally, we note that

Plaintiff's assignment of error failed to provide "clear and specific record or transcript references" relating to each alleged error. N.C.R. App. P. 10(c)(1).

Accordingly, Plaintiff's appeal is dismissed.

Dismissed.

Judges TIMMONS-GOODSON and HORTON concur.

ROBERT BLEDSOE, PLAINTIFF v. COUNTY OF WILKES, ET AL., DEFENDANTS

No. COA98-1403

(Filed 21 September 1999)

Appeal and Error— pro se plaintiff—appellate rules—multiple violations—appeal dismissed

A pro se plaintiff's appeal was dismissed for multiple violations of the Rules of Appellate Procedure. The rules apply to everyone.

Appeal by plaintiff from judgment entered 29 June 1998 by Judge Julius A. Rousseau in Wilkes County Superior Court. Heard in the Court of Appeals 25 August 1999.

Robert Bledsoe, civil pauper, pro se, for plaintiff-appellant.

Davis and Hamrick, L.L.P., by H. Lee Davis, Jr. and James G. Welsh, Jr., for defendant-appellees.

PER CURIAM.

Plaintiff has appealed from summary judgment entered in favor of defendants. However, plaintiff has failed to comply with the Rules of Appellate Procedure, thereby warranting dismissal of his appeal. A few of these violations appear below:

1. Plaintiff failed to file the record on appeal with this Court within fifteen (15) days after it was settled, in violation of Rule 12(a).

2. Plaintiff failed to include within the record the Return of Summons, as required by Rule 9(a)(1)(c).

3. Certain motions, notices, and other papers plaintiff included as part of the record did not contain filing dates. This violates Rule 9(b)(3).

4. Plaintiff failed to list assignments of error at the conclusion of the record, as required by Rules 9(a)(1)(k) and 10(c)(1). Thus, plaintiff's brief also failed to refer to any assignments of error, in contravention of Rule 28(b)(5).

The Rules of Appellate Procedure are mandatory; failure to comply with these rules subjects an appeal to dismissal. *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). Furthermore, these rules apply to everyone—whether acting *pro se* or being represented by all of the five largest law firms in the state. Because plaintiff violated many of the appellate rules, his appeal must be dismissed, notwithstanding his *pro se* status.

Additionally, we have reviewed this case on its merits and conclude that plaintiff's arguments are without merit.

Dismissed.

Panel consisting of:

Judges LEWIS, MARTIN, and HUNTER

CONNIE G. BLACKMON, PLAINTIFF v. MICHELLE C. BUMGARDNER, AND MARVIN L. McMILLAN, DEFENDANTS

No. COA98-1394

(Filed 5 October 1999)

1. Costs— attorney fees—settlement amount greater than actual recovery

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by denying plaintiff's motion for attorney fees because the amounts offered in settlement were more than four times the amount recovered by plaintiff at trial. N.C.G.S. § 6-21.1.

2. Costs— judgment less than offer of judgment

The trial court did not err in a negligence case arising out of an automobile accident by awarding a portion of costs to defendant under N.C.G.S. § 1A-1, Rule 68(a) because plaintiff recovered a judgment less than defendant's offer of judgment and plaintiff must bear defendants' costs incurred since the making of the offer.

3. Witnesses— expert witness fees—appealability—failed to assign error—no subpoena—trial court's discretion

The trial court did not err in a negligence case arising out of an automobile accident by failing to award plaintiff expert witness fees because: (1) plaintiff failed to assign error to the trial court's denial of plaintiff's request for expert witness fees; (2) even if the error was properly assigned, there is no evidence to suggest plaintiff's expert witnesses appeared in court in response to a subpoena as required by N.C.G.S. § 7A-314; and (3) even if subpoenas were issued, the decision to award expert fees lies within the trial court's discretion.

4. Motor Vehicles— automobile accident—judgment notwithstanding the verdict—credibility a jury issue

The trial court did not err in a negligence case arising out of an automobile accident by denying plaintiff's motions for judgment notwithstanding the verdict under N.C.G.S. § 1A-1, Rule 50 and for a new trial when defendants stipulated to the issue of negligence but not to the issues of proximate cause or damages because the jury weighs credibility and has the right to believe any part or none of the testimony concerning plaintiff's injuries, the reasonableness of her medical expenses, and the extent of her pain and suffering.

5. Damages and Remedies— automobile accident—motion to set aside the verdict—inadequate damages—jury determines if medical treatment is reasonably necessary

The trial court did not err in a negligence case arising out of an automobile accident by denying plaintiff's motion to set aside the verdict under N.C.G.S. § 1A-1, Rule 59 based on inadequate damages because defendants rebutted the presumed reasonableness of the medical charges and it remains entirely within the province of the jury to determine whether certain medical treatment was reasonably necessary. N.C.G.S. § 8-58.1.

6. Motor Vehicles— jury instructions—matters of insurance—limit deliberations to matters in evidence—additional instructions within trial court's discretion

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by refusing to instruct the jury that it should not consider matters of insurance because the trial court properly instructed the jury to limit its deliberations to matters in evidence and the decision whether to give the jury additional instructions about matters of insurance was within the trial court's discretion.

7. Witnesses— automobile accident—expert witness—chiropractor—adequately instructed

The trial court did not err in a negligence case arising out of an automobile accident by refusing to instruct the jury that a chiropractor is an expert witness because the trial court adequately instructed the jury on the issue of expert testimony under N.C.G.S. § 90-157.2 and the trial court told the jury that the doctor was accepted as an expert in the field of chiropractic.

8. Evidence— cross-examination of plaintiff—questions concerning date of communications—attorney-client privilege not violated—opened the door

The trial court did not err by allowing defense counsel to cross-examine plaintiff about privileged communications between plaintiff and her attorney because: (1) defendants merely asked whether plaintiff had communications at all with her attorney on the dates in question and defendants did not seek to elicit the substance of those conversations from plaintiff; and (2) plaintiff's attorney opened the door on redirect by asking plaintiff about conversations she had with her attorney.

Judge GREENE dissenting in part.

Appeal by plaintiff from judgment entered 27 July 1998 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 24 August 1999.

On 18 July 1995, Connie G. Blackmon (plaintiff) was driving a 1988 Mazda automobile on North New Hope Road in Gastonia, Gaston County, North Carolina, approaching the Kentucky Fried Chicken (KFC) parking lot. Michelle C. Bumgardner (defendant

Bumgardner) drove Marvin L. McMillan's (defendant McMillan) truck from the KFC parking lot onto North New Hope Road in the path of the plaintiff's vehicle. The vehicles driven by plaintiff and defendant Bumgardner collided.

Officer D.G. Luckadoo of the Gastonia Police Department investigated the automobile accident. Defendant Bumgardner and her two children reported no injuries; the officer assigned plaintiff an injury code of "C" indicating complaints of injury with no visible signs. Following the accident, plaintiff initially sought treatment at the emergency room of Gaston Memorial Hospital, where she was examined by Dr. Paul M. Peindl. Dr. Peindl diagnosed contusions to the upper left chest and right knee of plaintiff. He concluded that there were no restrictions in plaintiff's ability to return to work, and plaintiff was discharged in stable condition.

The next day, plaintiff began chiropractic treatment with Dr. Fletcher G. Keith of Keith Clinic of Chiropractic. Plaintiff initially complained of headaches, neck pain, and popping sounds in the neck when turning her head. Dr. Keith diagnosed a cervical sprain, a lumbar sprain and post-traumatic cephalgia. He treated plaintiff until 7 January 1996 when she was released from his care.

At trial, plaintiff testified that she never had migraine headaches before the accident, but now suffers from them at least once a month. In accordance with Dr. Keith's instructions, plaintiff stayed out of work for one week following the accident. Defense counsel asked plaintiff about dates on which she had communications with her attorney regarding her physical condition, and specifically whether plaintiff had any contact with her attorney from the time of the accident in July 1995 to the filing of the complaint in November 1996. Over objection, the court instructed plaintiff to answer.

At trial, plaintiff sought damages for her pain and suffering, for $2,379.00 in medical expenses and $406.29 in lost wages. Defendants stipulated to negligence, but not to proximate cause nor to damages. The jury awarded plaintiff damages of $900.00. The trial court denied plaintiff's motions for a judgment notwithstanding the verdict and for a new trial. The trial court also taxed a portion of defendant's costs to the plaintiff, and denied plaintiff's motion for attorney fees. Plaintiff appealed, assigning error.

Tim L. Harris & Associates, P.C., by William E. Moore, Jr., for plaintiff appellant.

Morris York Williams Surles & Barringer, by R. Gregory Lewis and Demetrius L. Worley, for defendant appellees.

HORTON, Judge.

Plaintiff contends the trial erred by: (I) denying plaintiff's motion for attorney fees, awarding costs to defendant, and failing to award plaintiff expert witness fees; (II) refusing to set aside the verdict and grant a new trial on the issue of damages; (III) refusing to instruct the jury that it should not consider matters of insurance; (IV) refusing to instruct the jury that a chiropractor is an expert witness; and (V) allowing defense counsel to cross-examine plaintiff about privileged communications between plaintiff and her attorney.

I. Costs and Fees

Award of Attorney Fees

[1] Plaintiff argues that the trial court erred in denying her motion for an award of attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 (1997), which provides that

> [i]n any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

In *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973), our Supreme Court upheld an award of attorney's fees under section 6-21.1 and stated that:

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to

> bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Id. at 239, 200 S.E.2d at 42; *City Finance Co. v. Boykin*, 86 N.C. App. 446, 450, 358 S.E.2d 83, 85 (1987). "The allowance of counsel fees under G.S. 6-21.1 is, by the express language of the statute, in the discretion of the presiding judge. The case law in North Carolina is clear that to overturn the trial judge's determination, the defendant must show an abuse of discretion." *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Trull*, 349 N.C. 428, 445, 509 S.E.2d 178, 190 (1998) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In the case before us, we do not find an abuse of discretion by the trial court. Upon plaintiff's motion, the court heard arguments from counsel for both parties. Defense counsel argued that, prior to trial, defendant made an offer of judgment of $4,100.00 which was rejected by plaintiff. After hearing other arguments from both parties, the trial court stated:

> Having considered the arguments of counsel for attorney's fees based on the fact that Jury award was substantially less than the offered judgment, I'm going to exercise my discretion and DENY counsel's request for attorney fees.

This Court has recently held that in exercising its discretion, the trial court should consider all the circumstances of the case, which include offers of settlement made by the opposing party, and the timing of those offers. *See Washington v. Horton*, 132 N.C. App. 347, 351, ___ S.E.2d ___, ___ (1999). Here, a substantial offer of judgment was made well before trial, and that offer was increased through negotiations to the sum of $4,750.00. The amounts offered in settlement were more than four times the amount recovered by the plaintiff at trial. We hold that under these circumstances the trial court did not abuse its discretion in denying plaintiff's motion for an award of attorney fees.

Costs Awarded to Defendants

[2] Plaintiff next contends the trial court erred in awarding a portion of their costs to defendants. In the judgment dated 27 July 1998, the trial court awarded "[c]osts incurred subsequent to October 8, 1997, including Defendants' post-Offer of Judgment costs of $275.85, are taxed to the Plaintiff." It appears the trial court based the award on N.C. Gen. Stat. § 1A-1, Rule 68(a), which provides in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the *offeree* must pay the costs incurred after the making of the offer.

Id. (1990) (emphasis added). "The purpose of Rule 68 is to encourage settlements and avoid protracted litigation. The offer operates to save the defendant the costs from the time of that offer if the plaintiff ultimately obtains a judgment for less than the sum offered." *Scallon v. Hooper*, 58 N.C. App. 551, 554, 293 S.E.2d 843, 844, *disc. review denied*, 306 N.C. 744, 295 S.E.2d 480 (1982). Defendants made an offer of judgment to plaintiff on 8 October 1997 in the amount of $4,100.00. Plaintiff recovered a judgment in the amount of $900.00, which is less than defendant's offer of judgment. Consistent with Rule 68(a) and the holding in *Scallon*, plaintiff must bear defendants' costs incurred since the making of the offer on 8 October 1997. The trial court did not err in awarding post-offer of judgment costs to defendants. This assignment of error is overruled.

Expert Witness Fees

[3] Plaintiff contends the trial court erred in failing to award plaintiff expert witness fees. A review of the record on appeal reveals that plaintiff failed to assign error to the trial court's denial of plaintiff's request for expert witness fees. The " '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.' " *Wicker v. Holland*, 128 N.C. App. 524, 528, 495 S.E.2d 398, 400-01 (1998); N.C.R. App. P. 10(a). Even assuming *arguendo* that plaintiff properly

assigned error, we hold that the trial court did not err in denying plaintiff's motion.

The decision whether to award expert witness fees lies within the court's discretion. N.C. Gen. Stat. § 7A-314 provides in pertinent part:

> (a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court.
>
> . . . .
>
> (d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, *in its discretion*, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section.

Id. (Cum. Supp. 1998) (emphasis added). Our Supreme Court has interpreted the above statute and held that

> Sections (a) and (d) must be considered together. Section (a) makes a witness fee for any witness, except those specifically exempted therein, dependent upon his having been subpoenaed to testify in the case, and it fixes his fee at $5.00 per day. As to expert witnesses, Section (d) modifies Section (a) by permitting the court, in its discretion, to increase their compensation and allowances. The modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation.

State v. Johnson, 282 N.C. 1, 27-28, 191 S.E.2d 641, 659 (1972). There is no evidence in the record to suggest that plaintiff's expert witnesses appeared in court in response to a subpoena. However, even if subpoenas were issued, the court has discretion on whether to award expert witness fees. We cannot say under these circumstances that

the trial court abused its discretion, or that its ruling was "manifestly unsupported by reason" or so arbitrary that it could not have been the result of a "reasoned decision." *See Trull*, 349 N.C. at 445, 509 S.E.2d at 190. This assignment of error is overruled.

II. JNOV and New Trial

[4] Plaintiff next contends the trial court erred in denying her motions for judgment notwithstanding the verdict and for a new trial. Rule 50 of the North Carolina Rules of Civil Procedure provides in pertinent part:

> (b) Motion for Judgment Notwithstanding the Verdict.—
>
> (1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case, the motion shall be granted if it appears that the motion for directed verdict could properly have been granted.

N.C. Gen. Stat. § 1A-1, Rule 50 (1990). A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence to go to the jury. *Jacobsen v. McMillan*, 124 N.C. App. 128, 131, 476 S.E.2d 368, 369 (1996). A motion for judgment notwithstanding the verdict is cautiously and sparingly granted. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985). Further, " '[i]t has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.' " *Id.* at 380, 329 S.E.2d at 343 (citations omitted). "In considering a motion for [judgment notwithstanding the verdict], the trial court is to consider all evidence in the light most favorable to the party opposing the motion;

the nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence; and contradictions must be resolved in the nonmovant's favor." *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986).

In support of her position, plaintiff relies upon the case of *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974). In *Robertson*, the minor plaintiff and his father sued the defendant for damages resulting from defendant's alleged negligence. The minor plaintiff sought to recover for personal injuries, and the father sought recovery for medical expenditures incurred by reason of his son's personal injuries. The medical expenses were stipulated to be in the amount of $1,970.00. The jury answered the issues of negligence in favor of the plaintiffs and awarded $1,970.00 to the father and nothing to the minor plaintiff. The trial court denied the plaintiff's motion for a new trial, and this Court found no error in the trial. Our Supreme Court held that the jury arbitrarily ignored the minor plaintiff's proof of pain and suffering, reasoning that "[i]f the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to *all* damages that the law provides in such case." *Id.* at 566, 206 S.E.2d at 194.

Defendant contends that the case *sub judice* and *Robertson* are distinguishable. We agree. Here, defendants stipulated to the issue of negligence, but not to the issues of proximate cause or damages. We note that

> [a] stipulation is an agreement between the parties establishing a particular fact in controversy. The effect of a stipulation is to eliminate the necessity of submitting that issue of fact to the jury. Where facts are stipulated, they are deemed established as fully as if determined by jury verdict. A stipulated fact is not for the consideration of the jury, and the jury may not decide such fact contrary to the parties' stipulation.

Smith v. Beasley, 298 N.C. 798, 800-01, 259 S.E.2d 907, 909 (1979) (citations omitted). Because the parties did not stipulate to the issues of proximate cause and damages, these issues were to be considered by the jury. In *Beasley*, as in this case,

> there was no stipulation removing any element of damages from the consideration of the jury. The testimony of plaintiff's witnesses remained mere evidence in this case to be considered by

> the jury. It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove. In weighing the credibility of the testimony, the jury has the right to believe any part or none of it.

Id. at 801, 259 S.E.2d at 909 (citation omitted). In the case before us, the jury considered plaintiff's evidence with regard to her medical expenses, lost wages, and pain and suffering. The jury performed its function of hearing the testimony and weighing the credibility of plaintiff's witnesses. In weighing credibility, the jury had the right to believe any part or none of the testimony concerning plaintiff's injuries, the reasonableness of her medical expenses, and the extent of her pain and suffering. We hold the trial court did not abuse its discretion in denying plaintiff's motion for judgment notwithstanding the verdict.

[5] Plaintiff further contends that the trial court erred in denying her motion to set aside the verdict. She relies on N.C. Gen. Stat. § 1A-1, Rule 59, which provides in pertinent part:

> (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> * * * *
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]

Id. (1990). Plaintiff also cites a relevant North Carolina statute which provides:

> Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian . . . is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges.

N.C. Gen. Stat. § 8-58.1 (1986). At trial, plaintiff's medical records were admitted into evidence. Plaintiff testified that her medical expenses amounted to $2,379.00. This Court has interpreted the language of N.C. Gen. Stat. § 8-58.1 and held, among other things,

> when plaintiff proffers the evidence required by section 8-58.1, the finder-of-fact must find the total amount of the alleged medical charges is reasonable, unless defendant carries its burden of going forward by rebutting the presumed fact of reasonableness.
>
> Nonetheless, to recover medical expenses plaintiff bears the ultimate burden of proving "both that the medical attention [plaintiff] received was reasonably necessary for proper treatment of [plaintiff's] injuries and that the charges made were reasonable in amount." Put simply, an aggrieved party must satisfy a two-prong test—the claimed medical charges were (1) reasonably necessary, and (2) reasonable in amount.
>
> . . . The medical expenses presumption does not, however, operate to preclude the jury from finding that [plaintiff's] medical expenses were not reasonably necessary for the proper treatment of his injuries. In fact, to hold otherwise would infringe on the unassailable right of the jury to weigh evidence and assess the credibility of witnesses.

Jacobsen, 124 N.C. App. at 134-35, 476 S.E.2d at 371-72 (citations omitted). Therefore, "it remains entirely within the province of the jury to determine whether certain medical treatment was reasonably necessary . . . ." *Id.* at 135, 476 S.E.2d at 372.

Counsel for defendant elicited the following from plaintiff's expert witness, Dr. Peindl:

> Q: And, in fact, there were no complaints with respect to the neck?
>
> A: No.
>
> Q: And no complaints with respect to the back?
>
> A: No.
>
> * * * *
>
> Q: So in your opinion at the time you saw her there was no reason for her not to return to work or her usual activities; is that right?
>
> A: No.

The testimony of Dr. Peindl could be considered by the jury in assessing the nature of plaintiff's injury and the amount of her damages. Plaintiff contends that defendant failed to rebut the presumption

under N.C. Gen. Stat. § 8-58.1 because defendant failed to offer any evidence to challenge the testimony of plaintiff's expert witnesses. We disagree. *See Smith v. Beasley*, 298 N.C. 798, 259 N.C. 907 (where defendant offered no evidence, the trial court did not err in denying plaintiff's motion to set aside the jury verdict of $3,350.00 as an inadequate award of damages; and there was no merit to plaintiff's contention that because defendant offered no evidence her evidence was uncontradicted and should be treated as a stipulation, since the testimony of plaintiff's witnesses was merely evidence to be considered, weighed, and believed or not believed by the jury). We do not find any evidence of passion or prejudice in the jury's exercise of its fact-finding functions. The trial court did not abuse its discretion in denying plaintiff's Rule 59(a) motion for a new trial. Plaintiff's assignment of error is overruled.

III. Instruction to Jury on Matters Not in Evidence

[6] Plaintiff contends the trial court erred in failing to instruct the jury that it was not to consider matters of insurance in reaching its verdict. The record reveals the following questions by the jury and the judge's response:

> THE COURT: The jury has a question. Well, they actually have three questions and I will read those to you now. The first one "Was the emergency room bill paid by insurance?" The second question, "If so, what percentage of the bill was paid?" The third question, "Were any other medical treatments paid by the defendant's insurance?" Do y'all wish to be heard with regard to a response?

After hearing counsel for both parties, the trial court adopted defense counsel's position to instruct the jury to consider only the evidence presented:

> THE COURT: All right. Members of the jury, I have received three written questions from you. I am going to ask you to recall and keep in mind all the evidence presented during the trial. I am going to ask you to recall and keep in mind and apply the instructions that I gave to you after the attorneys made their closing arguments and instruct you that, members of the jury, *you are to consider only the evidence presented. You are specifically instructed not to consider matters not presented and outside the scope of the evidence presented in open court during this trial.* At this time I am going to ask you to resume your deliberations.

Plaintiff objected in the absence of the jury to the trial court's failure to specifically instruct the jury that it was not to consider the matter of insurance in its deliberations. We disagree.

Plaintiff cites *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E.2d 808 (1965), for the proposition that evidence as to liability-insurance coverage is inadmissible because it is not only irrelevant but also incompetent. *Id.* at 390, 141 S.E.2d at 811-12. In *Spivey*, the trial court permitted defense counsel to elicit information from the plaintiff that he had received workmen's (now worker's) compensation benefits as a result of the accident. The Supreme Court reversed the case on other grounds, and pointed out that on retrial the existence of liability insurance or the receipt of worker's compensation benefits was not a proper subject of inquiry before the jury. *Spivey* does not inform our decision in this case. Here, the trial court properly instructed the jury to limit its deliberations only to matters in evidence. Plaintiff cites no other authority in support of her position.

Here, prior to the submissions of the questions about insurance by the jury, the judge adequately instructed the jury on the plaintiff's burden of proof, the law of negligence, and consideration of expert testimony. The decision whether to give the jury additional instructions about matters of insurance was one within the trial court's sound discretion, and its decision will not be overturned absent an abuse of that discretion.

> It is well settled in this State that the court's charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, this Court will not sustain an exception on the grounds that the instruction might have been better.

Hanks v. Insurance Co., 47 N.C. App. 393, 404, 267 S.E.2d 409, 415 (1980). Here we hold there was no abuse of discretion by the trial court in its further instruction to the jury. Plaintiff's assignment of error is overruled.

IV. Expert Witness Instruction

[7] Plaintiff contends the trial court erred in failing to instruct the jury that a chiropractor is an expert witness in accordance with N.C. Gen. Stat. § 90-157.2. That statute reads as follows:

> A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law 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.

Id. (1997). In his charge to the jury, the trial judge instructed the jury on the issue of expert testimony as follows:

> In this case you have heard evidence from witnesses who have testified as expert witnesses. An expert witness is permitted to testify in the form of an opinion in a field where he purports to have specialized skill or knowledge.
>
> As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider . . . the evidence with respect to the witness' training, qualifications and experience or the lack thereof, the reasons, if any, given for the opinion, whether or not the opinion is supported by the facts you find from the evidence, whether or not the opinion is reasonable, and whether or not it is consistent with other believable evidence in the case.
>
> You should consider the opinion of an expert witness but you are not bound by it. In other words, you are not required to accept an expert witness' opinion to the exclusion of the facts and circumstances disclosed by other testimony.

The judge's charge to the jury is taken from the Pattern Jury Instructions on expert witness testimony. N.C.P.I. Civil 101.25. With regard to jury instructions, this Court

> has held the use of the N.C.P.I. to be "the preferred method of jury instruction." However, a new trial may be necessary if a pattern instruction misstates the law.

Barber v. Constien, 130 N.C. App. 380, 385, 502 S.E.2d 912, 915 (citation omitted), *disc. review denied*, 349 N.C. 351, 515 S.E.2d 699 (1998). We note that after Dr. Keith was qualified and tendered as an expert witness during the trial, the trial court instructed the jury that Dr. Keith "is accepted by the Court as an expert in the field of chiropractic." In the case before us, we hold the trial court adequately instructed the jury on the issue of expert testimony. The trial court did not err in failing to instruct the jury that a chiropractor is an expert witness in accordance with N.C. Gen. Stat. § 90-157.2 (1997). This assignment of error is overruled.

V. Confidential Communications

[8] Plaintiff finally contends that the trial court erred in allowing defense counsel to cross-examine plaintiff and then to argue to the jury about privileged communications between plaintiff and her attorney. On recross-examination defense counsel questioned plaintiff concerning communications she had with her attorney:

Q: The question was[,] is it your testimony that you had no contact with your attorney from the period of July '95 through November of '96?

MR. MOORE: Objection.

THE COURT: Overruled. You may answer.

A: Probably only in letter form from his office.

Q: Okay, and during that time maybe through letter form did you update your attorney before November, '96 with respect to your conditions?

MR. MOORE: Objection, Your Honor.

THE COURT: Overruled. You may answer.

* * * *

Q: Okay. So you never updated your attorney with respect to your physical condition before November of '96?

A: No.

MR. MOORE: Objection as to any communication between this client and her attorney.

THE COURT: Overruled.

With regard to the attorney-client privilege, our Supreme Court has held that:

> It is well established that the substance of communications between attorney and client is privileged under proper circumstances. *See generally* 1 Stansbury's North Carolina Evidence § 62 (Brandis rev. 1973); McCormick on Evidence § 87-95 (2nd ed. 1972). Not all facts pertaining to the lawyer-client relationship are privileged, however. "[T]he authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client." *Colton v. United States*, 306 F.2d 633, 637 (2nd Cir. 1962). We are of the opinion that the fact that an attorney did communicate with his client in a certain manner on a certain date is likewise not normally privileged information. "It is the substance of the [attorney-client] communication which is protected, however, not the fact that there have been communications." *United States v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964). . . .
>
> * * * *
>
> It is well settled that the privilege afforded a confidential communication between attorney and client may be waived by the client when he offers testimony concerning the substance of the communication.

State v. Tate, 294 N.C. 189, 192-93, 239 S.E.2d 821, 824-25 (1978). Here, there was no violation of the attorney-client privilege. Defendants' questions on cross-examination address whether plaintiff had communications at all with her attorney on the dates in question. Defendants did not seek to elicit the substance of those conversations from plaintiff. Further, on redirect examination, plaintiff's attorney opened the door about communications plaintiff had with his firm prior to the filing of the complaint:

> Q: And is that when you met with the lawyers in my office?
>
> A: Yes.
>
> Q: And is that when you provided us with the information on which we based our pleadings in this case?

A: Yes, sir.

Q: Had you come back in November and visited us again?

A: No.

* * * *

Q: So you came and provided us with information in July and it took my office that much time to get it filed; is that right?

A: Yes.

Since plaintiff opened the door about any contact she had with her attorney and the dates such contact occurred, it was not improper for defense counsel to cross-examine plaintiff about this issue. This assignment of error is overruled.

Plaintiff was afforded a fair trial before a jury and an able trial judge. In that trial we find

No error.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in part.

Judge GREENE dissenting in part.

I believe the trial court failed to exercise its discretion in denying Plaintiff's request for attorney's fees under N.C. Gen. Stat. § 6-21.1 and therefore that denial must be reversed and remanded for reconsideration. Otherwise, I fully concur with the majority.

The trial court denied Plaintiff's request for a section 6-21.1 award of attorney's fees on the explicit grounds that the "[j]ury award was substantially less than the offered judgment." This is an indication the trial court may have believed it was *required* to deny Plaintiff's request for attorney's fees on the ground the jury verdict was less than the offered judgment. This is simply not the law and also reveals the trial court did not exercise its discretion in ruling on Plaintiff's section 6-21.1 attorney's fees request.[1] *See Calloway v.*

1. The exercise of discretion pursuant to a section 6-21.1 motion requires a consideration of "the entire record," *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334 (1999), with emphasis on the economical feasibility of plaintiff's claim. *See Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973) (statute must be construed liberally to accomplish purpose).

Motor Co., 281 N.C. 496, 505, 189 S.E.2d 484, 490-91 (1972) (motion denied as a matter of law when it should have been decided as a matter of discretion must be reversed and remanded); N.C.G.S. § 6-21.1 (1997) (attorney's fee award in discretion of court).

Rule 68 of our Rules of Civil Procedure does *require* the trial court to assess plaintiff with "the costs incurred after" the offer, if the plaintiff rejects an offer from the defendant and the "judgment finally obtained" by the plaintiff is "not more favorable than the offer." N.C.G.S. § 1A-1, Rule 68(a) (1990). The "judgment finally obtained" is the final judgment entered by the trial court, including the amount of the jury verdict and any attorney's fees assessed pursuant to section 6-21.1. *Poole v. Miller*, 342 N.C. 349, 354, 464 S.E.2d 409, 412 (1995). In this case, a denial of attorney's fees on the basis of Rule 68 would have thus been premature if based simply on the comparison of the $900.00 jury verdict with the $4,100.00 offer. Furthermore, even if the offer is determined to be more favorable than the "judgment finally obtained," the trial court retained the authority under N.C. Gen. Stat. § 6-21.1 to award attorney's fees for legal services rendered to Plaintiff *prior* to the offer. *Purdy v. Brown*, 307 N.C. 93, 98-99, 296 S.E.2d 459, 463 (1982).

MARKET AMERICA, INC., PLAINTIFF v. ROBIN CHRISTMAN-ORTH, DEFENDANT

No. COA98-1118

(Filed 5 October 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 Market America on defendant's counterclaim for libel where the communication was protected by a qualified privilege and defendant did not come forward with 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—summary judgment

The trial court did not err in an action arising from defendant working with two multi-level sales companies by granting sum-

mary judgment for Market America on defendant's counterclaim for slander. 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, did not remember whose voicemail she listened to, could not remember precisely what was said, and had no witnesses or recordings.

3. Employer and Employee— non-competition clause—valid

Market America's covenant not to compete was not unreasonable as a matter of law where it contained no fixed geographic restriction and it was likely that it was intended to reach the entire United States, but the covenant was operative for only six months and forbade participation only in those companies using a similar matrix marketing structure or handling similar products to that of Market America.

4. Employer and Employee— covenant not to compete—independent distributor

A covenant not to compete was applicable to an independent distributor.

5. Employer and Employee— covenant not to compete—applicable to current distributor

A covenant not to compete was applicable to a current distributor even though the agreement contained language referring to the period after termination or resignation. Market America certainly intended to prohibit competition by those still working as distributors for the company.

6. Employer and Employee— covenant not to compete—legitimate business purpose

A non-competition clause was valid where defendant argued that there was no legitimate business purpose for restricting distributors from participating in a business venture with a "similar matrix marketing system," but Market America's interest in protecting the integrity and viability of the business is legitimate. Moreover, the covenant expired six months from the date of termination or resignation.

7. 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 upon *Ellis v. Northern Star Co.*, 326 N.C. 219, was unfounded. The communication in this case was protected by a qualified privilege and there was no evidence that defendant suffered actual injury.

8. Unfair Trade Practices— non-competition clause—valid

Defendant failed to establish a triable issue of fact as to her counterclaim for unfair or deceptive trade practices where she contended that Market America inequitably asserted its power and position, but the non-competition clause was valid and enforceable and defendant presented no facts to show any immoral, unethical, oppressive, unscrupulous, or substantially injurious conduct on the part of Market America.

9. Wrongful Interference— summary judgment—no business relationship—no malice

The trial court properly granted summary judgment for Market America on defendant's counterclaim for tortious interference with business relations where plaintiff had no business with which Market America could interfere and there was no showing of actual malice by Market America.

Appeal by defendant from order entered 2 June 1998 by Judge William H. Freeman in Guilford County Superior Court. Originally heard in the Court of Appeals 9 June 1999. Petition for Rehearing allowed on 22 September 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.

On 24 August 1999, defendant filed with this Court a "Petition for Rehearing" pertaining to our decision herein filed 20 July 1999 and reported at 134 N.C. App. 234, 517 S.E.2d 645 (1999). Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, we allowed the petition on 22 September 1999 but stipulated that the case would be reconsidered without further argument or briefing. The following opinion supersedes and replaces the opinion filed 20 July 1999.

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 commissions 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 com-

petent 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.

[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). The court must consider the time and territory restrictions in tandem when determining the reasonableness of a non-competition provision. *Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994). 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." *Starkings*, 67 N.C. App. at 541, 313 S.E.2d at 615. Stated another way, a covenant not to compete " 'must be no

wider in scope than is necessary to protect the business of the employer.' " *Hartman*, 117 N.C. App. at 316, 450 S.E.2d at 919 (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 the validity of Market America's covenant not to compete on several grounds: First, defendant contends that the covenant is void and unenforceable under North Carolina law because it contains no territorial restriction. In support of this contention, defendant relies on our Supreme Court's opinion in *Professional Liability Consultants, Inc. v. Todd*, 345 N.C. 176, 478 S.E.2d 201 (1996) (per curiam) (adopting Judge Smith's dissenting opinion in 122 N.C. App. 212, 468 S.E.2d 578 (1996)), *reh'g denied*, 345 N.C. 355, 483 S.E.2d 175 (1997) and the Fourth Circuit's decision in *American Hotrod Assoc., Inc. v. Carrier*, 500 F.2d 1269 (4th Cir. 1974).

In *Todd*, 345 N.C. 176, 478 S.E.2d 201, the anti-competition covenant prohibited the defendant, a former sales representative of the plaintiff, from contacting the plaintiff's customers for a period of five years. Similarly, in *American Hotrod*, 500 F.2d 1269, the covenant not to compete restricted the defendants, members of a hot rod association, from becoming involved in the promotion, scheduling, or arrangements related to drag racing for a five-year period. Neither the *Todd* covenant nor the *American Hotrod* covenant contained any specified territorial restriction, and in both cases, the court determined that the covenants were unenforceable, because given the lack of territorial limits, the five-year provision of the agreements was excessive. *Todd*, 345 N.C. at 176, 478 S.E.2d at 202 and *American Hotrod*, 500 F.2d at 1279.

In the instant case, the non-competition covenant contains no fixed geographic restriction, but given that Market America is a national company, it is likely that the covenant is intended to reach the entire United States. The extensiveness of this territory notwithstanding, the covenant is operative for only six months following resignation or termination of the independent contractor relationship and forbids participation only in those companies "using a similar matrix marketing structure or handling similar products to that of Market America." Thus, the reasoning in *Todd* and *American Hotrod*

are inapplicable to the present set of facts, and we cannot say that Market America's covenant not to compete is unreasonable as a matter of law.

[4] Next, defendant argues 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 it 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 are valid against independent contractors).

[5] Defendant further contends 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*, 349 N.C. 240, 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.

[6] Lastly, defendant argues 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, and as noted previously, 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.

[7] 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 bulletin 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.

[8] 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.

[9] 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.

THE COUNTRY CLUB OF JOHNSTON COUNTY, INC., PLAINTIFF v. UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANT

No. COA98-1419

(Filed 5 October 1999)

Appeal and Error— appealability—denial of motions to dismiss—interlocutory

An appeal from the denial of motions to dismiss was dismissed as interlocutory where the order did not dispose of the case, the trial court made no certification, USF&G was unable to meet the substantial right exception in that there was no possibility of any verdict inconsistent with previous judicial determinations, immediate appeal is not mandated in every instance of the denial of a motion based upon res judicata, and manifest injustice will not result absent immediate appeal.

Appeal by defendant from order entered 2 September 1998 by Judge Robert L. Farmer in Johnston County Superior Court. Heard in the Court of Appeals 26 August 1999.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., and W. Brian Howell, P.A., by W. Brian Howell, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, for defendant-appellant.

JOHN, Judge.

Defendant United States Fidelity and Guaranty Company (USF&G) purports to appeal the trial court's order denying its motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) and Rule 12(b)(6) (1990) (Rule 12(b)(1) and Rule 12(b)(6)). Defendant's appeal is interlocutory and must be dismissed.

In view of our disposition and the extensive factual rendition in the first of now three appeals to this Court by the parties, *see U.S. Fidelity & Guaranty Co. v. Country Club of Johnston County*, 119 N.C. App. 365, 367-70, 458 S.E.2d 734, 736-38, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 527 (1995) (*USF&G I*), and *U.S. Fidelity and Guar. Co. v. Country Club of Johnston Co.*, 126 N.C. App. 633, 491 S.E.2d 569 (unpublished opinion), *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38 (1997) (*USF&G II*), lengthy exposition of the underly-

ing facts is unnecessary herein. Pertinent procedural and factual history is as follows:

After consuming several alcoholic drinks at the premises of plaintiff Country Club of Johnston County (the Club) on 18 October 1991, a member of the Club was operating an automobile involved in a fatal collision. On the date of the collision, USF&G insured the Club under a master insurance policy (the policy) including commercial general liability coverage. Suit was instituted in May 1993 against both the member and the Club in Wake County Superior Court. *See Sanders et al. v. Upton*, 93 CVS 4415 (*Sanders*). USF&G defended *Sanders* on behalf of the Club under a reservation of rights regarding coverage by the policy and subsequently brokered a settlement.

During the settlement phase of *Sanders*, USF&G filed a declaratory judgment action seeking judicial determination that it was not obligated to defend or afford coverage to the Club under the policy because of an alcohol liability exclusion (alcohol exclusion) therein related to serving of alcohol by the Club. The Club filed answer and counterclaim, asserting coverage "under the [p]olicy . . . and all attendant circumstances." In that suit, the trial court granted summary judgment in favor of USF&G and the Club thereafter voluntarily dismissed its counterclaim and appealed.

Two separate opinions were subsequently rendered by this Court. The first provided that the policy excluded coverage, but, upon noting that "[t]he doctrines of waiver and estoppel may . . . apply to disallow [USF&G] from denying coverage," *USF&G I*, 119 N.C. App. at 374, 458 S.E.2d at 740, remanded to the trial court for resolution of those issues, *id.* at 375, 458 S.E.2d at 741.

Following remand, USF&G appealed the trial court's grant of the Club's subsequent summary judgment motion, contending, *inter alia*, that

> (I) USF&G did not, as a matter of law, waive the liquor liability exclusion; [and that] (II) USF&G is not, as a matter of law, estopped from asserting the liquor liability exclusion.

USF&G II, 126 N.C. App. 633, 491 S.E.2d 569. In our second opinion involving the parties, we affirmed the trial court's ruling that, by virtue of its actions and those of its agents, USF&G had waived its right to rely upon the alcohol exclusion, and "conclude[d that] USF&G's remaining contentions [we]re wholly without merit." *Id.*

On 23 January 1995, prior to our decision in *USF&G I*, the Club instituted the instant proceeding against USF&G alleging, in an amended complaint, bad faith, tortious breach of contract, unfair claim settlement practices, and unfair and deceptive trade acts or practices. The case lay dormant while the appeals in *USF&G I* and *USF&G II* were pending. However, USF&G filed Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss 5 November 1997, which motions were denied by the trial court 3 September 1998. USF&G filed timely notice of appeal, and the Club moved to dismiss the appeal as interlocutory 15 March 1999.

An order of the trial court

> 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. . . . There is generally no right to appeal an interlocutory order.

Howerton v. Grace Hospital, Inc., 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996) (citations omitted).

Withholding appeal of denial of summary relief at the early stages of litigation in the trial court is generally favored. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 209, 240 S.E.2d 338, 344 (1978) (upon denial of early appeal, the "trial court and the parties will be given an opportunity to develop more fully the facts in . . . dispute and to put the merits of the claim in bolder relief"; delayed appeal "w[ill] give the reviewing court a more complete picture, factually and legally, of the entire controversy between the parties"). Indeed, the rule prohibiting interlocutory appeals

> 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) (citation omitted).

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).

Notwithstanding, interlocutory orders may be appealed in two instances:

> first, where there has been a final determination of at least one claim, and the trial court certifies there is no just reason to delay the appeal, [N.C.G.S. § 1A-1, Rule 54(b) (1990) (Rule 54(b))]; and second, if delaying the appeal would prejudice a "substantial right."

Liggett Group v. Sunas, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993) (citations omitted). In either instance, "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal," *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994), and "not the duty of this Court to construct arguments for or find support for appellant's right to appeal," *id.* at 380, 444 S.E.2d at 254.

In the case *sub judice*, the trial court's order denying USF&G's motion to dismiss is interlocutory in that it "does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *Howerton*, 124 N.C. App. at 201, 476 S.E.2d at 442. Moreover, as in *Liggett*, "the court below made no certification [under Rule 54(b) and] the first avenue of appeal is closed" to USF&G. *Liggett*, 113 N.C. App. at 24, 437 S.E.2d at 677.

Under the second "avenue," the substantial right exception, *see* N.C.G.S. § 1-277(a) (1996) and N.C.G.S. § 7A-27(d)(1) (1995), an otherwise interlocutory order may be appealed upon a showing by the appellant that: (1) the order affects a right that is indeed "substantial," and (2) "enforcement of that right, absent immediate appeal, [will] be 'lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.' " *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 250, 507 S.E.2d 56, 62 (1998) (quoting *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987)). Nonetheless, the substantial right test

> is more easily stated than applied [and] [i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters, 294 N.C. at 208, 240 S.E.2d at 343.

In any event, it is well-settled that

> [d]enial of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is interlocutory . . ., as is the denial of a Rule 12(b)(6) motion for failure to state a claim for which relief can be granted. . . . Neither affects a substantial right and neither is immediately appealable.

Burlington Industries, Inc. v. Richmond County, 90 N.C. App. 577, 579, 369 S.E.2d 119, 121 (1988); *see also State v. School*, 299 N.C. 351, 355, 261 S.E.2d 908, 911 (1980) (denial of motion to dismiss generally does not deprive movant of any substantial right).

Notwithstanding, under the instant circumstances, *see Waters*, 294 N.C. at 208, 240 S.E.2d at 343, USF&G asserts implication of the substantial rights of avoidance of trial and appeal of denial of a dismissal motion grounded upon the defense of *res judicata*. We consider USF&G's arguments *ad seriatim*.

This Court recently reiterated the long-standing rule that "[a]voidance of trial is not a substantial right entitling a party to immediate appellate review." *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, —, — S.E.2d —, — (1999) (citation omitted). However, where

> a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined,

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), thereby

> creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.

Green v. Duke Power Co., 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

Therefore, to demonstrate that a second trial will affect a substantial right, USF&G must show, *see Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253, not only that one "claim has been finally determined," *Davidson*, 93 N.C. App. at 26, 376 S.E.2d at 492, and others

remain "which have not yet been determined," *id.*, but that "(1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists," *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995) (emphasis added) (citation omitted). USF&G is unable to meet this test.

USF&G purports to appeal the trial court's *denial* of its motion to dismiss. An order denying a motion to dismiss

> do[es] not determine even one claim, but simply require[s] subsequent trial of the fact issues underlying that claim, [and is] generally not appealable.

Davidson, 93 N.C. App. at 26, 376 S.E.2d at 492; *see also School*, 299 N.C. at 355, 261 S.E.2d at 911 (denial of Rule 12(b)(6) motion to dismiss "merely serves to continue the action then pending [and no] final judgment is involved"). No final dismissal of claims or parties occurred in the trial court in the instant case; thus, there exists no possibility that, upon reversal of such dismissal, a second trial might produce an inconsistent verdict. *See Davidson*, 93 N.C. App. at 27, 376 S.E.2d at 492 (while dismissal of plaintiff's claims was immediately appealable, denial of defendant's motion to dismiss plaintiff's remaining claim was not immediately appealable "since there ha[d] been no final disposition whatsoever of that claim"); *cf. First Atl. Mgmt. Corp.*, 131 N.C. App. at 251, 507 S.E.2d at 62 (appeal of grant of defendant's partial summary judgment motion proper even though interlocutory because of potential inconsistent verdicts); *Hoots v. Pryor*, 106 N.C. App. 397, 402, 417 S.E.2d 269, 273, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992) (in case of multiple defendants, potential for inconsistent verdicts on issue of plaintiff's contributory negligence "if . . . case were to be tried in . . . separate proceedings" compels holding that "plaintiffs' appeal of [the trial court's] order is not premature and should not be dismissed"); *J & B Slurry Seal Co.*, 88 N.C. App. at 9, 362 S.E.2d at 817 (appeal allowed of grant of defendant's summary judgment motion dismissing plaintiff's claim, but leaving defendant's counterclaim intact, because of possible inconsistent verdicts); *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (plaintiff's appeal of grant of defendant's partial summary judgment motion allowed even though interlocutory because inconsistent verdicts possible).

Interestingly, USF&G both in its appellate brief and in oral argument to this Court, essentially advocated that we render an "incon-

sistent" opinion herein. In *USF&G II*, this Court affirmed the trial court's ruling that "USF&G ha[d] waived its right to rely on the [alcohol] exclusion," *USF&G II*, 126 N.C. App. 633, 491 S.E.2d 569, and held that USF&G's argument that it "[wa]s not, as a matter of law, estopped from asserting the [alcohol] exclusion" was "wholly without merit," *id.* However, USF&G has continued to insist the policy afforded no coverage and that the Club therefore may not assert a bad faith claim.

USF&G first ignores the principle that a panel of this Court "may not overrule the decision of another panel on the same question in the same case." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). We note in passing that this principle was previously reiterated in *USF&G II*. *USF&G II*, 126 N.C. App. 633, 491 S.E.2d 569 (this Court in *USF&G I*, by which decision the Court is now bound, "considered, and found meritless, the exact argument USF&G attempts to re-assert in the present appeal—[that] the doctrines of waiver and estoppel cannot expand the scope of an insurance policy to include risks expressly excluded by the plain language of the policy").

USF&G also overlooks the estoppel effect of conduct comprising waiver. It is not that the conduct of USF&G and that of its agents has operated to write into the policy coverage previously excluded; rather, conduct comprising waiver has created a disability on the part of USF&G thereby precluding it from thereafter *denying* that such coverage is included within the policy.

As this Court explained in *Chance v. Henderson*, 134 N.C. App. 657, ——, —— S.E.2d ——, —— (1999) (citation omitted), estoppel effects a "personal disability [upon] the party attacking the [court order]; it is not a function of the [order] itself." Accordingly, the defendant in *Chance* who by his conduct "in essence ratified and affirmed [a court] Order [was thereafter] estopped from seeking to avoid its effect," *id.* Similarly, herein, USF&G, whose waiver of its right to rely on the alcohol exclusion in the policy has been judicially determined, *see USF&G II*, 126 N.C. App. 633, 491 S.E.2d 569, is thereby "disallow[ed] . . . from denying coverage," *USF&G I*, 119 N.C. App. at 374, 458 S.E.2d at 740, under the policy on grounds of said exclusion.

In short, the issue in the instant case is no longer one of coverage, but rather USF&G's liability for alleged bad faith, tortious breach of contract, unfair claim settlement practices, or unfair and deceptive

trade acts or practices in its handling of the Club's claim and the resulting litigation. There is no possibility of any verdict inconsistent with previous judicial determinations.

USF&G also argues that because it relies on the principles of *res judicata* and claim-splitting as barring the Club's lawsuit in the instant case, a substantial right is thereby affected and it is entitled to an immediate appeal of denial of its motions to dismiss which asserted those grounds. USF&G cites *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993) and *Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 430 S.E.2d 689, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993), as support. USF&G's reliance on *Bockweg* and *Northwestern* is unfounded.

In *Bockweg*, our Supreme Court held "that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right" because of the "possibility that a successful defendant . . . will twice have to defend against the same claim by the same plaintiff." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161; *accord*, *Northwestern*, 110 N.C. App. at 536, 430 S.E.2d at 692.

First, we do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* "*may* affect a substantial right." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161 (emphasis added).

In addition, we note the reliance in *Bockweg* on the line of cases, *see Green*, 305 N.C. at 608, 290 S.E.2d at 596, and *Patterson v. DAC Corp.*, 66 N.C. App. 110, 113, 310 S.E.2d 783, 785 (1984), noting that the potential for inconsistent verdicts in two trials affects a substantial right so as to permit immediate appeal of an otherwise interlocutory order. Indeed, this Court, in an opinion issued shortly after *Bockweg*, *Community Bank v. Whitley*, 116 N.C. App. 731, 449 S.E.2d 226, *disc. review denied*, 338 N.C. 667, 453 S.E.2d 175 (1994), interpreted the permissive language of *Bockweg* as allowing, under the substantial right exception, immediate appeal of the denial of a motion for summary judgment based, *inter alia*, upon defense of *res judicata* "*where a possibility of inconsistent verdicts exists* if the case proceeds to trial." *Id.* at 733, 449 S.E.2d at 227 (emphasis added); *see also Little v. Hamel*, 134 N.C. App. 485, — S.E.2d — (1999) (appeal of denial of summary judgment motion based upon *res judicata* considered to affect substantial right where, although not directly noted by the Court, defendants had been absolved of liability

in previous suit between the parties and faced possibility of inconsistent verdicts).

In short, denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Community Bank*, 116 N.C. App. at 733, 449 S.E.2d at 227. We have established that the current case presents no possibility of inconsistent verdicts.

Finally, *Bockweg* involved appeal from denial of a summary judgment motion, whereas we are concerned herein with denial of a motion to dismiss. As earlier noted, withholding of appeal of summary relief at the early stages of trial court litigation is generally favored. *See Waters*, 294 N.C. at 209, 240 S.E.2d at 344.

We also note that the decision in *Northwestern*, relied upon by USF&G, supports our interpretation of *Bockweg*. In *Northwestern*, this Court observed there was no possibility of inconsistent verdicts, thus making the facts therein "distinguishable from those in *Bockweg*." *Northwestern*, 110 N.C. App. at 536, 430 S.E.2d at 692. We nonetheless "chose[] to consider the merits of defendants' appeal." *Id.*; *see* N.C.R. App. P. 2 ("[t]o prevent manifest injustice to a party," appellate court "may . . . suspend or vary the requirements" of the Rules of Appellate Procedure).

Suffice it to state we do not perceive it as "manifest" that injustice will result herein absent immediate appeal. *See Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) ("Rule 2 relates to the residual power of our appellate courts . . . , *in exceptional circumstances*, . . . to prevent injustice which appears manifest to the Court and *only* in such instances" (emphasis added)). Significantly, USF&G has failed to show that

> enforcement of [a substantial] right, absent immediate appeal, [will] 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). On the contrary, USF&G's

> rights . . . are fully and adequately protected by an exception to the order which may then be assigned as error on appeal should final judgment in the case ultimately go against it.

Waters, 294 N.C. at 208, 240 S.E.2d at 344.

Appeal dismissed.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. LARRY LEGGETT

No. COA98-1413

(Filed 5 October 1999)

1. Evidence— other crimes—murder—robbery with a firearm

The trial court did not err in a double murder case by allowing testimony of defendant's other crimes of robbery with a firearm pursuant to Rule 404(b) because the evidence was relevant for some purpose other than to show defendant's propensity to commit this type of crime, and the trial court concluded under the Rule 403 balancing test that the evidence was more probative than prejudicial.

2. Evidence— past recollection recorded—properly authenticated—statement within reasonable time—accurate when given

The trial court did not err in a double murder case when it allowed the past recorded recollection of a State's witness, defendant's cellmate, to be read to the jury because it was properly authenticated under N.C.G.S. § 8C-1, Rule 803(5) since the witness gave the statements within a reasonable time of having heard them and testified that they were accurate when given.

3. Constitutional Law— right to confront and cross-examine witnesses—past recollection recorded—firmly rooted hearsay exception

The trial court did not violate defendant's constitutional right to confront and cross-examine witnesses against him in a double murder case when it allowed the past recorded recollection of a State's witness, defendant's cellmate, to be read to the jury because the recorded recollection exception codified in Rule 803(5) is a firmly rooted hearsay exception in North Carolina.

4. Constitutional Law— due process—alternative but not mutually inconsistent theories—credibility

The trial court did not violate defendant's due process rights in a double murder case when it allowed the State to argue alternative but not mutually inconsistent theories at different trials because only the co-participants know who actually fired the fatal shots at each victim and the State is allowed to argue the credibility of the witnesses to the different juries.

5. Criminal Law— instructions—harmless error—prompt and complete correction

The trial court's initial jury instructions in a double murder case concerning the consideration of the testimony of a co-participant who had been convicted in a separate trial were rendered harmless by the trial court's prompt and complete correction of the erroneous instruction.

Appeal by defendant from judgment entered 10 April 1996 by Judge Herbert Small in Wayne County Superior Court. Heard in the Court of Appeals 19 August 1999.

Michael F. Easley, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

EDMUNDS, Judge.

This appeal arises from a double murder. On the evening of 20 January 1994, Margaret Strickland borrowed her mother's car to visit Bobby Stroud. Two days later, the bodies of Strickland and Stroud were found near Dudley, North Carolina. Autopsies disclosed that Strickland had suffered blunt force injury to her left cheek and forehead as well as three gunshot wounds, one to the chest and two to her head and face. Stroud also suffered from three gunshot wounds, one to the back and two to his head and neck. The car owned by Strickland's mother was found behind an abandoned house. Inside the trunk, police discovered Strickland's fingerprints and palm print. In the back seat, police found a cassette cover containing the fingerprint of Kwame Teague. Markers from human blood found on the back seat matched markers found in Strickland's blood.

Three individuals were indicted for the murders and were tried separately. Defendant, the last of the three, was tried for first-degree

murder and related charges at the 11 March 1996 criminal session of the Wayne County Superior Court. The State proceeded under theories of both felony murder and premeditation and deliberation. Defendant was convicted of first-degree kidnapping, robbery with a dangerous weapon, and first-degree murder under the felony murder rule. The trial court imposed a sentence of life.

I.

[1] Defendant first argues that it was error for the trial court to allow testimony of other crimes pursuant to Rule 404(b) of the Rules of Evidence because, he contends, there were insufficient similarities between the crimes to allow testimony regarding the past crimes. We disagree.

Rule 404(b) has been held to be a rule of inclusion, unless the only probative value of the evidence of other crimes is to show a propensity to commit an offense of the nature of the crime charged. *See State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). The rule states:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (Supp. 1998). When a court determines that evidence is offered pursuant to Rule 404(b), the court first must determine whether that evidence is relevant. *See State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). " '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). Even if relevant, the evidence may be excluded if the danger of prejudice substantially outweighs its probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Exclusion or admission of evidence under Rule 403 is left to the sound discretion of the trial court. *See State v. Parker*, 113 N.C. App. 216, 225, 438 S.E.2d 745, 751 (1994). "When the incidents are offered for a proper purpose, the ultimate test of admissibility is 'whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.' " *State v. Pruitt*, 94 N.C. App. 261, 266,

380 S.E.2d 383, 385 (1989) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988) (citation omitted)).

The evidence in question related to two prior incidents. The first occurred in January 1994, when two black men entered the apartment of Mark Spears and Robin Barnes. Spears identified defendant as the intruder who pointed a pistol at his (Spear's) head and with whom he struggled before the intruders fled. Barnes also testified that he was "pretty sure" defendant was the individual wrestling with Spears. The second incident occurred on 29 January 1994, when Robert Flores was robbed at gunpoint by two men. Flores identified defendant as the robber who threatened him with a handgun. After a lengthy *voir dire* hearing on the matter, the trial court concluded:

> [T]he evidence . . . is competent . . . to show that there was a plan and a scheme to participate in the armed robbery with the assistance of at least one additional person.
>
> . . . .
>
> . . . [T]he perpetrators of each armed robbery attempted to gain an advantage by the use of surprise or deception over the intended victim. . . .
>
> The perpetrator of the Spears' and Barnes' attempted robbery pointed a gun at the left ear of Spears. The perpetrator of the robbery of Strickland shot her in the head above the left ear.
>
> The perpetrators commenced each crime after [sic] 9 p.m. and approximately midnight of the same day.
>
> The use of the small caliber handgun was used in a similar fashion during the Flores' and Spears' incident in that the gun was first raised before it was lowered or pointed at anyone.
>
> . . . .
>
> . . . The similarities of the crimes committed against Robert Flores, Mark Spears, and Robert Barnes are sufficient to support the reasonable inference that the defendant Larry Leggett participated in each of them.
>
> . . . The evidence of the robbery of Flores and the attempted robbery of Spears and Barnes is admissible for the purpose of showing intent, preparation, plan and identity of the defendant and its probative value is not outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, consid-

erations of undue delay, waste of time or needless presentation of cumulative evidence.

We find no abuse of discretion in the admission of this evidence. After finding the evidence relevant for some purpose other than to show defendant's propensity to commit this type of crime, *see Morgan*, 315 N.C. at 637, 340 S.E.2d at 91, the trial court applied the balancing test of Rule 403, *see Boyd*, 321 N.C. at 577, 364 S.E.2d at 119, and concluded that the evidence was more probative than prejudicial. Although most robberies committed with a firearm necessarily have much in common, the court isolated a number of pertinent factors on which to base its decision to admit the evidence. This assignment of error is overruled.

II.

[2] Next, defendant argues that the trial court erred in allowing the past recorded recollection of state's witness James Davis to be read to the jury. Davis had been defendant's cellmate at the Wayne County jail. After having a conversation with defendant about the events of 20 January 1994, Davis reported to the attorney representing co-defendant Lemons that defendant had told him that defendant, Teague, and Lemons robbed two people and that he (defendant) and Teague had each shot the woman once. Davis provided the attorney a handwritten copy of this statement. When the handwritten statement was presented to the State during Lemons' sentencing, a detective interviewed Davis and took another essentially similar statement, which Davis signed. When called by the prosecution at defendant's trial, Davis testified that he could no longer remember the substance of his conversations with defendant, but that his earlier statements to the detective and the attorney were made while he correctly remembered defendant's comments to him and were the truth as he knew it at the time.

Defendant argues that these statements were "not properly authenticated, did not meet the criteria for admission under G.S. 8C-1, Rule 803(5) and deprived [him] of his right of confrontation and due process . . . ." Rule 803(5) provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

N.C. Gen. Stat. § 8C-1, Rule 803(5) (1992). This rule covers precisely the situation confronted by the trial court.

After conducting a *voir dire* as to the statement Davis made to Lemons' attorney, the trial court made the following finding:

> When the witness made the statement he wrote it in his own handwriting and it was his recollection of the matters contained in the statement and the statement made by him was true at the time he made it. This statement is a record concerning a matter about which the witness once had knowledge but is now unable to recall what he knew and said. It was made by the witness when the matter was fresh in his memory and correctly reflects the knowledge he had at the time he made the statement. . . . [T]he Court orders that this statement may be read into evidence by the witness . . . .

The court made similar findings as to the statement Davis made to the detective.

Davis' powers of recollection at defendant's trial were less than impressive. He testified that the statement to Lemons' attorney was in his handwriting and contained his signature, but he could not remember writing it. However, he further testified that, although he could not remember writing the statement, what he wrote was true. Davis added that at the time he gave the statement to Lemons' attorney, he was able to recall his conversation with defendant, but that he no longer remembered what was said. He remembered testifying at Lemons' trial, but did not remember the substance of his testimony. He did not remember what he told the detective, but he did recall reviewing and correcting the statement that the detective took from him, thereby adopting it. Davis' testimony establishes that both statements are prior recollections recorded and satisfy the requirements of Rule 803(5).

Prior case law confirms the admissibility of this evidence. In *State v. Nickerson*, 320 N.C. 603, 359 S.E.2d 760 (1987), a witness stated that he could not remember the events in question. The State then presented to the witness a writing that he had previously signed. The witness testified that he remembered making a statement to an officer five weeks after the shooting, that he saw the officer write it down, that he told the truth in his statement, and that he and the officer had signed it. The witness then read the statement into evidence. The defendant argued that the witness's recorded recollection should not have been admitted into evidence "because it was not shown that

it was made while the matter was fresh in the memory of the witness [and the statement] was made approximately five weeks after the incident." *Id.* at 608, 359 S.E.2d at 762. The trial took place approximately five months after the statement was made. In response to the defendant's argument, our Supreme Court stated:

> We hold the reading of the statement was admissible under the rule. The testimony of [the witness] showed that he once had knowledge about the matter but at the time of the trial could not recall it sufficiently to testify about it at trial. He testified further that he told the truth to the deputy and saw him write it down. He then signed the statement. This satisfies the requirement of the Rule that the statement be adopted by the witness when the matter was fresh in his memory and reflected his knowledge accurately.

Id. at 607, 359 S.E.2d at 762.

By comparison, in *State v. Hollingsworth*, 78 N.C. App. 578, 337 S.E.2d 674 (1985), the witness whose statement was to be admitted testified that the information contained in the statement was "a lie." She further testified that she did not remember and never had remembered any of the events in question. This Court reversed the trial court's admission of her statements, holding that "[s]ince she testified that when she wrote the letter, it did not correctly reflect her knowledge of the events and she did not know facts that she had forgotten by the time of the trial, the trial court should not have admitted the letter into evidence as a recorded recollection." *Id.* at 581, 337 S.E.2d at 676-77. In the instant case, the witness gave the statements within a reasonable time of having heard them and testified that they were accurate when given. The judge followed the proper procedure in allowing the statements to be read to the jurors. There was no error in admitting this evidence.

[3] Defendant also contends that admission of these statements deprived him of his constitutional right to confront and cross-examine witnesses against him. However, evidence falling within a "firmly rooted" hearsay exception has been held sufficiently reliable that a defendant's constitutional right of confrontation is not violated by its admission. *See State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998).

It is a question of first impression in North Carolina whether the recorded recollection exception codified in Rule 803(5) is firmly

rooted. The exception is of great antiquity in North Carolina, *see* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 224 (5th ed. 1998), and has been found by other jurisdictions to be firmly rooted, *see Hatch v. State*, 58 F.3d 1447, 1467 (10th Cir. 1995) ("The exception for past recorded recollections is clearly a firmly rooted hearsay exception."); *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965) (This exception has "long been favored by the federal and practically all the state courts that have had occasion to decide the question."); *Flynn v. State*, 702 N.E.2d 741, 745 (Ind. App. 1998) ("[Witness's] prior recorded statement fell with [sic] a firmly rooted hearsay exception under Evid. R. 803(5) as a prior recorded statement."); *State v. Jenkins*, 483 N.W.2d 262 (Wis. App. 1992); *see also* Fed. R. Evid. 803(5) advisory committee's note. We are persuaded that this exception is firmly rooted in North Carolina. Admission of this evidence did not violate defendant's constitutional rights. This assignment of error is overruled.

III.

[4] Defendant next contends that he is entitled to a new trial because the State has at different trials taken inconsistent positions regarding the testimony of two witnesses. At the sentencing phase of the earlier capital trial of co-defendant Lemons, witnesses for Lemons included James Davis and Antoine Dixon, both of whom testified that defendant had stated to them that defendant and Teague were the ones who shot the victims. Both witnesses were cross-examined and their credibility challenged by the State. However, these same witnesses were presented by the State at defendant's later murder trial. Defendant contends that because the State sought to impeach both Davis and Dixon during the trial of Lemons, it could not in good faith offer these same individuals later as credible witnesses at defendant's trial.

Defendant does not contend that the evidence presented against Lemons was inconsistent with the evidence presented against defendant. In fact, the evidence presented through these witnesses was not mutually contradictory, nor did it change between Lemons' trial and defendant's trial. There is no indication that this evidence was objectively false or that any knowing misrepresentations were made to the jury. Although defendant's statements reported by Davis and Dixon were inconsistent as to some details, the statements were consistent in defendant's admission that he shot Strickland. Therefore, the inconsistencies did not affect defendant's culpability. The case at bar is similar to *State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997), where

in the trial of a co-defendant, the State argued that Flowers was only a lookout, while in Flowers' own trial, the prosecution argued that he participated in the actual stabbing. In finding no error, our Supreme Court noted that the State's evidence was essentially the same in both trials and that the State's theory was that all defendants were equally culpable. *See id.* at 19, 489 S.E.2d at 401.

We are also persuaded by the court's reasoning in *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992), a federal habeas corpus decision. In that case, three defendants were charged with first-degree murder, but there was uncertainty regarding which of the three actually shot the victim. At the separate trials of the defendants, the prosecution took different positions as to who committed the killing. In responding to the defendant's claim that he was denied his due process rights by the prosecution's shifting theories, the court held that it was not improper for the State to take inconsistent positions as long as doing so did not involve the use of necessarily contradictory evidence. *See id.* at 1578. In light of the uncertainty as to the identity of the triggerman, the court held it proper for the prosecutor to argue alternate theories regarding the facts of the murder. *See id.*

In the case at bar, the evidence was essentially the same in both cases, and the State, contending that both Lemons and defendant were guilty, proceeded against each co-defendant under theories of premeditation and deliberation and of felony murder. *See State v. Lemons*, 348 N.C. 335, 501 S.E.2d 309 (1998), *cert. granted, judgment vacated*, — U.S. —, 144 L. Ed. 2d 768 (1999). Because only the co-defendants know who actually fired the fatal shots at each victim, it was appropriate for the State to argue alternative but not mutually inconsistent theories at different trials. It was also appropriate for the State to argue credibility of the witnesses to the different juries. *See State v. Solomon*, 340 N.C. 212, 456 S.E.2d 778 (1995). We find no violation of defendant's due process rights. This assignment of error is overruled.

IV.

[5] Finally, defendant contends the trial court erred in instructing the jury on considering the testimony of Kwame Teague. The State called Teague as a witness after he had been convicted in a separate trial. When Teague testified that defendant was not present at the shootings, the State asked to treat him as a hostile witness, then introduced his prior statements to impeach his credibility. The trial judge

instructed the jury on the use of prior inconsistent statements and added:

> You will recall that Kwame Teague made statements before this trial to officers and I instruct you that those statements he made before the trial is [sic] not substantive evidence you may consider in determining the defendant's guilt or innocence during the trial. But you may consider those earlier statements in determining whether or not you will believe his testimony during this trial. That testimony was received for that limited purpose. There may be other witnesses [to which] the instruction I have previously given to you [applies] as to whether or not their earlier statements were consistent with or conflicted with their testimony during the trial but I specifically wanted to mention the testimony of Kwame Teague to remind you to scrutinize his testimony carefully.

Defendant made timely objection to this instruction out of the presence of the jury. After hearing defendant's objection, the trial court re-instructed the jury as follows:

> [I]t has been brought to my attention that I may have made some mistakes in my instructions to you and, in fact, in some cases did and I am going to try to correct those now. I mentioned the scrutinizing of the testimony of Kwame Teague. By that term I meant that you should be very careful in considering his testimony in that you may consider his testimony during the trial which was given under oath in determining the guilt or innocence of the defendant but the statements he made before the trial to officers or other persons are not substantive evidence that you may consider in determining the guilt or innocence of the defendant but are statements you may consider only in determining whether or not you will believe the other testimony given by Kwame Teague during the course of the trial. Those statements that he made to people outside the courtroom was [sic] offered solely for the purpose of enabling you to consider them in determining his credibility.

Defendant focuses on the original instruction given prior to his objection and argues that "it was error for the court to make this spontaneous comment, impermissibly suggesting an opinion to the jury to be careful of the witness who was most helpful to the defense, Kwame Teague." However, "[a] trial court's instructions must be read contextually as a whole, and isolated erroneous portions will not be

considered prejudicial error on appeal when the instruction read as a whole is correct." *State v. Bennett*, 65 N.C. App. 394, 397, 308 S.E.2d 879, 881 (1983) (citations omitted). It appears from the court's supplementary instructions that the trial judge recognized the possible ambiguity or error in his initial instruction about Teague and took steps to correct any misunderstanding the jury might harbor. The subsequent instruction clarified for the jury that it should not equate statements made by Teague under oath, which could be considered in determining defendant's guilt or innocence, with his earlier contradictory statements made out of court, which were not substantive evidence and could be considered only in determining Teague's credibility. This instruction was an accurate statement of the law, and any error in the initial instruction was rendered harmless by the "prompt and complete correction of the erroneous instruction." *State v. Jennings*, 333 N.C. 579, 613, 430 S.E.2d 188, 205 (1993). This assignment of error is overruled.

In closing, we note the trial court's request to the Attorney General to advise us that the Court of Appeals has "made too much erroneous and bad law because of their meddling in things that are of no concern and unimportant." We will do our best.

No error.

Judges LEWIS and JOHN concur.

VIRGIE M. SANDERS, PLAINTIFF v. AMERICAN SPIRIT INSURANCE COMPANY, DEFENDANT

No. COA98-1247

(Filed 5 October 1999)

Insurance— automobile—underinsured motorist coverage—summary judgment improper—need form promulgated by Rate Bureau and approval by Commissioner of Insurance

The trial court erred in granting defendant's motion for summary judgment because the pertinent automobile insurance policy issued by defendant provides underinsured motorist coverage under N.C.G.S. § 20-279.21(b)(4) to plaintiff for injuries sustained while a passenger in an automobile driven by defendant's named

insured since rejection of underinsured motorist coverage is not accomplished unless it is in writing and on a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance.

Appeal by plaintiff from judgment entered 22 June 1998 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 19 May 1999.

Dean A. Shangler for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by R. Scott Brown and Michael J. Byrne for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's grant of defendant's summary judgment motion proffered pursuant to N.C.G.S. § 1A-1, Rule 56(c)(1990) (defendant's motion). The sole issue for our determination is whether an automobile insurance policy issued by defendant (the policy) provides underinsured motorist (UIM) coverage to plaintiff for injuries sustained while a passenger in an automobile driven by defendant's named insured Joan Johnson (Johnson). We conclude the policy provides such coverage and that the trial court erred in granting defendant's motion.

The following pertinent facts and procedural history are undisputed: On 6 December 1995, plaintiff, a passenger in an automobile driven by Johnson, was injured when Johnson's vehicle collided with an automobile operated by John Davenport (Davenport) on U.S. 70 in Wake County, North Carolina. Plaintiff, as an occupant of Johnson's vehicle, was insured under the policy issued by defendant to Johnson and her husband (Mr. Johnson).

In October 1997 and subsequent to settlement with Davenport's insurer, Travelers Insurance Company (Travelers), plaintiff initiated the instant action against defendant seeking UIM coverage for damages caused by Davenport's alleged negligence in excess of the amount tendered in settlement by Travelers. Defendant filed answer 18 December 1997, generally denying plaintiff's allegations and affirmatively defending upon grounds that Mr. Johnson had rejected UIM coverage under the policy.

On 2 March 1998, the parties agreed that UIM coverage under the policy was a condition precedent to plaintiff's recovery at trial and stipulated to severance of the issues so as to permit the trial court to

determine preliminarily as a matter of law whether Mr. Johnson had effectively rejected UIM coverage under the policy. The parties thereupon filed cross-motions for summary judgment. On 22 June 1998, the court granted defendant's motion and plaintiff thereafter timely appealed.

In support of its motion, defendant proffered upon Mr. Johnson's rejection of Uninsured/Underinsured Motorists Coverage and his selection of Uninsured Motorists Coverage under defendant's policy form F.39500A (defendant's form). Defendant's form provided:

ELECTION/REJECTION FORM
UNINSURED MOTORISTS COVERAGE
COMBINED UNINSURED/UNDERSINSURED
MOTORISTS COVERAGE

Uninsured Motorists Coverage (UM) and Combined Uninsured/Underinsured Motorists Coverage (UM/UIM) and coverage options are available to me. I understand that:

1. the UM and UM/UIM limits shown for vehicles on this policy may not be added together to determine the total amount of coverage provided.

2. UM and UM/UIM bodily injury limits up to $1,000,000 per person and $1,000,000 per accident are available.

3. UM property damage limits up to the highest policy property damage liability limits are available. Coverage for property damage is applicable only to damages caused by uninsured motor vehicles.

4. my selection or rejection of coverage will apply to any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy with this company, or affiliated company, unless a named insured makes a written request to the company to exercise a different option.

5. my selection or rejection of coverage below is valid and binding on all insureds and vehicles under the policy, unless a named insured makes a written request to the company to exercise a different option.

(CHOOSE ONLY ONE OF THE FOLLOWING)

___ I choose to reject Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of:

Bodily Injury___; Property Damage ___

___ I choose Combined Uninsured/Underinsured Motorists Coverage at limits of:

Bodily Injury___; Property Damage ___

___ I choose to reject both Uninsured and Uninsured/Underinsured Motorists Coverages.

Named
Insured _____

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c).

Plaintiff submits defendant was not entitled to summary judgment as a matter of law in that Mr. Johnson did not reject UIM coverage. Plaintiff argues defendant's form differed from that promulgated by the North Carolina Rate Bureau (the Rate Bureau form) and cites this Court's decision in *Hendrickson v. Lee*, 119 N.C. App. 444, 453, 459 S.E.2d 275, 280 (1995). Plaintiff's argument has merit.

In determining whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy. *Vasseur v. St. Paul Mutual Ins. Company*, 123 N.C. App. 418, 420, 473 S.E.2d 15, 16, *disc. review denied*, 345 N.C. 183, 479 S.E.2d 209 (1996) (citations omitted). The instant case concerns UIM coverage and as such, the governing statute is the version of N.C.G.S. § 20-279.21(b)(4) (Supp. 1991), a section within the Financial Responsibility Act (the Act), in effect at the time the policy was issued. *See id.* at 420, 473 S.E.2d at 16. (G.S. § 20-279.21(b)(4) was thereafter, amended but the amendments in any event are irrelevant to the issue *sub judice*).

The Act is remedial in nature and must be liberally construed, *id.* at 421, 473 S.E.2d at 17 (citation omitted), in order to protect "innocent victims who may be injured by financially irresponsible motorists," *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 224, 376 S.E.2d 761, 763 (1989) (citation omitted). The purpose of the Act is "best served when the statute is interpreted to provide the innocent victim with the *fullest possible protection*," *id.* at 225, 376

S.E.2d at 764 (emphasis added), from the negligent acts of an underinsured motorist.

The applicable version of G.S. § 20-279.21(b)(4) herein outlines specific procedures under which UIM coverage may be rejected by a named insured and states in pertinent part:

> (b) [An] owner's policy of liability insurance:
>
> . . . .
>
> (4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner. . . .
>
> . . . .
>
> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. Once the named insured exercises this option, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured is valid and binding on all insureds and vehicles under the policy.
>
> If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverge. *Rejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.*

G.S. § 20-279.21(b)(4) (emphasis added).

Defendant concedes its form executed by Mr. Johnson in purportedly rejecting UIM coverage was not approved by the Commissioner of Insurance nor identical in all respects to the Rate Bureau form. Indeed, comparison of the two forms reveals, *inter alia*, that defendant's form does not contain the term "combined" in choices 1 and 3, the list of options under the Rate Bureau's form providing as follows:

> ___ I choose to reject *Combined* Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of:
>
> Bodily Injury ____; Property Damage ____
>
> ___ I choose Combined Uninsured/Underinsured Motorists Coverage at limits of:
>
> Bodily Injury ____; Property Damage ____
>
> ___ I choose to reject both Uninsured and *Combined* Uninsured/Underinsured Motorists Coverages.

(emphasis added).

According to plaintiff, the result of defendant's omission is that

> the choices presented by Defendant's form allow selecting "Combined/Unisured/ Underinsured Motorists Coverage" at limits specified by the insured, [but not a concomitant] rejection of this specific type of available coverage

as provided by the Bureau's form. Defendant counters that "when viewed in the context of the entire form used by defendant, the phrase 'Uninsured/Underinsured Motorists Coverage' in Choices 1 and 3 can only be taken to mean 'Combined Uninsured/Underinsured Motorists Coverage.' " As such, continues defendant, Mr. Johnson's rejection of UIM coverage was effective because defendant's form was in "substantial compliance" with the Rate Bureau Form. We are not persuaded.

> [When] a statute [such as G.S. § 20-279.21(b)(4)] is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in[to] it, and if the terms of the policy conflict with the statute, the . . . statute will prevail.

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989) (citations omitted).

Accordingly, in *Hendrickson*, 119 N.C. App. 444, 459 S.E.2d 275, defendants therein unsuccessfully argued that rejection of UIM coverage could be accomplished by use of a form which " 'substantially complied' with the statutory mandate." *Id.* at 457, 459 S.E.2d at 282-83. In *Hendrickson*, this Court pointedly observed that

> G.S. § 20-279.21(b)(4) . . . provid[es] that rejection of UIM coverage "*shall*" be in writing and on "a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance" [and] [t]he language "shall" as applied in Chapter 20 of the North Carolina Motor Vehicle Statutes, is "mandatory" and not merely "formal" and "directory language."

Id. at 454, 459 S.E.2d at 281 (citations omitted).

Similarly, in *Martin v. Continental Ins. Co.*, 123 N.C. App. 650, 474 S.E.2d 146 (1996), this Court addressed defendant insurer's contention that a purported rejection, not on the Rate Bureau form, nonetheless "clearly and unambiguously reject[ed] . . . [UIM] coverage" and was "valid and binding." *Id.* at 658, 474 S.E.2d at 150. We stated defendant's argument was "beside the point," *id.*, by virtue of its failure to acknowledge that

> [i]n *Hendrickson*, this Court strictly enforced the requirement that UIM coverage may be rejected only "in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance," . . . in order to "assure compensation of the innocent victims of uninsured or underinsured drivers"—the primary purpose of the Act.

Id. (citations omitted).

Finally, in *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782 (1999), our Supreme Court reemphasized that

> [t]he language of [G.S. § 20-279.21(b)(4)] is *mandatory*. An insurer is obligated to obtain the insured's selection or rejection of UM or UM/UIM coverage in writing and *on a form promulgated by the Rate Bureau* and approved by the Commissioner.

Id. at 269, 513 S.E.2d at 784-85 (emphasis added).

Notwithstanding, defendant cites a circular letter mailed by the Rate Bureau to member companies as support for the position that "substantial compliance" with G.S. § 20-279.21(b)(4) might effect rejection of UIM coverage. The letter provided that

> the language [of the form] may not be changed or substantively amended, without prior approval . . . .

Defendant maintains that the "fact that the Rate Bureau stated that the language of its forms may not be 'changed or substantively amended' " means the Rate Bureau "was using the word 'changed' in the sense [of] 'substantively amended.' " However, this Court has previously explained that the disjunctive term "or" creates two separate clauses and, when used, it is "incorrect to read the second part of [a] . . . definition as qualifying the first part." *Wrenn v. Byrd*, 120 N.C. App. 761, 766, 464 S.E.2d 89, 92, *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1995) (citation omitted).

Finally, defendant concludes by pointing to *Smith v. Nationwide Mut. Ins. Co.*, 72 N.C. App. 400, 324 S.E.2d 868, *rev'd on other grounds*, 315 N.C. 262, 337 S.E.2d 569 (1985). *Smith* construed N.C.G.S. § 20-310(f) (1978) which provided that an insurer "shall" provide notice containing specific information prescribed by the statute to cancel or refuse to renew automobile liability insurance policies. In *Smith*, this Court stated:

> all of the provisions of [G.S. § 20-310(f)] must be complied with before an insurer may refuse to renew an insurance policy pursuant to [G.S. § 20-310(e)(4).] Compliance means substantial compliance with [G.S. § 20-310] in order for an insurer to effectively cancel [or fail to renew] an automobile liability policy for nonpayment of premium.

Id. at 404, 324 S.E.2d at 871.

Analogizing to the case *sub judice*, defendant insists our approval of "substantial compliance" with G.S. § 20-310(f) as adequate for an insurer to cancel or fail to renew an automobile liability policy for nonpayment of premium mandates ratification herein of "substantial compliance" with G.S. § 20-279.21(b)(4). We do not agree.

We first note that the opinion in *Smith* was issued at least ten years prior to the decisions in *Hendrickson*, *Martin* and *State Farm* cited above. Moreover, in *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 255, 382 S.E.2d 745, 749 (1989), also subsequent to *Smith*, our Supreme Court held that certain subsections of G.S. § 20-310(f) require strict compliance to comport with the purpose of the Financial Responsibility Act. The Court stated in *Pearson*:

> We conclude, both as to stating the date and giving the statutorily required period of time, that the insurer must strictly comply with the statute. . . .
>
> For the protection of both the motoring public and the insured, automobile insurance cancellation dates must be expressly and carefully specified with certainty. They should not be left to the possible vagaries of date calculations nor to the uncertainties which result when less than the statutorily prescribed period of time has been given.

Id. at 252-53, 382 S.E.2d at 748; *see also Hales v. N.C. Insurance Guaranty Assn.*, 337 N.C. 329, 339, 445 S.E.2d 590, 597 (1994) (plaintiff insured's policy not canceled absent "forecast of evidence tending to show that the Commissioner of Insurance had previously approved the form of the notice[, and] the notice did not state the date on which any cancellation or refusal to renew would become effective, a date which 'must be expressly and carefully specified with certainty' in order to comply with the requirements of [the statute]") (citations omitted). It is well established that this Court is required to follow decisions of our Supreme Court until that Court orders otherwise. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (citation omitted).

In sum, we conclude our Supreme Court's expressed preference for "certainty," *Pearson*, 325 N.C. at 253, 382 S.E.2d at 748, so as "to provide . . . innocent victim[s injured by financially irresponsible motorists] with the fullest possible protection," *Proctor*, 324 N.C. at 225, 376 S.E.2d at 764, is best met by "avoiding confusion and ambiguity through the use of a single standard and approved form," *Hendrickson*, 119 N.C. App. at 456, 459 S.E.2d at 282. We therefore reiterate that the language of G.S. § 20-279.21(b)(4) is "mandatory," *State Farm*, 350 N.C. at 269, 513 S.E.2d at 784-85, and that "rejection of UIM coverage '*shall*' be in writing and on 'a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance,' " *Hendrickson*, 119 N.C. App. at 454, 459 S.E.2d at 281 (emphasis added) (quoting G.S. § 20-279.21(b)(4)). Defendant's form herein failed to meet this test, Mr. Johnson's purported rejection of UIM coverage thus was ineffective, and the trial court's grant of summary judgment in favor of defendant must be reversed.

Reversed.

Judges TIMMONS-GOODSON and HUNTER concur.

G.E. CAPITAL MORTGAGE SERVICES, INC., PLAINTIFF v. JAMES E. NEELY AND WYLENE NEELY, DEFENDANTS

No. COA98-1343

(Filed 5 October 1999)

1. Mortgages— erroneous cancellation of deed of trust—no issues of fact

There were no issues of fact in an action seeking a declaratory judgment that an erroneously canceled note and deed of trust was valid and enforceable where defendants argued that there was an issue as to whether the note was paid, given that it was marked "Paid and Satisfied," but defendants admitted that the note was never paid and that plaintiff had canceled the debt in error. Defendants also raised a factual issue as to whether plaintiff was a "holder" of the note, but plaintiff did not dispute that it did not have possession of the note after sending it to defendants. The only issues were the purely legal ones of the effect of the note being marked "Paid and Satisfied," and the effect of plaintiff's lack of possession on its ability to enforce the note.

2. Negotiable Instruments— note—cancellation—clerical error—debt not discharged

The trial court correctly concluded that a note which had been mistakenly canceled and surrendered was still valid; cancellation and surrender of a promissory note due to clerical error or mistake alone does not provide the requisite intent to effectively discharge the debt represented by that note. N.C.G.S. § 25-3-604.

3. Mortgages— anti-deficiency statute—not applicable

The anti-deficiency statute, N.C.G.S. § 45-21.38, was not applicable to an erroneously canceled note because that statute applies only to purchase-money mortgages and the record here does not reflect that the loan was used to acquire defendants' real property. Moreover, that statute only applies where the purchase-money mortgagee is the seller.

4. Mortgages— deed of trust—erroneously recorded cancellation—reinstated

The trial court did not err by reinstating a deed of trust where the deed of trust was erroneously canceled and a Notice of Satisfaction was filed with the register of deeds. No third party

relied on the mistakenly recorded cancellation, defendants admitted that they had never paid off the underlying debt, and plaintiff realized its error and took steps to correct it in a timely fashion. The equities in the case warrant that the deed of trust be reinstated.

5. Negotiable Instruments— mistakenly canceled note—returned to debtor—enforcement

Plaintiff was entitled to enforce a note and deed of trust where the note had been mistakenly canceled and returned to the debtor and defendants argued that plaintiff had forfeited its status as a holder. The party suing has to overcome a presumption that the instrument was discharged where the obligor has possession, but proof that the debtor never satisfied the underlying obligation can meet that burden. Additionally, the underlying obligation here was not discharged and plaintiff could recover under general contract law and not rely solely on the law of negotiable instruments.

Appeal by defendant from judgment entered 6 August 1998 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 18 August 1999.

Poyner and Spruill, L.L.P., by Anna S. Gorman and Constance L. Young, for plaintiff-appellee.

Hancock and Hundley, by R. Darrell Hancock and George R. Hundley, for defendant-appellants.

LEWIS, Judge.

This case deals with the issue of an attempted reinstatement of a Note and Deed of Trust after both were erroneously canceled by the creditor-mortgagee. This issue is one of first impression in North Carolina.

On 26 April 1985, defendants James and Wylene Neely borrowed $28,500 from the North Carolina Federal Savings and Loan Association, executing a Promissory Note in that amount. This Note was secured by a Deed of Trust on their home at 119 Division Avenue, East Spencer, North Carolina, which was promptly recorded with the Rowan County Register of Deeds. The Note and Deed of Trust were subsequently assigned to plaintiff G.E. Capital Mortgage Services, Inc.

In 1996, when defendants' loan balance was $25,090.08, plaintiff mistakenly applied a payment of $24,035.16 to defendants' account. After adding amounts in escrow, plaintiff sent defendants a letter stating that $979.48 was needed to fully satisfy their debt. Having already made a payment of $283.43 in the interim, defendants promptly sent plaintiff a check for the $696.05 difference, even though they knew their account balance was substantially more than that. Plaintiff thereafter marked both the Note and Deed of Trust "Paid and Satisfied" and sent them to the defendants, who took them to the Register of Deeds where the cancellation was made of record.

Plaintiff subsequently realized its error, adjusted the account to reflect the true balance owed, and filed a Rescission of Satisfaction and Reinstatement of Mortgage with the Register of Deeds. On several occasions, plaintiff demanded that defendants continue making their regular mortgage payments; defendants refused every request. Plaintiff then filed this action on 15 October 1997, seeking (1) a declaratory judgment that the Note and Deed of Trust were still valid and enforceable and (2) a money judgment in the amount of $29,004.00 (the unpaid balance plus late charges and interest accrued). From an order of summary judgment in favor of plaintiff on both claims, defendants appeal. We affirm.

[1] Initially, defendants contend that factual issues exist such that summary judgment was improper. We disagree. The standard for summary judgment has often been recited by this Court. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, a party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of *material* fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990) (emphasis added).

Defendants argue that there remains an issue as to whether the Note was in fact paid, given that it was marked "Paid and Satisfied." They attempt to analogize this case to *Bank v. Construction Co.*, 46 N.C. App. 736, 266 S.E.2d 1 (1980), in which a note was also erroneously marked "paid." There we held that summary judgment was improper because a factual issue existed as to whether or not the note had been paid. *Id.* at 738, 266 S.E.2d at 2. In that case, however, the dispositive fact was not that the note had been marked "paid," but that one of the debtors testified he knew the note was paid. *Id.* Here we have no such testimony; indeed, defendants admit that the Note

was never paid and that plaintiff had canceled their debt in error. Accordingly, the only issue remaining is purely a *legal* one, namely the *effect* of the Note being marked "Paid and Satisfied."

Defendants also assert that the fact plaintiff was not in possession of the Note raises a factual issue as to whether plaintiff was a "holder" of the Note entitled to enforce it. However, plaintiff does not dispute that it did not have possession of the Note after sending it to defendants. Again, the only dispute between the parties is a *legal* issue: the *effect* of plaintiff's lack of possession on its ability to enforce the Note.

Defendants argue that both the Note and the Deed of Trust are null and void as a result of plaintiff's mistaken cancellation. Because the Note and Deed of Trust represent differing rights and obligations, each instrument will be analyzed separately.

[2] We begin with the Note. Defendants maintain that the underlying obligation was discharged, thereby extinguishing the Note. We disagree. Discharge of instruments is controlled by N.C. Gen. Stat. § 25-3-604, which mirrors revised Article 3, § 604 of the Uniform Commercial Code ("UCC"). Under the relevant subsection, an underlying obligation is discharged "by an *intentional* voluntary act, such as surrender of the instrument." N.C. Gen. Stat. § 25-3-604(a) (1995) (emphasis added). Our courts have not yet had occasion to construe this subsection in the context of mistakenly canceled notes. The Official Commentary to § 25-3-604 provides no guidance, so we look to other jurisdictions that have analyzed similar statutory provisions. We now join the overwhelming majority of those jurisdictions and hold that cancellation and surrender of a promissory note due to clerical error or mistake alone does not provide the requisite intent to effectively discharge the debt represented by that note.

As a preliminary consideration, we note that most courts considering this issue have been construing statutory provisions mirroring the pre-1990 version of Article 3. That version stated:

> (1) The holder of an instrument may even without consideration discharge any party
>
> (a) in any manner apparent on the face of the instrument or the indorsement, as by *intentionally* cancelling the instrument . . . .

6A Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 3-605, at 375 (3d ed. 1998) (emphasis added). North Carolina, too, employed this provision until 1995, when our legislature codified the Revised Article 3 version. Despite different wording between the respective sections of the pre-1990 and revised versions of Article 3, we note one significant parallel: both require an intent to cancel. This intent requirement has led courts, whether construing the pre-1990 or revised Article 3, to conclude that mistakenly marking a note "paid" (or the equivalent) will not discharge the debt.

In *Gibraltar Sav. Ass'n v. Watson*, 624 S.W.2d 650 (Tex. App. 1981), the Texas Court of Appeals dealt with an analogous set of facts. The Watsons borrowed $21,550 from Gibraltar Savings Association ("Gibraltar"), using their townhouse to secure the promissory note. *Id.* at 651. Sometime later, a payment of $9100 was mistakenly credited to their account. *Id.* The Watsons eventually sold the townhouse, using the sale proceeds to pay off the loan balance. *Id.* However, this balance was $9100 less than it should have been because of the clerical error. *Id.* As a result, Gibraltar marked "paid" on the note and subsequently turned it over to the Watsons. *Id.* Gibraltar thereafter realized its error and demanded payment of the $9100. *Id.* The Watsons knew the $9100 had never been paid, but still refused to comply with Gibraltar's demands. *Id.* The Texas court held that the mistaken cancellation had not effectively discharged the debt. *Id.* at 652-53. In analyzing the UCC's intent requirement, the court stated:

> The word in the statute which must be given particular attention is "intentionally." The statute does not contemplate a situation like the one before this court where the instrument was "cancelled" by a "paid" mark placed on the instrument by mistake. For a party to be discharged pursuant to this statute, the holder has to perform his act of cancelling or renouncing intentionally.

Id. at 652. Other courts have used similar reasoning to arrive at the same conclusion. *See, e.g.*, *Columbia Sav. v. Zelinger*, 794 P.2d 231 (Colo. 1990); *Gover v. Home & City Sav. Bank*, 574 So. 2d 306 (Fla. Dist Ct. App. 1991); *First Galesburg Nat'l Bank & Trust Co. v. Martin*, 373 N.E.2d 1075 (Ill. App. Ct. 1978); *Richardson v. First Nat'l Bank*, 660 S.W.2d 678 (Ky. Ct. App. 1983); *Firstier Bank v. Triplett*, 497 N.W.2d 339 (Neb. 1993); *Los Alamos Credit Union v. Bowling*, 767 P.2d 352 (N.M. 1989); *Peoples Bank v. Robinson*, 249 S.E.2d 784 (S.C. 1978). Because plaintiff's mistaken cancellation and surrender of the Note here was not accompanied by the requisite intent to dis-

charge, the trial court was correct in concluding that the Note was still valid.

[3] Defendants also contend that, notwithstanding the validity of the Note, plaintiff cannot sue on the Note because of the anti-deficiency judgment provisions in N.C. Gen. Stat. § 45-21.38. However, defendants have misread the statute. Generally speaking, a creditor-mortgagee such as plaintiff has an election of remedies. Upon default, it may sue to collect on the unpaid note or foreclose on the land used to secure the debt, or both, until it collects the amount of debt outstanding. *Bank v. Whitehurst*, 203 N.C. 302, 308, 165 S.E. 793, 795 (1932). Section 45-21.38 provides an exception; it limits certain creditors to recovery only through foreclosure. Under § 45-21.38, if the proceeds from the foreclosure sale do not satisfy the debt obligation, the creditor-mortgagee is left with no other remedy. In other words, it cannot sue on the note—it must look only to the land.

However, § 45-21.38 does not apply to plaintiff. By its very terms, the statute only applies when the deed of trust "secure[s] to the seller the payment of the balance of the purchase price of real property." N.C. Gen. Stat. § 45-21.38 (1996). Thus, the statute only applies to purchase-money mortgages. Nowhere does the record reflect that the loan here was used to acquire the defendants' real property. More significantly, however, § 45-21.38 also applies only where the purchase-money mortgagee is the *seller*. *Id.* Here, the original mortgagee (North Carolina Federal Savings and Loan Association), from whom plaintiff acquired the Note and Deed of Trust, was not the seller, but a commercial lending institution. Therefore, § 45-21.38 is inapplicable here.

As a result, because the underlying obligation represented by the Note is still valid, and because the anti-deficiency judgment statute does not apply, the trial court was correct in awarding plaintiff a monetary judgment in the amount of the outstanding debt balance, plus interest and late fees.

[4] Next, we turn to the validity of the Deed of Trust. Defendants argue that the filing of the Notice of Satisfaction with the Register of Deeds permanently canceled the Deed of Trust such that any attempted reinstatement had no effect. We disagree.

We begin our analysis by noting that no third party has encumbered the property or otherwise relied on the mistakenly-recorded cancellation. Thus, we are dealing only with the effect of the mistake

as between the mortgagor and mortgagee themselves. While our courts have not had occasion to reinstate a mortgage canceled by mistake, they have used their equitable powers to reinstate mortgages canceled for other reasons. *See, e.g., Monteith v. Welch*, 244 N.C. 415, 94 S.E.2d 345 (1956) (cancellation by unauthorized person); *First Financial Savings Bank v. Sledge*, 106 N.C. App. 87, 415 S.E.2d 206 (1992) (cancellation procured by fraud). Furthermore, courts in other jurisdictions have applied general principles of equity to reinstate mortgages that were canceled due to mistake. *See, e.g., Taylor v. Jones*, 194 So. 2d 80 (Ala. 1967); *United Serv. Corp. v. Vi-An Constr. Corp.*, 77 So. 2d 800 (Fla. 1955); *Westgard v. Farstad Oil, Inc.*, 437 N.W.2d 522 (N.D. 1989). As one leading commentator summarized, "[w]here formal release has been obtained by fraud, misrepresentation, or mistake, equity may decree a cancellation of it and reinstate the mortgage." 4 Richard R. Powell, *Powell on Real Property* § 37.33[2], at 37-228 (1999). We feel the equities in this case warrant that the Deed of Trust involved here be reinstated. Defendants admitted they never paid off the underlying debt; plaintiff realized its error and took steps to correct it in a timely fashion; the Reinstatement of Mortgage was recorded by plaintiff with the Register of Deeds only three weeks after it was mistakenly canceled; and no third party relied on the mistaken cancellation in the interim. Accordingly, the trial court did not err in reinstating the Deed of Trust.

[5] Finally, defendants argue that, notwithstanding the validity of the Note and Deed of Trust, plaintiff is not entitled to *enforce* either of these instruments. In order to enforce an instrument, our statutes require that the claimant be either (1) a holder of the instrument, (2) a nonholder with possession of the instrument who has the rights of a holder, or (3) one attempting to enforce the instrument pursuant to N.C. Gen. Stat. § 25-3-309 or § 25-3-418(d). N.C. Gen. Stat. § 25-3-301 (1995). Of these, the only possible theory that applies to plaintiff is that it is a "holder" of the instrument. Holder is defined as:

> the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession.

N.C. Gen. Stat. § 25-1-201(20) (1995). Defendants argue that plaintiff forfeited its status as holder when it turned over possession of the instruments to defendants. However, defendants' argument is overly technical and places undue weight on the element of physical possession. In construing the statutory definition of holder, this Court

has previously stated, "[T]he mere absence of the note from the owner's possession does not defeat his right to bring the action to enforce the terms of the note." *Good v. Good*, 72 N.C. App. 312, 315, 324 S.E.2d 43, 45, *disc. review denied*, 313 N.C. 600, 330 S.E.2d 609 (1985). White and Summers, the leading commentators on the UCC, clarified: "When the obligor has possession, the party suing on the instrument has to overcome a presumption that the instrument was discharged. Proof of the fact that the debtor never satisfied the underlying obligation . . . can meet this burden." 2 James J. White & Robert S. Summers, *Uniform Commercial Code: Practitioner Treatise Series* § 16-13, at 134-35 (4th ed. 1995). Plaintiff has met that burden here and thus is entitled to enforce both the Note and Deed of Trust.

Additionally, we must point out that the status of holder is only significant if the creditor is attempting to enforce the *instrument* itself. N.C. Gen. Stat. § 25-3-301 (1995). Because we have held that the underlying obligation was not discharged, plaintiff (as payee of defendants' debt), could—and did—also sue on the underlying obligation. Thus, plaintiff need not rely solely on the law of negotiable instruments to recover this debt; it can also recover under general contract law. Accordingly, defendants' final argument is rejected.

Affirmed.

Judges MARTIN and SMITH concur.

VICKIE L. RISSOLO, PLAINTIFF-APPELLANT v. CELESTE W. HUNTER SLOOP, D.D.S., DEFENDANT-APPELLEE

No. COA98-1326

(Filed 5 October 1999)

Statute of Limitations— dental malpractice—summary judgment—continuing course of treatment doctrine

The trial court erred in granting summary judgment in a negligence case in favor of defendant-dentist because there is a genuine issue of material fact concerning whether to apply the continuing course of treatment doctrine in order to toll the statute of limitations under N.C.G.S. § 1-15(c).

Appeal by plaintiff from judgment entered 30 June 1998 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 16 August 1999.

Pulley, Watson, King & Lischer, P.A., by Stella A. Boswell and Richard N. Watson, for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by William P. Daniell, for defendant-appellee.

McGEE, Judge.

Plaintiff was a dental patient whose wisdom teeth extraction by defendant on 8 May 1992 began a series of complaints, discussions with and among dentists, and prescriptions to relieve her dental pain. Plaintiff alleged in her complaint that defendant provided her a continuing course of treatment to relieve pain from the date of her wisdom teeth extraction to 13 July 1993, when defendant cemented a crown on one of her teeth. Defendant filed an answer stating that no continuing course of treatment was provided, and therefore that the three-year statute of limitations was not tolled for any time subsequent to the extraction of the wisdom teeth. Defendant filed a motion for summary judgment which was heard on 8 June 1998. An order granting defendant's summary judgment motion was filed 30 June 1998. Plaintiff appeals.

Plaintiff argues there is a genuine issue of material fact under the continuing course of treatment doctrine as to whether the statute of limitations was tolled pursuant to N.C. Gen. Stat. § 1-15(c) (1996) resulting in plaintiff's claim being timely filed. "Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "Summary judgment . . . is rarely appropriate in negligence cases." *Rouse v. Pitt County Memorial Hospital*, 343 N.C. 186, 191, 470 S.E.2d 44, 47 (1996) (citation omitted). "All of the evidence before the court must be construed in the light most favorable to the non-moving party. The slightest doubt as to the facts entitles the non-moving party to a trial." *Miller v. Talton*, 112 N.C. App. 484, 486, 435 S.E.2d 793, 796 (1993) (citation omitted).

Plaintiff's argument focuses on the continuing course of treatment doctrine. N.C.G.S. § 1-15(c) provides 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[.]

Our Supreme Court affirmed the "continuing course of treatment" doctrine in *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 781 (1996) ("We now affirm that the continuing course of treatment doctrine . . . is the law in this jurisdiction."). Under this doctrine, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the plaintiff's cause of action, plaintiff's claim is tolled until the earlier of (1) the termination of the physician's treatment of the patient, or (2) the time at which the patient knew or should have known of the injury. *Ballenger v. Crowell*, 38 N.C. App. 50, 60, 247 S.E.2d 287, 294 (1978). "It is not necessary under this doctrine that the treatment rendered subsequent to the negligent act itself be negligent, if the physician continued to treat the patient for the particular disease or condition created by the original act of negligence." *Stallings v. Gunter*, 99 N.C. App. 710, 714-15, 394 S.E.2d 212, 215 (1990) (citation omitted).

Plaintiff alleges that on 12 May 1992, four days after the extraction of her wisdom teeth (teeth numbers 1, 16, 17 and 32), she returned to defendant's office because she experienced severe pain near the extraction sites. Another dentist, who saw plaintiff because the defendant was on vacation, stated that plaintiff had an inflammatory reaction and prescribed medication. Her exam notes from that day indicated muscular tenderness and bilateral clicks of the temporomandibular joint. Two days later the same dentist diagnosed a dry socket on the site of tooth number 17. Plaintiff returned to this dentist at defendant's office on 16 May 1992, complaining that the pain had not decreased. She again spoke to the dentist on 20 May 1992 concerning continued pain. Plaintiff visited defendant's office on at least four more occasions between 21 May and 3 June, attended by defendant on the final three visits. She telephoned defendant on other days when she did not visit defendant's office.

Between June and December 1992, plaintiff discussed her continuing pain with defendant in a hair salon where defendant was a regular customer. On 7 December 1992, defendant recemented with temporary cement a crown that had been placed on plaintiff's tooth number 19 in March 1992 because plaintiff said she experienced pain in that area. Tooth number 19 is two teeth removed from the site of

extracted tooth number 17, which plaintiff recalls having been difficult for defendant to extract but which defendant says had been removed easily.

In January 1993, defendant advised plaintiff to consult an endodontist due to reported pain in teeth 18 and 19. On 25 January 1993, the endodontist performed a root canal on tooth 19 and the next day prescribed medication because of plaintiff's pain. The following day, defendant again recemented the crown on tooth 19 with temporary cement, and plaintiff reported pain the next day.

On 1 February 1993, the endodontist saw plaintiff and telephoned defendant to inform her that tooth 19 was ready to be crowned. On 8 February, the endodontist noted that tooth 18 was responsive to hot and cold and performed a root canal on tooth 18 that day. Plaintiff visited the endodontist with a complaint about tooth 20 on 22 February, and the endodontist, noting that tooth 18 was fine, telephoned defendant to tell her that the root canal on tooth 18 was complete. Three days later, plaintiff told defendant by telephone that she had pain from the tooth 18 root canal, and defendant prescribed medication.

The plaintiff complained to defendant of pain from tooth 20 on 1 March 1993, at which time plaintiff requested a referral to a named second endodontist. Defendant spoke with this second endodontist about plaintiff's two root canals and ensuing pain. When this endodontist found nothing wrong with plaintiff's teeth, defendant sent her to a third doctor who also found no problem.

The first endodontist's office notes indicate that on 5 March 1993 defendant told him that (1) plaintiff was having pain with heat and cold, which plaintiff believed was associated with tooth 19; (2) defendant had found no response from tooth 18 or 19 to a temperature test she administered on plaintiff; and (3) defendant was not sure of the origin of plaintiff's continuing pain. The two doctors discussed options, from which defendant decided plaintiff should have tooth number 19 refilled. Defendant spoke with the third doctor about plaintiff on 8 March 1993, and the first endodontist and third doctor had a conversation about plaintiff as well.

On 9 March 1993, plaintiff told the first endodontist that she had a tight pulling in her jaw and reported sensitivity to touch and liquid but not temperature. At that time the endodontist removed the filling in tooth 19 and refilled it with temporary filling. On 12 March, plain-

tiff reported soreness to the endodontist and never saw him again. She returned to defendant's office on 23 March to have the crown on tooth 19 recemented with temporary bonding glue. The recementing required an adjustment of plaintiff's bite, during which tooth 14, which is directly above tooth 19, was involved. Plaintiff states that tooth 14 was filed down, but defendant's notes only acknowledge the involvement of tooth 14 in an illegible notation. In any case, plaintiff reported sensitivity in tooth 14, for which defendant numbed the area and later recommended a crown.

Defendant placed a temporary crown on tooth 18 on 23 April 1993 and prescribed medication for pain. Defendant cemented the crown on tooth 18 and removed the crown on tooth 19 to insert a permanent filling on 10 May. On 7 June, defendant examined plaintiff and indicated in her notes both asymptomatic temporomandibular joint clicks and sensitivity in tooth 19. Plaintiff returned on 21 June for the crown preparation on tooth 14, at which time defendant prescribed more medication. Defendant cemented the crown for tooth 14 on 13 July 1993.

Plaintiff filed her complaint on 11 July 1996, within three years after her crown on tooth 14 was cemented. Plaintiff's contention, supported by expert opinion, is that her pain from the beginning had not been tooth problems but instead had been the result of temporomandibular joint dysfunction caused by a negligent extraction of her wisdom teeth by defendant on 8 May 1992. Plaintiff contends that all of the endodontic work performed subsequent to her wisdom teeth extraction, including the crown on tooth 14, was a continuing course of treatment for the pain associated with the original extractions. More specifically, plaintiff argues that a genuine issue of material fact exists about whether to apply the continuing course of treatment doctrine, which would preclude summary judgment for defendant. We agree.

In *Callahan v. Rogers*, 89 N.C. App. 250, 365 S.E.2d 717 (1988), our Court held that the trial court erred in granting the defendant's motion to dismiss the plaintiff's action based on the three-year statute of limitations where the evidence "tended to show that plaintiff filed the action pursuant to the continued course of treatment exception." *Id.* at 252, 365 S.E.2d at 718. The plaintiff in *Callahan* had been experiencing pain following a hip operation by the defendant and had undergone corrective surgery by another doctor within seven months of the alleged negligent operation. After the original operation, the

plaintiff had made postoperative visits to the defendant for the same injury and continued course of treatment. Our Court stated that "we believe these facts give rise to the application of the continued course of treatment rule[.]" *Id.* at 255, 365 S.E.2d at 720. We concluded that:

> [P]laintiff continued to seek treatment from defendant because of continued pain in that area for which medical attention was first sought. These visits continued over a period of six months, culminating in plaintiff's last visit on 24 June 1981 . . . [which was within the limitations period].
>
> On the record before this Court, there exists a genuine issue of material fact, and based on the evidence, defendant is not entitled to judgment as a matter of law.

Id.

In *Cobo v. Raba*, 125 N.C. App. 320, 481 S.E.2d 101 (1997), *aff'd*, 347 N.C. 541, 495 S.E.2d 362 (1998), a patient sued his psychiatrist for malpractice, but the defendant argued that the three-year statute of limitations barred any actions arising out of treatment rendered before the plaintiff tested positive for HIV because the defendant's treatment was distinctly different after that time. Our Court held that the psychiatrist's treatment, even if "more supportive" after the HIV test, did not change in that the sessions continued four times a week for discussions about how to manage the plaintiff's personal problems. *Id.* at 326, 481 S.E.2d at 106. As a result, "because defendant continued to treat [plaintiff] after 1986 for conditions that [he] has alleged were caused by defendant's negligence before 1986, the continuing course of treatment doctrine is applicable and plaintiffs' action was timely filed." *Id.*

Under the reasoning in *Callahan* and *Cobo*, there is a genuine issue of material fact in this case as to whether the crown on tooth 14 was related to the treatment for pain in tooth 19, which was being treated as part of a continuing course to relieve pain for a joint condition caused by defendant's negligent removal of wisdom teeth. From May 1992 through July 1993, plaintiff regularly communicated to defendant her complaints of continuing pain. Even though plaintiff was treated during this time by two endodontists and a third doctor, she also continued to receive treatment by defendant. Thus, plaintiff's evidence at least supports an inference that the statute of limitations had not expired before 11 July 1996. When the evidence is sufficient to support an inference that the limitations period has not expired,

that issue should be submitted to the jury. *Hatem v. Bryan*, 117 N.C. App. 722, 725, 453 S.E.2d 199, 201 (1995) ("[W]e conclude that the issue of when the limitations period expired is a question of fact for the jury.").

Reversed and remanded.

Chief Judge EAGLES and Judge WALKER concur.

GLORIA REMONA COOPER, PETITIONER v. BOARD OF EDUCATION FOR NASH-ROCKY MOUNT SCHOOLS, AND NASH-ROCKY MOUNT SCHOOLS, RESPONDENTS

No. COA98-1446

(Filed 5 October 1999)

1. **Schools and Education— non-teacher—right to judicial review of school board decision**

   A non-teacher is entitled to judicial review of a school board's decision if that decision affects her character.

2. **Schools and Education— school board decision—effect on petitioner's character**

   Being dismissed from a job for making a racial comment, which the Board characterized as being "totally unacceptable for an employee in a school setting," affected petitioner's character within the meaning of N.C.G.S. § 115C-45(c).

3. **Schools and Education— school board decision—judicial review**

   Petitioner received judicial review of a school board decision where, after hearing arguments of counsel, reviewing the full record, and considering memoranda of law presented by the parties, the trial court granted the motion for summary judgment.

4. **Schools and Education— school board—procedure**

   The procedure followed by defendant in terminating plaintiff was adequate where plaintiff contended that she was not on notice that the Board would consider earlier conduct, but the Board was permitted to consider any facet of petitioner's employment history and, at worst, this evidence was irrelevant and harmless; and, although the Board did not follow the precise pro-

cedure set out in N.C.G.S. § 115C-45 in that petitioner did not request review of the school personnel decision to suspend her and recommend termination, the Board granted petitioner's request that it review its own decision. Such a review, although not provided for by the statute, more than compensated for any procedural flaws in the Board's actions.

5. Schools and Education— school board—at-will employee terminated for racial comment—not arbitrary or capricious

It was not arbitrary or capricious, nor an abuse of discretion, for the Board to terminate an at-will employee for making a racial comment in a school setting where the statement was made while petitioner was driving a bus and the passengers became so inflamed and unruly that petitioner was compelled to return to the school immediately for assistance in controlling the students.

Appeal by petitioner from judgment entered 29 June 1998 by Judge George L. Wainwright, Jr., in Nash County Superior Court. Heard in the Court of Appeals 19 August 1999.

Robinson Law Office, by Charles Everett Robinson, for petitioner-appellant.

Valentine, Adams & Lamar, L.L.P., by L. Wardlaw Lamar, for respondent-appellee Board of Education for Nash-Rocky Mount Schools.

EDMUNDS, Judge.

Petitioner, an African-American at-will employee of the Nash-Rocky Mount Schools, worked as a school bus driver and teacher's assistant. After school on 25 March 1997, petitioner told an African-American male student misbehaving on her school bus to "act your age and not your color." Several students on the bus reacted so strongly that petitioner felt compelled to return to school immediately.

School administrators suspended petitioner with pay on 27 March 1997 and notified her of their recommendation that the Nash-Rocky Mount Board of Education (the Board) terminate her employment at its 7 April 1997 meeting. Petitioner did not attend the meeting because the school system superintendent discouraged her from doing so, advising her that the meeting would be open to the public.

The Board voted at that meeting to terminate petitioner's employment. On 16 June 1997, petitioner asked the Board to grant her a hearing to review its decision. The Board agreed, and a three-member panel of the Board held this administrative hearing on the evenings of 30 July and 4 August 1997. After hearing petitioner's evidence, the panel voted to uphold the termination.

Petitioner filed a petition for judicial review on 8 September 1997. Respondent filed a Rule 12(b) motion to dismiss based on lack of subject matter and personal jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted. The court denied all motions except the motion to dismiss for failure to state a claim, which it deemed premature until a transcript of the Board's administrative hearing could be made a part of the record. When the court conducted its review on 22 June 1998, it treated respondent's motion to dismiss as a motion for summary judgment. After reviewing the record and each party's memorandum of law, the trial court granted respondent's motion for summary judgment and dismissed petitioner's action with prejudice. Petitioner appeals.

I.

[1] We must decide as an initial matter whether N.C. Gen. Stat. § 115C-45 (1997) gives a non-teacher the right to judicial review of a school board's decision when that decision affects the non-teacher's character. The statute reads in pertinent part:

> An appeal shall lie from the decision of all school personnel to the appropriate local board of education. . . .
>
> . . . .
>
> An appeal shall lie from the decision of a local board of education to the superior court of the State in any action of a local board of education affecting one's character or right to teach.

N.C. Gen. Stat. § 115C-45(c). This statute replaced N.C. Gen. Stat. § 115-34 (repealed 1981). We have noted previously that these statutes are not "materially different." *See Williams v. New Hanover County Bd. of Education*, 104 N.C. App. 425, 429, 409 S.E.2d 753, 756 (1991). The only difference between these statutes is that in section 115C-45(c), the word "local" replaced the words "county or city." Although there are no reported cases discussing the grant or denial of judicial review to non-teachers under section 115C-45(c), our

Supreme Court has held that non-teachers are entitled to judicial review under section 115-34 of school board decisions that affect character. *See Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979) (holding that cafeteria worker's failure to invoke remedies provided under section 115-34 was failure to exhaust administrative procedures prior to filing tort claim). In light of the plain language of section 115C-45(c) and the case law interpreting the predecessor statute to section 115C-45, we hold that a non-teacher is entitled to judicial review of a school board's decision if that decision affects her character.

II.

[2] We next address the issue of whether the Board's decision affected petitioner's character within the meaning of section 115C-45(c). Respondent argues that "[n]owhere in her petition for a Superior Court review does the petitioner state as a basis for such a review that . . . her character has been affected." We disagree. In her petition for review to the trial court, petitioner set forth her objection to the admission into evidence of opinion testimony about whether petitioner's racially charged statement "adversely impacted on Petitioner's character . . . ." "[P]leadings must be liberally construed in the light most favorable to the nonmoving part[y]." *Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143 (1993) (citation omitted). Consequently, we hold that petitioner did raise in the court below the issue of whether the Board's decision affected her character.

Because the issue was properly raised, we must determine whether the decision affected petitioner's character. Although there is no case directly on point, we are guided by *Presnell*, 298 N.C. 715, 260 S.E.2d 611. In *Presnell*, the plaintiff was the manager of an elementary school cafeteria. The school principal's allegations that plaintiff brought alcohol into the school for painters working there led to her termination. The Supreme Court, holding that the opportunities for review allowed by section 115-34 met constitutional due process requirements, assumed that an allegation of alcohol-related misconduct on the grounds of an elementary school did affect the plaintiff's character. *See id.* Similarly, we are persuaded that being dismissed from a job for making a racial comment, which the Board's counsel characterized as being "totally unacceptable for an employee in a school setting," affected petitioner's character within the meaning of section 115C-45. Therefore, petitioner was entitled to judicial review.

III.

[3] Petitioner contends that she did not receive the judicial review provided by section 115C-45. Petitioner sought judicial review after her termination was upheld by the three-member panel of the Board. When respondent filed a motion to dismiss pursuant to Rule 12(b)(6), the superior court deferred ruling on the motion until a transcript of the administrative proceeding was made part of the record. Once the transcript became available, the trial court treated the Rule 12(b)(6) motion as a Rule 56 motion for summary judgment. After hearing arguments of counsel, reviewing the full record, and considering memoranda of law presented by the parties, the trial court granted the motion for summary judgment. Therefore, petitioner received judicial review of the Board's decision as set forth in section 115C-45.

[4] In the alternative, petitioner argues that even if she did receive judicial review, summary judgment should not have been granted because the procedure followed by the Board was inadequate. A trial court may grant a motion for summary judgment where there is no genuine issue of material fact and where the movant is entitled to judgment as a matter of law. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). While there is a presumption that the judge found facts from proper evidence sufficient to support the judgment, *see J.M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 324 S.E.2d 909 (1985), we review the record in the light most favorable to the nonmovant, *see Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

Petitioner made two procedural arguments in her petition for judicial review to the superior court. First, she contended that she received insufficient notice of the reasons for her termination. However, the record demonstrates that school administrators initially informed petitioner that she was being suspended with pay for the comments she made on her school bus. When the three-member panel convened to review the Board's decision, it heard additional evidence of petitioner's problems as a cafeteria worker some years before. Petitioner objected to the introduction of this evidence because she was not on notice that the Board would consider earlier conduct. Although the school board may operate under a more relaxed standard than a court of law, all essential elements of due process must still be satisfied. *See Hope v. Charlotte-Mecklenburg Bd. of Education*, 110 N.C. App. 599, 430 S.E.2d 472 (1993). Petitioner was an at-will employee who could be terminated by the Board for any reason or for an arbitrary reason. *See Sides v. Duke Hospital*, 74

N.C. App. 331, 328 S.E.2d 818 (1985), *disapproved of on other grounds by Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997). The Board was permitted to consider any facet of the petitioner's employment history, as long as doing so was not unlawful or contrary to public policy. *See Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). At worst, evidence pertaining to petitioner's prior employment was irrelevant to the uncontested evidence of petitioner's more serious act while driving the school bus. Any error by the Board in considering this evidence was harmless.

Second, petitioner contended in her petition that she was entitled to appear before the Board when it considered her termination. We disagree. The procedure followed in this case was not the precise procedure set out in section 115C-45. Pursuant to that section, a decision by school personnel is appealable to the appropriate school board, and an adverse decision by that board affecting character or right to teach is appealable further to superior court. Here, school personnel suspended petitioner and recommended her termination. Under section 115C-45, petitioner could have requested that the Board review this decision. However, she did not make such a request, and on recommendation of the superintendent, did not attend the first Board meeting where she was terminated. However, she did request and obtain a review by the Board of its own decision. Such a review, although not provided for by the statute, more than compensated for any procedural flaws in the Board's actions. Petitioner's substantial rights were not prejudiced by any procedural irregularities below.

[5] The only substantive argument petitioner raised in her petition for review was that the Board's decision was arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence admissible under N.C. Gen. Stat. § 150B-29(a) (1995). The statement was made while petitioner was driving a school bus. The passengers became so inflamed and unruly that petitioner was compelled to return to the school immediately for assistance in controlling the students. We hold that it was not arbitrary or capricious, nor an abuse of discretion, for the Board to terminate an at-will employee for making a racial comment in a school setting.

On appeal, the issue is whether the Board's decision is supported by substantial evidence. Acting as an appellate court, the superior court makes that determination based on a review of the whole record. *See Overton v. Board of Education*, 304 N.C. 312, 283 S.E.2d

495 (1981). Here, the court did review the entire record before granting respondent's summary judgment motion. We have also reviewed the whole record and hold that there was sufficient evidence to support the Board's decision; the trial court correctly determined there were no disputed material issues as a matter of law and properly granted summary judgment.

As a final matter, respondent filed with this Court a motion to dismiss petitioner's appeal. That motion is denied.

Affirmed.

Judges WYNN and JOHN concur.

VON PETTIS REALTY, INC., AGENT, AND GERALD JOHNSON, OWNER, PLAINTIFFS V. DONNA McKOY, DEFENDANT

No. COA98-1530

(Filed 5 October 1999)

Landlord and Tenant— Residential Rental Agreements Act— breach of implied warranty of habitability

The trial court did not err in upholding the jury's award of damages based on plaintiffs' violation of the North Carolina Residential Rental Agreements Act because: (1) the proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition, provided the damages do not exceed the total amount of rent paid by the tenant; and (2) the tenant is entitled to any special and consequential damages alleged and proved.

Appeal by plaintiffs from judgment dated 2 March 1998 and from order dated 11 June 1998 by Judge Richard D. Boner in Mecklenburg County District Court. Heard in the Court of Appeals 9 September 1999.

Robinson, Bradshaw & Hinson, P.A., by Frank E. Emory, Jr. and Stephen M. Cox, for plaintiff-appellants.

Odom & Groves, P.C., by Stephen D. Koehler, for defendant-appellee.

GREENE, Judge.

Von Pettis Realty, Inc. (Realty) and Gerald Johnson (Johnson) (collectively, Plaintiffs) appeal from a jury verdict and judgment in favor of Donna McKoy (Defendant), finding Plaintiffs violated the North Carolina Residential Rental Agreements Act (the Act), N.C.G.S. ch. 42, art. 5 (1994 & Supp. 1998), and engaged in unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1. Plaintiffs also appeal the trial court's order denying their Rule 59 motions for a new trial and Rule 11 motion for sanctions.

Johnson owned a house, used as a residence, located at 318 Whispering Pines, Charlotte, North Carolina (the property), and The Brokerage House Realty (Brokerage) managed the property. Sometime prior to 20 July 1995, the City of Charlotte Community Development Department notified Brokerage that the condition of the property violated several housing code provisions, and Brokerage forwarded this information to Johnson. Realty later succeeded Brokerage as manager of the property.

On 20 July 1995, Defendant and Johnson entered into a lease for the property. Defendant testified that when she entered into the lease Plaintiffs agreed to repair several defects on the property in a timely manner; however, Plaintiffs never repaired these defects.

Defendant resided at the property from 22 July 1995 to 29 November 1996, and paid monthly rent of $550.00. During Defendant's tenancy, the fair rental value of the property in a warranted condition (a condition in compliance with the Act) would have been $700.00; however, because Plaintiffs failed to make necessary repairs, the fair rental value of the property was $250.00 to $300.00.

On 1 September 1996, a defective wall outlet caused a power outage and a fire at the property. The fire department instructed Defendant to keep the power turned off until all defective outlets had been repaired, and Defendant reported the problem to Realty. On 4 September 1996 Defendant contacted the city inspector because the wall outlets had not yet been repaired.

On 5 September 1996, Plaintiffs filed a summary ejectment action against Defendant in the Small Claims Court of Mecklenburg County. The Small Claims Court granted Plaintiffs' petition for summary ejectment, and Defendant appealed to the Mecklenburg County District Court. Defendant also filed a counterclaim against Plaintiffs alleging Plaintiffs violated the Act and had engaged in unfair and deceptive trade practices. The case was placed in non-binding arbitration, with the arbitrator recommending an award for Defendant in the amount of $16,034.78. A trial de novo was then requested by Plaintiffs, pursuant to N.C. Gen. Stat. § 7A-37.1(b), and the case was tried in the district court.[1]

On 6 February 1998, the jury found Plaintiffs had violated the Act and awarded Defendant $6,400.00 in damages. The jury also made findings regarding the "unfit and uninhabitable" state of the house and, based on these findings, the trial court found Plaintiffs had engaged in unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. The trial court awarded Defendant treble damages in the amount of $19,200.00, pursuant to N.C. Gen. Stat. § 75-16, and attorney's fees of $10,000.00, pursuant to N.C. Gen. Stat. § 75-16.1.

After the entry of the jury verdict,[2] Plaintiffs filed a written motion for a new trial on the issue of damages, pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the ground "the evidence was insufficient to justify the verdict."[3]

The dispositive issue on appeal is how to measure damages in an action for breach of the implied warranty of habitability under the Act.

A tenant may bring an action for rent abatement against a landlord for breach of the implied warranty of habitability under the Act and recover damages. *Surratt v. Newton*, 99 N.C. App. 396, 404, 393 S.E.2d 554, 558-59 (1990) (citations omitted); *see also* N.C.G.S.

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1. Plaintiffs did not contest at trial, and do not contest in this Court, the application of the Act to the property.

2. Before the entry of the jury verdict, Plaintiffs made an oral Rule 59 motion for a new trial on damages on the ground the damages verdict was "against the greater weight of the evidence." This motion was denied.

3. There were other grounds asserted but they are not material to the resolution of this case.

§ 42-42 (Supp. 1998). There are various opinions about the proper measure of those damages.

There are at least four formulas for measuring a tenant's damages for breach of the implied warranty of habitability. *See* 5 David A. Thomas, *Thompson on Real Property* § 40.23(c)(8)(vi)(B), at 189 (David A. Thomas ed., 1994). The first formula measures damages as the difference between the amount of rent agreed to in the lease and the fair rental value of the property in an unwarranted condition. *Id.* Under this formula, a tenant could recover for breach of warranty if at the time the parties entered into the lease the property was fully warranted, but subsequently became unwarranted. *Id.* A tenant could not recover, however, if at the time the parties entered into the lease the property was in an unwarranted condition, and the parties agreed to a rental amount that reflected the fair rental value of the property in the unwarranted condition. *Id.* This method would, therefore, permit a landlord to rent substandard housing without any possible liability for damages in a rent abatement action.

A second formula measures damages as the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition. *Id.* This formula would result in the same measure of damages as the first formula if the property was in a warranted condition at the time the parties entered into the lease but subsequently became unwarranted. *Id.* In contrast to the first formula, however, a tenant could also be awarded damages if the property was in an unwarranted condition at the time the parties entered into the lease and the amount of rent agreed to in the lease reflected the value of the property in its unwarranted condition. *Id.* at 189-90. Under this formula, though, a tenant could be awarded damages in excess of the total amount of rent paid, which could result in a landlord paying a tenant for leasing the property. *Id.* at 190. Further, this formula does not account for any benefit received by the tenant for use of the property in its unwarranted condition.

A third formula measures damages by determining the percentage of use lost by the tenant as a result of the unwarranted condition of the property, and reducing the agreed upon rent by that percentage. *Id.* at 189. This method requires the trier of fact to subjectively determine "the degree to which habitability has been diminished," *id.* at 190, and has therefore been characterized as a " 'civil fine levied on the landlord.' " *Id.* at 190 n.1202 (quoting Samuel Bassett Abbott,

Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U. L. Rev. 1 (1976)).

A fourth possible method would measure damages as the difference between the fair rental value of the property as warranted and the fair rental value of the property in its unwarranted condition, but limit the damages to the total amount of rent paid by the tenant. Under this method, a tenant could receive an award of damages even if the parties entered into a lease setting rent at the fair rental value of the property in an unwarranted condition, but a tenant could not receive an award in excess of the total amount of rent actually paid by the tenant. This method, admittedly, fails to account for any benefit received by a tenant for use of the property in its unwarranted condition, but it does provide incentives for the landlord to provide housing consistent with the Act. We therefore believe this method provides the best balance of the competing public policy concerns raised by the various damages formulas. Furthermore, we believe this fourth method for measuring the damages is most consistent with this Court's previous opinions addressing damages in rent abatement actions. *See Miller v. C. W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 371, 355 S.E.2d 189, 194 (1987); *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 34, 446 S.E.2d 826, 831, *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994); *Surratt v. Newton*, 99 N.C. App. 396, 407, 393 S.E.2d 554, 560 (1990).

Accordingly, we hold that the proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition; provided, however, the damages do not exceed the total amount of rent paid by the tenant. Additionally, the tenant is entitled to any "special and consequential damages alleged and proved." *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694, *disc. review denied*, 321 N.C. 296, 362 S.E.2d 779 (1987).

In this case, Defendant paid monthly rent of $550.00 for a period of 16.23 months, or a total amount of $8,926.50. The fair rental value of the property during Defendant's tenancy was $250.00 per month, or a total amount of $4,057.50. The fair rental value of the property in a warranted condition would have been $700.00 per month, or a total amount of $11,361.00. The difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition was $7,303.50. Thus $7,303.50, plus any special and consequential damages, constituted the maxi-

mum amount of rent abatement the Defendant was entitled to receive.[4] The jury's award of $6,400.00 was therefore permissible and the trial court correctly denied Plaintiffs' Rule 59 motions.

Plaintiffs have raised several other assignments of error which we have carefully reviewed and determine to be without merit.

No error.

Judges TIMMONS-GOODSON and HORTON concur.

SANDRA WALKER HORTON, WIFE OF, JAMES W. HORTON, JR. AND SANDRA ASHLEY HORTON, DEPENDENT MINOR CHILDREN OF JAMES W. HORTON, DECEASED, EMPLOYEE, PLAINTIFF v. POWELL PLUMBING & HEATING OF N.C., INC., EMPLOYER; SELF-INSURED (CONSOLIDATED ADMINISTRATORS, INC.), DEFENDANTS

No. COA98-1376

(Filed 5 October 1999)

Workers' Compensation— death benefit—presumption that death the result of an accident—not rebutted

Defendants did not rebut the presumption that decedent's death was accidental where there was evidence that decedent committed suicide, but there was other competent evidence that he did not and the Commission chose to believe the latter. Issues of credibility are for the Commission.

Appeal by defendants from Opinion and Award filed 10 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 August 1999.

Farris & Farris, P.A., by Robert A. Farris, Jr. and Thomas J. Farris, for plaintiff-appellees.

Cranfill, Sumner & Hartzog, L.L.P., by J. Michael Mackay, for defendant-appellants.

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4. We are unable to ascertain the amount of the special and consequential damages awarded in this case, if any, as the jury verdict form does not separate those damages into a separate issue. As the jury awarded a sum less than $7,303.50, the amount of the special and consequential damages, if any, therefore is not material in this case. The better practice would be for the trial court to provide a separate issue for the jury on these special and consequential damages.

GREENE, Judge.

Powell Plumbing and Heating of North Carolina, Inc. (Employer) and Consolidated Administrators, Inc. (Carrier) (collectively, Defendants) appeal from the Opinion and Award of the North Carolina Industrial Commission (Commission) awarding Sandra Walker Horton, wife of deceased employee, James W. Horton (Decedent), and James W. Horton, Jr. and Sandra Ashley Horton, dependent minor children of Decedent (collectively, Plaintiffs) weekly compensation at $155.33 for 400 weeks, medical expenses, burial expenses, attorney's fees, and costs.

In support of the Award, the Commission entered the following pertinent Conclusions of Law:

> 1. . . . [W]hen an employee is found dead at his place of work, there is a presumption that the employee died by accident while in the scope and course of employment and without anything to the contrary, the claim is compensable. Here, the [D]efendant has failed to sufficiently or convincingly rebut the presumption in that it has not offered any credible or convincing evidence to the contrary. Defendant has offered some evidence, but due to the numerous inconsistencies and unanswered questions, the evidence offered is not credible or convincing and is not accepted as fact in this matter to the extent that [D]efendant would be able to sufficiently rebut the . . . presumption.
>
> 2. The [D]ecedent died as a result of an accident sustained while in the course and scope of his employment with the [D]efendant-employer.

In support of these conclusions, the Commission entered the following pertinent Findings of Fact:

> 2. Decedent was found dead in the shop area of the building at which [D]efendant-employer conducted its business. . . . The cause of his death as determined by the North Carolina Medical Examiner was a gunshot wound to the chest.
>
> . . . .
>
> 7. . . . [T]here was no indication that [D]ecedent had struggled with anybody.
>
> 8. David L. Deberry [Detective Deberry] was the detective with the Guilford County Sheriff's Department assigned to the case. It was his opinion that [D]ecedent had committed suicide. . . .

9. Detective Deberry's opinion was [based in part on] the fact that he could not come up with any leads that would indicate that anybody else had any motive to kill [D]ecedent. Additionally, [D]ecedent had traces of [gun] powder residue on his hand.

10. Detective Deberry found a gun [wrapped in a shirt] on top of and at the rear of a box, which was on top of a shelf and next to a wall and which was some 12 to 13 feet above the floor and to the rear of the location of [D]ecedent's body. He theorized that after the [D]ecedent shot himself, he tossed the gun with his right hand across his left shoulder up onto the box and shelf. . . .

. . . .

16. Decedent had gun powder residue in the web of his hand and on the back of his hand that was consistent with his holding the gun in a normal fashion at the time of its discharge. The gun powder pattern on [D]ecedent's hand was also consistent with his hand being in the area of the gun when it discharged.

17. William S. Best of Forensic Analytical Services and Testing was of the opinion that the powder disbursement was consistent with either [D]ecedent shooting himself or with somebody else shooting [D]ecedent.

18. Detective Deberry said that [D]ecedent's arms did not move after he was shot and that the [D]ecedent did not move otherwise. If [D]ecedent did not move his arm after being shot, it would have been impossible for him to . . . throw it [the gun] on top of the box on the shelf.

19. When viewing the evidence as presented by Detective Deberry, one is left with an unclear picture of what happened and with unanswered questions as to how [D]ecedent was shot. If one believes Detective Deberry, then [D]ecedent should have smeared blood when he threw the gun over his left shoulder, which did not happen. There is a remaining question of whether [D]ecedent could have lived long enough to wrap the gun in the shirt it was found in and then to throw it on top of the box and shelf which cannot be clearly and convincingly answered. Further, it cannot be clearly and convincingly answered whether the gun was wrapped in the shirt after [D]ecedent shot himself or whether he was shot by somebody else.

. . . .

22. Neither Detective Deberry, nor anybody else, found a suicide note.

23. When Detective Deberry asked [D]ecedent's family and co-workers (employees), nobody had any indication that [D]ecedent was depressed or suicidal. Decedent's medical history did not have any indication that he had a history of depression or mental illness.

. . . .

26. A review of all the competent, credible, and convincing evidence offered in this matter leaves one with a lot of questions and no answers of what really happened at the time the gun discharged and who pulled the trigger.

27. It is clear that no one knows for sure how or by whom the [D]ecedent was shot. It is clear that the undersigned cannot accept the facts as Detective Deberry would have us to believe, because they are not consistent with the medical examiners report. For example, on the one hand, Detective Deberry believes that the [D]ecedent shot himself and after doing so, wrapped the gun in a shirt and threw it over his left shoulder with his right hand and arm. However, on the other hand, he also believes that the [D]ecedent did not move his arms after being shot.

The pertinent evidence reveals that on 10 October 1994 Decedent's dead body was found on the premises of his employer, Powell Plumbing & Heating of North Carolina, Inc. (Powell Plumbing), a corporation owned by Decedent, where he had been working just prior to his death.

Plaintiffs brought this action to recover workers' compensation benefits for the death of Decedent. Decedent had sustained a single gunshot wound to the upper left chest area, which was determined to be the cause of death. The original death certificate for Decedent listed the cause of death as a "homicide," but eventually the Guilford County Sheriff's Department determined that Decedent's death was a suicide, resulting from a self-inflicted gunshot wound.

The evidence shows that late in the evening of Sunday 9 October 1994, Decedent drove to Powell Plumbing and parked in front of the business. Two employees of a business near Powell Plumbing, who were taking a break at around 11:30 or 11:45 in the evening, reported hearing two men loudly arguing somewhere in the Main Street area

near where the Decedent was found. Neither witness saw these men, but there was another witness who reported seeing a blue or dark colored mini sized pick-up truck backed in the parking lot at about 11:30 that same night in front of the building.

The next morning, James L. Lax (Mr. Lax), an employee of Powell Plumbing, reported to work at the office between 6:00 and 6:30 a.m. Once inside the business, Mr. Lax found Decedent's body lying face down in a pool of blood in the metal shop. Although Mr. Lax testified at the hearing before the Commission that he deactivated the burglar alarm before entering the building, he reported to the Guilford County Sheriff's Department on the day of his discovery that the green light of the alarm was on, signifying the alarm was off.

The investigating officers of the Guilford County Sheriff's Department found no signs of forced entry. During the initial investigation on 10 October 1994, no weapon was found. It was not until the next day, 11 October 1994, that a 22-caliber pistol was located wrapped in a cloth and a work shirt. The pistol was located in between two taller boxes on top of a smaller box approximately 12 to 15 feet off the floor on a shelf suspended from the ceiling.

There were no finger prints found on the handle of the pistol matching those of Decedent's. Detective Deberry speculated that after shooting himself in the chest Decedent wiped his fingerprints from the pistol, wrapped the pistol in a cloth and shirt, and from a kneeling position threw the pistol 12 to 15 feet in the air behind him on a shelf, without untucking his shirt, without spreading blood from his wound anywhere, or without disturbing the wrapping around the pistol.

The dispositive issue is whether Defendants rebutted the presumption that Decedent's death was accidental.

"In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment." *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988); N.C.G.S. § 97-2(6)(10) (Supp. 1988). Upon a showing the decedent was in the course and scope of his employment at the time of his death, the claimant is entitled to a presumption that the death was the result of an accident and arose out of his employment. *Pickrell*, 322 N.C. at 368, 368 S.E.2d at 585. Once the presumption is established, defendant-employer has the burden of

presenting evidence showing the death was caused by some non-accidental event or the injury did not arise out of the employment. *Id.* at 371, 368 S.E.2d at 586.

In this case, Defendants do not dispute Decedent's death nor do they argue that his death occurred outside the course and scope of his employment. Thus Plaintiffs are entitled to the presumption that Decedent's death was accidental and arose out of his employment. Accordingly, the Commission did not err in concluding Plaintiffs were entitled to a presumption of compensability.

Defendants do contend they rebutted this presumption and direct our attention to the evidence that Decedent died as a result of suicide. *See* N.C.G.S. § 97-12(3) (1991) (decedent employee not entitled to workers' compensation benefits if death caused by "willful intention to injure or kill himself"). There is competent evidence in this record supporting Defendants' argument. There is, however, other competent evidence and inferences from that evidence supporting the proposition that Decedent did not commit suicide. *See Hollman v. City of Raleigh*, 273 N.C. 240, 249, 159 S.E.2d 874, 880 (1968). The Commission chose to believe the latter and issues of credibility are for the Commission. *Hillard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Furthermore, if there is any competent evidence in the record to support the findings of the Commission, we are bound by that determination. *Id.* at 595, 290 S.E.2d at 684.

Affirmed.

Judges TIMMONS-GOODSON and SMITH concur.

STATE OF NORTH CAROLINA v. SCOTTIE LEE GRAVES

No. COA98-1285

(Filed 5 October 1999)

1. Search and Seizure— warrantless search—unconstitutional

Crack cocaine and a crack pipe should have been excluded from a prosecution for possession of cocaine and paraphernalia, resisting an officer, and being an habitual felon where an officer interviewed defendant in an emergency room after defendant had

been shot; a nurse began to remove defendant's clothing while the officer was speaking to defendant; wads of brown paper fell out of defendant's shoe or pant leg onto the gurney; and the officer picked up the wads of paper and unraveled them, finding the crack and the pipe. The record is bereft of any evidence that the officer recognized or even suspected that the brown paper wads contained contraband before he picked them up and unraveled them; while the wads of paper were suspicious and an officer of this experience would likely recognize such wads as containing contraband, the State cannot substitute speculation for evidence.

2. Confessions and Other Incriminating Statements— fruit of poisonous tree—applicable portions of statement unclear

In a narcotics prosecution which involved an illegal search, only that portion of the information obtained after an unlawful search need be excluded as being the result of that search.

Appeal by defendant from judgment entered 26 March 1998 by Judge W. Erwin Spainhour in Guilford County Superior Court. Heard in the Court of Appeals 25 August 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart, and Agency Legal Specialist Kathy Jean Moore, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance Everhart Widenhouse, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment imposing an active sentence entered upon his pleas of guilty to one count of felonious possession of cocaine, one count of misdemeanor possession of drug paraphernalia, one count of resisting a public officer, and to being an habitual felon. Prior to pleading guilty, defendant moved to suppress evidence seized from his person as well as his statement made subsequent to the seizure.

Evidence presented at the suppression hearing may be summarized as follows: On 7 October 1997, Officer K.A. Davis of the Greensboro Police Department went to the emergency room of Moses Cone Hospital to visit defendant, who had been shot earlier that evening in an area of Greensboro known for drug activity. The pur-

pose of Officer Davis' visit was to ascertain defendant's condition and to gather any information defendant may have had about the shooting. While Officer Davis was speaking to defendant, a nurse began to remove defendant's shoes and clothing; as she did so, Officer Davis noticed some wads of brown paper fall out of defendant's shoe or pant leg onto the gurney. Without telling defendant the wads of paper had fallen from his clothing, Officer Davis proceeded to pick up the paper wads and unravel them. In the first paper, Officer Davis found a crack pipe made of burned glass tubing and a brass screen. In another piece of paper, Officer Davis found crack cocaine.

After searching the paper wads and seizing the contents, Officer Davis continued to interview defendant, who was not under arrest. During the interview, defendant told Officer Davis that earlier in the evening he had been a passenger in a car in which a drug deal between two other people had gone bad. Defendant did not admit to buying drugs. Near the end of the interview, Officer Davis advised defendant that he had found the drugs and drug paraphernalia contained in the brown paper; defendant did not admit to possessing the contraband. Officer Davis then left the hospital and obtained a warrant for defendant's arrest; defendant was arrested the next morning upon his release from the hospital.

The trial court found the facts as summarized above and concluded that Officer Davis' seizure of the cocaine and drug paraphernalia did not violate defendant's rights under the United States or North Carolina Constitutions as the items were lawfully seized under the plain view doctrine. The trial court also concluded that defendant's statements to Officer Davis were voluntarily made. Defendant appeals the denial of his motion to suppress.

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[1] Defendant first argues that the crack cocaine and drug paraphernalia seized by Officer Davis at the hospital should have been suppressed because Officer Davis' warrantless seizure and search of the wads of brown paper belonging to defendant was unconstitutional. Due to the paucity of the evidence presented by the State at the suppression hearing, we must agree.

The Fourth Amendment to the United States Constitution and Article I of the Constitution of the State of North Carolina protect individuals against unreasonable searches and seizures. U.S. Const. Amend. IV, N.C. Const. Art. I, § 20. A warrant obtained with judicial approval is the traditional protection against unlawful government

intrusions. A warrantless search unaccompanied by such judicial approval is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement. *In re Whitley*, 122 N.C. App. 290, 468 S.E.2d 610 (1996). The State bears a heavy burden to demonstrate how the warrantless intrusion was exempted from the warrant requirement. *Arkansas v. Sanders*, 442 U.S. 753, 61 L.Ed.2d 235 (1979); *United States v. Jeffers*, 342 U.S. 48, 96 L.Ed. 59 (1951).

One exception to the warrant requirement is the plain view doctrine, under which police may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband. *State v. Mickey*, 347 N.C. 508, 495 S.E.2d 669, *cert. denied*, 525 U.S. 853, 142 L.Ed.2d 106 (1998). The burden is upon the State to establish all three prongs of the plain view doctrine.

In this case, the first prong of this plain view test is clearly met, as Officer Davis was rightfully in the emergency room trying to gather evidence concerning the shooting of defendant. The second prong of the test is also satisfied, as Officer Davis' initial observation of the wadded pieces of brown paper was inadvertent, since they fell from defendant's clothing when the nurse was undressing him. The State, however, has failed to establish that it was immediately apparent to the police officer that the items observed were evidence of a crime or contraband.

The term "immediately apparent" in a plain view analysis is satisfied only " 'if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.' " *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d. 387, 389-90 (1993) (quoting *State v. White*, 322 N.C. 770, 777, 370 S.E.2d 390, 395 (1988)). "Probable cause exists where the 'facts and circumstances within their [the officers'] knowledge . . . [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. U.S.*, 338 U.S. 160, 175, 93 L.Ed. 1879, 1890 (1949)). "The circumstances leading to [a] seizure 'should be viewed as a whole through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *State v. Hendrickson*, 124 N.C. App. 150, 155, 476 S.E.2d 389, 392 (1996) (quoting *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979)). In sum, the State must establish that, given the facts and

circumstances of the case, and viewed through the eyes of a policeman with the experience and training of Officer Davis, the nature of the contents of the brown paper wads was immediately apparent.

The record is bereft of any evidence that Officer Davis recognized or even suspected that the brown paper wads contained contraband before he picked them up and before he unraveled them. Officer Davis testified that when the wads of paper fell onto the gurney, he "saw something that was a little black, and just began to unravel it and came up with the tube." He recognized drug paraphernalia only after he unraveled the wads. When asked how he obtained the crack cocaine, Davis testified that he found it in "[t]he papers that were on the gurney, I began to unravel them and I discovered it then." At no time was Officer Davis asked, nor did he testify, as to what he suspected was contained in the paper wads before he unwrapped them.

The State argues that the facts and circumstances of the case, combined with the experience of Officer Davis, made the nature of the contents of the brown wads immediately apparent to Officer Davis. Officer Davis testified that he had worked for the Greensboro Police Department for almost 8 years at the time of the arrest, that he had received a narcotics training course, that he has observed crack cocaine on at least 50 occasions, and that he has arrested more than twenty individuals for possession of crack cocaine. Officer Davis had worked in the neighborhood where defendant was shot for over seven years, and described it as an area of high narcotics activity.

The State contends that "[a]lthough Officer Davis did not explicitly testify that he immediately knew what the items were, it is arguable that as he grasped the items, the identity of at least one item was immediately apparent by touch." While we agree with the State that the brown wads were suspicious, and also agree that a man of Officer Davis' experience would likely recognize such wads as containing contraband, the State cannot substitute speculation for evidence. Without testimony regarding the immediately apparent nature of the contraband, the evidence obtained from this search cannot be used at defendant's trial. We reached a similar result in *State v. Sanders*, 112 N.C. App. 477, 483, 435 S.E.2d 842, 846 (1993), when we held that where the officer who conducted a warrantless search "was never asked and did not testify about whether it was immediately apparent to him that the item he felt was contraband," the evidence obtained could not be used against the defendant at trial.

Although it may seem counterintuitive that a police officer is prohibited from picking up suspicious looking items inadvertently discovered in the course of lawful police activity, we are compelled to reach this result. The only check on warrantless intrusions is judicial review obtained in a suppression hearing. In such a hearing, the testimony of the police officer who conducted the search or seizure is often the sole evidence presented; it is against this evidence alone that the court must measure the reasonableness of the intrusion. As the State failed to elicit any testimony whatsoever about whether it was immediately apparent to Officer Davis that the brown paper wads contained contraband, the evidence obtained from this search may not be used at trial against defendant.

[2] Defendant also contends the statements he made to Officer Davis at the hospital were the "fruit" of an unconstitutional search and seizure and should have been suppressed. Under the "fruit of the poisonous tree" doctrine, evidence must be suppressed if it was obtained as the result of illegal police conduct or was the "fruit" of that unlawful conduct. *State v. Guevara*, 349 N.C. 243, 249, 506 S.E.2d 711, 716 (1998), *cert. denied*, 526 U.S. 1133, 143 L.Ed.2d 1013 (1999). Any incriminating statements obtained as a result of the illegal search must be suppressed. It is unclear in this case, however, which portions of the statements were obtained as a result of the illegal search. Officer Davis obtained much of this statement simply by questioning defendant. He did not tell defendant he had discovered the pipe and cocaine until near the end of the interview. Therefore, only that information obtained after the unlawful search can be said to have been discovered as a result thereof, and only this portion of defendant's statement need be excluded from evidence.

For the foregoing reasons, we must grant defendant a new trial at which the evidence obtained as a result of the illegal search shall not be admissible.

New trial.

Judges LEWIS and HUNTER concur.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT PARISI

No. COA98-989

(Filed 5 October 1999)

Motor Vehicles— driving while impaired—prior out-of-state conviction—aggravating factor—substantially equivalent offense

In a case involving driving while under the influence of an impairing substance under N.C.G.S. § 20-139.1, the trial court did not err in determining that defendant's conviction in New York for the offense of driving while ability impaired was a prior conviction constituting an aggravating factor for purposes of sentencing because both offenses are "substantially equivalent."

Appeal by defendant from judgment entered 2 April 1998 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Reuben F. Young, for the State.

Ledford & Murray, P.C., by Joseph L. Ledford, for defendant-appellant.

McGEE, Judge.

Defendant entered a plea of guilty to driving while under the influence of an impairing substance in violation of N.C. Gen. Stat. § 20-138.1 on 2 April 1998. Prior to defendant's sentencing hearing, he provided the State with a copy of his case history listing from the State of New York, which showed that defendant had been convicted on 5 August 1991 of driving while ability impaired in violation of New York Vehicle and Traffic Law § 1192.1. The trial court determined that this conviction constituted a grossly aggravating factor and sentenced defendant at a Level Two punishment to a minimum term of twelve months' imprisonment. This sentence was suspended and defendant was placed on unsupervised probation for twenty-four months, the terms of which included an active sentence of seven days and the suspension of defendant's North Carolina driver's license. From this judgment defendant appeals.

Defendant argues that the trial court erred in determining that his conviction in New York for the offense of driving while ability impaired was a prior conviction involving impaired driving and was, therefore, a grossly aggravating factor for purposes of sentencing. We disagree.

N.C. Gen. Stat. § 20-179(c) (1993) states in part:

> The judge must impose the Level Two punishment under subsection (h) of this section if the judge determines that only one of the grossly aggravating factors applies. The grossly aggravating factors are:
>
> (1) A prior conviction for an offense involving impaired driving if:
>
> a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
>
> b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing.

The statute lists other factors which the trial court may consider as grossly aggravating factors, but the case before us concerns only the factor listed above. N.C. Gen. Stat. § 20-4.01(24a)(d) (1993) provides that an offense involving impaired driving includes "[a]n offense committed in another jurisdiction substantially equivalent to the offenses in subparagraphs a through c." Subparagraphs a through c of this section include the offenses of impaired driving, death by vehicle, second degree murder or involuntary manslaughter, provided these offenses were "based upon impaired driving or a substantially equivalent offense under previous law." N.C. Gen. Stat. § 20-4.01(24a).

N.C. Gen. Stat. § 20-138.1 (1993) defines the offense of impaired driving as follows:

> (a) Offense.—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

Defendant argues that New York's offense of driving while ability impaired is not "substantially equivalent" to North Carolina's offense of driving while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1; N.Y. Vehicle and Traffic Law § 1192.

N.Y. Vehicle and Traffic Law § 1192 sets forth four different offenses prohibiting the operation of a motor vehicle after the consumption of alcohol or drugs:

> 1. Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol.
>
> 2. Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.
>
> 3. Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.
>
> 4. Driving while ability impaired by drugs. No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

The New York offense of "driving while ability impaired" was defined by the Court of Appeals of New York in *People v. Cruz*, 48 N.Y.2d 419, 399 N.E.2d 513 (N.Y. 1979). The court stated:

> It is evident from the statutory language and scheme that the question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

Id. at 426-27, 399 N.E.2d at 516.

In *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) (citations omitted), our Court stated in defining impairment that:

> Under our statutes, the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant's faculties, is not enough to render him or her

> impaired. Nor does the fact that defendant smells of alcohol by itself control. On the other hand, the State need not show that the defendant is 'drunk,' i.e., that his or her faculties are *materially* impaired. The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired.

Impair is defined as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." Black's Law Dictionary 752 (6th ed. 1990). Appreciable is defined as "[c]apable of being estimated, weighed, judged of, or recognized . . . [p]erceptible but not a synonym of substantial." Black's Law Dictionary 101 (6th ed. 1990).

For a proper finding that defendant was impaired, *Cruz* requires that the defendant must have consumed alcohol to the point that the driver's physical and mental abilities, which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver, have actually been impaired to any extent. *Cruz* at 426-27, 399 N.E.2d at 516. *Harrington* requires that the effect on defendant's faculties must be "sufficient to be recognized and estimated." *Harrington* at 45, 336 S.E.2d at 855.

For the New York offense of driving while ability impaired to qualify as "substantially equivalent" to the North Carolina offense of driving while under the influence of an impairing substance, the respective statutes need not be identical in each and every respect. Substantially is defined as "[e]ssentially; without material qualification[.]" Black's Law Dictionary 1428 (6th ed. 1990). Equivalent is defined as "[e]qual in value, force, measure[.]" Black's Law Dictionary 541 (6th ed. 1990). Other jurisdictions have discussed what constitutes a "substantially equivalent" offense. *See State v. Oliver*, 720 A.2d 1001, 1004 (N.J. Super. A.D. 1998) (criminal conduct underlying prior conviction "qualitatively similar to defendant's conduct in the instant case and, therefore, [the prior conviction] was 'substantially equivalent[]' "); *O'Neill v. State*, 661 So.2d 1265, 1268 (Fla. App. 5 Dist. 1995) (in order to qualify as substantially similar, the South Carolina statute need not "mirror" the Florida statute; "[t]he out-of-state conviction need only be 'substantially similar' . . . in elements and penalties[]").

In determining whether an offense was substantially equivalent, the Pennsylvania Supreme Court recently discussed in *Com. v. Robertson*, 722 A.2d 1047, 1048 (Pa. 1999) whether "the Maryland crime of driving while intoxicated . . . [was] an 'equivalent offense' to

the Pennsylvania crime of driving under the influence of alcohol[.]" *Robertson* at 1048. Defendant had been convicted of driving under the influence as a repeat offender and argued on appeal that his Maryland conviction for driving while intoxicated should not have been considered as a prior conviction because it was not an equivalent offense. *Id.* at 1050. The court stated that a person was guilty of driving under the influence of alcohol in Pennsylvania "if he drove, operated or was in physical control of the movement of any vehicle: (1) while under the influence of alcohol to a degree which rendered him incapable of safe driving[.]" *Id.* (citation omitted). The court stated that "a person was guilty of driving while intoxicated in Maryland simply if he drove or attempted to drive any vehicle while intoxicated." *Id.* (citation omitted). In holding that the two statutes contained substantially equivalent offenses, the court stated that "[t]he two statutes [were] not divergent simply because a showing that the person was incapable of unsafe operation of a motor vehicle was not a necessary element of proof in a prosecution" under the Maryland statute. *Id.* at 1051. The court further stated that although:

> Maryland require[s] only a showing of intoxication, we fail to see how this renders the statutes so different that appellant cannot be said to be a repeat offender. Appellant fails to explain, and we fail to comprehend, how a person could be intoxicated and yet be capable of safe operation of a motor vehicle.

Both the North Carolina and the New York offenses require that a defendant be impaired to the extent that the driver's ability to operate a vehicle is diminished. The tenuous difference between the two offenses is that *Harrington* requires appreciable, or perceptible impairment, whereas *Cruz* simply requires impairment to any extent. As in *Robertson*, the two statutes are "not divergent" simply because the New York offense does not require a showing of perceptible impairment in a prosecution for driving while ability impaired. Although the definitions of "impairment" under North Carolina and New York laws are not identical and the statutes do not "mirror" one another, *O'Neill* at 1268, they are "substantially equivalent." N.C.G.S. § 20-138.1; N.Y. Vehicle and Traffic Law § 1192; N.C.G.S. § 20-4.01(24a)(d). North Carolina's offense of driving while under the influence of an impairing substance and New York's offense of driving while ability impaired are "substantially equivalent" offenses. The trial court did not err in determining that defendant's conviction in New York for the offense of driving while ability impaired was a grossly aggravating factor in sentencing defendant.

Affirmed.

Judges GREENE and MARTIN concur.

RONNIE COLLINS AND PATTI ANN COLLINS, PLAINTIFFS v. HORIZON HOUSING, INC., D/B/A CHOICENTER; REDMAN HOMES, INC.; AND ASHE FEDERAL BANK, DEFENDANTS

No. COA98-1469

(Filed 5 October 1999)

Sales— Retail Installment Sales Act—not applicable to bank

Summary judgment was properly granted for defendant-bank in an action arising from the purchase of a mobile home where plaintiffs contended that defendant was liable for any claims or defenses plaintiffs had against the seller. Although plaintiffs argued that the bank was subject to the Retail Installment Sales Act because it knew that it was loaning money to purchase a mobile home and so was "indirectly" engaged in furnishing goods and services, that argument is supported by neither logic nor the plain language of the statute. N.C.G.S. § 25A-1.

Appeal by plaintiffs from summary judgment for defendant Ashe Federal Bank entered 18 August 1998 by Judge Howard R. Greeson, Jr., in Ashe County Superior Court. Heard in the Court of Appeals 9 September 1999.

Don Willey for plaintiff-appellants.

Vannoy & Reeves, PLLC, by Jimmy D. Reeves and David A. Jolly, for Ashe Federal Bank, defendant-appellee.

HORTON, Judge.

On 5 December 1997, Ronnie Collins and his wife, Patti Ann Collins (plaintiffs) filed this action in Ashe County Superior Court against Horizon Housing, Inc., d/b/a Choicenter (Horizon); Redman Homes, Inc. (Redman); and Ashe Federal Bank (defendant Bank) (collectively, defendants), seeking damages and attorney fees arising out of their purchase of a mobile home manufactured by defendant Redman and sold to them by defendant Horizon. Financing for the

purchase was arranged through defendant Bank. A $20,000.00 loan from defendant Bank was secured by the mobile home itself and by Lot 20 of Mountain Shadows Subdivision, located in the City of Jefferson in Ashe County. In connection with their bank loan, plaintiffs executed a statement acknowledging that they were granting defendant Bank a security interest in both the mobile home and Lot 20. Horizon received $19,921.37 of the loan proceeds; the balance of $78.63 was retained by defendant Bank to be applied to the financing costs.

Plaintiffs allege in their complaint that the mobile home they purchased was defectively manufactured, delivered and set up, and that the defendants Redman and Horizon have failed to respond to their complaints, despite repeated requests. They further allege that defendant Bank is the holder of the consumer sales contract and is, therefore, liable for any claims or defenses plaintiffs have against Horizon. Defendant Bank moved to dismiss pursuant to Rule 12(b)(6), moved for attorney fees pursuant to N.C. Gen. Stat. § 6-21.5, and moved for summary judgment. Defendant Bank's motion for summary judgment was allowed by the trial court on 18 August 1998, and plaintiffs appealed. Thereafter, plaintiffs voluntarily dismissed with prejudice their claims against Redman and Horizon.

In support of its motion for summary judgment, defendant Bank filed the affidavit of Martin G. Little, its senior vice-president, who alleged that the Bank's "primary emphasis" is single-family home loans in Ashe and Alleghany Counties; that the Bank provides financing for both mobile and modular homes; that the Bank is not engaged in the sale of goods, and is not affiliated with any mobile home dealer, specifically Horizon; that the Bank deals directly with borrowers, and that plaintiffs approached the Bank directly about a home loan. Plaintiffs filed affidavits in opposition to the motion for summary judgment, stating in pertinent part that defendant Bank was aware that they were borrowing money to buy a Redman home from Horizon, and that the home would be their primary residence; that defendant Bank regularly engages in making loans to Ashe County consumers which finance their purchases of mobile homes and real estate; that the Bank also advertises its home financing services and rates.

Plaintiffs argue that there is a genuine issue of material fact with regard to whether defendant Bank engages in the sale of goods and services, and that the trial court erred in granting summary judgment. Plaintiffs argue that, since the Bank loaned money or gave "value" to

plaintiffs to enable them to acquire a property right in the mobile home, the "money loaned is therefore tied directly to rights acquired by the [plaintiffs] in the mobile home, and so the loan proceeds are tied directly to the sale itself." We disagree.

In an effort to bring defendant Bank into the fray, plaintiffs contend that the Bank is subject to Chapter 25A of the North Carolina General Statutes, the Retail Installment Sales Act. Yet that Act specifically states that it "does not apply to a bona fide direct loan transaction in which a lender makes a direct loan to a borrower, and such lender is not regularly engaged, directly or indirectly, in the sale of goods or the furnishing of services as defined in this Chapter." N.C. Gen. Stat. § 25A-1 (1986). Plaintiffs argue that the Bank is "indirectly" engaged in the furnishing of goods and services because it knew that it was loaning plaintiffs money to purchase a mobile home. Plaintiffs are unable to cite any authority to support their strained reading of the Retail Installment Act, but do cite the case of *Steed v. First Union National Bank*, 58 N.C. App. 189, 293 S.E.2d 217, *disc. review denied*, 306 N.C. 751, 295 S.E.2d 763 (1982). Plaintiffs contend that *Steed* stands for the proposition that "banks have no automatic exemption from liability under North Carolina's Retail Installment Sales Act." However, *Steed* did not involve a direct loan transaction. In *Steed*, First Union National Bank was the assignee of the original seller, Connor Mobile Homes, which arranged the original financing. The action was one to collect allegedly unauthorized default charges levied by First Union.

Plaintiffs' arguments are supported by neither logic nor the plain language of the statute. Carried to its logical extreme, plaintiffs' arguments would subject all financial institutions engaged in making loans to prospective home buyers to liability, thus hampering the efforts of such prospective buyers to achieve the dream of home ownership. The trial court properly granted summary judgment for defendant Bank.

It appears from the record that the Bank's motion for attorney fees was not ruled on by the trial court, but is still outstanding in the lower court.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 SEPTEMBER 1999

AMAKER v. DUFFY REALTY & BLDG. CO. No. 98-1559	Durham (98CVS1301)	Affirmed
BENNETT v. BOBBY MURRAY CHEVROLET No. 98-684	Wake (97CVS4774)	Affirmed
BENNETT v. BOBBY MURRAY CHEVROLET No. 98-1062	Wake (97CVS4774)	Affirmed
BRADHAM v. KORNEGAY No. 98-1378	Craven (97CVS86)	Vacated and Remanded
CORN v. CONVERSE, INC. No. 98-1175	Wake (95CVS6372)	Affirmed
FRENCH v. N.C. DEP'T OF TRANSP. No. 98-932	Alamance (98CVS87)	Affirmed
GUTHRIE v. FOOD LION No. 98-1193	Ind. Comm. (002236)	Affirmed
IN RE HAMPTON No. 98-844	Catawba (96J65)	Affirmed
IN RE LAMAR No. 98-899	Rockingham (96J35)	Affirmed
IN RE MITCHELL No. 98-1318	Edgecombe (97J123) (97J124)	Affirmed
STATE v. BRITT No. 98-885	Mecklenburg (96CRS47713) (96CRS47714) (97CRS152471)	No error in the trial of the defendant. Remanded for new sentencing hearing.
STATE v. HAYES No. 98-896	Iredell (96CRS14316)	No Error
STATE v. HEILIGER No. 98-1150	Rutherford (96CRS6478)	No Error
STATE v. JONES No. 98-1074	Wilson (96CRS7020) (96CRS7021)	No Error

SUDDRETH v. CITY OF CHARLOTTE No. 98-1235	Mecklenburg (97CVS16598)	Affirmed
THOMPSON v. TRIANGLE COMMUNITIES No. 98-1036	Ind. Comm. (387489)	Affirmed
TOWN OF CAROLINA BEACH v. BOLDEN No. 98-1301	New Hanover (97CVS1898)	Affirmed

FILED 5 OCTOBER 1999

ALLEN v. WHISPER KNITS No. 98-1120	Ind. Comm. (460803) (526461)	Affirmed
BARNWELL v. PRUITT No. 98-1479	Buncombe (97CVS364)	Affirmed
BLACKBURN v. BLACKBURN No. 98-1354	Durham (89CVD02321)	Reversed and Remanded
BOOTH v. RUSSIN No. 98-1389	Guilford (98CVS3406)	Affirmed
CHERRY v. PERDUE FARMS, INC. No. 99-102	Ind. Comm. (493661)	Affirmed
CITY OF DURHAM v. LoDAL, INC. No. 98-828	Granville (94CVS577)	Affirmed
COLEMAN v. FARM FRESH, INC. No. 98-1314	Ind. Comm. (390318)	Affirmed
EDGE v. STONE MFG. CO. No. 99-158	Ind. Comm. (342941)	Appeal Dismissed
ERTEL v. DENVER AIR CENTER, INC. No. 98-1346	Mecklenburg (98CVS4668)	Affirmed
HATHAWAY v. N.C. FARM BUREAU MUT. INS. CO. No. 98-1477	Halifax (98CVS323)	Affirmed
IN RE DADE No. 98-1605	Buncombe (97J471) (97J472)	Affirmed
IN RE TAYLOR No. 99-293	Buncombe (98J248)	Affirmed
IN RE VARADY No. 99-271	Buncombe (96J237)	Dismissed

MILLER v. MILLER No. 99-259	Davidson (96CVD696)	Dismissed
SCHOOLER v. KENNEDY No. 98-1218	Wake (94CVS10760)	Affirmed
STATE v. ARRINGTON No. 99-237	Buncombe (98CRS2990) (98CRS558221) (98CRS558222) (98CRS558223)	Affirmed
STATE v. BOYD No. 98-1535	Rowan (95CRS1650) (95CRS1651) (95CRS1652)	No Error
STATE v. BROWN No. 98-1613	Davidson (98CRS1032)	No Error
STATE v. CLAWSON No. 99-30	Mecklenburg (97CRS19642)	No Error
STATE v. COMITO No. 99-195	Guilford (97CRS79092)	Affirmed
STATE v. DUNN No. 99-192	Randolph (95CRS5200) (95CRS5201) (95CRS5202) (95CRS5203) (95CRS5204)	No Error
STATE v. FREEBURN No. 99-187	Mecklenburg (96CRS52706)	No Error
STATE v. GILES No. 99-204	Wake (96CRS5494)	No Error
STATE v. HAIRSTON No. 99-220	Forsyth (92CRS23061)	Reversed and Remanded
STATE v. HARRELSON No. 99-352	Iredell (97CRS30) (97CRS31)	No Error
STATE v. INGRAM No. 99-186	Davidson (97CRS15918) (97CRS15919) (98CRS3810)	No Error
STATE v. JOHNSON No. 99-267	Mecklenburg (97CRS144057) (97CRS29341)	No Error
STATE v. JOHNSON No. 99-354	Wake (97CRS39472)	No Error

STATE v. JORDAN No. 99-345	Mitchell (97CRS1515)	No Error
STATE v. LEWIS No. 99-398	Gaston (98CRS012382) (98CRS012419) (98CRS012696)	No Error
STATE v. LITTLE No. 99-292	Mecklenburg (97CRS038096)	No Error
STATE v. McCAIN No 99-215	Mecklenburg (98CRS16114) (98CRS16115) (98CRS119527) (98CRS119528)	No Error
STATE v. MIDDLETON No. 99-490	Mecklenburg (95CRS059793)	No Error
STATE v. PERSON No. 99-155	Onslow (97CRS23657) (97CRS23658) (97CRS23659) (97CRS24191) (97CRS24592)	No error in part; Vacated in part;
STATE v. PILKINGTON No. 99-356	Jackson (98CRS1871) (98CRS1872) (98CRS2148)	No Error
STATE v. SCHRADER No. 99-86	Robeson (94CRS19137)	No Error
STATE v. SECHRIST No. 99-247	Forsyth (98CRS31046)	Affirmed
STATE v. STALLINGS No. 99-154	Onslow (97CRS16784) (97CRS16786) (98CRS11718)	No Error
STATE v. SUITT No. 99-113	Durham (98CRS32447)	Affirmed
STATE v. TWIFORD No. 98-813	Dare (97CRS5920)	No prejudicial error in the trial; sentence is vacated. Remanded for resentencing in accordance with this opinion.

GREGORY OSBURN AND JOY C. OSBURN, PLAINTIFF-APPELLANTS v. DANEK MEDICAL, INC., SOFAMOR-DANEK GROUP, INC., WARSAW ORTHOPAEDIC, INC., KEITH M. MAXWELL, M.D., KEITH M. MAXWELL, M.D., P.A., AND ST. JOSEPH'S HOSPITAL, DEFENDANT-APPELLEES

No. COA98-840

(Filed 19 October 1999)

1. Medical Malpractice— informed consent—experimental device—instructions

The jury in a medical malpractice action arising from back surgery was properly instructed on the issue of informed consent where the court's comprehensive instructions were in full accordance with N.C.G.S. § 90-21.13(a) and alerted the jury that evidence of the investigational or experimental status of the devices was properly considered. Plaintiffs perceive *Estrada v. Jaques*, 70 N.C. App. 627 as establishing a per se rule requiring the jury to be instructed that a health care provider in every instance has a duty to inform a patient of the experimental nature of a proposed treatment procedure, but that was a limited holding founded upon the particular circumstances therein.

2. Medical Malpractice— violation of FDA regulations—no private cause of action

The trial court did not err by granting summary judgment for some of the defendants on plaintiffs' claims for violation of FDA requirements in an action arising from back surgery. *Medtronic v. Lohr*, 518 U.S. 470, involved the question of whether the federal statute pre-empted common-law state claims and did not give rise to an implied private state cause of action for violation of FDA regulations or requirements.

3. Fraud— experimental medical device—deception of FDA

Summary judgment for some of the defendants was properly granted on plaintiffs' fraud claim which alleged false representations or concealment from the FDA. A careful review of the record reflects a failure of evidence on the question of whether the FDA was deceived; no evidence or testimony from the FDA indicated that the agency was deceived and it appears that the FDA was aware of the eventual intended use of the device.

4. Medical Malpractice— negligence per se—violation of FDA regulations

The trial court did not err by granting summary judgment for some defendants on the issue of negligence per se based upon violation of FDA regulations in an action arising from plaintiff-Mr. Osburn's back surgery where the record failed to reflect evidence raising a material fact as to the existence of a causal relationship.

5. Fraud— experimental medical device—marketing and promotion

The trial court did not err in an action arising from plaintiff's back surgery by granting summary judgment for some of the defendants on the issue of fraudulent marketing and promotion. There was no record evidence raising an issue of material fact regarding reliance.

Judge McGEE concurring in part and dissenting in part.

Appeal by plaintiffs from orders and judgments entered in Buncombe County Superior Court, including order entered 12 December 1997 and judgment entered 29 August 1997 by Judge Ronald K. Payne; and order entered 10 July 1997 and order and judgment entered 22 May 1997 by Judge Forrest A. Ferrell. Heard in the Court of Appeals 25 February 1999.

Donald B. Hunt for plaintiff-appellants.

Smith, Helms, Mulliss & Moore, L.L.P., by J. Donald Cowan, Jr. and Lisa Frye Garrison, for Danek Medical, Inc., Sofamor-Danek Group, Inc., and Warsaw Orthopaedic, Inc., defendant-appellees.

Young, Moore and Henderson P.A., by Joseph W. Williford and Brian O. Beverly, for Keith M. Maxwell, M.D., and Keith M. Maxwell, M.D., P.A., defendant-appellees.

Roberts & Stevens, P.A., by Isaac N. Northup, Jr. and Jacqueline D. Grant, for St. Joseph's Hospital, defendant-appellee.

JOHN, Judge.

Plaintiffs Gregory Osburn (Osburn) and wife Joy C. Osburn appeal certain orders and judgments entered in the trial court. We conclude plaintiffs' assignments of error are unfounded.

Pertinent factual and procedural background includes the following: Osburn fell and suffered injury in 1989 and subsequently sought treatment from defendant Dr. Keith M. Maxwell, M.D. (Dr. Maxwell). Dr. Maxwell performed back surgery on Osburn in October 1990, implanting an ISF Luque II plate and screw spinal fixation device (ISF Luque II device). In February 1992, Dr. Maxwell removed the ISF Luque II device, replacing it with a TSRH spinal fixation device (TSRH device). A third spinal surgery was performed on Osburn by Dr. Maxwell in 1993, and in 1994 Dr. Maxwell removed the TSRH device.

Both the ISF Luque II and the TSRH devices implanted in Osburn were manufactured by defendants Danek Medical, Inc. (Danek) and Warsaw Orthopaedic, Inc. (Warsaw), which corporations were purchased by defendant Sofamor-Danek Group (Sofamor) in 1993. Osburn's four operations were each performed at the premises of defendant St. Joseph's Hospital (St. Joseph's). Notwithstanding his extensive surgical history, Osburn continued to experience pain.

The instant suit was initiated in 1995 and an amended complaint filed in 1996. Plaintiffs asserted the following claims: (1) fraud against Danek, based upon alleged violation of Food and Drug Administration (FDA) regulations; (2) fraudulent marketing and promotion against Danek; (3) civil conspiracy, concert of action and negligence *per se* against all defendants; (4) medical malpractice and constructive fraud against defendants Dr. Maxwell and St. Joseph's; (5) fraud against Dr. Maxwell and St. Joseph's based upon their alleged assertions that the ISF Luque II and the TSRH devices used in Osburn's back were "safe and effective"; (6) loss of consortium against all defendants; and (7) punitive damages against all defendants.

The trial court entered summary judgment in favor of Danek, Warsaw, Sofamor, and St. Joseph's on 22 May 1997. On 10 July 1997, the trial court entered partial summary judgment in favor of defendants Dr. Maxwell and Keith M. Maxwell, M.D., P.A. (Dr. Maxwell, P.A.), Dr. Maxwell's medical practice corporation, on all plaintiffs' claims against those defendants save that of negligence. At trial, the jury returned a verdict of no negligence. The trial court thereupon entered judgment 29 August 1997 dismissing plaintiffs' claims as to Dr. Maxwell and Dr. Maxwell, P.A. Plaintiffs moved for a new trial, which motion was denied in an order entered 12 December 1997.

Plaintiffs appeal the foregoing judgment and order as well as the grant of summary judgment in favor of Danek, Warsaw, Sofamor and St. Joseph's and of partial summary judgment to Dr. Maxwell and Dr. Maxwell, P.A.

[1] Plaintiffs first assign error to the trial court's jury instructions on the issue of informed consent. Plaintiffs argue Dr. Maxwell had a duty to inform them of the experimental nature of the ISF Lusque II and TSRH devices used by Dr. Maxwell in Osburn's back surgery, and that the trial court erred in refusing to instruct the jury as to this duty. We hold the jury was properly instructed under present applicable law.

The pertinent statute, N.C.G.S. § 90-21.13 (1993), provides as follows:

> (a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient . . . where
>
> (1) The action of the health care provider in obtaining the consent of the patient . . . was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
>
> (2) A reasonable person from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities . . . .

To meet the statutory standard,

> the health care provider must provide the patient with sufficient information about the proposed treatment and its attendant risks to conform to the customary practice of members of the same profession with similar training and experience situated in the same or similar communities. In addition, the health care provider must impart enough information to permit a reasonable person to gain a "general understanding" of both the treatment or

> procedure and the "usual and most frequent risks and hazards" associated with the treatment.

Foard v. Jarman, 326 N.C. 24, 26-27, 387 S.E.2d 162, 164 (1990) (quoting G.S. § 90-21.13(a)(2)).

Plaintiffs filed a written request for jury instructions on 25 August 1997, requesting that the jury be instructed that

> the health care provider has a duty, in exercising reasonable care under the circumstances, to inform the patient of the experimental nature of the proposed procedure.

Plaintiffs renewed their request during the charge conference conducted 28 August 1997.

The trial court declined plaintiffs' tendered instructions, stating that the duty of a physician to inform patients that a device is experimental was not the standard of care under G.S. § 90-21.13. The court charged the jury that plaintiffs were required to prove Dr. Maxwell did not obtain Osburn's informed consent either

> by failing to provide information to [Osburn] which would, under the same or similar circumstances, have given a reasonable person a general understanding of the procedures and treatments to be used, and the usual and most frequent risks and hazards inherent in them as recognized by other orthopedic surgeons in the same or similar communities[; or] by not obtaining [consent] in accordance with the standard of practice among other orthopedic surgeons with the same or similar training and experience and who were situated in the same or similar communities at the time in question.

The trial court further related to the jury the contentions of each party pertaining to the alleged investigative and experimental nature of the proposed procedures and thereafter charged, *inter alia*, that if it found:

> [Dr. Maxwell] was negligent in that he did not inform the plaintiff that the [ISF Luque II or TSRH devices were] investigational or experimental, and that such was not in accordance with the standard of practice [for] obtaining consent among other orthopedic surgeons, which standard would require him to so inform [Osburn] . . . ,

it should answer in favor of plaintiffs.

We believe the court's comprehensive instructions were in full accordance with G.S. § 90-21.13(a) and alerted the jury that evidence of the investigational or experimental status of the devices was properly considered in its resolution of the issue of Dr. Maxwell's negligence. Rather than requiring physicians to inform patients in every instance that a procedure is experimental in nature, G.S. § 90-21.13 directs a physician to indicate the status of a procedure and risks involved therein

> in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities,

G.S. § 90-21.13(a)(1), and in such a manner that a reasonable person would under the circumstances derive from the information

> a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities,

G.S. § 90-21.13(a)(2).

Plaintiffs rely heavily upon *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E.2d 240 (1984); however, after careful review, we conclude *Estrada* is inapposite. In *Estrada*, a physician-defendant moved for summary judgment and was thereby required to show his compliance with G.S. § 90-21.13. *Estrada*, 70 N.C. App. at 645, 321 S.E.2d at 251. This Court observed the physician-defendant had admitted in his pleadings that the procedure in question was experimental, and concluded such admission established "the usual and most frequent risks and hazards inherent in [the procedure or treatment]" as recognized by other orthopedic surgeons in the same or similar community. *Id.* at 648, 321 S.E.2d at 253-54 (quoting G.S. § 90-21.13(a)(2)). Accordingly, we continued, the physician was required to show, as a matter of law for purposes of summary judgment, that his patient had "a general understanding," G.S. § 90-21.13(a)(2), of the associated risks as recognized by other health care providers, including the experimental nature of the procedure. *Id.* at 648, 321 S.E.2d at 254.

Plaintiffs perceive *Estrada* as establishing a *per se* rule requiring the jury to be instructed that a health care provider in every instance has a duty to inform a patient of the experimental nature of a proposed treatment procedure. To the contrary, *Estrada* is a limited

holding founded upon the particular circumstances therein. Should the statute governing informed consent be deemed to require amendment to provide as plaintiff contends, that is the province of our General Assembly. *See Elliott v. Elliott*, 235 N.C. 153, 158, 69 S.E.2d 224, 227 (1952) (appellate court "does not make the law[; t]his is the province of the General Assembly"). Based on the foregoing, we hold the trial court did not err in declining plaintiffs' proposed jury instructions on the issue of informed consent.

[2] Plaintiffs' second major assignment of error is directed at the trial court's entry of summary judgment in favor of Danek, Warsaw, Sofamor, St. Joseph's and Dr. Maxwell on plaintiffs' claims of violation of FDA regulatory requirements. Plaintiffs' argument is unfounded.

The Federal Food, Drug, and Cosmetics Act (FDCA) provides that "all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." 21 U.S.C. § 337(a) (1994). "Courts have generally interpreted this provision to mean that no private right of action exists to redress alleged violations of the FDCA." *Summit Technology v. High-Line Medical Instruments*, 922 F.Supp. 299, 305 (C.D. Cal. 1996); *see also Gile v. Optical Radiation Corp.*, 22 F.3d 540, 544 (3rd Cir.), *cert. denied*, 513 U.S. 965, 130 L. Ed. 2d 342 (1994) ("violations of the FDCA do not create private rights of action"), and *Bailey v. Johnson*, 48 F.3d 965, 968 (6th Cir. 1995) ("Congress did not intend, either expressly or by implication, to create a private cause of action under the FDCA").

Notwithstanding, plaintiffs insist that the United States Supreme Court in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 135 L. Ed. 2d 700 (1996), held that state causes of action may be maintained for violation of FDA regulations. Plaintiffs misread *Lohr*.

Lohr involved a question of whether § 360k of the FDCA, 21 U.S.C. § 360k (1994), pre-empted plaintiffs from bringing a *common-law* state claim. *Id.* at 474, 135 L. Ed. 2d at 709. The Court held "[n]othing in § 360k denies . . . the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Id.* at 495, 135 L. Ed. 2d at 721. Contrary to plaintiffs' assertion, therefore, the Court's holding does not give rise to an implied private state cause of action for violation of FDA regulations or requirements.

Plaintiffs also assert in passing that they "may seek damages based on state claims for violation of FDA regulations and requirements." Again, no recognized state claim, either statutory or common law, is precluded by the "by and in the name of the United States" language of 21 U.S.C. § 337(a). The Third Circuit Court of Appeals held that

> [r]efusing to entertain [a fraud on the FDA claim] solely because the statutory scheme does not contain a private cause of action would be the equivalent of finding preemption of state law claims contrary to the clear holding of *Lohr.*

In Re Orthopedic Bone Screw Liability Litigation, 159 F.3d 817, 825 (3d Cir. 1998). Further, plaintiffs may produce evidence of alleged FDA violations to substantiate state law claims. *See Loewy v. Stuart Drug & Surgical Supply, Inc.*, No. 91 CIV. 7148, 1999 WL 216656, at *3 (S.D.N.Y. Apr. 14, 1999) (FDA violations may be offered as proof on state common law claim). However, plaintiffs are precluded by 21 U.S.C. § 337(a) from bringing a state claim "to redress alleged violations of the FCDA." *Summit Technology*, 922 F. Supp. at 305.

[3] Plaintiffs also contend the trial court erred in granting summary judgment in favor of Danek, Warsaw, and Sofamor on plaintiffs' fraud claim.

> A defendant may show as a matter of law that [it] is entitled to summary judgment in [its] favor by showing that there is no genuine issue of material fact concerning an essential element of the plaintiff's claim for relief and that the plaintiff cannot prove the existence of that element.

Blue Ridge Sportcycle Co., v. Schroader, 60 N.C. App. 578, 580, 299 S.E.2d 303, 304 (1983) (citation omitted). "When a trial court considers a motion for summary judgment, 'the evidence is viewed in the light most favorable to the non-moving party.' " *Yates v. Haley*, 103 N.C. App. 604, 606, 406 S.E.2d 659, 660 (1991) (quoting *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986)).

Plaintiffs alleged in Count I of their amended complaint that:

92. The FDA was ignorant of the fact that these devices and device components were intended by Danek for use as pedicle screw fixation devices.

93. Were it not for these fraudulent acts and statements, the FDA would not have issued 510(k) clearances for Danek's pedicle

> screw fixation devices and device components . . ., the devices would not have been introduced into interstate commerce, and the Plaintiff would not have been exposed to the dangerous device . . . .
>
> The elements of fraud are:
>
> "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party."

Helms v. Holland, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996) (quoting *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985)).

Careful review of the record reflects failure of the evidence upon an essential element of plaintiffs' claim, *i.e.*, that the FDA was in fact deceived. Plaintiffs assert that Danek misrepresented to the FDA the intended use of its plate and screw device and perpetrated this fraud, upon denial of its application for FDA approval of the ISF Luque II device for use in pedicles, by resubmitting identical components to the FDA for approved use in long or flat bones such as in pelvic, femoral condyle, and tibia plateau fractures. Plaintiffs conclude that as a result of

> the misrepresentations . . . regarding the intended use of the plates and screws, the FDA cleared these components as substantially equivalent to pre-amendment devices.

Even considered in the light most favorable to plaintiffs, the evidence, as opposed to plaintiffs' conclusory assertion, *see Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 505, 451 S.E.2d 650, 658, *disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995) (to defeat properly supported summary judgment motion, "facts, as distinguished from allegations," must be produced, and non-movant may not "rely on mere conjecture"), fails to raise a genuine issue of material fact as to whether the FDA was in fact deceived.

No evidence or testimony from FDA representatives indicated the agency was deceived by Danek's actions. Rather, it appears from the record that the FDA was aware Danek eventually intended the plate and screw system for use in pedicles. Indeed, the FDA in 1986 approved Danek's request to conduct clinical trials to "develop data on the safety and effectiveness of the Luque II device for pedicular

fixation." No evidence was presented raising a genuine issue of material fact as to the deception element of plaintiffs' fraud claims, and summary judgment was therefore properly granted as to said claims.

[4] Plaintiffs next assign error to the trial court's grant of summary judgment to Danek, Warsaw, Sofamor, St. Joseph's and Dr. Maxwell on the issue of negligence *per se*. Plaintiffs assert the foregoing defendants violated the FDCA and FDA regulations, which violations led to damages suffered by plaintiffs, thereby establishing a cause of action for negligence *per se*.

> A safety statute or a safety regulation having the force and effect of a statute creates a specific duty for the protection of others. . . . A member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator. . . .

Baldwin v. GTE South, Inc., 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994) (citations omitted).

In addressing plaintiffs' contention of negligence *per se*, we need look no further than the requirement for a causal relationship between the alleged regulatory violation by defendants and the injury alleged by plaintiffs. The record before us fails to reflect evidence raising a material fact as to the existence of such a relationship.

Plaintiffs' expert medical witness, Dr. Alois Gibson (Dr. Gibson), testified that the two devices used in Osburn's back appeared to have functioned properly. Dr. Gibson related that he knew of no failure of the devices and found "no indication that there was any misplacement." Dr. Gibson further stated that use of the devices did not cause Osburn's pain, and that the pain continued after removal of the devices.

During his testimony, Dr. Gibson offered the opinion that surgery probably should not have been performed upon Osburn. Specifically, he asserted, "I did not find any indications for the surgery." He observed that Osburn had "failed back syndrome" and explained that

> [a] person with a failed back syndrome is a person who has had multiple operations, continues to complain of pain, is disabled and may or may not have physical findings abnormal.

However, the issue of whether surgery was medically justified is not before us. The question is whether evidence presented to the trial

court raised an issue of material fact as to whether the alleged violation of the FDCA and FDA regulations constituted the proximate cause of damages suffered by plaintiffs. At no time during his testimony did Dr. Gibson link the devices used in Osburn's back to the latter's ongoing problems which commenced with his work-related injury. The trial court did not err in its grant of summary judgment on the issue of negligence *per se*.

[5] Plaintiffs further challenge the trial court's entry of summary judgment in favor of Danek, Warsaw, and Sofamor on plaintiffs' claim of fraudulent marketing and promotion. Plaintiffs alleged in their amended complaint that misrepresentations of the "safety and efficacy" of the devices

> were made to induce physicians to perform and patients to undergo pedicle screw fixation surgery involving the use of Danek's devices.

The foundation of plaintiffs' claim for fraudulent marketing and promotion was reliance by Dr. Maxwell and by plaintiffs upon alleged misrepresentations by Danek. Again, no record evidence raises an issue of material fact regarding such reliance either by Dr. Maxwell or by plaintiffs. Dr. Maxwell testified he contracted to "manufacture the ISF Luque system and the TSRH system" and that he "lectured with regard to the use of the ISF Luque system and TSRH system." Further, Dr. Maxwell submitted information to Danek as part of an investigational study on the ISF Luque II device to "prove its good points and expose any bad points."

Thus, rather than showing reliance by Dr. Maxwell on representations by Danek in his decision to use the ISF Luque II or TSRH devices in surgery, the record indicates Dr. Maxwell was an active participant in development of the device. No evidence shows plaintiffs relied on representations by Danek. The trial court did not err in granting summary judgment on plaintiffs' claim of fraudulent marketing and promotion.

In view of the foregoing disposition of plaintiffs' appeal of rejection of their claims either by the trial court on summary judgment or by the jury, it is unnecessary to address plaintiffs' claims of loss of consortium and punitive damages. Likewise, we do not discuss defendants' cross-assignments of error. As to plaintiffs' remaining assignments of error, we have carefully reviewed each and find them unfounded.

No error.

Judge WALKER concurs.

Judge McGEE concurring in part and dissenting in part.

Judge McGEE concurring in part and dissenting in part.

I respectfully dissent from the majority opinion's determination that the jury instructions on the issue of informed consent were proper.

Plaintiffs argued that Dr. Maxwell had a duty to inform them of the experimental nature of the devices used by Dr. Maxwell in Gregory Osburn's back surgery, and that the trial court erred in refusing to instruct the jury as to this duty.

As the majority states, the pertinent statute is N.C. Gen. Stat. § 90-21.13(a)(1) and (2). "Subsection (a)(2) establishes an objective standard to determine whether the patient would have obtained a general understanding of the procedures or treatments contemplated and of the usual and most frequent risks and hazards inherent in them." *Nelson v. Patrick*, 58 N.C. App. 546, 550, 293 S.E.2d 829, 832 (1982). In order to meet this standard, "the health care provider must impart enough information to permit a reasonable person to gain a 'general understanding' of both the treatment or procedure and the 'usual and most frequent risks and hazards' associated with the treatment." *Foard v. Jarman*, 326 N.C. 24, 27, 387 S.E.2d 162, 164 (1990).

However, in cases where the treatment or procedure is experimental, a health care provider's lack of knowledge of the ordinary risks may prevent the health care provider from fully informing the patient. In *Estrada v. Jaques*, 70 N.C. App. 627, 649, 321 S.E.2d 240, 254 (1984), our Court held

> that where the health care provider offers an experimental procedure or treatment to a patient, the health care provider has a duty, in exercising reasonable care under the circumstances, to inform the patient of the experimental nature of the proposed procedure. With experimental procedures the "most frequent risks and hazards" will remain unknown until the procedure becomes established. If the health care provider has a duty to inform of *known* risks for *established* procedures, common sense and the purposes of the statute [G.S. 90-21.13] equally require

> that the health care provider inform the patient of any *uncertainty* regarding the risks associated with *experimental* procedures. This includes the experimental nature of the procedure and the *known or projected most likely risks.*

As noted in *Estrada*, "[o]ne federal court has explicitly established such a rule, that the patient 'must always be fully informed of the *experimental nature* of the treatment *and* of the foreseeable consequences of that treatment.' " *Id.*, citing *Ahern v. Veterans Admin.*, 537 F. 2d 1098, 1102 (10th Cir. 1976).

Plaintiffs' attorney filed a written request for a jury instruction that "the health care provider has a duty, in exercising reasonable care under the circumstances, to inform the patient of the experimental nature of the proposed procedure." Plaintiffs' attorney again presented the request for special jury instructions during the charge conference. The trial court declined to apply the rule in *Estrada*, stating that the duty of a physician to inform patients that a device is experimental is not the standard of care under N.C. Gen. Stat. § 90-21.13.

"It is well established that when a party aptly tenders a written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, at least in substance, is reversible error." *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 379, 343 S.E.2d 15, 20-21 (1986) (citations omitted). The instruction requested by plaintiffs was a correct statement of the law as set forth in *Estrada*. *Estrada* establishes that a health care provider has a duty to inform patients of the experimental nature of a procedure. Further, there is substantial evidence in the record to support such an instruction, including: testimony that during 1991-1993 pedicle screw implants were investigational and had not received approval by the FDA; evidence that Dr. Maxwell contributed to an investigation by Sofamor Danek which was being submitted to the FDA; statements from the FDA to Danek requiring that patients be informed of the experimental nature of the ISF Luque and TSRH devices; and testimony that the concept of the pedicle screw and plate is new in its application to the spine.

I am not saying that a health care provider must inform the patient of the FDA classification or status of a device, an issue discussed by defendants Keith M. Maxwell, M.D. and Keith M. Maxwell, M.D., P.A. As stated by a Pennsylvania court, "the FDA does not reg-

ulate the practice of medicine" and "a physician . . . is generally free to use a medical device in a manner different from that for which the FDA has approved the device for commercial sale, *i.e.*, an 'off-label' use." *Southard v. Temple University Hospital*, 731 A.2d 603 (Pa. Super. 1999). However, the FDA classification or status is evidence in determining whether a device is experimental. After reviewing all of the evidence, and after proper instruction by the trial court as to a physician's duty to inform a patient of the experimental nature of the device, it was for the jury to decide whether this device was experimental and whether defendants Keith M. Maxwell, M.D. and Keith M. Maxwell, M.D., P.A. breached their duty to plaintiffs.

Since plaintiffs' request for jury instruction was correct in the law and supported by the evidence, it was reversible error for the trial court to refuse to give the requested instruction. Plaintiff is entitled to a new trial against Keith M. Maxwell, M.D. and Keith M. Maxwell, M.D., P.A. on the question of informed consent. This determination also reopens the questions of loss of consortium and punitive damages as to these defendants, and these issues should be remanded for trial.

IN THE MATTER OF: THE APPEAL OF SOUTHEASTERN BAPTIST THEOLOGICAL SEMINARY, INC. FROM THE DENIALS OF EXEMPTION OF THE 1996 WAKE COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA98-1440

(Filed 19 October 1999)

1. Taxation— property—exemptions—educational use

The Property Tax Commission did not err by concluding that certain parcels of land held by a seminary were exempt where competent, material and substantial evidence was presented to establish that the seminary sought to provide and maintain a relaxed campus atmosphere conducive to study, that the parcels in question were part of the original campus purchased by the seminary, that the seminary is the only Southern Baptist educational institution that maintains a rural campus, that this unique setting is a recruiting tool important to the seminary in competing for potential students, that students use the parcels for various activities consistent with the educational philosophy of the seminary, that the seminary intended to buffer its campus from

encroaching urbanization, and that each parcel is situated in such a way as to contribute to the intended buffering effect. N.C.G.S. § 105-278.4.

2. Taxation— qualification of tax exempt property—equal protection—uniformity

The statute governing determination of tax-exempt property is constitutional under both the United States and North Carolina constitutions. N.C.G.S. § 105-278.4 enumerates within the body of the statute the requirements necessary to qualify for an exemption and no additional guidelines need be implemented to qualify property as exempt.

Appeal by Wake County and cross-appeal by Taxpayer from the final decision entered 5 May 1998 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 26 August 1999.

Wake County Attorney's Office, by Shelley T. Eason, Deputy County Attorney, for Wake County-appellant/appellee.

Kennedy Covington Lobdell & Hickman, L.L.P., by Lacy H. Reaves and Amy L. Pritchard, for taxpayer-appellee/appellant.

EDMUNDS, Judge.

Southeastern Baptist Theological Seminary (the Seminary), an affiliate of the Southern Baptist Church, is a religious educational institution located in Wake Forest, North Carolina. The Seminary owns approximately 600 acres of land on the site formerly occupied by Wake Forest College. The 600 acres contains the central campus, a golf course, student housing, and several parcels of undeveloped land.

The North Carolina Constitution authorizes the General Assembly to exempt from taxation "property held for educational, scientific, literary, cultural, charitable, or religious purposes." N.C. Const. art. V, § 2(3). In 1995, the Wake County Revenue Director, reviewing all previously exempt educational property in Wake County, determined that four parcels belonging to the Seminary did not fall under the exemption statute, N.C. Gen. Stat. § 105-278.4 (1997), and therefore were subject to taxation. The Seminary appealed the denial of its exemption applications for these four parcels to the Wake County Board of Equalization and Review, which upheld denial. The Seminary then appealed to the North Carolina

Property Tax Commission (the Commission), which reversed the County's denial as to three of the four parcels. The County appeals this decision; the Seminary cross-appeals, challenging the constitutionality of the application of the exemption statute.

I. Wake County's Appeal

[1] We note as a preliminary matter that when a matter comes before the Commission, it is the taxpayer's burden to prove that the property is entitled to an exemption. *See In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 4, 434 S.E.2d 865, 867 (1993), *aff'd per curiam*, 336 N.C. 69, 441 S.E.2d 550 (1994). "This burden is substantial and often difficult to meet because all property is subject to taxation unless exempted by a statute of statewide origin." *Id.* (citing N.C. Gen. Stat. § 105-274).

The County contends that the Seminary failed to meet that burden, arguing that "there was insufficient evidence adduced at hearing to support exemption of the subject property under N.C. Gen. Stat. § 105-278.4[] as a matter of law . . . ." We disagree.

The exemption statute at issue, section 105-278.4, reads in pertinent part:

> (a) Buildings, the land they actually occupy, and *additional land reasonably necessary for the convenient use of any such building* shall be exempted from taxation if:
>
> (1) Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);
>
> (2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;
>
> (3) Of a kind commonly employed in the performance of those activities *naturally and properly incident* to the operation of an educational institution such as the owner; and
>
> (4) *Wholly and exclusively used for educational purposes* by the owner . . . .

(b) Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such improvements, and additional land reasonably necessary for the convenient use of any such improvement shall be exempted from taxation if:

(1) Owned by an educational institution that owns real property entitled to exemption under the provisions of subsection (a), above;

(2) Of a kind commonly employed in the performance of those activities *naturally and properly incident* to the operation of an educational institution such as the owner; and

(3) *Wholly and exclusively used for educational purposes* by the owner . . . .

(Emphasis added.) Subsection (f) of that section defines an "educational purpose" as

one that has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons. The operation of a golf course, a tennis court, a sports arena, a similar sport property, or a similar recreational sport property for the use of students or faculty is also an educational purpose, regardless of the extent to which the property is also available to and patronized by the general public.

N.C. Gen. Stat. § 105-278.4(f) (emphasis added). This statute permits consideration of the nature of the particular educational institution in determining whether an educational exemption may be applied. Unimproved land may be educationally exempted if it is for the convenient use of improved land and "[o]f a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution *such as the owner*[.]" N.C. Gen. Stat. § 105-278.4(b)(2) (emphasis added). Therefore, the Commission was allowed to consider that the educational uses to which the questioned property was put were uses made by a Seminary.

The County argues that the requirements of section 105-278.4 were not met in that the parcels at issue were not incidental to the operation of the Seminary, nor were they wholly and exclusively used

for educational purposes. *See Atlantic Coast Conference*, 112 N.C. App. 1, 434 S.E.2d 865. The standard of review for a final order of the Commission is governed by N.C. Gen. Stat. § 105-345.2 (1997), which reads in pertinent part:

> (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.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

We therefore consider the "whole record" generated by the Commission. *See In re Appeal of Parsons*, 123 N.C. App. 32, 38, 472 S.E.2d 182, 187 (1996) (citing *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981)). Because we are reviewing the Commission's finding that the property was "naturally and properly incident to the operation" of the Seminary and "wholly and exclusively used for educational purposes by the owner," N.C. Gen. Stat. § 105-278.4(b), we must specifically determine whether those findings were supported by "competent, material and substantial evidence" in the record, N.C. Gen. Stat. § 104-345.2(b)(5). At the Commission hearing, evidence was presented concerning the present condition, use, and status of the parcels now at issue on appeal:

A. Parcel 2, consisting of 12.72 acres, was undeveloped. It bordered Richland Creek on one side and North Richland Avenue, a road leading to residential areas near the campus, on the other. Lying between the Seminary campus and a residential development, Parcel 2 contained a large gully and a Carolina Power and Light Company easement. At the time of the hearing, Parcel 2 did not adjoin or abut other Seminary property. The Seminary offered testimony that Parcel 2 was used by Seminary students and their families for recreational activities and that the tract served as a buffer from faculty housing.

B. Parcel 3, consisting of 165 acres, bordered Capital Boulevard, the main highway in the area, and projected eastward toward the Seminary campus. There was a cemetery on the parcel, and five acres were used as a biodegradable landfill. The parcel was adjacent to the golf course and an area of student housing, but did not abut any other seminary property.

Garnet Paul Fletcher, vice-president for administration for the Seminary, testified that this sylvan area was "essential" to the atmosphere of the campus because it helped establish the character of the school, allowing the Seminary to "offer an ambience or a setting that is not duplicated anywhere else in North Carolina . . . ." The importance of this property to the campus atmosphere was confirmed by students and family members, who also testified to their recreational use of the parcel. Children of students roamed the property, and families gardened there. It was used for hiking and family outings. Students hunted on the property. It buffered the campus from busy Capital Boulevard and nearby housing developments. On the other hand, the students and family members also testified that they had never attended any organized religious or educational activities on the parcel, nor were there any established hiking paths or picnic areas or any other improvements on the parcel.

Many trees on parcel 3 were damaged by Hurricane Fran. As a result, portions of the parcel were clear cut, and the income derived from the sale of timber was used to repair other damage caused by the hurricane. In 1995, the Seminary contracted to sell fifty-six acres of this tract for commercial development, contingent upon the rezoning of the property. The Seminary sought to have the relevant portion of the tract rezoned for a highway business district, but when all its applications were denied, the sale did not proceed. Vice-president Fletcher testified that had the sale taken place, the Seminary

would have used the proceeds to purchase land closer to campus for building additional student housing.

C. Parcel 4 also fronted Capital Boulevard and was split by old Stadium Drive, which at one time had been the main entrance to the campus. While that old entrance road still existed and carried some traffic, the commonly-used entrance at the time of the hearing ran along the side of Parcel 4. The parcel buffered the Seminary campus from commercial development along Capital Boulevard. With the exception of an exempt cemetery, this parcel did not adjoin or abut other Seminary property. The Seminary had sold timber growing on this parcel, but only in order to thin the forest and maintain its natural state, as recommended by the company managing the forest.

D. Maps showing the relationships of these parcels to each other, to the Seminary campus, and to other area features such as highways and housing developments were also introduced.

E. Curtis West, a real-estate appraiser, testified on behalf of the Seminary as to his findings pertaining to the ratio of building space to exempted land for several area educational institutions. He compared the ratio for the Seminary with the average ratio found at the other institutions and concluded that the ratio for the Seminary would be consistent with the average ratio for other schools if the property in dispute were exempted; otherwise, the Seminary's ratio of buildings to exempted land would be low (i.e., the Seminary would have more buildings per unit of exempt land than the average for this area).

F. The County presented Emmett Douglas Curl, revenue director for Wake County, who reviewed the exemption applications and examined the parcels in question. He testified as to the procedures used in Wake County for determining whether a given parcel is exempt from taxation:

> [T]o meet the test for exemption as taught in the Institute of Government and the ad valorem tax committee, you must meet two tests. One is ownership and once you meet the ownership test, then you must meet the use test.
>
> And the use test, you go back to the general statutes to find what they say and how they must be used based on the statute that the property is making application under.

With regard to Parcel 3, he observed no evidence of use "nor did we get any information from the individuals in our conversation that the property was in use in any manner." Additionally, "it wasn't close enough to the campus to be used as a buffer and . . . there were other buffering properties that would provide for any reasonable buffer for the central campus and its buildings . . . ." As to Parcels 2 and 4, he also saw no evidence of use or improvements. Curl disputed the Seminary's need for these parcels as buffer property, noting that there are 600 feet of woods between the student housing complex and Parcel 3, and that a golf course and power line easement lie between the campus and Parcel 3. Wake Forest High School lies between the campus and Parcel 2. Parcel 4 is over one-half mile away from the closest building owned by the Seminary.

In conducting the whole record test statutorily required of a reviewing court, we "must decide all relevant questions of law *de novo*, and review the findings, conclusions and decision to determine if they are affected by error or are unsupported ' "by competent, material and substantial evidence in view of the entire record." ' " *Parsons*, 123 N.C. App. at 38-39, 472 S.E.2d at 187 (quoting *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (1993) (quoting N.C. Gen. Stat. § 105-345.2)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Thompson v. Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)), *quoted in Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 341, 339 S.E.2d 681, 685 (1986). A whole record review, while less deferential than an abuse of discretion review, is nevertheless not "a tool of judicial intrusion." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979), *quoted in Rainbow Springs*, 79 N.C. App. at 341, 339 S.E.2d at 685. Instead, it "gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Id.* If the whole record supports the Commission's findings, we may not substitute our own judgment for that of the Commission, even in the presence of conflicting views of the evidence. *See In re Moses H. Cone Memorial Hospital*, 113 N.C. App. 562, 570, 439 S.E.2d 778, 782 (1994), *aff'd in part*, 340 N.C. 93, 455 S.E.2d 431 (1995).

Few North Carolina appellate opinions deal with the educational exemption, and those few, decided on facts substantially different from the case at bar, provide little guidance. *See In re Wake Forest*

University, 51 N.C. App. 516, 277 S.E.2d 91 (1981) (parking lot shared by Wake Forest University and R.J. Reynolds held sixty-four percent exempt, reflecting the extent it was used exclusively by the University); *Atlantic Coast Conference*, 112 N.C. App. 1, 434 S.E.2d 865 (property held by the ACC for its administrative offices was held exempt so long as salaries to commissioners and assistants, along with other administrative expenses, were reasonable for a non-profit institution).

However, we do find some guidance in analogous cases. One of the County's arguments in support of its contention that the property should not receive an educational exemption is that the land is undeveloped. In *In re Southview Presbyterian Church*, 62 N.C. App. 45, 302 S.E.2d 298 (1983), this Court held that a 15.56-acre tract held by the church met the requirements of a religious exemption, even though the tract was undeveloped, because it was used "for neighborhood recreation activities and for Boy Scout and Girl Scout activities such as camp-outs and athletics." We were "persuaded that such activities qualify as activities that demonstrate and further the beliefs and objectives of Southview Presbyterian Church and that the 15.56 acre tract is reasonably necessary for the convenient use of petitioner's church buildings." *Id.* at 51, 302 S.E.2d at 301 (internal citation omitted). Similarly, in *In re Appeal of Worley*, 93 N.C. App. 191, 377 S.E.2d 270 (1989), this Court upheld a religious exemption for a 5.29-acre parcel, which was unimproved and remained a natural area. The parcel at issue was used by church youth groups for recreational church-related activities, as well as by church members for hunting deer. This Court stated:

> Although we decline to hold that permitting hunting . . . was an exempt "religious purpose," we conclude that the other recreational activities that occurred there and the use of the property as a spiritual retreat together constituted sufficient "present use wholly and exclusively for religious purposes" to warrant exemption.

Id. at 196-97, 377 S.E.2d at 273-74. We are aware that *Southview Baptist Church* and *Worley* address religious exemptions as opposed to the educational exemption with which we are now dealing. Nevertheless, in light of the wording of the statute, which speaks of both improved land and land necessary for convenient use of improved land, we see no reason to exclude land from consideration for an educational exemption merely because it is undeveloped, so

long as sufficient competent, material, and substantial evidence is presented to support the exemption.

The County, pointing to the Seminary's attempts to rezone portions of Parcel 3 for sale for commercial development, argues that the Seminary was holding the parcel for future sale for profit and that the current possession was not "wholly and exclusively" for educational purposes. We disagree. North Carolina courts have held that future planned use of exempted property does not override the present use. Again, in the absence of North Carolina cases involving future use of property subject to an educational exemption, we review cases involving a religious exemption, while continuing to bear in mind that these exemptions are not necessarily equivalent. In *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269 (1940), our Supreme Court affirmed a religious exemption for a parcel owned and used by a church for outdoor meetings and upon which the church was planning to erect a new church building. In *Worley*, discussed *supra*, this Court cited *Harrison* to support our holding that a lot, currently used for church-related retreats and held for future church-related use, but that had been purchased by the church for the immediate purpose of blocking another buyer, was entitled to a religious exemption. Although we observe that both *Harrison* and *Worley* involve exempt property where the future use would also be for an exempt purpose, whereas here the County is contending that the Seminary was holding the land for a future non-exempt purpose, we do not find this distinction controlling. To be eligible for an educational exemption, there is no requirement that the party seeking the exemption have a positive intent to hold or use that property for some exempt purpose *ad infinitum*. "*[P]resent* use, not *intended* use, controls." *Worley*, 93 N.C. App. at 195, 377 S.E.2d at 273 (citing *Southview Presbyterian*, 62 N.C. App. at 50-51, 302 S.E.2d at 300-01).

Additionally, the County argues that the Seminary's sale of timber from the land was inconsistent with the educational use of the property. We disagree. The Seminary's stewardship to the land in maintaining a healthy forested state, in removing trees damaged by a hurricane, and in using proceeds from the sale of the removed timber to pay for other repairs caused by that hurricane, does not affect the designation of the land as educational property.

Competent, material, and substantial evidence was presented to establish that the Seminary sought to provide and maintain a relaxed campus atmosphere conducive to study, that the parcels in question

were part of the original Wake Forest Campus purchased by the Seminary, that the Seminary is the only Southern Baptist educational institution that maintains a rural campus, that this unique setting is a recruiting tool important to the Seminary in competing among potential students considering a seminary education, and that students use all the disputed parcels for various activities consistent with the educational philosophy of the Seminary. There was further evidence that Capital Boulevard is a major highway, that the Seminary intended to buffer its campus from encroaching urbanization, and that each parcel is situated in such a way as to contribute to the intended buffering effect. We have held that buffering is an appropriate consideration in determining whether an educational exemption applies to a particular parcel. *See Worley*, 93 N.C. App. 191, 377 S.E.2d 270.

We note also that the Commission stated in its Final Decision that "[e]ven though the land to building ratio analysis is an acceptable appraisal approach, the Commission did not consider said approach in this decision." We similarly do not consider evidence of the Seminary's land to building ratio. Nevertheless, the record in this case contains sufficient evidence to "give[] a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Rogers*, 297 N.C. at 65, 253 S.E.2d at 922. After review of the whole record, we affirm the decision of the Commission.

II. Seminary's Cross-Appeal

[2] On cross-appeal, the Seminary contends that subjecting the three parcels to taxation violates the United States and North Carolina constitutions, arguing that "the rule of uniformity was violated because the exemption statute was applied unequally to the Seminary . . . ." This allegedly unequal treatment was a result of the state's failure "to promulgate any written exemption guidelines or take any other measures to promote the equal application of the educational exemption."

The North Carolina Constitution provides that "[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general law *uniformly applicable* in every county, city and town, and other unit of local government." N.C. Const. art. V, § 2(2) (emphasis added). Additionally, "[e]very exemption shall be on a State-wide basis and shall be made by general law *uniformly applicable* in every county, city and town, and other unit of local government." N.C. Const. art. V, § 2(3) (emphasis added).

However, "occasional inequities resulting from the application of the statute should not defeat the law unless they result from hostile discrimination." *Edward Valves, Inc. v. Wake County*, 117 N.C. App. 484, 492, 451 S.E.2d 641, 647 (citation omitted), *review granted*, 340 N.C. 111, 456 S.E.2d 327 (1995), *aff'd as modified and remanded*, 343 N.C. 426, 471 S.E.2d 342 (1996). Similarly, the United States Supreme Court has stated that a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution occurs where a lack of uniformity of taxation results from more than "mere errors of judgment by officials" and "amounts to an intentional violation of the essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 353, 62 L. Ed. 1154, 1156 (1918). Accordingly, the Seminary must establish intentional discrimination against property subject to taxation in order to prevail.

The Seminary relies primarily on this Court's decision in *Edward Valves*, 117 N.C. App. 484, 451 S.E.2d 641. In that case, Edward Valves, a Wake County corporation that made valves for power plants, sold its assets to another business. Engineering drawings maintained since 1908 were listed as assets at the sale, even though up to that time the drawings had been treated as expenses and thus not listed. Wake County assessed a tax based upon the value of these drawings. We noted that the challenged scheme taxed intangible property only when it was capitalized on the books of the business. Because capitalization of such property did not occur until a business sold its assets, we held that the scheme resulted in discrimination "based upon an improper distinction between taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold." *Id.* at 492, 451 at 647. Wake County, the only county in the state to implement taxation on this type of property, had no written guidelines to effectuate the even application of the tax. Because the methodology employed by Wake County "singl[ed] out that intangible property for taxation that is in the hands of those businesses which have been the subject of asset sales," it gave "different tax treatment to taxpayers owning identical classes of property." *Id.* at 491, 451 S.E.2d at 646. The tax was thus held discriminatory and illegal.

In contrast to the facts in *Edward Valves*, section 105-278.4 exempts like property from taxation so long as the taxpayer meets the burden of establishing the four requirements set out in that statute. A statute does not have to exclude all inequalities to meet

constitutional requirements, and in fact the statute now at issue specifically grants some leeway by excluding property that is "reasonably necessary" for use of educational buildings and improvements. Nevertheless, the four requirements of the statute are reasonably objective and do not result in any hostile or systematic discrimination.

The Seminary further contends that the lack of written guidelines violates the rule of uniformity, citing *McElwee*, 304 N.C. 68, 283 S.E.2d 115. However, that case does not stand for the principle that written guidelines are invariably necessary. In *McElwee*, which involved a challenge to a county's reappraisal of all real property within its borders, the applicable statute required the county to "develop[] and compile[] uniform schedules of values, standards, and rules to be used in appraising real property." No such standards or rules appeared on record, and the Court found this failure, along with others noted in the opinion, to be evidence that the county's approach to reappraising property was arbitrary and capricious. By contrast, section 105-278.4 enumerates within the body of the statute the requirements necessary to qualify for the exemption. No additional guidelines need be implemented to qualify property as exempt. Accordingly, *McElwee* provides no useful guidance to the case at bar.

In conclusion, we hold that the Commission properly exempted the land in question. We further hold that the statute governing determination of exempt property is constitutional under both the United States and North Carolina constitutions.

III. Wake County's Motion to Amend the Record

After oral argument, Wake County moved, pursuant to N.C. R. App. P. 37, to amend the record on appeal to cover events occurring after the Commission issued its Final Decision on 5 May 1998. The Seminary opposes the motion. Because we have held above that the "present use" of the land controls, we deny the motion.

Affirmed.

Judges WYNN and JOHN concur.

K & S ENTERPRISES, PLAINTIFF v. KENNEDY OFFICE SUPPLY COMPANY, INC., DEFENDANT

No. COA98-1391

(Filed 19 October 1999)

1. Landlord and Tenant— commercial lease—leaking roof

The trial court did not err by concluding as a matter of law that defendant-tenant breached a lease agreement by terminating the lease and vacating the premises where defendant first became aware of a persistent leaking roof immediately after taking possession, suffering damage to his inventory and merchandise. The burden of fixing the roof rested on plaintiff, but the fact that defendant remained in the building for three years and eight months is evidence that he was not prevented from the full use and enjoyment of the building.

2. Landlord and Tenant— commercial lease—implied warranty of habitability

The doctrine of implied warranty of habitability did not apply to the commercial lease of a building with a leaking roof.

3. Landlord and Tenant— commercial lease—leaking roof—no constructive eviction

The trial court did not err in an action without a jury by concluding that defendant was not constructively evicted as a matter of law from a commercial building with a leaking roof where plaintiff's failure to repair the roof did not render the premises untenable and defendant did not abandon the premises within a reasonable time.

4. Landlord and Tenant— commercial lease—leaking roof—covenant of quiet enjoyment

A commercial tenant of a building with a leaking roof was not entitled to vacate the premises under the claim that plaintiff had breached the implied covenant of quiet enjoyment.

5. Appeal and Error— preservation of issues—trial without jury—exceptions to findings of fact

In a trial without a jury involving a commercial tenant who had vacated the premises early due to a leaking roof, the defendant preserved for appeal the issue of whether he was obligated to pay $10,018.10 by his exception to the conclusion that he was

entitled to a verdict in that amount even though he did not except to another finding which represented the sum of the various bills in issue but did not indicate that defendant was obligated to pay that amount. Moreover, defendant's failure to except to a finding that he had assumed under the lease the responsibility for utilities during the term of the lease meant that this finding (which was inconsistent with his argument that he was responsible only for utilities used) was presumed correct.

6. Landlord and Tenant— commercial lease—damages for breach—utilities

The trial court, sitting without a jury, had ample support for its conclusion that plaintiff was entitled to a verdict representing the sum of utilities bills and past due rent.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 30 June 1998 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 24 August 1999.

Donald E. Britt, Jr. for plaintiff-appellee.

H. Spencer Barrow and George B. Currin for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 12 April 1993, K & S Enterprises, Inc. ("plaintiff") leased property to Kennedy Office Supply Company, Inc. ("defendant") for the operation of defendant's retail office supply business. The term of the written lease prepared by plaintiff and executed by the parties was four (4) years, beginning 12 April 1993 and ending 11 April 1997, at a rental rate of $2,450.00 per month.

The roof of the building leaked before defendant took possession, and plaintiff was aware of this condition. On roughly five (5) occasions prior to leasing the building to defendant, plaintiff had employed All Span Building Systems, Inc. ("All Span") to repair the leaks. During lease negotiations, plaintiff did not advise defendant of the leaks, and defendant did not inquire whether the building leaked, nor did he make any inspection.

Defendant became aware of the leaks immediately after taking possession of the building. He suffered damage to his inventory and

merchandise. While defendant did not provide written notification to plaintiff of any repairs needed, defendant communicated in person, on the telephone, and through telephone messages with plaintiff regarding leaks in the building.

The parties dispute whether the vertical facade attached to the roof created structural defects which caused the leaks. The facade was removed in late November or early December 1996.

Despite the persistent leaking, defendant continued in possession of the premises for a period of three (3) years and eight (8) months. On 31 December 1996, however, defendant vacated the premises and paid no further rent.

On 30 June 1998, the trial court entered a written judgment containing the following pertinent Findings of Fact:

> 1. The Plaintiff and Defendant entered into a written lease agreement dated April 12, 1993, for property located at 109 North Third Street, Wilmington, North Carolina[.]
>
> . . .
>
> 3. The lease was for a period of four years and was to end on April 11, 1997.
>
> 4. The Defendant vacated the premises on December 31, 1996.
>
> . . .
>
> 6. The property was not re-leased until after April 11, 1997.
>
> 7. The Defendant did not pay rent for the period from December 31, 1996 until the lease term expired on April 11, 1997.
>
> 8. Under the terms of the lease, defendant assumed responsibility for water, sewer and power bills incurred during the term of the lease, which he paid until he vacated the property but not thereafter.
>
> 9. The Defendant, pursuant [sic] Paragraph 6 of the lease agreement, was required to "make all necessary repairs to the premises, including the roof of the building situated thereon, as may be necessary or required to maintain the building in the condition in which the same existed at the beginning of this lease, except that Lessee shall not be responsible or liable for exterior or structural damage or repair."

10. Paragraph 12 of the lease provides: "The Lessee shall have the right to terminate this lease if at any time it is prevented from the full use and benefit and enjoyment of the building by reason of law, zoning ordinance, restrictions or any other cause beyond lessee's control."

. . .

12. During lease negotiations between the Plaintiff and the Defendant, the Plaintiff did not advise the Defendant of prior problems relating to leaks to the building nor did the Defendant inquire of the Plaintiff if the building leaked or make any inspections of the building. Plaintiff made no misrepresentations, and his employee who continued to work for Defendant was aware of the leaks and previous repair efforts. An inspection would have disclosed the condition.

. . .

14. Prior to leasing the building from the Plaintiff, the Defendant conducted no inspections of the premises, did not go onto the roof of the premises and did not question the Plaintiff concerning any problems with the building.

. . .

20. The roof leaked before [Defendant] took possession, and [Defendant] became aware of the leaks immediately after taking possession; but [Defendant] continued in possession without [giving Plaintiff] any notice of any contention that the leaks constituted any breach of the lease agreement for a period of three years and eight months.

21. There is some evidence to support a conclusion that leaking was exacerbated by a vertical facade on the front wall that was attached to the roof. The facade has since been removed. After it was removed, the leaking apparently abated. The evidence does not by its greater weight establish that the leaks were due to any structural defect for which Plaintiff would be responsible under the terms of the written lease.

22. The evidence is not persuasive by its greater weight that the leaking roof denied Defendant the use and benefits to which he was entitled under the terms of the lease.

. . .

24. The amount of the past due rent including water, sewer and power is $10,018.10.

Based on its Findings of Fact, the trial court entered the following pertinent Conclusions of Law:

1. The Defendant breached the lease agreement.

. . .

3. Defendant was not constructively evicted.

4. Plaintiff did not breach the agreement, and Plaintiff subsequently performed his obligations.

Defendant appeals from the judgment of the trial court awarding plaintiff $10,018.10 plus interest and costs.

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[1] Defendant first argues that the trial court committed reversible error in concluding as a matter of law that defendant breached the lease agreement by terminating the lease and vacating the premises. We cannot agree.

The case at bar was tried before the court without a jury. When the trial court sits as a fact finder, its findings of fact generally have the weight of a jury verdict and are conclusive on appeal if supported by competent evidence. *Newland v. Newland*, 129 N.C. App. 418, 420, 498 S.E.2d 855, 857 (1998). This is true even though there may be evidence which would support contrary findings. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). In reviewing the trial court's conclusions of law, the appellate court must determine if the findings of fact supported the trial court's conclusions of law. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996); *Reeves v. B & P Motor Lines, Inc.*, 82 N.C. App. 562, 564, 346 S.E.2d 673, 675 (1986).

Defendant correctly asserts that plaintiff bore the burden of repairing the leaks. Pursuant to the Lease Agreement: "Lessee shall make all necessary repairs to the premises, including the roof of the building situated thereon, as may be necessary or required *to maintain the building in the condition in which the same existed at the beginning of this lease*[.]" (Emphasis added).

The trial court found that the roof leaked before defendant took possession and that defendant became aware of the leaks immediately after taking possession. Plaintiff admits that the roof leaked

prior to defendant's taking possession and that he periodically employed All Span to remedy the problem.

Defendant presented evidence that the roof leaked the first time that it rained after defendant took possession and that it continued to leak each time it rained during defendant's possession. While plaintiff argues in his brief that he fixed "each and every leak" before defendant took possession, Mr. Pope, plaintiff's own witness and the president of K & S Enterprises, testified that he sent All Span to the building to fix leaks *after* defendant occupied it. All Span billed Mr. Pope for this service and Mr. Pope paid the bill on 2 May 1993, several weeks after defendant took possession on 12 April 1993.

Furthermore, an employee of All Span testified to the difficulty of eliminating each leak in a roof which has a tendency to leak: "We could not exactly [sic] where it's coming from . . . . It could be that leak. So I fixed that one and if I find other place, fix that. And then the next rain comes, went back there. Some places that we have corrected, some places we haven't. It's hard to detect."

Based on the trial court's findings, it is clear that the burden of fixing the roof rested on plaintiff. Defendant performed its duty under the Lease Agreement to maintain the premises in the condition in which it found them; the building leaked when defendant took control and when defendant vacated it.

Having determined that plaintiff bore the responsibility for the leaks, we now address the issue of whether the leaks entitled defendant to vacate the premises lawfully prior to the expiration of the lease. According to the Lease Agreement, "[t]he Lessee shall have the right to terminate this lease if at any time it is prevented from the full use and benefit and enjoyment of the building by reason of law, zoning ordinance, restrictions or any other cause beyond Lessee's control."

Defendant correctly asserts that Paragraph 12 of the Lease Agreement does not stipulate that defendant must vacate the premises within a set time period once he is disturbed in his use and enjoyment. Nonetheless, the fact that defendant remained in the building for three (3) years and eight (8) months despite his claim that the building leaked immediately after he took possession is competent evidence that he was not prevented from the full use and enjoyment of the building.

Had defendant been disturbed in his use and possession, he would have taken pains to put plaintiff on notice that the leaks constituted a breach of the Lease Agreement. However, defendant never put his complaint in writing. While one employee of defendant orally communicated with plaintiff concerning the leaks, defendant's efforts to put plaintiff on notice consisted largely of leaving telephone messages.

The trial court found that "[t]he evidence is not persuasive by its greater weight that the leaking roof denied Defendant the use and benefits to which he was entitled under the terms of the lease." We believe that there is competent evidence in the record to support this finding as well as the conclusion of law that defendant breached the Lease Agreement by vacating the premises prior to the date of expiration. Thus, this assignment of error is overruled.

[2] We find no merit in defendant's claim that plaintiff breached the implied warranty of habitability. Pursuant to the Residential Rental Agreements, the landlord has a duty to "keep the premises in a fit and habitable condition." N.C. Gen. Stat. § 42-42(a)(2) (Cum. Supp. 1998). However, North Carolina General Statutes sections 42-38 *et. seq.* do not apply in the case *sub judice* because defendant was not renting a dwelling. *See* N.C. Gen. Stat. § 42-38 (1994). In tenancies not governed by the Residential Rental Agreements, there is no implied covenant that the premises are in a habitable condition. *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 372, 326 S.E.2d 295, 300 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986). Therefore, the doctrine of implied warranty of habitability does not apply in the present case.

[3] On his second assignment of error, defendant argues that the trial court committed reversible error in concluding as a matter of law that defendant was not constructively evicted. We disagree.

Constructive eviction occurs when an act of a landlord deprives his tenant of "that beneficial enjoyment of the premises to which he is entitled under his lease," causing his tenant to abandon them. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). In other words, constructive eviction takes place when a landlord's breach of duty under the lease renders the premises untenable. *Id.* A tenant seeking to show constructive eviction has the burden of showing that he abandoned the premises within a reasonable time after the landlord's wrongful act.

McNamara v. Wilmington Mall Realty Corp., 121 N.C. App. 400, 466 S.E.2d 324, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996).

Plaintiff's failure to repair the roof did not render the premises untenable. Significantly, defendant remained in the premises for three (3) years and eight (8) months even though defendant asserts that the leaks began immediately after he took possession of the premises. Defendant did not abandon the premises within a reasonable time. Thus, the trial court did not err in concluding that defendant was not constructively evicted as a matter of law and was not entitled to terminate the lease and vacate the premises under the terms of the Lease Agreement.

[4] Defendant also claims that it was entitled to vacate the premises because plaintiff breached the implied covenant of quiet enjoyment. Under North Carolina law, absent a lease provision to the contrary, a lease carries an implied warranty that the tenant will have quiet and peaceable possession of the leased premises during the term of the lease. *McNamara*, 121 N.C. App. at 406, 466 S.E.2d at 328. Defendant relies on *Dobbins v. Paul*, 71 N.C. App. 113, 321 S.E.2d 537 (1984), *overruled by Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995), which stands for the principle that a landlord breaches the implied covenant of quiet enjoyment when he constructively evicts the tenant. We have already concluded that defendant was not constructively evicted and find no merit in defendant's argument. Therefore, defendant's argument that he was entitled to vacate the premises fails.

[5] On his third assignment of error, defendant argues that the trial court committed reversible error in calculating damages to plaintiff in the amount of $10,018.10. At trial, defendant did not except to the amount of the judgment for plaintiff. Furthermore, in the record on appeal, defendant did not except to the trial court's Finding of Fact No. 24 which states, "[t]he amount of the past due rent including water, sewer and power is $10,018.10." Defendant also failed to except to Finding of Fact No. 8 which states that it was defendant's responsibility to pay for water, sewer and power bills incurred during the term of the lease.

Plaintiff argues that defendant did not preserve the damages issue and therefore the matter is not properly before this Court. Where no exceptions have been taken to the findings of fact, the findings are presumed to be supported by competent evidence and are binding on appeal. *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d

274, 280 (1994); *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991); *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). Plaintiff's argument with regard to Finding of Fact No. 24 lacks merit, but we agree with plaintiff that defendant failed to except to Finding of Fact No. 8.

In his reply brief, defendant argues that Finding of Fact No. 24 merely indicates that the total dollar amount of the various bills is $10,018.00, and does not indicate that defendant is obligated to pay that amount. In other words, defendant does not object to the trial court's calculations that the past due rent, HVAC repairs, water, power and sewer bills total $10,018.10. Instead, defendant objects to Conclusion of Law No. 5 that "[t]he plaintiff is entitled to a verdict in the amount of $10,018.10." Defendant did except in the record on appeal to Conclusion of Law No. 5.

We conclude that the issue of whether plaintiff is entitled to a verdict in the amount of $10,018.10 is properly before this Court. Defendant did not fail to preserve for appeal the issue of whether he is obligated to pay plaintiff $10,018.10 by his failure to except to Finding of Fact No. 24. We agree with defendant that Finding of Fact No. 24 merely represents the sum of the various bills in issue and does not indicate that defendant is obligated to pay that amount.

However, defendant also failed to except to Finding of Fact No. 8. According to Finding of Fact No. 8:

> [u]nder the terms of the lease, defendant assumed responsibility for water, sewer and power bills incurred during the term of the lease, which he paid until he vacated the property but not thereafter.

Finding of Fact No. 8 is inconsistent with defendant's argument that under the lease defendant was only responsible for utilities used by defendant while he was on the premises.

[6] Because defendant did not except to Finding of Fact No. 8, the finding is presumed to be correct and is binding on appeal. *See id.* The dispositive question on the issue before this Court is whether the trial court's finding of fact was sufficient to support its conclusion of law. *See Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 656-57 (1982).

We conclude that the trial court's finding of fact was sufficient to support its conclusion of law. Having determined that defendant

"assumed responsibility for water, sewer and power bills incurred during the term of the lease, which he paid until he vacated the property but not thereafter," the trial court had ample support for its conclusion of law that plaintiff was entitled to a verdict in the amount of $10,018.10, the sum of the bills in issue and the past rent due.

For the reasons stated herein, the judgment of the trial court is affirmed.

AFFIRMED.

Judge HORTON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

There is no competent evidence in this record to support the trial court's finding of fact that defendant was not denied "the use and benefits to which he was entitled under the terms of the lease." Accordingly, the conclusion of the trial court that defendant breached the lease is not supported by any finding of fact.

The lease specifically provided that defendant, as the lessee, had the "right to terminate [the] lease if at any time it is prevented from the full use and benefit and enjoyment of the building by reason of . . . any . . . cause beyond [its] control." As repair of the leaking roof was the responsibility of plaintiff, any restriction of defendant's use of the building, caused by the leaking roof, was "beyond" defendant's control.

The remaining question is whether defendant was denied the "full use" of the building as a consequence of the leaking roof. On this question, the evidence is not in dispute. Indeed all the evidence in this record is that the leaking roof denied defendant the use of a part of the building, thus denying it "full use" of the building. The leaks forced defendant to remove displays from the front of the building whenever it rained, leaving empty spaces that otherwise would have contained defendant's products. Due to the frequency of the leaks, defendant eventually removed products from shelves on the front wall of the building permanently and, instead, placed buckets on those shelves to catch the leaks. The leaks also forced defendant to remove displays from an aisle in the front of the building.

The fact that defendant remained in the building for an extended period of time during which the leaks occurred, does not constitute a waiver of defendant's right to terminate the lease on this grounds.[1] Indeed, plaintiff does not even make this argument. Furthermore, the fact that defendant did not notify plaintiff in writing of its reasons for vacating the premises is not material. The lease did not require written notice.

I therefore would reverse the judgment of the trial court and remand for entry of an order dismissing plaintiff's claims.

JOSEPH RUGGERY, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA98-1289

(Filed 19 October 1999)

1. Workers' Compensation— attorney fees—unreasonable defense

The Industrial Commission did not err by awarding an attorney's fee of $500 under N.C.G.S. § 97-88.1 for defending a case without reasonable ground where, in light of the circumstances, the employee received the Commission's approval for medical treatment by physicians of the employee's choosing within a reasonable time and the failure to obtain authorization prior to receiving treatment from these doctors did not provide the employer with reasonable ground to defend.

2. Workers' Compensation— attorney fees—correction officer—costs

The Industrial Commission did not abuse its discretion by awarding attorney's fees as part of the costs of appeal to an injured correctional officer where the employer argued that the claim was under N.C.G.S. § 143-166.19 rather than Chapter 97. N.C.G.S. § 143-166.19 provides that the Commission shall hear the matter in accordance with its procedure for hearing claims under the Workers' Compensation Act.

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1. There is no logic to suggest, a position adopted by the majority, that because defendant remained on the premises for over three years he "was not prevented from the full use and enjoyment of the building."

3. Workers' Compensation— attorney fees—correction officer—salary continuation

The Industrial Commission did not improperly award attorney's fees for a "salary continuation" claim by a correctional officer. The claim was not properly characterized "salary continuation" when the employee's vacation and sick leave time accumulations were charged by the employer for time out from work due to the employee's injury related disability. The employer offered no justification for charging the employee's vacation and sick time for treatment of his compensable injury.

Appeal by defendant from an Opinion and Award entered 27 July 1998 by Commissioner Bernadine S. Ballance for the Full Industrial Commission. Heard in the Court of Appeals 17 August 1999.

Lucas, Bryant & Denning, P.A., by Sarah Edwards Mills, for plaintiff-appellee.

Attorney General Michael F. Easley, by *Assistant Attorney General William H. Borden, for defendant-appellant.*

TIMMONS-GOODSON, Judge.

The North Carolina Department of Correction ("employer") appeals from the Opinion and Award of the North Carolina Industrial Commission ("Commission") requiring it to restore to the sick and vacation leave accounts of Joseph Ruggery ("employee") time charged to said accounts and to reimburse him for medical payments he may have made for treatment of his compensable injury. In addition, employer was ordered to pay an attorney's fee of five hundred (500) dollars to employee's counsel pursuant to North Carolina General Statutes section 97-88.1 for defending the claim without reasonable grounds and an attorney's fee pursuant to North Carolina General Statutes section 97-88 of one thousand (1000) dollars to employee's counsel as part of the cost of appeal.

On 12 March 1995, employee, a state correctional officer, suffered an injury arising out of and in the course of his employment with employer when employee lost control of a heavy metal trap door he was closing. The trap door jerked employee's arms and back, causing stretched nerves and radiculopathy. Employer conceded that the injuries were compensable under the Workers' Compensation Act.

As a correctional officer, employee was entitled to full salary for his disability for up to two years. Since 12 March 1995, employer continued to pay employee his full salary and also paid employee for some periods of injury leave and salary continuation even though employee was unable to work during those periods as a result of his injuries. However, employee claimed compensation for other periods of time out of work due to his injuries during which employer deducted from his accumulated vacation and sick time. Employee's vacation time and sick leave time accumulations were charged by employer for time out of work due to employee's injury related disabilities on the following dates: May 8, 1995; May 9, 1995; August 24, 1995; August 28, 1995 through September 11, 1995; September 12, 1995 through October 8, 1995; October 15, 1995; October 16, 1995; and October 23, 1995 through October 29, 1995.

Following his work related injuries, employee requested to be placed in the care of Dr. Jeffrey Siegel, a neurologist. Dr. Siegel treated employee from 12 May 1995 to 11 August 1995 at employer's expense. Dr. Siegel released employee to return to work with the restriction that he engage in no excessive physical activity. Employee worked from 14 August to 23 August 1995, but took sick leave on 24 August 1995.

On 25 August 1995, Dr. Siegel determined that employee was not significantly impaired and that his job functions should not be restricted. Employee worked on 25 August 1995. Based on Dr. Siegel's opinion, employee was placed back on the work schedule effective 26 August 1995. However, employee took sick leave, vacation leave or leave without pay 26 August 1995 through 8 October 1995. Additionally, employee took sick leave, vacation leave or leave without pay on October 15, 16 and 23-29, 1995.

Employee did not return to Dr. Siegel but instead received treatment from David E. Tomaszek, M.D., a neurosurgeon, without employer's authorization. Dr. Tomaszek administered nerve block injections and employee reported a lessening of his back pain. Dr. Tomaszek released employee to return to work with restrictions in November 1995. On 20 November, employee began to see Dr. Rudolph J. Maier, a neurologist, also without authorization from employer. In accordance with the recommendations of Dr. Tomaszek and Dr. Maier, employee returned to work for restricted duty. Employee continued to receive medical treatment until September 1996.

Employer contends that employee's claim for payment of medical treatment by Dr. Tomaszek and Dr. Maier was subject to attack because the treatment was not authorized by employer or the Commission. Employer further contends that the denial of additional salary continuation benefits was supported by: (1) the findings of Dr. Siegel that employee was capable of full duty on 25 August, 1995, (2) the testimony of Dr. Maier that employee was suggestible and tended to exaggerate his symptoms, and (3) the lack of any clear statement by a physician putting employee out of work for the periods of time at issue.

Employee contends that employee did not return to Dr. Siegel but instead sought treatment from other physicians only after Dr. Siegel refused to see employee. Dr. Siegel initially said that employee could only return to work with restrictions, but then removed all restrictions without seeing employee in the interim. According to employee, Dr. Siegel then refused to see employee or offer employee any explanation for his actions, leaving employee with no option but to find a new physician.

On 27 July 1998, the Commission found that the medical treatment of Dr. Maier and Dr. Tomaszek was necessary and tended to effect a cure and give employee relief with respect to the discomfort and disability which employee suffered as a result of the 12 March 1995 incident. The Commission ordered employer to restore to employee's accumulated sick leave and vacation leave accounts all sick leave and vacation time charged against those accounts during the following dates: May 8, 1995; May 9, 1995; August 24, 1995; August 28, 1995 through September 11, 1995; September 12, 1995 through October 8, 1995; October 15, 1995; October 16, 1995; and October 23, 1995 through October 29, 1995. Additionally, employer was ordered to pay an attorney's fee of five hundred (500) dollars to employee's counsel for defending the claim without reasonable grounds and to pay an attorney's fee of one thousand (1000) dollars to employee's counsel as part of the costs of the appeal. Employer appeals.

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[1] On appeal, by its first assignment of error, employer argues that the Commission erred in finding that employer unreasonably defended this case and in finding that employer should pay an attorney's fee of five hundred (500) dollars for defending this case without reasonable ground. We cannot agree.

Whether a defendant had reasonable ground to bring a hearing is a matter reviewable by this Court *de novo*. *Troutman v. White &*

Simpson, Inc., 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). The reviewing court must look to the evidence introduced at the hearing in order to determine whether a hearing has been defended without reasonable ground. *Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998). "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Id.* (quoting *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982)).

Pursuant to North Carolina General Statutes section 97-88.1, "[i]f the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who has . . . defended them." N.C. Gen. Stat. § 97-88.1 (1991). The purpose of North Carolina General Statutes section 97-88.1 is "to deter unfounded litigiousness." *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 21, 510 S.E.2d 388, 395, *disc. review denied*, 350 N.C. 834, —— S.E.2d —— (1999).

The policy underlying the Workers' Compensation Act is to "provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for employers." *Id.* at 16, 510 S.E.2d at 393. "The Workers' Compensation Act is to be construed liberally, and benefits are not to be denied upon technical, narrow, or strict interpretation of its provisions." *Id.* at 16, 510 S.E.2d at 392.

In the case *sub judice*, employer concedes that employee sustained an injury arising out of and in the course of his employment with defendant and that the injury was compensable under the Workers' Compensation Act. However, defendant argues that the defense of this claim was reasonable because the denial of salary continuation benefits was supported by the following: (1) the findings of Dr. Siegel that employee was capable of full duty on 25 August 1995, (2) the testimony of Dr. Maier that employee was suggestible and tended to exaggerate his symptoms, (3) the lack of any clear statement by a physician putting employee out of work for the periods of time at issue, and (4) the lack of authorization from employer and the Commission for employee to receive treatment from Dr. Tomaszek or Dr. Maier.

We find that the evidence introduced at the hearing did not provide employer with reasonable ground to defend. Employer could not

reasonably have based its decision to defend on Dr. Siegel's findings that employee was capable of full duty on 25 August 1995. Without re-examining the patient, Dr. Siegel reversed his own prior medical decision that employer was not capable of full duty. Two physicians subsequently examined employee and determined that he was not capable of working without restrictions.

The finding of Dr. Maier and Dr. Tomaszek that employee could only perform restricted duty shows that they concluded employee's complaints of pain were legitimate, regardless of whether he was suggestible or tended to exaggerate his symptoms. Dr. Tomaszek would not have performed nerve block injections, an invasive procedure, on a patient whom he believed to be fabricating symptoms. The medical treatment employee received from Dr. Maier and Dr. Tomaszek was necessary and provided him with relief. Following such treatment, employee reported that he had regained control of his left leg, numbness in his right arm had subsided and his pain was significantly reduced.

Furthermore, evidence introduced at the hearing shows that employee missed work to go to the doctor, undergo and recover from treatment. Employer charged employee's vacation time and sick leave time on dates that fell between early May of 1995 and late October of 1995. Dr. Tomaszek administered nerve block injections on employee on 21 September 1995 and 23 October 1995, demonstrating that employee required and received medical treatment during that period of time when employer charged employee's vacation time and sick leave accumulations.

Finally, employee had the right to seek necessary medical treatment from Drs. Maier and Tomaszek and should not have lost vacation and sick time to undergo treatment for his compensable injuries. We recognize that as a general rule, an employer has the right to select a physician to care for an injured employee and an employee may not procure his own medical treatment at the employer's expense without the employer's knowledge and consent. *Schofield v. Tea Co.*, 299 N.C. 582, 586-87, 264 S.E.2d 56, 60 (1980). However, North Carolina General Statutes section 97-25 provides exceptions to the general rule:

> If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured

> employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.
>
> Provided, however, *if he so desires, an injured employee may select a physician of his own choosing* to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

N.C. Gen. Stat. § 97-25 (Cum. Supp. 1998) (emphasis supplied). The proviso applies to the entire section of North Carolina General Statutes section 97-25. *Schofield*, 299 N.C. at 591, 264 S.E.2d at 62. "[T]he proviso clearly states that an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Commission." *Id.*

Furthermore, the injured employee need not seek approval for a physician's services prior to the treatment. *Forrest v. Pitt County Bd. of Education*, 100 N.C. App. 119, 126-27, 394 S.E.2d 659, 663 (1990) (citing *Schofield*, 299 N.C. 582, 264 S.E.2d 56), *aff'd*, 328 N.C. 327, 401 S.E.2d 366 (1991). Instead, the employee must obtain the approval of the Commission "within a reasonable time after he has selected a physician of his own choosing to assume treatment." *Id. at* 127, 394 S.E.2d at 663. Finally, treatment rendered by an employee's own physician must be "required to effect a cure or give relief[.]" *See Schofield*, 299 N.C. at 595, 264 S.E.2d at 64-65.

The Commission ultimately approved employee's choice of physicians and also determined that the treatment they provided tended to effect a cure. On 8 January 1998, Deputy Commissioner Richard B. Ford filed an Opinion and Award awarding employee medical and salary continuation benefits for medical treatment by physicians of employee's choosing. The Opinion and Award contained the following Finding of Fact:

> The medical care and treatment which plaintiff has received during the period from March 12, 1995 to September 1996 has been necessary and has tended to effect a cure and give relief to plaintiff with respect to the discomfort and disability which plaintiff has suffered as a result of the incident of March 12, 1995 and in particular the medical care and treatment of Dr. Rudolph J. Maier and Dr. David E. Tomaszek.

The Deputy Commissioner approved employee's use of physicians other than those provided by employer approximately fifteen (15) months after employee stopped receiving treatment in September

1996. The Commission affirmed the award on 27 July 1998 and made a finding of fact identical to the one above.

There is no evidence in the present case that employer suffered from a lack of notice that employee was receiving treatment from physicians the employer did not authorize. The uncontroverted evidence is that employee did not return to the employer-approved physician, Dr. Siegel, but instead sought treatment from other physicians because Dr. Siegel refused to see employee. We do not believe that the legislature intended to shield employers from paying for medical expenses arising from work-related injuries when the employer-approved physician has refused to treat the employee, forcing the employee to seek treatment from other physicians. "[C]ourts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) (citations omitted).

In light of the circumstances, we believe that employee received the Commission's approval for medical treatment by physicians of employee's choosing within a reasonable time. We conclude that employee's failure to obtain the authorization of employer or the Commission prior to receiving treatment from Drs. Maier and Tomaszek did not provide employer with reasonable ground to defend.

We find no substantial evidence of conduct by employee inconsistent with his claim as would support a legitimate doubt about his credibility. *See Sparks*, 55 N.C. App. at 664, 286 S.E.2d at 576. Thus, we conclude that the hearing was defended without reasonable ground and that the Commission did not err in ordering employer to pay to employee's counsel an attorney's fee of five hundred (500) dollars.

[2] In its second assignment of error, employer argues that the Commission erred in finding that employee was entitled to have attorney's fees of one thousand (1,000) dollars paid to his counsel as part of the costs of appeal. We cannot agree.

This Court shall apply an abuse of discretion standard of review for the award of attorney's fees by the Commission. *Childress v. Trion, Inc.*, 125 N.C. App. 588, 590, 481 S.E.2d 697, 698, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997). Chapter 97, the Workers'

Compensation Act, authorizes the Commission to award reasonable attorney's fees when the Commission has ordered the insurer to compensate an injured employee.

> 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 . . . 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 . . . 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 part of the bill of costs.

N.C. Gen. Stat. § 97-88 (1991). Employer argues, however, that the Commission abused its discretion in awarding attorney's fees to employee's counsel because employee's claim for salary continuation was not made under Chapter 97, but instead under North Carolina General Statutes sections 143-166.19, *et seq.*, Salary Continuation Plan for Certain State Law-Enforcement Officers.

We find that employer's argument is without merit as North Carolina General Statutes section 143-166.19 provides that the Commission "shall proceed to hear the matter in accordance with its regularly established procedure for hearing claims filed under the Worker[s'] Compensation Act[.]" N.C. Gen. Stat. § 143-166.19 (1999). The established procedure under the Workers' Compensation Act includes the awarding of reasonable attorney's fees to the counsel of an injured employee. Therefore, the Commission may in its discretion award reasonable attorney's fees under North Carolina General Statutes section 143-166.19, the provision that applies to certain state law-enforcement officers. Otherwise, state law-enforcement officers would be singled out and denied awards of attorney's fees if they were injured in the course of their employment, even though their employer had unreasonably defended the claim.

[3] Finally, we find no merit in employer's argument that the Commission erred by awarding attorney's fees for a salary continuation claim. Employer concedes that the Commission is empowered to award attorney's fees for a medical expenses claim, but argues the Commission is not empowered to award attorney's fees for a salary continuation claim. We do not believe that employee's claim is properly characterized as a "salary continuation claim" where employee's

vacation time and sick leave time accumulations have been charged by employer for time out from work due to employee's injury related disability. Indeed, the parties stipulated that employer continued to pay employee his full salary since the date of his injury, leading the Commission to conclude that "plaintiff is entitled to no further wages or compensation than that which he has already received." Employer has offered no justification for charging employee's vacation and sick time for treatment of his compensable injury. We conclude that there is no evidence that the Commission abused its discretion by awarding attorney's fees to employee's counsel as part of the cost of the appeal.

For the reasons stated herein, the Opinion and Award of the Commission is affirmed.

AFFIRMED.

Judges GREENE and HORTON concur.

STATE OF NORTH CAROLINA v. FREDERICK MICHAEL MARINE, DEFENDANT

No COA98-1329

(Filed 19 October 1999)

1. Evidence— expert testimony—victim's credibility

The trial court did not err in a prosecution for first-degree statutory rape by allowing an expert witness to testify that the victim had been "guarded but straight forward" and "honest." The witness's opinion was that the victim suffered from post traumatic stress syndrome disorder and her testimony went to the reliability of her diagnosis, not to the victim's credibility. N.C.G.S. § 8C-1, Rule 702.

2. Evidence— failure to timely object—waived

The failure of a statutory rape defendant to make a timely new objection waived his assignment of error where defendant initially objected when the witness began her answer by saying "Either . . .," the court allowed the testimony "If she knows," the witness gave her "Either . . ." answer, and defendant made no fur-

ther objection, did not move to strike, and did not request an instruction.

3. Evidence— testimony in violation of motion in limine—curative instruction—no prejudice

There was no prejudicial error in a statutory rape prosecution where defendant contended that certain testimony violated his motion in limine prohibiting testimony concerning an investigation of him for use or distribution of controlled substances, but the trial court gave a curative instruction and the jury heard of defendant's suspected distribution of drugs from a defense witness.

4. Evidence— hearsay—corroboration of victim

The trial court in a first-degree statutory rape prosecution properly admitted a detective's testimony that another child had told him of defendant touching children in the park. The testimony was specifically offered to corroborate the testimony of the child, the jury was instructed to that effect, and the substance of the detective's testimony was generally consistent with the testimony of the child.

5. Evidence— hearsay—other testimony—no prejudice

Any error was harmless in a prosecution for first-degree rape where defendant contended that testimony tending to show that he was sexually promiscuous was double hearsay, but the jury heard ample other evidence suggesting his promiscuity.

Appeal by defendant from judgment entered 30 January 1998 by Judge Zoro J. Guice, Jr. in McDowell County Superior Court. Heard in the Court of Appeals 14 September 1999.

Attorney General Michael F. Easley, by Associate Attorney General Curtis O. Massey, II, for the State.

Lynch & Taylor, by Anthony Lynch, for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 20 January 1998 Session of McDowell County Superior Court for the rape of a twelve-year old girl ("R") on 2 January 1997. The charge of first degree statutory rape was submitted to the jury, which returned a verdict of guilty on 30 January 1998. Defendant now appeals.

[1] Defendant first argues that R's family counselor, Sarah Wells, who testified as an expert witness for the State at trial, improperly commented on R's credibility, in violation of Rules 405(a) and 608(a) of the North Carolina Rules of Evidence. Specifically, defendant contends that the following testimony by Ms. Wells amounted to commenting on R's credibility:

> Q: The signs that you've just described that you observed and looked for to indicate deceptiveness, what did you observe about [R] in that light?
>
> [Objection; overruled.]
>
> A: [R]'s behavior was typically—it was guarded but straight forward. Children who are making this stuff up want people to know so they talk about it. I'm not—I wasn't convinced that [R] had enough sexual education from adults or even from what she learned from kids around her to have been able to describe what she had described to the police. Those were both clear indicators to me that [R] was being very honest in her—

(Tr. at 752).

Rule 608(a) of the North Carolina Rules of Evidence permits the use of reputation or opinion testimony in order to bolster another witness' credibility, so long as it is done in accordance with Rule 405(a). Rule 405(a) then explicitly prohibits expert testimony regarding a witness' character. When read together, the Rules of Evidence thus prohibit an expert witness from commenting on the credibility of another witness. *State v. Wise*, 326 N.C. 421, 426, 390 S.E.2d 142, 145, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990).

On the other side of the coin, however, Rule 702 permits expert witnesses to explain the bases of their opinions. Thus, "a witness who renders an expert opinion may also testify as to the reliability of the information upon which he based his opinion." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Furthermore, the mental and emotional state of the victim before, during, and after a rape or sexual assault is relevant testimony that can help assist the trier of fact in understanding the basis of that expert's opinion. *State v. Kennedy*, 320 N.C. 20, 30-31, 357 S.E.2d 359, 366 (1987). A survey of our case law illustrates the line between properly explaining the basis of an expert's opinion and improperly commenting on a witness' credibility.

For example, in *State v. Wise*, our Supreme Court held that the following line of questioning was proper:

> Q: Now ma'am, could you describe her emotionally when she was telling you these things during these counseling sessions?
>
> A: Genuine.

Wise, 326 N.C. at 425, 390 S.E.2d at 145. The *Wise* court reasoned that the expert was only describing her observations as to the victim's emotions, not the credibility of the victim herself. *Id.* at 427, 390 S.E.2d at 146. Likewise, our Supreme Court also held as proper the following response when an expert was asked to explain the victim's performance on certain tests: "[She responded in an] honest fashion . . . admitting that she was in a fair amount of emotional distress." *Kennedy*, 320 N.C. at 30, 357 S.E.2d at 366. That court reasoned the expert was simply commenting on the reliability of the test results. *Id.* at 31, 357 S.E.2d at 366. And this Court, in *State v. Jenkins*, 83 N.C. App. 616, 351 S.E.2d 299 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987), concluded that the following questioning was permissible:

> Q: Are you saying from your practice in your particular profession children don't fantasize?
>
> A: Not to that extent. . . . I do not believe children will lie concerning sexual abuse. . . . I don't believe they make up stories along those lines.

Id. at 624, 351 S.E.2d at 304 (citing *State v. Raye*, 73 N.C. App. 273, 326 S.E.2d 333, *disc. review denied*, 313 N.C. 609, 332 S.E.2d 183 (1985)). We reasoned in *Jenkins* that the expert was simply explaining the basis of her opinion by referring to children in general, as opposed to the victim in particular. *Id.*

On the other side of the line, our Supreme Court concluded that the following questioning amounted to improper comments as to the victim's credibility:

> Q: Mrs. Broadwell, do you have an opinion satisfactory to yourself as to whether or not [V] was suffering from any type of mental condition in early June of 1983, or a mental condition which could or might have caused her to make up a story about the sexual assault?
>
> [Objection; overruled.]

A: There is nothing in the record or current behavior that indicates that she has a record of lying.

State v. Heath, 316 N.C. 337, 340, 341 S.E.2d 565, 567 (1986). The *Heath* court reasoned that, although couched in terms of a mental condition, the question was actually intended to elicit an opinion as to whether or not the victim had been lying. *Id.* at 342, 341 S.E.2d at 568. In *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804, *disc. review denied*, 320 N.C. 175, 358 S.E.2d 67 (1987), this Court reached the same conclusion as to the following question and response:

Q: And tell the members of the jury why you believed [R] was telling the truth.

[Objection; overruled.]

A: When I talk with children or adults who have been sexually abused, I typically try to get them to tell me the story from different angles. Every time I went to [R] to go back to the story, her story was always consistent . . . .

Id. at 631-32, 355 S.E.2d at 808. And finally, in *State v. Jenkins*, this Court again held that the following line of questioning violated Rules 608(a) and 405(a):

Q: Do you have an opinion as to whether when [X] states that an adult female, Beverly Jenkins, has tied him in a chair naked, and has touched his private parts, can he be making these things up?

A: Yes. I have an opinion.

Q: What is that opinion?

A: My opinion is he is not making up the—if he has said that he has been sexually abused, he is not making that up. Children do not lie about sexual abuse.

Jenkins, 83 N.C. App. at 623, 351 S.E.2d at 303.

Admittedly, the line between proper and improper questioning can be quite narrow, especially in the context of sexual assault and rape cases. This Court, for example, recently struggled over an expert's testimony, "I believed that [the victim] was a reliable informant." *State v. Bright*, 131 N.C. App. 57, 60, 505 S.E.2d 317, 319 (1998). One judge concluded this was proper to explain why the expert could rely on the victim's information. *Id.* at 60-61, 505 S.E.2d at 319. The

remaining two judges concurred in the result but concluded that the expert's response violated Rules 405(a) and 608(a). *Id.* at 62, 505 S.E.2d at 321 (Greene, J., concurring). Although *Bright* illustrates how narrow the line can be, we do not feel Ms. Wells' testimony crossed that line here into commenting on R's credibility.

Ms. Wells' opinion was that R suffered from post traumatic stress syndrome disorder ("PTSSD"). Under Rule 702, Ms. Wells could explain how she concluded that R suffered from PTSSD, including testifying as to R's mental and emotional state and as to the reliability of the information used to formulate her opinion. In formulating her opinion, Ms. Wells explained that one of the indicators of PTSSD is that the victim "has experienced actual or threatened serious injury or threat to her physical integrity." (Tr. at 748). The testimony complained of here simply seeks to explain why Ms. Wells felt R had experienced a traumatic event: R's behavior and lack of sexual education convinced Ms. Wells that the information she was using to formulate her opinion was reliable. In short then, Ms. Wells' testimony went to the reliability of her diagnosis, not to R's credibility. Accordingly, this was a permissive use of expert testimony under Rule 702.

[2] Next, defendant assigns as error the admission of certain testimony suggesting that defendant stole a bracelet when the testifying witness admitted she had no knowledge as to whether the bracelet had been stolen. During the State's case-in-chief, N, a young girl who lived in the same neighborhood as R and the defendant, testified that defendant's girlfriend once visited her in order to return her bracelet. The following questioning then transpired:

> Q: How did [defendant's girlfriend] come to have your bracelet, if you know?
>
> A: Either it was tooken [sic]—
>
> [DEFENSE COUNSEL]: Objection, if she doesn't know, she shouldn't be testifying about it.
>
> [COURT]: If she knows.
>
> A: Either it was tooken [sic] or I gave it to somebody who dropped it. I'm not sure.

(Tr. at 558-59). Defense counsel made no further objection, nor did he move to strike or request an instruction that the jury disregard. His failure to do so renders his objection waived.

In response to defense counsel's objection, the trial judge ruled that N's response was admissible only "[i]f she knows." When N confessed that she did not know, her response thereby became inadmissible. It was then defense counsel's duty to move to strike the earlier testimony through a *new* motion. *Cf. State v. Jordan*, 305 N.C. 274, 276-77, 287 S.E.2d 827, 829 (1982) (stating it was defendant's obligation to move to strike earlier objected-to testimony relating to a letter once it became apparent that the testimony was inadmissible because the letter itself was ruled inadmissible). Because defendant failed to make a timely new objection or motion to strike, his assignment of error fails. *Wise*, 326 N.C. at 425, 390 S.E.2d at 145 ("When an objection is not timely made, it is waived.").

[3] Defendant next argues that certain testimony elicited from the victim's mother violated his motion *in limine*. That motion *in limine*, granted by the trial court, prohibited the State from "offering any testimony that the McDowell County Sheriff's Department or any law enforcement agency was investigating defendant for the use or distribution of controlled substances." Defendant contends that this was violated when, on cross-examination by defense counsel, the victim's mother testified:

> I called McDowell County Sheriff's Department to report that there was a person out at Twin Lakes that I suspected of selling drugs to the kids out there, and it was [defendant].

(Tr. at 445). Because the trial judge offered a curative instruction, and because the error, if any, was harmless, we reject defendant's argument.

Immediately after this testimony was offered, the trial judge instructed the jury to disregard it. "When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179 (1980). Defendant has pointed to nothing in the record, nor can we find anything, that even remotely suggests the jury failed to follow this instruction.

Furthermore, the error, if any, was harmless. During his case-in-chief, defense counsel specifically questioned defendant's former fiancée regarding the police investigation into defendant's distribution of drugs:

> Q: How many times did you see [Detective] Tom Farmer out at your trailer in March and April, 1997?

A: Three.

Q: Did he come to see you each time?

A: Yes.

Q: The first time he came to you, did he come to ask you questions about sex and improper contacts with young girls?

A: Not the first time.

Q: What did he ask you about then?

A: The first time he asked if [defendant] had been dealing drugs from the trailer?

. . . .

Q: Do you have any idea . . . why this man would think y'all were dealing guns out of that trailer?

A: No.

Q: Or drugs?

A: No.

(Tr. at 869, 871). To receive a new trial, defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (1997). Given that the jury also heard this testimony from a defense witness regarding defendant's suspected distribution of drugs, we fail to see how non-commission of the alleged error would have led to a different result at trial.

[4] Finally, defendant contests the admission of certain testimony as hearsay. Defendant objects first to the following testimony of Detective Kelly Reeves:

Q: What did [A] say to you?

[Objection; overruled.]

A: [A] had indicated to us that a girl that he knew had been raped by [defendant], had stated that he had knew [sic] some other children in the park that [defendant] had touched—

. . . .

Q: Do you recall if [A] was able to tell Detective Farmer specifically who his friend was that had been raped by the [d]efendant?

[Objection; overruled.]

A: He said [R].

(Tr. at 271, 273). Our courts have long held that statements offered to corroborate previous testimony are not hearsay because they are not offered to prove the truth of the matter asserted. *State v. Holden*, 321 N.C. 125, 142, 362 S.E.2d 513, 525 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Detective Reeves' testimony here was specifically offered to corroborate the testimony of A and the jury was instructed to that effect. Accordingly, his testimony was admissible so long as it was "generally consistent with the [other] witness's testimony." *State v. Locklear*, 320 N.C. 754, 762, 360 S.E.2d 682, 686 (1987). A testified as follows:

Q: Tell the jury what you told Detective Reeves and Detective Farmer when they came out to Twin Lakes that day?

A: I told them about how [defendant] always had his hands on everybody when we would play the games. I told them what [R] told me that [defendant] had done to her . . . .

(Tr. at 290-91). Though different words were used, the substance of Detective Reeves' testimony was generally consistent with the testimony of A. Slight variations between the prior testimony and the corroborating testimony do not render the corroborating testimony inadmissible. *State v. Case*, 253 N.C. 130, 135, 116 S.E.2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 5 L. Ed. 2d 707 (1961). Accordingly, the trial court did not err in admitting Detective Reeves' testimony for corroborative purposes.

[5] Defendant also objects to the following response by A, arguing it constitutes double hearsay:

A: I told [Detective Farmer] that [R] had told me—

[DEFENSE COUNSEL]: Objection.

[COURT]: Overruled.

A: —that [B] had told [R]—

[DEFENSE COUNSEL]: Objection.

[COURT]: Overruled.

[DEFENSE COUNSEL]: It's double hearsay, Your Honor.

[COURT]: Overruled.

A:—that she had slept with [defendant].

(Tr. at 292). Again, we conclude that the error, if any, was harmless. Defendant contends that this response tended to show he was sexually promiscuous, thereby prejudicing him. However, the jury heard ample other evidence already suggesting defendant's promiscuity. Four other children testified to the jury that defendant had previously touched them in their breasts, crotch, or both. The additional testimony of A complained of here did not further prejudice defendant such that a different result would have occurred at trial.

No error.

Judges MARTIN and HUNTER concur.

BARBARA NORRIS, ADMINISTRATRIX OF THE ESTATE OF JASPER NORRIS, III, PLAINTIFF v. JOSEPH PAUL ZAMBITO, M.L. HAYES, IN HIS INDIVIDUAL CAPACITY AND AS A POLICE OFFICER FOR THE CITY OF DURHAM; V.P. BYNUM, IN HIS INDIVIDUAL CAPACITY AND AS A POLICE OFFICER FOR THE CITY OF DURHAM, AND THE CITY OF DURHAM, DEFENDANTS

No. COA98-1488

(Filed 19 October 1999)

1. Evidence— wrongful death—police chase—expert testimony partially excluded—may not testify whether certain legal standard met

In a wrongful death case of a bystander motorist killed in a collision at an intersection with another motorist involved in a police chase who was suspected of driving while impaired and driving with a suspended license, the trial court did not err in excluding portions of an expert witness's affidavit opining that defendant-officers' conduct in pursuing the suspect was conducted in a grossly negligent manner, showed a reckless disregard for the safety of others, and was a violation of the City's pursuit policy because N.C.G.S. § 8C-1, Rule 704 does not al-

low an expert to testify whether a certain legal standard has been met.

2. Police Officers— police chase—motor vehicle collision—no gross negligence—summary judgment proper

The trial court did not err in granting summary judgment in favor of defendant police officers and the City in a wrongful death case of a bystander motorist killed in a collision at an intersection with another motorist involved in a police chase because N.C.G.S. § 20-145 exempts police officers from speed laws when engaged in the pursuit of a law violator and plaintiff did not demonstrate a genuine issue of material fact as to gross negligence since: (1) the officers had good reason to remove the motorist involved in the chase due to the immediate and significant potential danger to the public posed by his driving while impaired; (2) the apparent probability of injury to the public at the time the officer initiated pursuit was not great since the road was clear and dry, the pursuit occurred in the early morning hours, traffic in the area was very short, and the length and duration of the pursuit were both short; and (3) even if plaintiff showed the officers had violated the City's pursuit policy, such evidence would not show gross negligence.

3. Police Officers— police chase—motor vehicle collision—summary judgment proper—no gross negligence—prior knowledge suspect may flee—state of mind irrelevant

Even in light of the suspect's earlier threat to flee from the police, the trial court did not err in granting summary judgment in favor of defendant police officers and the City in a wrongful death case of a bystander motorist killed in a collision at an intersection with another motorist involved in a police chase since: (1) the officers were not required to guess the law violating motorist's state of mind in order to determine whether to pursue him; and (2) officers will not be held grossly negligent for attempting to apprehend a suspect merely because he indicates that he does not wish to be apprehended.

Appeal by plaintiff from judgment entered on 17 August 1998 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 14 September 1999.

Thomas, Ferguson & Charns, L.L.P., by Jay H. Ferguson, for plaintiff-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr., and Keith D. Burns, for defendant-appellees.

MARTIN, Judge.

Plaintiff filed this action seeking compensatory and punitive damages for the wrongful death of Jasper Norris, III, allegedly caused by negligence on the part of defendants. Defendants Hayes and Bynum, who were police officers employed by the City of Durham (defendant City), and defendant City filed answers denying negligence and asserting the affirmative defense of sovereign immunity. After discovery, defendants Hayes, Bynum and City moved for summary judgment.

The materials before the trial court upon hearing the motion for summary judgment tended to show that at approximately 1:00 a.m. on 20 October 1993, Corporal M.L. Hayes of the Durham Police Department was on routine patrol when he spotted Joseph Paul Zambito driving a red and white pickup truck on Academy Road in Durham. Corporal Hayes recalled that he had arrested Zambito a few months earlier for driving while impaired and radioed to Officer V.P. Bynum, who was also patrolling in the area, that he had spotted Zambito. The officers discussed the fact that Zambito's driver's license had likely been suspended, and Officer Bynum informed Corporal Hayes that he had seen Zambito earlier in the evening and suspected that Zambito was driving while impaired.

Officer Bynum spotted Zambito shortly thereafter and began to follow him on Cornwallis Road. Zambito increased his speed over the posted 35 mile per hour limit and Officer Bynum responded by increasing his speed and turning on his emergency lights. A few hundred feet later, Zambito made a sharp right turn onto University Drive, accelerated rapidly, and proceeded on University Drive toward Hope Valley Road. Officer Bynum continued in pursuit. Zambito entered the intersection of University Drive and Hope Valley Road against a red traffic light at a speed of approximately 70 miles per hour and collided with a car driven by plaintiff's decedent, Jasper Norris, III, who died as a result of the collision. Officer Bynum was approximately 150 yards behind Zambito at the time of the collision. Corporal Hayes did not witness the collision, but arrived shortly thereafter. Zambito's blood-alcohol level was .013.

The pursuit lasted no longer than one minute and was less than one mile in length. The speed limit on the roads over which the pursuit occurred was 35 miles per hour, and the officers testified that the roads were in good condition and free of other motorists. The officers also testified that their speed never exceeded 65 miles per hour, and that they were always in control of their cars.

Three days before the incident in question, Zambito had been arrested by another Durham police officer for driving while impaired and instigating a similar chase. During the booking process on that charge, Zambito told an officer that he would run from the police every time he was chased. There was no evidence that either Corporal Hayes or Officer Bynum was aware of Zambito's threat.

Plaintiff offered an affidavit of John Gormley, who was tendered as an expert in police pursuit tactics. The trial court sustained defendants' objections to those portions of Mr. Gormley's affidavit in which he stated his opinion that the officers' pursuit of Zambito was "grossly negligent" and "showed a reckless disregard for the safety of others", and that the chase was a violation of defendant City's pursuit policy, on grounds that Mr. Gormley's opinions expressed legal conclusions.

The trial court determined that no genuine issue of material fact existed as to whether the officers' conduct amounted to gross negligence or a reckless disregard for the rights and safety of others, or that they had an intent to harm plaintiff's decedent. Accordingly, the trial court granted summary judgment in favor of defendants Hayes, Bynum, and City and dismissed plaintiff's claims against them. Plaintiff appeals.

I.

[1] Plaintiff assigns error to the trial court's exclusion of those portions of Mr. Gormley's affidavit in which he opined that the officers' conduct in pursuing Zambito "was conducted in a grossly negligent manner and showed a reckless disregard for the safety of others" and "was a violation of the City of Durham's pursuit policy." We reject plaintiff's argument.

G.S. § 8C-1, Rule 704 provides "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The rule, however, does not authorize the admission into evidence of all expert opinion testi-

mony. As a general rule, an expert may not testify as to whether a certain legal standard has been met. *Pelzer v. United Parcel Service, Inc.*, 126 N.C. App. 305, 484 S.E.2d 849, *disc. review denied*, 346 N.C. 549, 488 S.E.2d 808 (1997).

> The rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.

State v. Smith, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985). Opinion testimony may be received regarding the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion *should* be drawn. *Hajmm Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 403 S.E.2d 483 (1991).

> From the Rules of Evidence, the advisory committee's notes, case law, and commentaries, we discern two overriding reasons for excluding testimony which suggests whether legal conclusions should be drawn or whether legal standards are satisfied. The first is that such testimony invades not the province of the jury but "the province of the court to determine the applicable law and to instruct the jury as that law." (citation omitted.) It is for the court to explain to the jury the given legal standard or conclusion at issue and how it should be determined. To permit the expert to make this determination usurps the function of the judge. The second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion.

Id. at 587, 403 S.E.2d at 489.

Whether the officers' conduct in pursuing Zambito was "grossly negligent" or "showed reckless disregard for the safety of others" are legal conclusions to be drawn from the evidence; Mr. Gormley's opinion testimony drawing such conclusions was, therefore, properly excluded. *See Murrow v. Daniels*, 85 N.C. App. 401, 355 S.E.2d 204 (1987), *rev'd on other grounds*, 321 N.C. 494, 364 S.E.2d 392 (1988). Likewise, the City's pursuit policy establishes a legal standard and, while Mr. Gormley would certainly be permitted to testify as to the requirements of the City's pursuit policy, the trial court properly

declined to consider his testimony as to whether the officers' conduct violated that standard. This assignment of error is overruled.

II.

[2] Plaintiff's primary contention on appeal is that the trial court erred in granting the motions of defendants Hayes, Bynum and City for summary judgment and dismissing her claims against those defendants. Plaintiff argues that genuine issues of material fact exist as to whether the officers, in pursuing Zambito, acted with reckless disregard for the rights and safety of others so as to be grossly negligent.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The burden of establishing the absence of any genuine issue of material fact is on the moving party, and the evidence presented should be viewed in the light most favorable to the nonmoving party. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 348 S.E.2d 772 (1986). The moving party may meet this burden by showing that an essential element of the opposing party's claim is nonexistent, or that the opposing party cannot produce evidence to support an essential element of the claim. *Pine Knoll Association, Inc. v. Cardon*, 126 N.C. App. 155, 484 S.E.2d 446, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997). Although issues of negligence are generally not appropriately decided by way of summary judgment, if there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established, summary judgment is proper. *Lavelle v. Schultz*, 120 N.C. App. 857, 463 S.E.2d 567 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

G.S. § 20-145 exempts police officers from speed laws when engaged in the pursuit of a law violator. The exemption, however, does not apply to protect the officer from "the consequence of a reckless disregard of the safety of others." Our Supreme Court has construed the statute as establishing a general standard of care, as opposed to a simple exemption from speed laws, and has held that an officer's liability in a civil action for injuries resulting from the officer's vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care. *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547, *reh'g denied*, 350 N.C. 600, — S.E.2d — (1999);

Young v. Woodall, 343 N.C. 459, 471 S.E.2d 357 (1996). Gross negligence has been defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988).

Courts have discussed several factors as relevant to the issue of whether the conduct of a law enforcement officer engaged in pursuit of a fleeing suspect meets the grossly negligent standard. First, the reason for the pursuit is to be considered. If the officer was attempting to apprehend someone suspected of violating the law, the police officer would fall squarely within the standard of care established by the Supreme Court's construction of G.S. § 20-145. *Clark v. Burke County*, 117 N.C. App. 85, 87, 450 S.E.2d 747, 748 (1994) (officer trying to apprehend man suspected of discharging firearm in a public place); *Bullins* at 584, 369 S.E.2d at 604 (officer attempting to apprehend a driver acting "as if he was under the influence of alcohol"); *Fowler v. NC Dept. of Crime Control & Public Safety*, 92 N.C. App. 733, 733, 376 S.E.2d 11, 12, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 773 (1989) (officer trying to arrest driver traveling at 115 m.p.h. along rural highway). It is also relevant to consider whether the suspect was known to police and could be arrested through means other than apprehension via a high speed chase; *Bullins* at 584, 369 S.E.2d at 604 (suspect was unknown to police and no other means existed for apprehension); or whether the fleeing suspect presented a danger to the public that could only be abated by immediate pursuit. *Clark* at 87, 450 S.E.2d at 748; *Bullins* at 584, 369 S.E.2d at 604.

Also relevant to a determination of whether the officer's conduct was grossly negligent is the probability of injury to the public by the officer's decision to pursue and continue to pursue the suspect. Relevant considerations include the time of day or night when the pursuit occurred, *Bullins* at 584, 369 S.E.2d at 604; *Fowler* at 736, 376 S.E.2d at 13; the location of the pursuit (a highway, residential neighborhood, rural area, or within the city limits), *Bullins* at 584, 369 S.E.2d at 604; *Fowler* at 736, 376 S.E.2d at 13; *Clark* at 90, 450 S.E.2d at 749; population of the area, *Fowler* at 736, 376 S.E.2d at 13; type of terrain (hilly or curvy roads), *Clark* at 90, 450 S.E.2d at 749; traffic conditions, *Bullins* at 584, 369 S.E.2d at 604; presence of other vehicles on the road, *Bullins* at 584, 369 S.E.2d at 604; posted speed limits, *Clark* at 90, 450 S.E.2d at 749; road conditions, *Bullins* at 584, 369 S.E.2d at 604; weather conditions, *Clark* at 90, 450 S.E.2d at 749; *Fowler* at 733, 376 S.E.2d at 12; duration of pursuit, *Clark* at 90, 450

S.E.2d at 749; *Fowler* at 736, 376 S.E.2d at 13; and length of pursuit, *Clark* at 90, 450 S.E.2d at 749; *Fowler* at 736, 376 S.E.2d at 13.

In addition, evidence with respect to the law enforcement officer's conduct in pursuing the fleeing driver is relevant to the issue of gross negligence. Courts have discussed whether the officer used emergency lights, sirens and headlights, *Fowler* at 736, 376 S.E.2d at 13; *Young* at 460, 471 S.E.2d at 358; collided with any person, vehicle or object, *Bullins* at 585, 369 S.E.2d at 604; kept his or her vehicle under control, *Bullins* at 585, 369 S.E.2d at 604; followed relevant departmental policies regarding chases, *Young* at 460, 471 S.E.2d at 358; violated generally accepted standards for police pursuits, *Clark* at 91, 450 S.E.2d at 750; and what the officer's speed was during the pursuit, *Fowler* at 736, 376 S.E.2d at 13.

Applying those factors to the evidence before the trial court at the summary judgment hearing in the present case, we conclude that plaintiff did not demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of the officers, so as to survive defendants' summary judgment motion. The officers were attempting to apprehend a driver they suspected to be driving while intoxicated. Even though they knew Zambito and could possibly have apprehended him at his home at a later time, they had good reason to attempt to remove him from the road due to the immediate and significant potential danger to the public posed by his driving while impaired. Moreover, the apparent probability of injury to the public at the time Officer Bynum initiated the pursuit was not great; the road was clear and dry, the pursuit occurred in the early morning hours, traffic in the area was very light, and the length and duration of the pursuit were both short. Finally, even assuming that plaintiff had showed that the officers, in pursuing Zambito, had violated defendant City's pursuit policy, such evidence would not show gross negligence. A violation of voluntarily adopted safety policies is merely some evidence of negligence and does not conclusively establish negligence. *Peal by Peal v. Smith*, 115 N.C. App. 225, 444 S.E.2d 673 (1994), *affirmed*, 340 N.C. 352, 457 S.E.2d 599 (1995); *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988); *Briggs v. Morgan*, 70 N.C. App. 57, 318 S.E.2d 878 (1984).

[3] Plaintiff argues, however, that the officers' pursuit of Zambito in the face of his earlier threat to run from police amounted to a reckless indifference to the rights and safety of others. We disagree. The

officers were not required to guess Zambito's state of mind in order to determine whether or not to pursue him; our Supreme Court held that a suspect's intent or state of mind is irrelevant. *Parish*, 350 N.C. 231, 513 S.E.2d 547. Assuming the officers were aware of Mr. Zambito's threats to flee, which the record does not support, police officers will not be held grossly negligent for attempting to apprehend a suspect merely because he indicates that he does not wish to be apprehended.

Because plaintiff has not forecast sufficient evidence to show a genuine issue of material fact as to gross negligence on the part of Officer Bynum and Corporal Hayes, an essential element of her claim is nonexistent and defendants are entitled to judgment as a matter of law. Summary judgment dismissing plaintiff's claim against defendants Bynum, Hayes, and City is affirmed.

Affirmed.

Chief Judge EAGLES and Judge LEWIS concur.

HERMAN RIVERA, EMPLOYEE/PLAINTIFF v. GEORGE TRAPP, EMPLOYER/DEFENDANT, AND/OR DAVID BEAUCHEMIN, EMPLOYER/NON-INSURED DEFENDANT, AND/OR JOHN SCHUCK, EMPLOYER/NON-INSURED-DEFENDANT

No. COA98-1527

(Filed 19 October 1999)

1. Workers' Compensation— injury arose out of and in the course of his employment—not a thrill-seeking employee—acted solely to accomplish job—employer authorized action

The Industrial Commission did not err in determining plaintiff-roofer's injuries arose out of and in the course of his employment when plaintiff was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house because: (1) it was not a situation where a thrill-seeking employee took action that bore no resemblance to accomplishing his job; (2) plaintiff acted solely to accomplish the task for which he was hired; and (3) defendant-employer Schuck authorized plaintiff to ride the forklift.

2. Workers' Compensation— temporary total disability— election of statute for recovery permissible

In a case where plaintiff-roofer was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in assigning plaintiff a rating of temporary total disability under N.C.G.S. § 97-29 instead of N.C.G.S. § 97-31(13) because although plaintiff may not recover under both sections, he may elect to claim under N.C.G.S. § 97-29 if this section is more favorable.

3. Workers' Compensation— disability—sufficiency of evidence

In a case where plaintiff-roofer was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in determining plaintiff has proven a disability under N.C.G.S. § 97-29 because plaintiff has sufficiently shown that his injury has prevented him from earning wages from defendant-employer Schuck or any other employer through evidence that: (1) his arm was "no good" and he could not hold anything heavy; (2) he worked exclusively as a roofer since coming to the United States in 1995; (3) he had continuous pain in his arm and back; and (4) he has been unable to work since the accident.

4. Workers' Compensation— temporary total disability—evidence of diminished earning capacity—alien without immigration green card or social security card protected by Workers' Compensation Act

Even though defendant Trapp contends plaintiff-roofer lacks earning capacity since he did not have an immigration green card or a social security card in a case where plaintiff was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in concluding plaintiff was temporarily totally disabled because plaintiff's injury diminished his earning capacity since: (1) N.C.G.S. § 97-2(2) makes clear that the General Assembly sought to protect every employee engaged in an employment, including aliens like plaintiff; and (2) plaintiff also presented evidence that prior to the injury, he did in fact have earning capacity as a roofer.

5. Workers' Compensation— knowingly allowed employer to work without insurance—willfully neglected to bring employer into compliance

In a case where plaintiff-roofer was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in finding that defendant Trapp willfully neglected to bring defendant-employer Schuck into compliance with the requirements of N.C.G.S. § 97-93 because: (1) Trapp admitted he did not require Schuck to provide a certificate as proof that Schuck had workers' compensation insurance; (2) Trapp admitted he had taken Schuck to obtain insurance after plaintiff fell; (3) Trapp also stated he has not seen defendant Schuck since plaintiff fell; (4) Trapp admitted he discovered Schuck had no insurance while Schuck was in the process of retiling the roof; and (5) Trapp's testimony allowed the Commission to conclude that he knowingly allowed Schuck to work without insurance.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 27 July 1998. Heard in the Court of Appeals 20 September 1999.

Brumbaugh, Mu & King, P.A., by Kenneth W. King Jr., for plaintiff-appellee.

Stephen E. Culbreth for defendant-appellant George Trapp.

EAGLES, Chief Judge.

Defendant George Trapp appeals from the opinion and award of workers' compensation benefits to plaintiff Herman Rivera.

The Commission's findings tend to show the following. Plaintiff was an eighteen year old male who came to the United States from Honduras in 1995. He speaks little English and does not possess an Immigration Service "Green Card" or a Social Security number. Plaintiff worked as a roofer first in Texas, then in Indiana prior to coming to North Carolina in the fall of 1996. Plaintiff came to North Carolina due to the abundance of work available after the two hurricanes of that year. Plaintiff worked for several months in North Carolina prior to meeting Defendant John Schuck. Defendant Schuck hired plaintiff and two of plaintiff's friends to work as roofers on two homes damaged by hurricane Fran. Schuck was to pay plaintiff $12.00 an hour for ten hours a day, six days a week. Immediately

prior to working for Schuck, plaintiff earned $100.00 a day, six days a week.

Defendant David Beauchemin hired Trapp to complete the necessary construction work on Beauchemin's home in Topsail Beach. While Trapp referred to himself as a consultant, the Commission found that Trapp was actually a contractor. Trapp hired and negotiated with the subcontractors. Additionally, he wrote checks for labor and materials and fired at least one subcontractor whose work was unsatisfactory. The contract between Beauchemin and Trapp required all contractors who worked on the home to have workers' compensation insurance.

Trapp hired Schuck to roof Beauchemin's home. Schuck represented to Trapp that he was licensed and insured. Schuck drove a truck with a sign that read "Regional Roofing Contractors" and represented that he worked for Regional. Prior to hiring him, Trapp failed to obtain a certificate of insurance from Schuck. Soon after hiring him, Trapp discovered that Schuck did not have workers' compensation insurance. Despite this discovery, Trapp allowed Schuck to continue roofing Beauchemin's house. Neither Beauchemin nor Trapp had workers' compensation insurance.

On 3 January 1997, plaintiff was working, roofing Beauchemin's house for Schuck. In order to complete the job, someone placed roofing materials on a forklift borrowed from an adjacent jobsite. Plaintiff climbed into the forklift in order to ride with the materials to the roof. Upon reaching the third story of the house, the forklift and plaintiff fell. The fall injured the left side of plaintiff's upper chest and fractured his left radius. Plaintiff had never used a forklift in this fashion, although he had seen it done before.

An ambulance transported plaintiff to Onslow Memorial Hospital where he spent five days. As a result of the fall, plaintiff suffered a fracture of his distal left radius and contusions to his abdomen and chest. After his discharge, orthopedist Dr. Jeffrey Gross treated plaintiff. On 12 June 1997, Dr. Gross assigned a ten percent (10%) permanent partial disability rating to plaintiff's left arm.

Since plaintiff's injury, he has not been able to work or earn wages. The injury to his left arm prevents him from lifting anything heavy. Additionally, plaintiff's limited ability to understand English and his exclusive employment background in construction have contributed to his inability to find work.

[1] Based on those facts the Commission concluded that plaintiff's injury arose out of and in the course of his employment with Schuck. The Commission concluded that plaintiff was entitled to temporary total disability at a rate of $400.00 per week from 4 January 1997 until further order of the Industrial Commission. The award also required Trapp and Schuck to pay for plaintiff's medical expenses. The Commission also concluded that Trapp had the ability and authority to stop Schuck from working until Schuck acquired workers' compensation insurance. As a result of Trapp's failure to bring Schuck into compliance, the Commission fined Trapp $10,000. The Commission also fined Schuck $50.00 per day for each day beginning 1 January 1997 and ending 3 January 1997. Defendant Trapp appeals.

The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). This is true even when there is evidence that would support contrary findings. *Ross v. Mark's Inc.*, 120 N.C. App. 607, 610, 463 S.E.2d 302, 304 (1995). Trapp challenges the Commission's findings and conclusions that plaintiff's injury arose out of and in the course of his employment.

In order for plaintiff to recover benefits under the Act, he must show that his injuries resulted from (1) an accident, (2) arising out of his employment, and (3) within the course of his employment. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988). Under the Workers' Compensation Act, the term "arising out of the employment refers to the origin or cause of the accidental injury, while the words in the course of the employment refer to the time, place, and circumstances under which an accidental injury occurs." *Roberts v. Burlington Industries*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988) (citations omitted). Further, whether an injury arose out of and in the course of employment is a mixed question of law and fact. *Id.* This standard limits our review to whether the evidence supports the Commission's findings and conclusions. *Id.*; *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116, *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998) (citations omitted).

In order for an injury to "arise out of employment" there must exist some causal connection between the injury and the employ-

ment. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 252, 293 S.E.2d 196, 198 (1982). In other words, the employment must be a contributing cause or bear a reasonable relationship to the employee's injuries. *Roberts*, 321 N.C. at 355, 364 S.E.2d at 417; *Brown v. Service Station*, 45 N.C. App. 255, 256-57, 262 S.E.2d 700, 702 (1980). An injury is "in the course of employment" when it occurs "under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Shaw*, 130 N.C. App. at 446, 503 S.E.2d at 116 *(quoting Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982)). This Court has stated that an injury is compensable under the Act if "it is fairly traceable to the employment" or "any reasonable relationship to the employment exists." *Shaw*, 130 N.C. App. at 445, 503 S.E.2d at 116; *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547, 549, *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983).

Here, plaintiff needed the materials in order to repair the roof. Plaintiff testified that while he had never used a forklift to move materials to a roof, he had seen it done on other jobs. Further, plaintiff stated that everything he used went up to the roof by use of the forklift. By moving the materials to the roof, plaintiff was furthering his employer's business. Additionally, plaintiff testified that Schuck authorized him to use the forklift. These facts show that plaintiff acted to benefit his employer and that his injury occurred as a direct result of his employment.

Trapp claims that the case of *Teague v. Atlantic Company*, 213 N.C. 546, 196 S.E. 875 (1938) controls here. We disagree. In *Teague*, an employee died while attempting to ride a conveyor belt. *Id.* at 547, 196 S.E. at 875. The belt's purpose was to convey empty crates from the basement of employer's plant to the first floor. *Id.* The foreman expressly ordered all employees not to ride the conveyor. *Id.* The Supreme Court held that the deceased exceeded the scope of his employment and that the plaintiff's death was not compensable. *Id.* at 548, 196 S.E. at 875.

We find *Teague* distinguishable. *Teague* dealt with a situation where a thrill-seeking employee took action that bore no resemblance to accomplishing his job. *Hoyle*, 306 N.C. at 259, 293 S.E.2d at 201. Here, the record shows that plaintiff acted solely to accomplish his job. Plaintiff rode on the forklift to move necessary materials to

the third floor. While this action may have been outside the "narrow confines of his job description" as a roofer, it is clear that plaintiff's actions were reasonably related to the accomplishment of the task for which he was hired. *See Id.* at 259, 293 S.E.2d at 202-03. Further, in *Teague*, the foreman had given the plaintiff an express order not to ride the conveyor belt. *Teague*, 213 N.C. at 547, 196 S.E.2d at 875. Here, plaintiff testified that Schuck authorized him to ride the forklift. We hold that this evidence supports the Commission's findings and conclusions that plaintiff's injury arose out of and in the course of his employment.

[2] Trapp also alleges that the Commission erred by assigning plaintiff a rating of temporary total disability under G.S. § 97-29 (1991) instead of compensating him under G.S. § 97-31(13) (1991). Trapp claims that plaintiff's exclusive remedy was under G.S. § 97-31(13). We disagree. G.S. § 97-29 and G.S. § 97-31 are alternative avenues of recovery for an employee whose scheduled injuries leave him or her totally disabled. *See Hill v. Hanes Corp.*, 319 N.C. 167, 175-76, 353 S.E.2d 392, 397 (1987); *Dishmond v. Int'l Paper Co.*, 132 N.C. App. 576, 577, 512 S.E.2d 771, 772, *disc. review denied*, 350 N.C. 828, —— S.E.2d —— (1999). G.S. § 97-29 provides compensation for total disability, while G.S. § 97-31 furnishes a list of specific injuries and corresponding compensations. *Dishmond*, 132 N.C. App. at 577, 512 S.E.2d at 772. This statutory scheme exists to prevent double recovery, not to dictate an exclusive remedy. *Gupton v. Builders Transport*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987) (citations omitted). Our Supreme Court has stated, "[e]ven if all injuries are covered under the scheduled injury section an employee may nevertheless elect to claim under G.S. § 97-29 if this section is more favorable; but he may not recover under both sections." *Hill*, 319 N.C. at 176, 353 S.E.2d at 398.

[3] Trapp alleges that plaintiff has not proved disability under G.S. § 97-29. Disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. § 97-2(9) (Supp. 1998). Plaintiff may prove disability by evidence that (1) the employee is physically or mentally incapable of work in any employment as a result of the injury; (2) the employee is capable of some work but, after reasonable efforts, has been unsuccessful in obtaining other employment; (3) the employee is capable of some work but it would be futile to seek work because of preexisting conditions such as age, inexperience, lack of education; or (4) the employee has obtained

employment at a wage less than that earned prior to the injury. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The Commission found as fact:

> 18. As a result of plaintiff's work-related injury on 3 January 1997, plaintiff has been unable to work or earn any wages since 4 January 1997 and continuing through the date of hearing before the Deputy Commissioner. His left arm still gives him problems and he cannot lift anything heavy. Plaintiff's limited ability to understand English, coupled with his exclusive background in construction work, has contributed to his inability to find work since his compensable injury.

Plaintiff testified at the hearing that his arm was "no good," and that he could not hold anything heavy. He also testified that he had worked exclusively as a roofer since coming to the United States in 1995. He stated that he had continuous pain in his arm and back. Further, he has been unable to work since the accident. Plaintiff's doctor also assigned him a ten percent (10%) impairment rating for his left wrist. Plaintiff has sufficiently shown that his injury has prevented him from earning wages from Schuck or any other employer. *See Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E.2d 374 (1986). We hold that this evidence is sufficient to support the Commission's finding of fact. We also hold the finding of fact supports plaintiff's rating of temporary total disability.

[4] Trapp suggests that plaintiff's injury did not diminish plaintiff's earning capacity. According to Trapp, no one can legally employ plaintiff because he has no Immigration Service "Green Card" or Social Security card. Because plaintiff lacks earning capacity, Trapp claims the Commission could not conclude that plaintiff was temporarily totally disabled. We find this argument unpersuasive. G.S. § 97-2(2) (Supp. 1998) defines employee to include "every person engaged in an employment . . . including aliens." The statute makes clear that the General Assembly sought to include individuals like the plaintiff under the protections of the Workers' Compensation Act. Further, plaintiff presented sufficient evidence to show that prior to the injury he did in fact have earning capacity as a roofer.

[5] Next Trapp challenges the Commission's findings and conclusions that Trapp willfully neglected to bring Schuck into compliance with the requirements of G.S. § 97-93 (Supp. 1998). Trapp claims that

he did not know that Schuck lacked Workers' Compensation insurance until after plaintiff fell. Therefore, he argues that the Commission could not conclude that he willfully neglected to bring Schuck into compliance with Chapter 97. We disagree. G.S. § 97-94 (Supp. 1998) states that the Commission may assess a civil penalty of up to one hundred percent (100%) of the amount of any compensation due to the employer's employees for any person who has the ability and authority to bring an employer into compliance with G.S. § 97-93 and fails to do so. G.S. § 97-93 requires every employer subject to the provisions of the Workers' Compensation Act "to insure and keep insured his liability under this Article."

It is well known that, "the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *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). Thus, the Commission may assign more weight and credibility to certain testimony than others. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal. *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

On this issue, Trapp's testimony is confusing at best. Trapp admits that he did not require Schuck to provide a certificate as proof that Schuck had workers' compensation insurance. Therefore, he allowed Schuck to work without having tangible evidence of any insurance. Trapp testified that he took Schuck to obtain insurance after he learned that Schuck did not have any. Trapp stated that this trip occurred after plaintiff fell. However, he also testified that he had not seen Schuck since plaintiff's fall. Further, Trapp answered affirmatively to a question that he took Schuck to obtain insurance before the fall. Trapp also testified that he discovered Schuck had no insurance while Schuck was in the process of retiling the roof. Plaintiff's injury occurred during this process. If Trapp did not see Schuck after the injury, then the Commission could have concluded that Trapp knew about Schuck's lack of insurance prior to the fall. Trapp's testimony also allows the Commission to conclude that Trapp knowingly allowed Schuck to work without insurance. This finding is sufficient to support a conclusion that Trapp willfully neglected to bring Schuck into compliance with Chapter 97.

For the foregoing reasons we affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

IN RE: THE FORECLOSURE OF A DEED OF TRUST OF JAMIE ESPINOSA AND WIFE, CHERI ESPINOSA v. HAYES MARTIN, TRUSTEE AND ROBERT TUCKER, SUBSTITUTE TRUSTEE

No. COA98-1491

(Filed 19 October 1999)

1. **Mortgages— power of sale—real property—no valid debt—no ratification**

In an action for foreclosure under power of sale of plaintiffs' real property based on a loan taken out by plaintiff-wife's father purportedly signed by plaintiffs and the father, the trial court did not err in dismissing the foreclosure proceeding based on its determination that there was no valid debt owed by plaintiffs to the bank and plaintiffs did not ratify the loan because there is no evidence that: (1) any portion of the loan proceeds passed to plaintiffs directly or indirectly; (2) plaintiffs knew of the loan transactions until the foreclosure was instituted; (3) plaintiff-wife's father acted as an agent of plaintiffs in obtaining the loan secured by their real property; or (4) any of plaintiffs' legal obligations were satisfied from the loan proceeds.

2. **Mortgages— power of sale—real property—equitable relief beyond scope of review**

In an action for foreclosure under power of sale of plaintiffs' real property based on a loan taken out by plaintiff-wife's father purportedly signed by plaintiffs and the father without their knowledge, the trial court did not err in declining to address unnamed defendant Bank's argument for equitable relief because that action would have exceeded the trial court's permissible scope of review in this foreclosure action since a power of sale is limited to the four findings of fact specified in N.C.G.S. § 45-21.16(d).

Appeal by petitioner Blue Ridge Savings Bank, Inc., from order entered 12 June 1998 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 9 September 1999.

This action for foreclosure under power of sale of certain real property in Jackson County, North Carolina, was heard in Jackson County Superior Court upon appeal from an Order of the Clerk of Superior Court of Jackson County.

Cheri Cagle Espinosa is the daughter of Charles E. Cagle, and is married to Jamie Espinosa (collectively, the Espinosas). On or about 3 March 1993, a loan application purporting to be signed by the Espinosas was submitted to Blue Ridge Savings Bank, Inc. (the Bank). On 5 March 1993, Teri C. Jenkinson and Carl M. Jenkinson deeded certain real property to the Espinosas (the Jenkinson property). Teri Jenkinson is the sister of Cheri Espinosa. On 11 March 1993, a Promissory Note was executed bearing the names of the Espinosas in favor of the Bank in the principal sum of $280,000.00. The promissory note was secured by a deed of trust on the Jenkinson property in which Hayes C. Martin (Martin) was designated as trustee for the Bank. Martin was President of the Bank and a long-time friend of Mr. Cagle. On the same day, the closing attorney issued a check from his trust account made payable to the Espinosas in the amount of $278,364.00 with the notation "net proceeds from loan Blue Ridge Savings Bank." The signatures of Jamie Espinosa, Cheri Espinosa and Charles Cagle appear on the check as endorsers. There is some evidence that Charles Cagle deposited the trust account check into his account at First Union National Bank.

A second undated loan application was thereafter submitted to the Bank, bearing the signatures "Jessie Espinosa" as borrower and "Cheri Espinosa" as co-borrower. On or about 21 January 1994, Charles E. Cagle and his wife conveyed additional real property (the Cagle property) to the Espinosas. On that same day, a second promissory note was signed in the names of the Espinosas in favor of the Bank in the sum of $467,000.00. The sum of $467,000.00 represented the total of the 11 March 1993 loan of $280,000.00 and a new loan in the amount of $187,000.00. The $467,000.00 promissory note was secured by a deed of trust on the Jenkinson property and the Cagle property, bearing the names of Jamie Espinosa and Cheri Espinosa, with Hayes C. Martin designated as trustee for the Bank. On or about 21 January 1994, the Bank issued a check signed by Hayes C. Martin to "Thomas W. Jones, Attorney Trust Account," in the sum of $187,000.00, representing the "new money" from the loan. The check was endorsed: "Thomas W. Jones Trust Account: By: Thomas W. Jones, and Charles E. Cagle." On or about 24 November 1995, a loan modification agreement purporting to bear the signa-

tures of Jamie Espinosa and Cheri Espinosa, extended the term of the loan.

At trial, there was ample evidence, including the testimony of a handwriting expert, tending to show that none of the loan documents, including the modification agreement, were signed or submitted to the Bank by the Espinosas. There was no evidence that the Espinosas received any of the proceeds from either loan, no evidence that Hayes C. Martin ever talked with the Espinosas at any time about the loans, and no evidence that the Espinosas received, directly or indirectly, any portion of the loan proceeds. There is also no evidence that the Espinosas knew about the loan transactions at any time prior to the institution of this foreclosure action. Martin apparently had accepted the representations of his friend Cagle that the documents were properly signed by the Espinosas and notarized.

There was evidence that Mrs. Espinosa received a loan delinquency notice from Blue Ridge Savings Bank in the fall of 1996. She testified she had never previously heard of Blue Ridge Savings Bank. Upon receiving the notice, Mrs. Espinosa contacted her father, Mr. Cagle, who said he would rectify the situation. At her father's request, she faxed and mailed copies of her tax returns to Bob Long, her father's attorney. She had not received any further communications from the Bank until she was served with notice of the foreclosure proceeding.

The Bank instituted a foreclosure proceeding and served the Espinosas with process. Charles Cagle was not made a party to the proceeding. After a full hearing, the clerk of superior court determined the Espinosas were not responsible for the outstanding debt to the Bank, and entered an order dated 25 November 1997 staying the foreclosure proceeding. The Bank appealed to the Superior Court of Jackson County. After a full hearing, the superior court entered an order determining that there was no valid debt owed the Bank by the Espinosas, and dismissed the foreclosure proceeding. The Bank appealed, assigning error.

John R. Sutton for Blue Ridge Savings Bank, Inc., petitioner appellant.

Hunter, Large & Sherrill, P.L.L.C., by Raymond D. Large, Jr. and Diane E. Sherrill, for Jamie Espinosa and wife, Cheri Espinosa, respondent appellees.

HORTON, Judge.

An action for foreclosure under power of sale provides an alternative to "costly and . . . time-consuming . . . foreclosure[s] by action . . . ." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). At the initial hearing before the clerk of superior court, the clerk is to "find the existence of a '(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled . . . .' " *Id.* at 93, 247 S.E.2d at 429. *See also* N.C. Gen. Stat. § 45-21.16(d) (1996). The role of the clerk is limited to making findings on those four issues. If the foreclosure action is appealed to the superior court for a *de novo* hearing, the inquiry before a judge of superior court is also limited to the same issues. *Id.* at 94, 247 S.E.2d at 429.

Here, the issue before the superior court on appeal was whether there was a "valid debt" of which the Bank, was the holder. The superior court found that Jamie Espinosa and Cheri Cagle Espinosa did not execute any of the loan documents in question, including the promissory notes. None of the parties to this appeal disagree with that finding, appellant Bank contending that Charles E. Cagle, father of Cheri Cagle Espinosa, forged the signatures of the Espinosas in order to secure the loans in question. We note that the superior court did not make a finding as to the identity of the forger of the loan documents, that question not being relevant to the limited issues before that court on appeal. Even if we assume for the purposes of argument that Cheri Espinosa's father, Charles E. Cagle, forged the instruments in question, our reasoning and decision would remain the same.

[1] The Bank argues, however, that even if the Espinosas did not participate in the loan transactions, they ratified the loan transactions by retaining the benefits of those transactions after learning that their signatures had been forged on the loan documents. We disagree, and affirm the judgment of the superior court.

We have defined ratification as

> "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement (Second) of Agency § 82 (1958). "Ratification requires intent to ratify plus full knowledge of all the material facts." Contracting Corp. v. Bank of New Jersey, 69

> N.J. 352, 361, 354 A.2d 291, 296 (1976). It "may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *Id.*

American Travel Corp. v. Central Carolina Bank, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

"[T]o constitute ratification as a matter of law, the conduct must be consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose." *Id.* at 443, 291 S.E.2d at 896. The superior court found no evidence that any portion of the loan proceeds passed to the Espinosas, or that they knew of the loan transactions until the foreclosure was instituted and those findings are supported by competent evidence. Further, there was no evidence that Charles E. Cagle acted as agent of the Espinosas in obtaining the loan secured by their real property, and no evidence that any legal obligation of the Espinosas was satisfied from the loan proceeds. Further, the trial court found that none of the loan proceeds were used to purchase the real property deeded to the Espinosas, and that they did not directly or indirectly benefit from the loan transactions in any way. Those additional findings are also supported by competent evidence of record. The trial court concluded that the Bank failed to prove by the greater weight of the evidence that "Jaime [*sic*] and Cheri Espinosa, or either of them, knew all of the facts material to the loans in question prior to the time of the institution of this foreclosure proceeding." Further, the trial court concluded that the Espinosas "did not ratify any of the transactions or documents associated with the loans in question."

The Bank contends that as a matter of law the Espinosas ratified the loan transactions by retaining the Jenkinson and Cagle properties after they learned that their signatures had been forged on the loan transactions. The Bank bases its contention on the decision of our Supreme Court in *O'Grady v. Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978). In *O'Grady*, one Pridemore had a power of attorney given him by Stewart. Based on that power of attorney, Pridemore signed Stewart's name to a promissory note. The Supreme Court held that Pridemore's action exceeded his authority as set out in the power of attorney, thus Stewart's signature on the note was clearly unauthorized. However, the case was remanded to the trial court to determine whether Stewart ratified the unauthorized actions of Pridemore by

(1) taking control of bank accounts containing a portion of the loan proceeds, (2) with knowledge of the source of funds in the bank accounts, and (3) with knowledge that his name had been signed on the promissory note by Pridemore. *Id.* at 235-36, 250 S.E.2d at 602. The present case is clearly distinguishable from *O'Grady*. Here, there is no finding that Charles E. Cagle, or anyone else, acted as an agent for the Espinosas in the loan transactions; nor that they received, directly or indirectly, any of the loan proceeds; nor that they had any knowledge that anyone had signed their names on the loan documents until the foreclosure proceeding was instituted against them. *O'Grady* is clearly factually distinguishable, and does not support the Bank's argument.

We have carefully examined the other authorities cited by the Bank, but find that those cases involve principal-agent relationships and the liability of a principal for unauthorized acts of its agent. *Bank v. Grove*, 202 N.C. 143, 162 S.E. 204 (1932) (agent borrowed money on behalf of his principal without authority, but agent used it to satisfy legal obligations of his principal; principal retained the benefit of those payments and was deemed to have ratified the acts of the agent); *Christian v. Yarborough*, 124 N.C. 72, 32 S.E. 383 (1899) (where agent exceeds his authority, principal must either ratify the whole transaction, or repudiate the whole; may not merely ratify the portions to his advantage). Here, the trial court found no evidence of any principal-agent relationship, either actual or implied, between the Espinosas and Charles E. Cagle.

[2] Finally, the Bank argues that it would be grossly inequitable to allow the Espinosas to retain the land free of any obligation for the loan in question. That question was not properly before either the clerk or the trial court in this foreclosure proceeding, and therefore is not before us on appeal. In *Watts*, the mortgagors successfully raised an equitable defense in a foreclosure proceeding before the superior court, but we reversed the action of the superior court on appeal. We noted that

> [a] power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action. 389 F. Supp. at 1258; 10 Thompson on Real Property, § 5175, p. 204 (1957); Note, Power of Sale Foreclosure After Fuentes, 40 U. Chi. L. Rev. 206 (1972). To construe the statute so as to provide a full hearing on matters at issue other than those before the Clerk would make the foreclosure by power of sale as costly and as time-consuming

as foreclosure by action, since a mortgagor could obtain a full hearing on all issues merely by appealing to the Superior Court for a hearing *de novo*. It is clear that the legislature did not intend such a result. The Clerk of Superior Court is limited to making the four findings of fact specified in the statute, and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*. *See* G.S. 1-276 which limits appeals to "matters in controversy" before the Clerk.

* * * *

The trial judge in the case *sub judice* exceeded the permissible scope of review at the hearing *de novo* by invoking equitable jurisdiction to enjoin the foreclosure sale.

Watts, 38 N.C. App. at 94-95, 247 S.E.2d at 429-30. In the case before us, the superior court correctly declined to address the Bank's argument for equitable relief, as such an action would have exceeded the superior court's permissible scope of review in this foreclosure action.

We have carefully reviewed the other arguments and assignments of error brought forward by the Bank, but find them to be without merit. Despite its contentions to the contrary, the Bank received a fair and impartial hearing before an able trial court. The findings made by the trial court are supported by competent evidence, and the conclusions of law are supported by the findings and correctly apply applicable statutes and case law. Accordingly, the judgment of the superior court is

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

LAWANDA PARCHMENT, EXECUTRIX OF THE ESTATE OF ROY EDWARD PARCHMENT, PLAINTIFF v. BOBBY LEE GARNER, AND NORFOLK SOUTHERN RAILWAY COMPANY, DEFENDANTS

No. COA98-1531

(Filed 19 October 1999)

1. Railroads— grade crossing accident—contributory negligence—train sounded warning bell and horn

In a wrongful death action involving a train-automobile grade crossing accident, the trial court did not err by granting summary judgment in favor of defendant Norfolk Southern Railway Company because although the evidence tends to show there were no automatic warning mechanisms and decedent's view of the track was obstructed by trees and other vegetation, decedent was contributorily negligent since there is no plausible explanation why decedent would have been prevented from hearing the train's warning bell and horn, and decedent violated N.C.G.S. § 20-142.1(a)(3) by failing to stop within 50 feet of the crossing to determine whether it was safe to proceed across the track.

2. Railroads— grade crossing accident—no automatic warning mechanisms—not gross negligence

In a wrongful death action involving a train-automobile grade crossing accident, the trial court did not err by determining that defendant Norfolk Southern Railway Company was not grossly negligent in maintaining and signaling the rural crossing when there were no automatic warning mechanisms because northwest-bound motorists within 70 feet of the crossing could clearly see 167 feet down the track; and when the accident occurred, the train was burning its headlights, traveling at a maximum speed of 35 mph, and had been sounding its horn and ringing its bell continuously for a distance of 1,970 feet.

Appeal by plaintiff from judgment entered 13 October 1998 by Judge Michael E. Beale in Davie County Superior Court. Heard in the Court of Appeals 9 September 1999.

Long, Parker & Warren, P.A., by Steve Warren, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, by L.P. McLendon, Jr., Reid L. Phillips, and James C. Adams, II, for defendants-appellees.

TIMMONS-GOODSON, Judge.

The present appeal arises out of a wrongful death action brought by the executrix of the estate of Roy Edward Parchment ("Parchment"), alleging that Norfolk Southern Railway Company ("Norfolk") and its engineer, Bobby Lee Garner, negligently caused Parchment's death. After a thorough examination of the record, we affirm the order of the trial court.

Plaintiff Lawanda Parchment is the executrix of Parchment's estate. Parchment sustained fatal injuries when the automobile he was driving collided with a locomotive owned by Norfolk and engineered by Garner. The accident occurred at the Cooleemee Junction Grade Crossing ("the Crossing") on State Road 1116 ("SR 1116") in Davie County, North Carolina. Two tracks, a main line track and a spur track, intersected SR 1116 at the Crossing, and motorists traveling northwest on SR 1116 reached the spur track before reaching the main line. At the time of the accident, there were no automatic gates or flashing lights to signal a train's approach, but motorists traveling northwest on SR 1116 encountered advance warning signs at 780 feet from the Crossing, advance pavement markings at 429 feet from the Crossing, and a crossbucks sign at the Crossing.

On the afternoon of 27 September 1993, Garner maneuvered a Norfolk locomotive along the main line track toward the Crossing at a speed of 30 to 35 miles per hour (mph). William D. Shelton, the conductor, and Kelly F. Spainhour, the brakeman, were also present on the train at the time. When the train reached the whistle post located 1,970 feet from the Crossing, Garner began sounding the horn and ringing the bell, which he continued to do until after the accident occurred. At approximately 2:17 p.m., the locomotive traveled over the Crossing. Parchment, who was driving toward the Crossing in a northwesterly direction on SR 1116, struck the side of the locomotive at a speed of 30 mph. Parchment received mortal injuries as a result of the collision.

In her deposition, plaintiff testified regarding visibility conditions at the Crossing. Plaintiff stated that motorists traveling northwest on SR 1116 were unable to see an approaching train because of the trees, shrubbery and other vegetation occupying the 40-foot right-of-way adjacent to the railroad track. As to the manner by which motorists negotiated the Crossing, plaintiff testified as follows:

> [When you approach the crossing,] [y]ou couldn't see. You would go till you could roll and look, roll and look, roll and look till you

> were on the side [spur] track. And you'd roll and look. You had to. . . . [Y]our front of your vehicle was right at the side [spur] track before you could see, and you'd roll and look, roll and look. . . . So you didn't stop completely. If you stopped completely back, you could not see.

Plaintiff's expert, K. W. Heathington, submitted a report characterizing the Crossing as very hazardous due to the severe limitations on sight distances caused by the trees and vegetation. Heathington reported that with a train traveling at a maximum speed of 35 mph, sight deficiencies in the southeast quadrant, the area from which Parchment was traveling, were: (1) 321 feet (77.7%) for a vehicle approaching at 55 mph on SR 1116; (2) 266 feet (73.3%) for an approach speed of 40 mph; (3) 248 feet (71.3%) for an approach speed of 30 mph; (4) 246 feet (67.8%) for an approach speed of 20 mph; and (5) 341 feet (67.1%) for an approach speed of 10 mph. Heathington determined that the sight distance restrictions in all four quadrants "pose[d] critical safety problems for a reasonable and prudent motor vehicle operator using the crossing on SR 1116 (Junction Road)." He further concluded that ignoring the safety hazards caused by the visibility restrictions was "a willful and wanton disregard for the safety of the traveling public using the SR 1116 (Junction Road) crossing."

Plaintiff, in her capacity as the executrix of Parchment's estate, filed a lawsuit against Norfolk and Garner alleging that they negligently caused the accident resulting in Parchment's death. Following extensive discovery, Norfolk and Garner filed a motion for summary judgment on all issues raised in plaintiff's complaint. The trial court held a hearing on the motion on 21 September 1998, at which time plaintiff voluntarily dismissed her claims against Garner with prejudice. After hearing oral arguments and reviewing the evidence of record, the court entered an order granting summary judgment to Norfolk. As the basis for its decision, the court concluded that as a matter of law, Parchment was contributorily negligent and Norfolk was not liable to plaintiff for negligence or gross negligence. Plaintiff filed timely notice of appeal.

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[1] We consider first plaintiff's argument that the court erred in concluding that Parchment was contributorily negligent as a matter of law. Plaintiff contends that since there was evidence tending to show that Parchment was unable to see the train until it was too late to avoid a collision, the issue of his negligence was one for the jury to decide. On the facts of this case, we must disagree.

The question before the trial court on a motion for summary judgment "is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law." *DiOrio v. Penny*, 331 N.C. 726, 728, 417 S.E.2d 457, 459 (1992). Although summary judgment is seldom fitting in cases involving questions of negligence and contributory negligence, summary judgment will be awarded to a defendant if "the evidence is uncontroverted that [the plaintiff] failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of injury." *Id.*

Our courts have encountered considerable difficulty in enunciating bright-line rules to govern liability in train-automobile grade crossing accidents. Consequently, each case is evaluated on its own facts. *Jarrett v. R.R.*, 254 N.C. 493, 495, 119 S.E.2d 383, 384 (1961).

> Many cases involving injuries due to collision between motor vehicles and trains at grade crossings have found their way to this Court. No good can be obtained from attempting to analyze the close distinctions drawn in the decision of these cases, for, as was said in *Cole v. Koonce*, [214 N.C. 188, 198 S.E. 637 (1938)] each case must stand upon its own bottom, and be governed by the controlling facts there appearing.

Hampton v. Hawkins, 219 N.C. 205, 209, 13 S.E.2d 227, 229 (1941). Nevertheless, the law charges motor vehicle operators with a continuing obligation to look and listen before entering a railroad crossing. *Jernigan v. R.R. Co.*, 275 N.C. 277, 167 S.E.2d 269 (1969). Accordingly, "when a diligent use of one's senses of sight and hearing discloses danger in time to avoid it, failure to take the proper precaution constitutes negligence." *Id.* at 281, 167 S.E.2d at 272.

Section 20-142.1 of our General Statutes sets forth the responsibilities of a motorist when proceeding over a railroad crossing:

> (a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of the vehicle shall stop within 50 feet, but not less than 15 feet from the nearest rail of the railroad and shall not proceed until he can do so safely. These requirements apply when:
>
> . . .

(3) A railroad train approaching within approximately 1500 feet of the highway crossing emits a signal audible from that distance, and the railroad train is an immediate hazard because of its speed or nearness to the crossing[.]

N.C. Gen. Stat. § 20-142.1(a)(3) (1993). While failure to come to a complete stop as required by this section does not constitute negligence *per se*, it is a factor to be considered in determining whether a motorist acted negligently. *White v. R.R.*, 216 N.C. 79, 3 S.E.2d 310 (1939); *Weston v. R.R.*, 194 N.C. 210, 139 S.E. 237 (1927).

Viewing the evidence in the light most favorable to plaintiff and giving plaintiff the benefit of every inference reasonably drawn from the evidence, we hold that the trial court committed no error in concluding that Parchment's own negligence contributed to his injuries and, thus, barred recovery on his negligence claim. The evidence shows that Garner, the engineer, signaled the train's approach by sounding the horn and ringing the bell. Garner began issuing the warning sounds at the whistle post located 1,970 feet from the Crossing and continued to do so until the train traveled over the Crossing. Although plaintiff presented evidence tending to show that the view of the track was obstructed by trees and other vegetation, plaintiff has offered no plausible explanation as to why Parchment would have been prevented from hearing the warning bell and horn. Furthermore, the evidence demonstrates that in violation of section 20-142.1(a)(3), Parchment failed to stop within 50 feet of the Crossing to determine whether it was safe to proceed across the track. The report submitted by plaintiff's expert indicates that from the southeast quadrant at a distance of 70 feet from the Crossing, a motorist could clearly see 167 feet down the track. Thus, had Parchment stopped as required by section 20-142.1(a)(3), there is no reason why he would not have been able to see the train in time to avoid a collision. The trial court was, therefore, correct in entering summary judgment for Norfolk on the issue of Parchment's negligence, and plaintiff's argument is overruled.

[2] Plaintiff further argues that even if the trial court properly determined that Parchment was contributorily negligent, the same did not bar his recovery, because Norfolk was grossly negligent in maintaining and signaling the Crossing. Again, we must disagree.

As a principle of law, it is well established that contributory negligence will not prohibit recovery where the defendant has engaged in willful or wanton conduct, *Sorrells v. M.Y.B. Hospitality Ventures*

of Asheville, 332 N.C. 645, 423 S.E.2d 72 (1992), which is often referred to as "gross negligence," *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 486 S.E.2d 472 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998). Plaintiff contends that genuine issues of fact remain as to whether Norfolk was grossly negligent, because the vegetation obstructing the Crossing created an ultrahazardous condition requiring the use of automatic warning mechanisms.

In North Carolina, railway companies have a duty to warn motor vehicle operators, in a manner " 'appropriate to the location and circumstances, that a railroad crossing lies ahead.' " *Collins v. CSX Transportation*, 114 N.C. App. 14, 18, 441 S.E.2d 150, 152 (1994) (quoting *Cox v. Gallamore*, 267 N.C. 537, 541, 148 S.E.2d 616, 619 (1966)). Where the conditions at or near the crossing are such as to render it "ultrahazardous" or "extrahazardous," our law may require the use of mechanical warning devices. *Id.* Generally, however, such warnings are required only at crossings so treacherous that a reasonably prudent person could not safely use them without extraordinary protective measures. *Id.* Nevertheless, "the failure to signalize an 'extrahazardous' crossing properly does not automatically amount to gross negligence. Instead, the fact that a crossing is extrahazardous ordinarily dictates only the necessity for certain types of warnings." *Id.* at 22, 441 S.E.2d at 154. The key question is whether the railroad company exercised due care under the circumstances. *Id.* at 22, 441 S.E.2d at 155.

The evidence, examined in the light most favorable to plaintiff, tends to show that the collision between Parchment's vehicle and Norfolk's locomotive occurred at a rural railroad crossing on an afternoon when weather conditions were dry and partly cloudy. The Crossing consisted of two parallel tracks—a main line and a spur track—and was marked only by a crossbucks sign. Trees and other vegetation growing in the right-of-way adjacent to the tracks partially obstructed the view of approaching motorists; however, northwestbound motorists within 70 feet of the Crossing could clearly see 167 feet down the track. When the accident occurred, the train was burning its headlights, traveling at a maximum speed of 35 mph, and had been sounding its horn and ringing its bell continuously for a distance of 1,970 feet. Following the accident, plaintiff's expert examined the Crossing and determined that the conditions at the Crossing rendered it "ultrahazardous" and that Norfolk was grossly negligent in failing to utilize automatic warning devices.

The facts of this case are strikingly similar to those of *Collins*, 114 N.C. App. 14, 441 S.E.2d 150. In that case, the plaintiff was injured when his vehicle collided with a train at a rural railroad crossing marked only by a crossbucks sign. The plaintiff argued that foliage growing near the railroad track created visibility restrictions rendering the crossing extrahazardous. Thus, it was the plaintiff's position that the railroad company's failure to use mechanical warning devices at the crossing constituted gross negligence. The evidence presented at trial tended to show that when the accident occurred, "[t]he train was burning its headlights, traveling at the maximum speed limit of 70 m.p.h., and . . . failed to sound its horn." *Id.* at 23, 441 S.E.2d at 155. The evidence further showed that in spite of the foliage, "a motorist within 75' of the crossing had essentially an unobstructed view down the tracks." *Id.* In light of these facts, this Court held that assuming the crossing was ultrahazardous, the "defendant's failure to implement more extensive signalization did not rise to the level of 'gross negligence.' " *Id.* at 24, 441 S.E.2d at 155. We stated that the circumstances of the case "[were] more analogous to a typical rural grade crossing, and [were] notably similar to other cases wherein only the issue of 'ordinary' negligence was submitted." *Id.* at 24, 441 S.E.2d at 156.

Accordingly, pursuant to our ruling in *Collins*, 114 N.C. App. 14, 441 S.E.2d 150, we hold that assuming *arguendo* the Crossing at which the accident occurred was ultrahazardous, plaintiff has failed to show that the lack of automatic signaling devices constituted gross negligence on the part of Norfolk. Therefore, plaintiff's assignment of error fails.

For the foregoing reasons, the order of summary judgment in favor of Norfolk is affirmed.

AFFIRMED.

Judges GREENE and HORTON concur.

CURTIS KEITH McGEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA98-1246

(Filed 19 October 1999)

1. **Tort Claims Act— negligence—Commission is ultimate fact-finder**

In a negligence case filed under the Tort Claims Act based on damages to plaintiff's truck engine for failure to put anti-freeze in it while it was seized by defendant pursuant to a judgment and execution on the previous owner of the truck, the Full Commission did not err in reversing the deputy commissioner's decision to deny the claim because: (1) the Full Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner, and (2) there is ample evidence to support the Full Commission's findings that defendant's negligence proximately caused plaintiff's damages and defendant was not contributorily negligent.

2. **Tort Claims Act— negligence—pre-judgment and post-judgment interest**

In a negligence case filed under the Tort Claims Act based on damages to plaintiff's truck engine for failure to put anti-freeze in it while it was seized by defendant pursuant to a judgment and execution on the previous owner of the truck, the Full Commission did not err by failing to award pre-judgment and post-judgment interest in favor of plaintiff because N.C.G.S. § 24-5 does not authorize interest for an award of damages under the Tort Claims Act.

Appeal by defendant from judgment entered 24 June 1998 by the North Carolina Industrial Commission and cross-appeal by plaintiff. Heard in the Court of Appeals 16 August 1999.

Larry L. Eubanks and Jerry D. Jordan for plaintiff-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Felicia Gore Hoover, for the State.

WALKER, Judge.

Plaintiff brought a claim for damages to his truck under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et. seq.* The deputy commissioner denied plaintiff's claim. The Full Commission (Commission) reversed the deputy commissioner's decision and ordered defendant to pay plaintiff $15,290.54 in damages and court costs.

The Commission's findings include the following:

1. During the early morning hours of May 15, 1992, Betty McGee, the estranged wife of plaintiff, Curtis Keith McGee, and plaintiff's mother were awakened by a team of officers from the Forsyth County Sheriff's Department wearing plain clothes and carrying guns. Although the testimony is not clear on the reason for the officers' presence, it appeared to be a "drug raid."

. . .

3. Based upon the arrest and seizure report for Betty McGee, 578 units of an unnamed controlled substance was found during the search. These controlled substances were apparently Valium pills, based upon other evidence presented.

4. Betty McGee subsequently pled guilty to simple possession of a schedule IV controlled substance, a misdemeanor.

5. The plaintiff was never charged with a criminal offense in connection with the drugs found in the home occupied by his mother and estranged wife.

6. The plaintiff did not live with his mother at 5008 Days Brook Road, Winston-Salem, N.C. Betty McGee was residing temporarily with her mother-in-law while trying to locate a place to live. The house she previously rented had been sold and she was forced to move.

7. On May 15, 1992, the plaintiff, who was a truck driver, was in Georgia.

. . .

9. The evidence is conflicting on the question of why Richard A. Hughes, a controlled substance enforcement officer for the North Carolina Department of Revenue was present at plaintiff's mother's house during the early morning hours of May 15, 1992.

He was not at the time working in his position of part-time auxiliary deputy sheriff for Forsyth County.

10. Richard A. Hughes testified that he was called by Sergeant Crater, a deputy sheriff, and requested to come to the home of plaintiff's mother. Based upon the greater weight of the evidence, Mr. Hughes was called because the officers had found a 1979 Kenworth tractor truck parked in plaintiff's mother's yard. The truck was registered at the Department of Motor Vehicles in the name of Clinton Ray Price. Mr. Hughes had previously initiated an Execution from the N.C. Department of Revenue against Clinton Ray Price. The Execution directed the sheriff of Forsyth County to satisfy the judgment from personal or real property of Clinton Ray Price.

11. Prior to levying on the 1979 Kenworth tractor truck on May 15, 1992, Mr. Hughes was advised by Betty McGee that the truck in question did not belong to Clinton Ray Price. Mr. Hughes was also shown a notarized Bill of Sale and title dated February 18, 1992, indicating that Clinton Ray Price sold the truck to Curtis Keith McGee. The certificate of title was endorsed to Betty McGee. The truck was sold to plaintiff prior to the March 4, 1992 entry of judgment against Clinton Ray Price.

12. Plaintiff failed to register the title to the truck at the Department of Motor Vehicles after the purchase. However, the truck was inoperable on May 15, 1992.

13. After having notice that Clinton Ray Price no longer owned the truck in question, Mr. Hughes levied upon the truck based upon the prior Judgment and Execution. The Notice of Levy was signed on May 15, 1992 by Richard A. Hughes.

14. Defendant contends that the Notice of Levy was signed in Mr. Hughes' capacity as auxiliary deputy sheriff because only a sheriff or deputy sheriff can levy on an execution. Although this is a correct statement of the law, Mr. Hughes testified that he was acting for the N.C. Department of Revenue on May 15, 1992 when he was called to plaintiff's mother's home. Mr. Hughes' total involvement in this case was intended to be in his capacity as a revenue officer for the state. Based upon the Notice of Levy, R.A. Hughes took the truck into his possession and appointed Ingram's Garage as his agent by leaving the truck with Ingram's Garage subject to the orders of R.A. Hughes only.

. . .

17. At some subsequent time, more than two years after the seizure of plaintiff's truck, his truck was returned after plaintiff agreed to pay approximately $1,000.00 in storage costs. . . .

18. At some point while plaintiff's property was under the direct control of R.A. Hughes and his agent, Ingram's Garage, the engine block cracked due to lack of anti-freeze.

19. After the seizure of the truck and prior to the time the weather turned cold, plaintiff made repeated efforts to have anti-freeze installed in his truck. He called Mr. Hughes numerous times and his attorney called Mr. Hughes asking for permission to put anti-freeze in the truck. Plaintiff also called the sheriff's department in reference to getting anti-freeze in the truck, but was advised that the truck was under the control of Mr. Hughes.

20. Mr. Hughes told plaintiff and his attorney to have plaintiff purchase the anti-freeze, take it over to Ingram's Garage and that he would take care of getting the anti-freeze placed into the truck.

21. Plaintiff took the anti-freeze to Ingram's Garage as instructed, but was not allowed to put the anti-freeze in the truck himself. The anti-freeze was left at Ingram's Garage, but was never put into the truck. When the truck was returned to plaintiff, the engine block had cracked. Shortly before the seizure, plaintiff had placed a new engine in the truck, flushed the radiator, had the truck repainted and was completing repairs to have the truck leased out for hauling.

22. The seizure of the truck was pursuant to a Judgment and Execution on Curtis Ray Price. There was never a judgment from which to issue an Execution and Levy against plaintiff or Betty McGee. There is no evidence of why the truck was being held after it became clear that Clinton Ray Price did not own it.

23. Mr. Hughes was called in to become involved in the seizure of the truck as a North Carolina Revenue Officer. All of his actions in reference to the seizure of the truck were in his capacity as a state revenue officer. There is no evidence that he was "on duty" as an auxiliary deputy sheriff when he was called to come to the house of plaintiff's mother. He intended to act in his capacity as a state revenue officer when he took possession of the truck and placed it under the control of Ingram's Garage as his agent. The

Sheriff's Department of Forsyth County understood that R.A. Hughes was exercising his authority as a North Carolina revenue enforcement officer in seizing the truck. There were numerous deputy sheriffs who could have signed off on the Notice of Levy at the time Mr. Hughes signed it, including Sergeant Crater. The effect of having the signature of R.A. Hughes on the Notice of Levy is that the North Carolina Department of Revenue issued an Execution and levied upon its own execution and further took exclusive possession of the property. The truck was held subject to the order of R.A. Hughes only.

24. Plaintiff's tractor truck was damaged while in the possession of R.A. Hughes and his appointed agent, Ingram's Garage. At the time plaintiff's truck was damaged, Richard A. Hughes was exercising control over the seized truck in the course and scope of his employment as an enforcement officer for the N.C. Department of Revenue.

25. Mr. Hughes had a duty to take reasonable measures to protect plaintiff's property from damage while in his possession. Mr. Hughes promised plaintiff that he would install anti-freeze in the truck if plaintiff purchased the anti-freeze and took it to Ingram's Garage. Mr. Hughes breached his duty to plaintiff by failing to install anti-freeze in the truck as promised.

26. Mr. Hughes' failure to install or have the anti-freeze installed in plaintiff's tractor truck was the proximate cause of the damage to plaintiff's truck from the freezing and cracking of the engine and, therefore, constituted actionable negligence. As a proximate result of the negligence of Mr. R.A. Hughes while acting in the course and scope of his employment, plaintiff sustained damages in the amount of $10,290.54 to his truck and $5,000.00 in the loss of net income while his truck was being repaired. The North Carolina Department of Revenue is liable to plaintiff for these damages.

27. Plaintiff did all he could do to try to keep his property from being damaged. Plaintiff was not contributorily negligent. Plaintiff's failure to register his truck with the Division of Motor Vehicles did not constitute contributory negligence.

The Commission concluded that defendant's negligence was the proximate cause of plaintiff's damages and that plaintiff was not contributorily negligent.

[1] The defendant argues that the Commission erred in reversing the deputy commissioner's decision and making findings and conclusions contrary to those made by the deputy commissioner. Defendant contends that the responsibility of weighing a witness' credibility lies solely with the hearing commissioner, which was Deputy Commissioner Jones in this case.

In reviewing the findings made by a deputy commissioner . . ., the Commission may modify, adopt, or reject the findings of fact found by the hearing commissioner. *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976). It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). This State's Supreme Court in *Adams*, overruling *Sanders v. Broyhill Furniture Industr*ies, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), stated:

> 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.'

Adams, 349 N.C. at 681, 411 S.E.2d at 413. Thus, the Commission is the ultimate fact-finder on appeal and is authorized to make findings and conclusions contrary to those made by the deputy commissioner.

Furthermore, when considering an appeal from the Commission, this Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether the Commission's findings justify its conclusions and decision. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 496 S.E.2d 790 (1998). Findings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding. *Bullman v. Highway Comm.*, 18 N.C. App. 94, 195 S.E.2d 803 (1973). 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." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

Based on our review of the record, there is ample competent evidence to support the Commission's findings that defendant's negligence proximately caused plaintiff's damages and that plaintiff was not contributorily negligent.

[2] Plaintiff cross assigns as error the Commission's failure to award pre-judgment and post-judgment interest. Post-judgment interest is not collectible against the State without authorization by the legislature or unless the State has agreed to do so. *Myers v. Dept. of Crime Control*, 67 N.C. App. 553, 555, 313 S.E.2d 276, 277 (1984). In *Myers*, this Court held that statutory authority was necessary before any interest could accrue on a tort claims award, since the Tort Claims Act is in derogation of sovereign immunity and must be strictly construed. *Id.* Plaintiff, however, contends that he is entitled to interest under N.C. Gen. Stat. § 24-5 because the legislature amended the statute in 1985, after the *Myers* decision, to allow interest from the date the action is instituted.

However, in amending N.C. Gen. Stat. § 24-5, there is no indication that the legislature intended to authorize pre-judgment or post-judgment interest on an award of damages under the Tort Claims Act.

In addition, this Court held in the recent case of *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 132 N.C. App. 137, 510 S.E.2d 675 (1999), that N.C. Gen. Stat. § 24-1 *et. seq.* does not allow interest to be awarded against the State. Therefore, plaintiff is not entitled to pre-judgment or post-judgment interest under N.C. Gen. Stat. § 24-5 for his claim against the State under the Tort Claims Act, and plaintiff's cross assignment of error is overruled.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

ROGER TERRY CANOY, PLAINTIFF v. ROBERT WAYNE CANOY AND WIFE, DELORES J. CANOY, JAMES LESLIE CANOY AND WIFE, NELLIE MAE CANOY, JANIE CANOY M. SUMNER AND HUSBAND, FARRELL SUMNER, WILLIAM LARRY CANOY AND WIFE, FAYE CANOY, BRENDA FAYE CANOY BUCKLES, HAROLD EUGENE CANOY AND WIFE, JUDY CANOY, GLENN KEITH CANOY AND WIFE, SANDRA CANOY, RICHARD EDGAR CANOY AND WIFE, DOROTHY CANOY, AND NANCY LOU CANOY CAPPS AND HUSBAND, JOSEPH CAPPS, SCOTT N. DUNN, ADMINISTRATOR OF THE ESTATE OF MYRTLE GREESON CANOY, AND JOHN DOES A THROUGH Z, THE UNBORN HEIRS OF MYRTLE GREESON CANOY, DEFENDANTS

No. COA98-1185

(Filed 19 October 1999)

1. **Wills— life estate—contingent remainder—per stirpes share—condition of survival**

In a declaratory judgment action construing the last will and testament of plaintiff's mother devising the subject property to plaintiff-son as a life tenant and at his death in ten equal per stirpes shares to the testatrix's ten children, the remainder interest is contingent because the devise requires the remaindermen to survive plaintiff-life tenant in order to acquire an interest in the property, even though a deceased child's issue would take his or her share.

2. **Wills— life estate—contingent remainder—per stirpes share—remainderman share for life tenant**

In a declaratory judgment action construing the last will and testament of plaintiff's mother devising the subject property to plaintiff-son as a life tenant and at his death in ten equal per stirpes shares to the testatrix's ten children, a consideration of the will in light of the conditions and circumstances existing at the time the will was made reveals that the testatrix provided a remainderman share for plaintiff, even though he could not survive his own death, because plaintiff's issue, if any, would take just as the issue of any of the other nine children who predeceased plaintiff.

Appeal by plaintiff from judgment entered 6 May 1998 by Judge L. Todd Burke in Randolph County Superior Court. Heard in the Court of Appeals 12 May 1999.

Moser Schmidly Mason & Roose, by Stephen S. Schmidly, for plaintiff-appellant.

Max D. Ballinger for defendant-appellees William Larry Canoy and wife, Faye Canoy; Harold Eugene Canoy and wife, Judy Canoy; Glenn Keith Canoy and wife, Sandra Canoy; Richard Edgar Canoy and wife, Dorothy Canoy; Nancy Lou Capps and husband, Joseph Capps; and Brenda Canoy Buckles.

Robert T. Newman, Sr. Guardian Ad Litem for defendant-appellee Unborn Heirs.

HUNTER, Judge.

[1] Roger Terry Canoy ("plaintiff") instituted this declaratory judgment action on 14 March 1996 wherein he requested that the court construe the last will and testament of his mother Myrtle G. Canoy ("testatrix") and declare his interest in certain real property devised to him. Item IV of the testatrix's will provides, in pertinent part:

> Subject to the life estate of Glenn Canoy in Item III preceding[,] I will and devise all of my farm . . . consisting of all of my real estate in Randolph County . . . to my son, Roger Canoy, for the term of his natural life, and at his death, in ten (10) equal shares to my ten children, and for any that are deceased, to their issue, if any, per stirpes . . . .

The trial court found that each of the testatrix's ten children survived her. The trial court's conclusions relevant to this appeal were that

> [t]he class of remaindermen to take pursuant to Item IV of the will of [testatrix] will consist of the brothers and/or sisters of [plaintiff] who survive upon the death of [plaintiff] or the issue of any deceased brother and/or sister of [plaintiff],

and that the life estate of plaintiff did not merge with any remainder interest. While the court stated that only those siblings which survived the plaintiff would take a remainder share, the court did not declare the remainder to be "contingent" or "vested." However, the parties, in their briefs, have addressed the order as if the court found the remainder to be contingent.

Plaintiff and defendant guardian ad litem for the unborn heirs of testatrix contend that the trial court erred in determining that the remainder devised to testatrix's ten children was "contingent" upon their survival of plaintiff. These parties argue that the remainder was "vested" at the death of the testatrix and therefore each child did not

have to survive plaintiff in order to inherit his or her one-tenth share of the subject property. We disagree with this contention.

A vested remainder is "one which is limited to a certain person upon the happening of a certain event," Norman A. Wiggins & Richard L. Braun, *Wills and Administration of Estates in North Carolina* § 280 (2d ed. 1993), such as the natural expiration of the prior estate. "The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in praesenti*, though it is only to take effect in possession . . . at a future period, and such an estate may be transferred, aliened and charged . . . ." *Richardson v. Richardson*, 152 N.C. 705, 707, 68 S.E. 217, 218 (1910). There are three types of vested remainders: indefeasibly vested remainders, remainders vested subject to partial defeasance (subject to open) and remainders subject to complete defeasance (subject to a condition subsequent). *McMillan v. Davis*, 81 N.C. App. 433, 344 S.E.2d 595 (Eagles J., concurring), *disc. review denied*, 318 N.C. 416, 349 S.E.2d 597 (1986). A remainder interest is not vested, but is contingent, "when it is '*either* subject to a condition precedent (in addition to the natural expiration of prior estates), *or* owned by unascertainable persons, *or both*.' " *Hollowell v. Hollowell*, 333 N.C. 706, 715, 430 S.E.2d 235, 242 (1993) (*citing* Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* at 73 (2d ed. 1984)). Therefore, a person who holds a contingent remainder has no immediate fixed right of future enjoyment because whether or not his remainder will vest, or what portion he is to take, is unknown at the time of the devise.

Our Supreme Court has stated:

> It is the general rule that remainders vest at the death of the testator, unless some later time for the vesting is clearly expressed in the will, or is necessarily implied therefrom . . . . And it is a prevailing rule of construction with us that adverbs of time, and adverbial clauses designating time, do not create a contingency but merely indicate the time when enjoyment of the estate shall begin.

Pridgen v. Tyson, 234 N.C. 199, 201, 66 S.E.2d 682, 684 (1951) (citations omitted). "The paramount aim in the interpretation of a will is to ascertain if possible the intent of the testator." *Entwistle v. Covington*, 250 N.C. 315, 318, 108 S.E.2d 603, 606 (1959). The intent of the testatrix is to be determined from consideration of the entire document, and must be given effect unless it is contrary to some rule

of law or is in conflict with public policy. *Id.* The law favors the construction which gives the devisee a vested interest at the earliest possible moment that the testatrix's language will permit, and

> [a]s an incident of this rule, courts prefer to construe doubtful conditions as subsequent rather than precedent because such construction gives the devisee a vested estate subject to be divested instead of deferring the vesting.

Elmore v. Austin, 232 N.C. 13, 19, 59 S.E.2d 205, 210 (1950).

The devise at issue in the present case appears to be a "class gift," which is "created when the donor intends to benefit a group or a class of persons, as distinguished from specific individuals." *Mason v. Stanimer*, 102 N.C. App. 673, 676, 403 S.E.2d 605, 607 (1991). When a future interest is devised to a class with no contingency other than the natural termination of any preceding interest and some members of the class are alive at the testatrix's death, then the gift is vested in those members alive at the testatrix's death subject to open for afterborn members of the class. *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960). Likewise, if the limitation of a remainder refers to a class, but specifically describes the persons who are to take as surely as though they were named, and there is no intention that they shall take only in case they survive the ending of the particular estate preceding, the remainder vests in them immediately upon being created. *Roberts v. Bank*, 271 N.C. 292, 156 S.E.2d 229 (1967). "If, however, the [devise] means that a child had to survive the life tenant in order to acquire an interest in the property, [the child's] interest was contingent." *Id.* at 295, 156 S.E.2d at 231.

The testatrix in the present case devised the subject property "at [plaintiff's] death, in ten (10) equal shares to my ten children, and for any that are deceased, to their issue, per stirpes." While she did not specifically name each child in the devise in question, the devise indicates that she is referring to ten individuals, rather than a class, who will each take a one-tenth share of the property if they are alive at the death of the plaintiff life tenant. If the testatrix had not intended the devise to be to specific individuals who would inherit their share only upon surviving the plaintiff, testatrix would not have divided the remainder into shares and included the alternate devise to each child's issue in case the subject child did not survive plaintiff. The testatrix's words implied that at the plaintiff's death, if a child was not surviving, the child's share was devised to his or her issue.

The devise in the present case is very similar to the one at issue in *Brown v. Guthery*, 190 N.C. 822, 130 S.E. 836 (1925), wherein the testator stated:

> "I give and bequeath unto my beloved wife, Katie B. Toms, the following property, to be held by her during the term of her natural life, and upon her death to revert to my son, Charles French Toms, if he be alive, or to his heirs, if he be dead, viz.: The house and lot where I now live in Hendersonville, North Carolina, on the west side of Main street."

Id. at 823, 130 S.E. at 837. The Court held that the remainder to Charles French Toms was contingent, for

> [D]uring the life of the widow the estate in remainder is not "invariably fixed" in Charles French Toms, with the right of enjoyment only postponed until the falling in of the life estate. He takes no estate under the will until the happening of the event provided therein for the vesting of such estate, to wit, his survival of the life tenant.

Id. at 825, 130 S.E. at 838. Similarly, in the present case, if a child is deceased at the death of plaintiff life tenant, the testatrix devises the child's share to his or her issue. This clearly indicates that a child takes no estate unless he or she lives past the death of plaintiff life tenant. Thus, a child's survival is a condition precedent to the vesting of the remainder. "Conditions of survival are not implied unless it is clear that the testator so intended." *Roberts*, 271 N.C. at 296, 156 S.E.2d at 232. It is clear that the testatrix intended a condition of survival in the present case. Therefore, each child's remainder is contingent.

Assuming *arguendo* that each child's remainder is vested at the time of the devise, we note that if a vested remainder is subject to a condition subsequent and that condition is not met, the remainder becomes completely defeated. *McMillan*, 81 N.C. App. 433, 344 S.E.2d 595 (Eagles, J., concurring). Upon that instance, "the property remaining, both real and personal, revert[s] to the estate of the testatrix by operation of law." *Id.* at 437, 344 S.E.2d at 597. Any alternative devise of the property by the testatrix will take effect. The devise in question clearly implies that a condition subsequent to vesting must be met in order for each child to come into possession of his or her share—he or she must survive the life tenant. Accordingly, the remainder here is a vested remainder subject to complete defeasance

instead of an indefeasibly vested remainder. The result under such scenario is that a remainderman would actually take possession of his or her one-tenth share only if he or she met the condition of surviving the plaintiff.

[2] Due to our holding that the remainder to each child is contingent, we need not reach plaintiff's additional contention that his life estate merged with an indefeasibly vested remainder, creating a fee simple absolute. We note that the testatrix provided a remainderman share for plaintiff, even though she certainly knew that plaintiff could not survive his own death. While this devise appears confusing upon first glance, it reveals a specific plan that plaintiff's issue, if any, would take just as the issue of any of the other nine children who predeceased the plaintiff. It does not indicate that the testatrix intended the plaintiff's remainder to be indefeasibly vested. The devise illustrates that it was the intent of the testatrix that upon the death of her youngest child, the property at issue was to pass to her surviving children and the issue of predeceased children. In order to ascertain the intent of the testatrix, "the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made*." *Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956) (emphasis in original). Because plaintiff was the youngest child and a life estate preceded plaintiff's life estate, the testatrix must have known at the time the will was made that it was very possible that none of her children would survive plaintiff. The testatrix, in making this particular devise, formulated a plan for ensuring that the subject property remain within her family after the death of her youngest child while being divided equally into one-tenth shares, one for each child, or alternatively, the child's issue. The "per stirpes" designation by the testatrix ensured that each child's one-tenth share would go to his or her issue if he were deceased, and the size of the share would not be affected by the issue of the other children, further indication that the devise was one to individuals. Per stirpes distribution "denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living." *Trust Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E.2d 758, 761 (1963). Additionally, a review of the entire document reveals that in numerous instances, the testatrix made devises to her children, but provided that if they were deceased, the property was to pass to their issue, per stirpes. Because the testatrix included the identical provision in her will numerous times, it is unlikely that she did not intend for each child's remainder to be contingent on his or her survival of plaintiff. Nothing in the will before us indicates a

contrary intent, and to hold otherwise would go against the cardinal rule of will construction. Therefore, the order of the trial court is

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

CHRISTOPHER TODD MOORE, EMPLOYEE, PLAINTIFF v. CITY OF RALEIGH, EMPLOYER; SELF-INSURED, DEFENDANT

No. COA98-1297

(Filed 19 October 1999)

Workers' Compensation— pro se plaintiff—appeal required within fifteen days—self-representation not excusable neglect—waive own rules only if does not controvert statute

The Industrial Commission's opinion and award is reversed and remanded because it erred in considering pro se plaintiff's appeal of the deputy commissioner's opinion and award since: (1) plaintiff failed to file his appeal or motion for reconsideration within the fifteen-day period required by N.C.G.S. § 97-85; (2) self-representation and failure to hire counsel is not excusable neglect under N.C.G.S. § 1A-1, Rule 60(b); and (3) Industrial Commission Rule 801, which gives unrepresented plaintiffs special consideration for failure to strictly comply with the rules, does not allow the Commission to excuse plaintiff from complying with N.C.G.S. § 97-85.

Appeal by defendant from an opinion and award entered 1 July 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 August 1999.

The Jernigan Law Firm, by Roy J. Baroff, for plaintiff-appellee.

City Attorney Thomas A. McCormick, by Associate City Attorney Dorothy K. Woodward, for defendant-appellant.

HUNTER, Judge.

On appeal, defendant contends that the North Carolina Industrial Commission ("Industrial Commission") erred in considering plain-

tiff's appeal of the deputy commissioner's opinion and award because plaintiff failed to file his appeal within the fifteen day period required by N.C. Gen. Stat. § 97-85 (1991) and did not show excusable neglect. We agree. Accordingly, we reverse the opinion and award of the full Industrial Commission.

Evidence in the present case indicates that Christopher Todd Moore ("plaintiff") was hired by the City of Raleigh ("defendant") in December 1990 as a police officer. He sustained an injury by accident to his left knee on 12 April 1994 while chasing a criminal suspect. Plaintiff sought medical treatment in June 1994 and underwent arthroscopy in July 1994. Prior to arthroscopy, plaintiff had missed no time from work. He returned to full duty after the arthroscopy. Reconstruction on his knee was performed in November 1994, and plaintiff returned to light duty in May 1995; however, plaintiff accepted a disability retirement effective 1 September 1995. As a result of the accident of 12 April 1994, one physician gave plaintiff's left leg a ten percent permanent impairment rating, and another rated the impairment at twenty-five percent permanent.

Plaintiff presented his claim *pro se* to Deputy Commissioner John A. Hedrick on 3 August 1996. The deputy commissioner entered an opinion and award on 15 January 1997 wherein he found that plaintiff was restricted to light duty work upon his return to work in May 1995, and that plaintiff took disability retirement in September 1995 because he could not perform the "full duties of a police officer." The deputy commissioner determined that plaintiff had a fifteen percent permanent impairment to his left leg, and determined that plaintiff had presented evidence that he was entitled to compensation for permanent partial disability to his leg pursuant to N.C. Gen. Stat. § 97-31 (1991), or temporary partial disability pursuant to N.C. Gen. Stat. § 97-30 (1991). The deputy commissioner determined that under the law of this state, plaintiff may elect the most generous remedy, and awarded plaintiff such remedy under N.C. Gen. Stat. § 97-30.

Subsequently, plaintiff obtained counsel and filed a motion for reconsideration on 15 April 1997, wherein he sought a new hearing to obtain testimony from his treating physician and submit new contentions on three issues of law. Plaintiff indicated that he believed he was entitled to temporary total disability from 1 July 1995 and ongoing until he "return[s] to suitable employment." Plaintiff's motion for reconsideration was denied on 12 May 1997, and he filed notice of appeal on 27 May 1997. Although N.C. Gen. Stat. § 97-85 requires that

a motion for relief from an award in a workers' compensation case be filed within fifteen days, the full Industrial Commission considered plaintiff's appeal. It waived the fifteen day rule on the basis that plaintiff's *pro se* representation before the deputy commissioner constituted excusable neglect as he was "not able adequately to present his claim." The full Industrial Commission proceeded to find that plaintiff's return to work in May 1995 was a failed trial return to work under N.C. Gen. Stat. § 97-32.1 (1991) because plaintiff was unable to perform all the duties of a police officer and took disability retirement pursuant to his doctor's advice. The full Industrial Commission concluded that plaintiff was entitled to compensation for total incapacity pursuant to N.C. Gen. Stat. § 97-29 (1991) and "continuing under further orders of the Industrial Commission or until plaintiff is able to earn wages at some employment."

Initially, we note that the standard of appellate review of an opinion and award of the Industrial Commission is limited to a determination of (1) whether its findings of fact are supported by any competent evidence in the record; and (2) whether the Industrial Commission's findings of fact justify its legal conclusions. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). The Industrial Commission's conclusions of law are reviewable *de novo* by this Court. *Grantham v. R.G. Barry Corp.*, 217 N.C. App. 529, 491 S.E.2d 678 (1997).

Defendant asserts that the full Industrial Commission erred in considering the appeal of plaintiff because plaintiff did not appeal the deputy commissioner's award within fifteen days and failed as a matter of law to establish excusable neglect. We agree with defendant's contention.

Under the Workers' Compensation Act:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . .

N.C. Gen. Stat. § 97-85. Therefore, an opinion and award can be reconsidered only if "good ground" be shown and it is submitted within fifteen days of "when notice . . . shall have been given." *Id.* While N.C. Gen. Stat. § 97-85 specifically refers to the "full

Commission" as reviewing the award, under N.C. Gen. Stat. § 97-79 a deputy commissioner

> shall have the same power to issue subpeonas, administer oaths, conduct hearings, hold persons, firms or corporations in contempt . . . take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission[.]

N.C. Gen. Stat. § 97-79 (1991). Under this statute, a deputy commissioner has the same power as the full Industrial Commission in performing his or her duties and therefore, under N.C. Gen. Stat. § 97-85, he or she may reconsider his or her prior award just as the full Industrial Commission under N.C. Gen. Stat. § 97-85 may consider an appeal from an opinion and award of a deputy commissioner.

In the present case, plaintiff made a motion for reconsideration and when it was denied, he appealed. In *Utilities Comm. v. R. R.*, 224 N.C. 762, 32 S.E.2d 346 (1944), our Supreme Court delineated the procedural effect of a motion for reconsideration on an appeal where a court has the power to reconsider a prior judgment:

> A court, having power to grant a rehearing, may entertain a petition for rehearing, filed after the time for appeal from its original order has expired, but in considering whether or not to grant the rehearing, such consideration will not enlarge the time for appeal from the original order, if the petition for rehearing is denied. Furthermore, an appeal does not lie from the denial of a petition to rehear. On the other hand, where a petition for rehearing is filed before the time for appeal expired, it tolls the running of the time and appeal may be taken within the statutory time for appeal from the date of denial of the petition for rehearing.

Id. at 765, 32 S.E.2d at 348 (citations omitted). As previously noted, either a motion for reconsideration to a deputy commissioner or an appeal to the full Industrial Commission must be filed within fifteen days of the award from which the party is seeking relief. N.C. Gen. Stat. § 97-85. Because plaintiff in the present case did not file his motion for reconsideration to the deputy commissioner within fifteen days of notice of the original opinion and award, under *Utilities Comm. v. R. R.*, the period allowed for plaintiff's appeal to the full Industrial Commission was not tolled during the time the deputy commissioner considered the motion. Also, an appeal does not lie from a motion to reconsider. *Id.* Therefore, it is uncontroverted that

plaintiff filed his appeal to the full Industrial Commission 132 days after the entry of the opinion and award of the deputy commissioner and thus failed to meet the fifteen day deadline under N.C. Gen. Stat. § 97-85. However, we recognize that the Industrial Commission has additional discretionary authority to consider an appeal.

In *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985), our Supreme Court stated:

> The Rules of Civil Procedure are not strictly applicable to proceedings under the Worker's Compensation Act, *see* N.C. R. Civ. P. 1, and we find no counterpart to Rule 60(b)(6) in the Act or the Rules of the Industrial Commission. We believe the Industrial Commission, nevertheless, has inherent power to set aside one of its former judgments. Although this power is analogous to that conferred upon the courts by N.C. R. Civ. P. 60(b)(6), it arises from a different source. We conclude the statutes creating the Industrial Commission have by implication clothed the Commission with the power to provide this remedy, a remedy related to that traditionally available at common law and equity and codified by Rule 60(b). This power inheres in the judicial power conferred on the Commission by the legislature and is necessary to enable the Commission to supervise its own judgments.

Id. at 137, 337 S.E.2d at 483 (footnote omitted). The Court went on to note that it had previously held that "the Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud," *id.* at 138, 337 S.E.2d at 483, *citing Neal v. Clary*, 259 N.C. 163, 130 S.E.2d 39 (1963), and "also includes the power to order a rehearing on the basis of newly discovered evidence," *id.*, *citing Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935). Rule 60 of the North Carolina Rules of Civil Procedure provides in part that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (1) [m]istake, inadvertence, surprise, or excusable neglect." N.C.R. Civ. P. Rule 60(b). In *Allen v. Food Lion*, 117 N.C. App. 289, 450 S.E.2d 571 (1994), *review withdrawn*, 339 N.C. 609, 457 S.E.2d 303 (1995), this Court held that the Industrial Commission has the inherent power and authority, in its discretion, to consider a motion for relief due to excusable neglect. *Id.*, *citing Hogan*, 315 N.C. 127, 337 S.E.2d 477.

Excusable neglect is not shown when a party fails to hire an attorney, even if he has never been involved in a lawsuit before and

lacks knowledge of when his case will come up for trial. *Gregg v. Steele*, 24 N.C. App. 310, 210 S.E.2d 434 (1974). Judge Eagles (now Chief Judge) expounded on this holding in *In re Hall*, 89 N.C App. 685, 366 S.E.2d 882, *review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988), stating:

> A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process. *See Gregg v. Steele*, 24 N.C. App. 310, 210 S.E.2d 434 (1974). Similarly, the fact that the movant claims he did not understand the case, or did not believe that the court would grant the relief requested in the complaint, has been held insufficient to show excusable neglect, even where the movant is not well educated. *See Boyd v. Marsh*, 47 N.C. App. 491, 267 S.E.2d 394 (1980).

Id. at 688, 366 S.E.2d at 885. We are thus bound by the holding that representation of self and failure to hire counsel, even when a party is not well educated or is unacquainted with the judicial process, does not constitute excusable neglect.

We note that plaintiff contends that the full Industrial Commission's consideration of plaintiff's appeal was proper because Industrial Commission Rule 801 states:

> The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.

Undeniably, the "rules" referred to in Rule 801 are the Industrial Commission Rules. The Commission is an administrative agency and has discretionary authority to waive its rules only where such action does not controvert the provisions of the statute. *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E.2d 837 (1982). Under Rule 801, the Industrial Commission does not have authority to excuse plaintiff from complying with N.C. Gen. Stat. § 97-85. Furthermore, its discretionary authority enunciated in *Hogan* does not allow the Industrial Commission to disregard the holdings of this Court as to what constitutes "excusable neglect."

Based on the foregoing, we hold that the Commission erred by concluding that excusable neglect exists in this case due to the fact that plaintiff represented himself before the deputy commissioner and was unacquainted with the complexities of the Workers' Compensation Act. Thus, the full Industrial Commission had no

authority to consider plaintiff's appeal. We therefore reverse their opinion and award, and remand this case for entry of an opinion and award upholding the opinion and award of Deputy Commissioner Hedrick filed 15 January 1997. Due to our holding, we need not reach defendant's additional assignment of error.

Reversed and remanded.

Judges LEWIS and MARTIN concur.

IN THE MATTER OF: HANNAH F. ELLIS, JUVENILE, AND ADDISON S. ELLIS, JUVENILE

No. COA98-1468

(Filed 19 October 1999)

Child Abuse and Neglect— death of older sibling—removal of other children not required

The trial court did not err in failing to find by clear and convincing evidence that the two juveniles are abused or neglected children based on the conflicting evidence concerning the death of their older sibling since N.C.G.S. § 7A-517 does not require the removal of all other children from the home, the trial court has discretion in determining the weight to be given such evidence because it is in a superior position to observe and determine the credibility of the witnesses, and the environment in which the two juveniles live has been closely monitored by DSS.

Appeal by petitioner Department of Social Services from judgment entered 5 October 1998 by Judge Larry J. Wilson in Lincoln County District Court. Heard in the Court of Appeals 17 August 1999.

Maria Chantae Ellis (Chantae) was born to Robert Ellis and his wife, Shirley M. Ellis, on 20 May 1991. During 1996, Chantae resided primarily in the home of her grandmother, Debra Maners, and was cared for by both her grandmother and her mother, Shirley Ellis. Chantae died on 2 April 1996 at Lincoln Medical Center, and her body was transferred to Wake Forest University School of Medicine for an autopsy. On 29 April 1996, the Lincoln County Department of Social

Services (DSS) received a report stating that Chantae died as a result of being given Verapamil, an adult blood pressure medication. DSS then filed a juvenile petition on 1 May 1996 in which it alleged that Hannah S. Ellis (Hannah), a younger sibling of Chantae, was an abused and neglected juvenile. Pursuant to a non-secure custody order, Hannah was placed in a foster home. However, at a hearing on 6 May 1996, the trial court determined that there was no evidence showing that Hannah would be in danger if she were allowed to live with Shirley Ellis pending a hearing on the merits of the juvenile petition, and the court allowed Hannah to return to her mother's home. The adjudicatory hearing was continued from time to time, and the trial court allowed a motion to add Debra Maners, the grandmother of the child, as a caregiver of Hannah. On 7 January 1997, the parties entered into a consent order whereby Hannah would continue to reside with her mother, with DSS to monitor the placement in the mother's home. On 23 June 1997, the terms of the consent order were continued in effect.

A female child, Addison Shea Ellis (Addison), was born to Shirley and Robert Ellis on 22 December 1997. Two months later, on 20 February 1998, DSS filed a juvenile petition alleging that Hannah and Addison were abused and neglected children because their parents had not properly cared for them and because of concerns about the suspicious nature of the death of their older sibling, Chantae. On 25 February 1998 DSS filed an amended juvenile petition containing an additional allegation that the Office of the Chief Medical Examiner in Chapel Hill had ruled that the death of Chantae was a homicide. Both Hannah and Addison were placed in the custody of DSS pursuant to a non-secure custody order.

At a hearing to determine the necessity of the non-secure custody order, the trial court determined that there was no need for the order and returned the children to the home of their parents. An adjudicatory hearing was held during the week of 6 July 1998. At the close of the evidence, the trial court found that the children were neither abused nor neglected, and dismissed the juvenile petitions. Petitioner appealed.

The Jonas Law Firm, P.L.L.C., by Rebecca J. Pomeroy and W. Todd Pomeroy, for Lincoln County Department of Social Services, petitioner appellant.

Lewis & Shuford, P.A., by Robert C. Lewis, for Robert and Shirley Ellis, respondent appellees.

HORTON, Judge.

Petitioner contends that the trial court erred in failing to find by clear and convincing evidence that the juveniles were neglected or abused. The heart of petitioner's argument is that the juveniles' sibling, Chantae, died on 2 April 1996 as an alleged result of Munchausen Syndrome by Proxy (MSP) perpetrated by either her mother, respondent Shirley M. Ellis, or her grandmother, respondent Debra Maners. MSP is defined as "a psychiatric disorder in which the parent causes or fabricates a child's illness." *In re Jessica Z.*, 135 Misc. 2d 520, 521, 515 N.Y.S.2d 370, 371 (Fam. Ct. 1987). Because of the psychiatric disorder, the parent or caretaker treats the child for illnesses the child does not have by fabricating symptoms and giving the child inappropriate medicine, or by engaging in actions which cause the child to become ill. Petitioner alleged that the surviving juveniles, Hannah and Addison, were at risk due to their continued medical problems, the failure of their parents to secure proper medical assistance for them, and the mother's continued misstatements to DSS.

Under our Juvenile Code, a neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . or who is not provided necessary medical care . . . or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of abuse or neglect or lives in a home where another juvenile has been subjected to . . . abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7A-517(21) (1995). An abused juvenile is defined as

> [a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means . . . .

N.C. Gen. Stat. § 7A-517(1) (Cum. Supp. 1997). Whether a child is neglected or abused is a conclusion of law. *See In Re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997). The trial court must make sufficient findings of fact to support its conclusions. *See In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). Furthermore, the evidence presented must be clear and convincing in

order to sustain such a finding. N.C. Gen. Stat. § 7A-635 (Cum. Supp. 1997).

Where the trial court sits without a jury, the facts found by the trial court are binding on appeal so long as they are supported by competent evidence. *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. In this case the trial court made the following findings of fact:

A. That there exist[s] clear and convincing evidence that [Maria Chantae] Ellis died of Verapamil toxicity. There is not clear and convincing evidence at whose hands she died.

B. That the family has expressed its lack of belief in the medical professionals, some of which are not from this community but are well regarded and well qualified. The court has no problem in accepting the conclusion of these professionals as to the death of Chantae Ellis. The court joins with the medical professionals in sharing a concern for the younger children, Hannah and Addison. Although, not necessarily for all the same reasons.

C. That judging from the impact on this family, it doesn't appear to this court that these two children are going to ever be able to remove themselves from the shadow of Chantae's death at least as far as the family's concerned.

D. That the law is clear regarding the fact that the existence of abuse of a sibling is the basis for a finding of neglect of other siblings. However, the crucial difference in this case is that all of the cases and references to the abuse of another sibling deal with the abuse of a sibling in the home where the other sibling is living. To the extent that anyone would find abuse of Chantae Mari[a], it is clear from the evidence that the abuse occurred in the home of Mr. and Mrs. Maners. There may be a dispute as to what extent Mrs. Ellis was involved in the care of Mari[a] Chantae Ellis. Uncontroverted though is that the child lived with Mr. and Mrs. Maners. The other children live with Mr. and Mrs. Ellis.

E. That based on the statements of the professionals and care givers for Hannah and Addison while they have had some illnesses and understandably for the last two years they have been monitored or watched, nevertheless, they appear to be much healthier children than [Maria Chantae].

F. That the court has concerns about the minor children and yet has to weigh those concerns about the children against the paramount rights of their parents to raise their children under their care and custody against evidence that they are failing to care for and protect their children. The court does not find clear and convincing evidence to warrant neglect against Hannah and Addison Ellis and fails to find neglect as to Hannah and Addison Ellis.

Neither party took exception to any of these findings. The trial court concluded as a matter of law that based on the findings of fact "there was insufficient evidence to support a finding of neglect or abuse as regards Hannah Ellis or Addison Ellis" and dismissed the juvenile petition. Petitioner contends that the trial court's conclusion was erroneous. After careful consideration, we affirm the judgment of the trial court.

While the situation in which one sibling is killed or seriously injured is extremely troubling both to the trial courts and this Court, we have held that

> [the statute] does not require the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse. Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence.

In re Nicholson & Ford, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). In *Nicholson*, we upheld the lower court's decision to find neglect as to one sibling while dismissing the DSS petition as to the other sibling. The trial court in *Nicholson* considered both the death of a prior child and the risk of like harm to the remaining children in light of their respective ages. *Id.* at 93, 440 S.E.2d at 853. In this case, the order entered by the trial court shows that the able trial judge carefully weighed all of the evidence in the case, and determined that it was insufficient to prove neglect by the applicable clear and convincing standard.

We are particularly mindful of the fact that the environment in which Hannah and Addison live has been closely monitored by DSS from May of 1996 until July of 1998. Thus, the trial court had ample evidence regarding the efforts made by both the parents and DSS to provide a safe and caring environment in which to raise Hannah and Addison. While we understand the petitioner's concern that the satisfactory care provided Hannah and Addison by their parents may have

resulted in part from the continued supervision by petitioner, there is no competent evidence that the care provided the children will become inadequate once the petitioner is no longer involved with this family.

Although the petitioner introduced evidence tending to show that either Chantae's mother or grandmother administered the drug which caused the child's death, other competent evidence supports a contrary finding. The evidence was in sharp conflict, and the trial court found that there "is not clear and convincing evidence at whose hands [Chantae] died." The trial court's findings reflect that it struggled to assess the evidence and determine the risk of future harm to these children, but found inadequate evidence to support a conclusion of abuse or neglect. We recognize that the trial court is in a superior position to observe the parties and witnesses, determine their credibility, and determine the weight to give the credible evidence. All parties were ably represented in this matter. We have carefully studied the arguments and contentions of counsel and carefully reviewed the voluminous transcript in this matter. Having done so, we cannot say as a matter of law that the trial court erred in failing to find by clear and convincing evidence that Hannah and Addison are abused or neglected children.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

PAMELA GAIL COINER, PLAINTIFF v. LONNIE CARLON CALES, DEFENDANT

No. COA98-1355

(Filed 19 October 1999)

1. Appeal and Error— appellate rules violated—affidavit not in record on appeal—no motion to take judicial notice—sanctions appropriate

In a case involving a motor vehicle collision in North Carolina with out-of-state parties, plaintiff's attorney is assessed sanctions for violating Rules 9(a) and 28(b) and (d) of the Rules of Appellate Procedure because: (1) the attorney inappropriately included and referred to an affidavit in his brief that was explicitly excluded from the appellate record by the trial court; (2) the

attorney did not contest the order settling the record in the appeal under Rule 11(c); (3) the appellate court cannot take judicial notice of matters excluded from the record; and (4) the attorney did not file a motion under Rule 37 for the appellate court to take judicial notice of the material.

2. Process and Service— motor vehicle collision—out-of-state parties—service complete when returned to Commissioner of Motor Vehicles

In a case involving a motor vehicle collision in North Carolina with out-of-state parties, the trial court erred in allowing defendant's motion to dismiss under Rule 12(b)(5) for insufficient service because the service on defendant was complete under N.C.G.S. § 1-105(2) on the date the package was returned to the Commissioner of Motor Vehicles since defendant had moved and the forwarding order had expired.

3. Process and Service— motor vehicle collision—out-of-state parties—address from accident report sufficient—due diligence not required

In a case involving a motor vehicle collision in North Carolina with out-of-state parties, plaintiff's use of defendant's three-year-old address from the accident report in an effort to locate defendant was sufficient because N.C.G.S. § 1-105 does not have a due diligence requirement.

Appeal by plaintiff from order entered 27 July 1998 by Judge Judson D. DeRamus in Iredell County Superior Court. Heard in the Court of Appeals 23 August 1999.

On 2 October 1994, Defendant Cales, a South Carolina resident, allegedly injured Plaintiff Coins, a West Virginia resident, in an automobile collision in Iredell County. At the scene of the accident, defendant gave investigating troopers as his address a Greenville, South Carolina address.

On 1 October 1997, one day before the expiration of the three-year statute of limitations, N.C. Gen. Stat. § 1-52, plaintiff, pursuant to the North Carolina nonresident motorist service statute, N.C. Gen. Stat. § 1-105, served the registered service agent for the Commissioner of the North Carolina Department of Motor Vehicles (the Commissioner) with a copy of the complaint and summons. On 2 October, the Commissioner accepted service. On 3 October, the

Commissioner forwarded the package by certified mail to Defendant Cales at his Greenville, South Carolina address.

On 15 October 1997, the certified mail package was returned to the Commissioner undelivered, marked by the post office as "undeliverable as addressed—forwarding order expired." Defendant's forwarding address had expired because defendant had moved at least 18 months prior to the forwarding of the package by the Commissioner. The Commissioner then forwarded the returned certified package to plaintiff's counsel with a letter stating that the package had been forwarded, but was later returned to the Commissioner "unclaimed."

On 24 October 1997, plaintiff's attorney filed an affidavit of service pursuant to G.S. 1-105. On 30 October, plaintiff's attorney mailed a letter to defendant's insurer notifying the company of service pursuant to G.S. 1-105. The letter also stated that under G.S. 1-105, because 15 October was the date that the package was returned to the Commissioner, service was deemed complete on that date.

On 2 December 1997, defendant's counsel filed a Rule 12b(5) motion to dismiss for insufficient service. On 20 July 1998, the trial judge granted the motion to dismiss. Plaintiff appeals.

Law Offices of Michael A. DeMayo, L.L.P., by Michael A. DeMayo and Frank F. Voler, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith and Andrew Ussery, for defendant-appellee.

EAGLES, Chief Judge.

[1] In her original appellate brief and in her reply brief, plaintiff-appellant inappropriately refers to an affidavit by the Postmaster of Greenville, South Carolina, which sets out Post Office procedure for forwarding unclaimed packages. The trial court explicitly excluded this document from the appellate record in its 31 October 1998 Order Settling the Record on Appeal. Plaintiff did not assign error on appeal based on the trial court's exclusion of the affidavit.

Defendant moved for sanctions and/or dismissal of plaintiff's appeal on grounds that by disobeying the order of the trial court, plaintiff violated the North Carolina Rules of Appellate Procedure. We grant defendant's motion for sanctions, but decline to dismiss the appeal.

N.C. R. App. P. 11(c) provides that absent agreement by the parties, one or both of the parties may request that the trial judge settle the record on appeal. This Court has held that where the trial court refuses to include material in its order, the party whose material has been excluded may challenge the ruling on appeal. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 267, 468 S.E.2d 856, 857 (1996) (*citing Craver v. Craver*, 298 N.C. 231, 236-237, 258 S.E.2d 357, 361-62 (1979)). Here, plaintiff did not contest the order settling the record in her appeal. By including the excluded affidavit and referring to it in her briefs, plaintiff has violated our Rules of Appellate Procedure.

However, plaintiff argues that the inclusion of the affidavit is not prejudicial to defendant since any party may request that any court take judicial notice of evidence at any stage of a case. Plaintiff argues that she attached the affidavit in order to provide the court with the necessary information to take judicial notice of the postal regulations.

We first note plaintiff's inconsistent statements on the issue of judicial notice. While her reply brief states that she had in fact "requested that the [trial] Court take judicial notice of Postal Regulations," in her response to defendant's motion for dismissal/sanctions, plaintiff states that "the trial court . . . did not consider the issue of taking judicial notice of the Regulations." Yet we know from the record that the trial court both considered *and refused* plaintiff's request because the order settling the record explicitly excluded the material at issue.

We held in *Horton* that a request that this Court take judicial notice of certain material must be made by motion pursuant to N.C. R. App. P. 37. *Horton* at 268, 468 S.E.2d at 858 (*citing Morris v. Morris*, 92 N.C. App 359, 361, 374 S.E.2d 441, 442 (1988)). Yet no motion was filed here. But while a party can ask this Court to take judicial notice of matters outside the record, the Court may not take notice of matters *excluded* from the record, since the order settling the record on appeal is final and cannot be reviewed on appeal except on motion for certiorari. *State v. Johnson*, 298 N.C. 355, 372, 259 S.E.2d 752, 763 (1976). Again, no motion was filed. Any improper reference to non-record material in appellate briefs or appendices violates N.C. R. App. P. 9(a) and 28(b), (d). *Horton* at 268, 468 S.E.2d at 858. Plaintiff's attachment of the excluded affidavit to her brief violates the North Carolina Rules of Appellate Procedure.

Plaintiff argues that even if error, the inclusion of the excluded material was not sufficiently "gross" and "wanton" a violation to warrant dismissal. We agree, but given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with Rules 9, 28, and 37, we impose sanctions against plaintiff's attorneys in the form of costs associated with this appeal. N.C. R. App. P. 25, 34; *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). The costs of this appeal shall be taxed personally against plaintiff's attorneys.

[2] We next consider whether the trial court erred in granting defendant-appellee's motion to dismiss under Rule 12b(5). We hold that service on defendant was complete under N.C. Gen. Stat. § 1-105(2) and reverse the order of the trial court.

G.S. 1-105 provides that constructive service on the Commissioner is sufficient to gain personal jurisdiction over a nonresident defendant in an action arising out of an auto accident which occurred in North Carolina. Assuming that the defendant has neither received actual notice nor refused service, G.S. 1-105(2) provides that service may nevertheless be complete if

> the certified or registered [package served on the Commissioner] is not delivered to the defendant [(1)] because it is unclaimed, or [(2)] because he has removed himself from his last known address and has left no forwarding address, or [(3)] because the defendant] is unknown at his last known address, service on the defendant shall be deemed completed on the date that the . . . letter is returned to the plaintiff or [the Commissioner].

N.C. Gen. Stat. § 1-105.

Because defendant relocated prior to the delivery of the forwarded package and his forwarding address had expired, defendant argues that a strict construction of G.S. 1-105 is appropriate. *Hassell v. Wilson*, 301 N.C. 307, 314, 272 S.E.2d 77, 82 (1980) (requiring strict construction of constructive service statutes); *Humphrey v. Sinnott*, 84 N.C. App. 263, 267, 352 S.E.2d 443, 446 (1987) (G.S. 1-105(2) is "in derogation of the common law" and must be strictly construed). Accordingly, defendant argues that he was improperly denied an "opportunity" to claim the forwarded package. Absent this opportunity, defendant argues that the package could not be "unclaimed." Defendant therefore contends that service was incomplete under the first of the three tests stated in G.S. 1-105(2).

The plain language of G.S. 1-105(2) does not expressly predicate the classification of a forwarded package as "unclaimed" on nonresident defendants' first being afforded an opportunity to claim it. Strict construction precludes this Court from adding this condition precedent to the statute. We will not expand the rights of nonresident tortfeasors without express statutory authority.

G.S. 1-105 merely provides nonresident defendants with "*sufficient assurance* of actual notice" to meet "minimum" due process and personal jurisdiction requirements. *Humphrey* at 268, 352 S.E.2d at 446-47 (emphasis added). To *guarantee* defendant the opportunity he seeks would undermine the purpose of constructive service under G.S. 1-105: to enable suits against nonresident motorists who cause in-state accidents but are beyond the jurisdiction of our courts when suit is filed. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 391, 85 S.E.2d 319, 320 (1955). *See also* G. Gray Wilson, North Carolina Civil Procedure § 4-27 (2d ed. 1995) (*citing Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th cir. 1961)).

Accordingly, this Court has held that forwarded mail which was returned undelivered to the Commissioner was "unclaimed," and service was therefore proper under G.S. 1-105(2), even if the mail "is not delivered . . . because [defendant] has moved," *Humphrey*, 84 N.C. App. at 268, 352 S.E.2d at 446, or if the mail is returned to the Commissioner marked "moved, not forwardable." *Ridge v. Wright*, 35 N.C. App. 643, 645, 242 S.E.2d 389, 391 (1978). Here, defendant admits that the package was undelivered because he had moved. He also admits that "the certified mail was undelivered due to a notation on the envelope stating that the forwarding order had expired." In light of these admissions, we conclude that the package was "not forwardable," *Ridge*, 35 N.C. App. 643, 242 S.E.2d 389, and was "unclaimed" under G.S. 1-105(2). Accordingly, we hold that service was complete on 15 October 1998, the date the package was returned to the Commissioner.

[3] Finally, defendant argues that by using three-year-old address information in the accident report to locate defendant, plaintiff failed to meet his duty to exercise due diligence in locating defendant for purposes of service (for example, by use of directory assistance or query to defendant's insurance carrier). *Fountain v. Patrick*, 44 N.C. App. 584, 586-87, 261 S.E.2d 514, 516 (1980). However, unlike service by publication, there appears to be no due diligence requirement under G.S. 1-105. Wilson, *supra*, at § 4-27 (*citing Kennedy v.*

Starr, 62 N.C. App. 182, 302 S.E.2d 497 (1983)); *but see Id.* at 187-190, 302 S.E.2d at 500-502 (Whichard, concurring). For complete service under G.S. 1-105, all that is required is "sufficient compliance" with the statute. *Humphrey*, 84 N.C. App. at 267, 352 S.E.2d at 446-47. We conclude that using the address on the accident report was sufficient. An additional "due diligence" requirement imposes a new condition precedent to the operation of G.S. 1-105 which is not contemplated by the plain language of the statute.

Because we conclude that plaintiff complied with G.S. 1-105, and for that reason reverse the trial court's order of dismissal, we need not discuss defendant's remaining challenges. However, given plaintiff's noncompliance with the Rules of Appellate Procedure, we tax the costs of this appeal personally against plaintiff's attorneys.

Reversed and remanded.

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. TAUREAN WHITE, DEFENDANT

No. COA98-1315

(Filed 19 October 1999)

Evidence— prior bad act—first-degree rape—sexual assault—not sufficiently similar—only shows propensity

The trial court erred in a first-degree rape and non-felonious breaking or entering case by allowing evidence under Rule 404(b) of an alleged prior sexual assault because the facts of the two incidents are not sufficiently similar and the evidence only shows the propensity of defendant to commit sexual acts against young female children.

Appeal by defendant from judgments entered 18 December 1997 by Judge J. B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 September 1999.

In May 1997, thirteen-year-old Taurean White (defendant) lived with his parents at 4101 Willow Oak Road in Raleigh, North Carolina. Nine-year-old Rema Sider lived with her sixteen-year-old brother

Mikey and their mother two houses down the street from defendant. From 1993 to 1997, Mikey and defendant were friends and often visited each other in their respective family homes.

On 12 May 1997 Rema arrived home from school around 3:55 p.m. None of her family was home when she arrived. Rema went upstairs to get a drink of water, and on her way back downstairs, defendant "popped out" in front of her with a knife in his hand. Rema thought defendant was playing around, and she told him to leave. Defendant refused and forced her to pull her pants down. Defendant then "put his penis in [her] hole." Defendant had the knife in his hand during the entire incident. At one point, she tried to run away, but defendant stopped her. When defendant left, he told Rema not to open the door for anybody or tell anybody what happened. Defendant returned and heard Rema talking to her mother over the telephone; he told Rema to tell her mother that he came over "to borrow some CD's," and threatened to kill her if she told anyone about what just happened.

Ms. Sider was preparing to leave to pick up Rema, when Rema called her on the telephone. Rema was crying and told Ms. Sider what had happened. Rema also told her that defendant had taken some cigarettes from their house that day. Ms. Sider called 911 before going home. When she arrived at her home, a neighbor, who was a deputy sheriff, was at the house comforting Rema, who was upset and crying. At that time Rema again told Ms. Sider what defendant had done.

At trial on direct examination, Ms. Sider made statements of her personal belief in the truth of Rema's story. The court sustained defense counsel's objection to the first statement ("[Rema has] never really lied about this like this[]"), but defense counsel did not object to the other two statements: "I mean, this is nothing. I know when the child lie[s]. I raise[d] two boys and I know"; "I mean, this is nothing simple she can lie. And I know I believe her this is the truth."

Dr. Susan Lazurik, a graduate of UNC Medical School, who works for UNC Hospitals in medicine and pediatrics, testified that she examined Rema on 12 May 1997; that Rema denied any vaginal penetration; that her examination revealed no medical evidence of penetration; and that she found Rema to be a credible person.

Defendant testified on his own behalf. He maintained he never left his house on 12 May 1997. Defendant admitted he had been suspended from school because a teacher said defendant assaulted him, but he denied committing an assault. Defendant denied the testimony

of Rema, Ms. Sider, and other witnesses who claim he sexually assaulted Rema in May of 1997. On cross-examination, defendant also denied touching any part of his body to the four-year-old foster child staying with Betty Sorto, his father's aunt, in Wake Forest during September of 1997.

In rebuttal, the State presented the following evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence: Betty Sue Sorto lives in Wake Forest. Defendant's father is her nephew. In September 1997, following the alleged incident with Rema Sider, defendant and his father were living in Ms. Sorto's camper, close to her house, on the weekends. On the night of 28 September 1997, defendant came to her house to watch television. About 10:00 p.m., Ms. Sorto put her foster child Dominique to bed and closed her bedroom door. About 10:45 p.m., defendant asked for permission to go to the bathroom; he was gone about 20-25 minutes. Ms. Sorto asked defendant if Dominique had been sleeping and defendant replied that she had not. The next morning Ms. Sorto asked Dominique what defendant was doing in her room and Dominique said, "he was licking my pee pee." Dominique testified that defendant came into her room and "licked [her] private."

Defendant was convicted of first-degree rape and non-felonious breaking or entering. An active sentence of not less than 192 months nor more than 240 months on the charge of first-degree rape was imposed on the fourteen-year-old defendant. The trial court continued judgment on the charge of non-felonious breaking or entering. Defendant appealed to this Court, assigning error.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. Harris, for the State.

Cheshire, Parker, Schneider, Wells & Bryan, by Joseph B. Cheshire, V, and Bradley J. Bannon, for defendant appellant.

HORTON, Judge.

Defendant argues that the allegation of sexual assault against Dominique was not admissible under Rule 404(b) of the North Carolina Rules of Evidence. The Rule provides, in pertinent part:

> 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, prepara-

> tion, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992 and Cum. Supp. 1998). If the proffered evidence is admissible under Rule 404(b), the trial court must then consider whether the probative value of the evidence outweighs its prejudicial effects. Our Supreme Court has held that "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). For proper admission of those acts which have not resulted in a criminal conviction, the law requires the State to produce "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." *State v. Stager*, 329 N.C. 278, 303-04, 406 S.E.2d 876, 890 (1991).

Here, the proximity in time of the two incidents is not in issue. Defendant contends, however, that the 12 May 1997 incident involving Rema and the 28 September 1997 incident involving Dominique were not sufficiently similar to allow admission of the 28 September 1997 incident under Rule 404(b). With regard to the similarity of the two incidents, the trial court found that

> in comparing the evidence concerning the alleged rape on May 12, 1997 and the alleged incident at Ms. Sorto's house on September 28th, 1997 finds that they are similar in nature; that it involves this defendant and it involves a nine-year[-]old young female on May 12th, 1997, and a four-year[-]old young female on September 28th, 1997; that both of these alleged instances occurred in the victim's home. The victim home of Rema Sider and the victim home, the child Dominique's home, foster home, with Ms. Sorto; that the incident on September 28th occurred just little over four months from the incident which occurred on May 12, 1997; that in both cases, the victims were young, helpless female children one age 9 and one age 4.
>
> That the evidence tends to show, what it does show is for jury to say and determine that both instances involve immoral and unlawful sexual conduct by the defendant with two minor females, young females.

The court does find as a fact that this evidence is clearly admissible under 404B to show proof of motive to commit a sexual offense, the opportunity to take advantage of a minor child and to commit an offense, the intent—the intent of the defendant to form this sexual conduct act with the nine-year[-]old on May—May and the four-year[-]old in September, to perform—and for these reasons the court finds that this evidence should be admissible under 404B.

The court does further find that this is evidence that's admissible on behalf of the state to challenge the credibility of the defendant who voluntarily testified and then denied any wrongful acts and denied any of the wrongful acts that occurred on September 28, 1997 as well as May 12, 1997.

. . . And the court has weighed this evidence under Rule 403 and finds that the probative value is not substantially outweighed by the danger of unfair prejudice.

We agree with defendant that the facts of the two incidents are not sufficiently similar to allow the admission of the incident involving Dominique. Except for the fact that both incidents involve young females who were allegedly assaulted in their own homes, there are few points of similarity. In the case involving Rema Sider, defendant is accused of breaking into her home during the daytime at a time when she was alone; and having forcible vaginal intercourse with her by means of a weapon, threats, and his superior physical strength. There was also evidence that the sexual act included penetration; the victim, Rema Sider, who was nine years old at the time, was upset and crying hysterically in the aftermath of the incident. In the later incident involving Dominique, the act allegedly occurred at night, at a time the four-year-old child's caretaker was present in the home; defendant was in the child's home by permission, watching television; there was no evidence of the use of a deadly weapon or threats to Dominique; the sexual act alleged was cunnilingus; the child did not mention the act after it occurred, and was apparently laughing and happy when her caretaker saw her after the alleged incident. Our Supreme Court has defined "similar" to mean " ' "some unusual facts present in both crimes or particularly similar acts which would indicate the same person committed both." ' " *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91. Here, we cannot say that there are unusual features of the two incidents which point to defendant's identity as the perpetrator and allow the admission of the second incident in evidence

pursuant to Rule 404(b). "When the features of the . . . act [offered under Rule 404(b)] are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). In the case before us, the admission of the evidence relating to Dominique tends only to show the propensity of the defendant to commit sexual acts against young female children, a purpose for which the evidence cannot be admitted. The prejudicial effect of the evidence is obvious; our Supreme Court has explained that

> [p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner is guilty, and thus effectually to strip him of the presumption of innocence.

State v. Jones, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988). The evidence relating to Dominique was improperly admitted under Rule 404(b), and its admission requires that defendant be granted a new trial. Since the other errors alleged by defendant are not likely to recur, we need not address them.

New trial.

Judges GREENE and TIMMONS-GOODSON concur.

IN THE MATTER OF THE WILL OF KENNETH MASON (JACK) KRANTZ, JR., DECEASED

No. COA98-1568

(Filed 19 October 1999)

Wills— nuncupative—summary judgment improper

The trial court erred in granting summary judgment in favor of the caveator in a proceeding involving the probate in solemn form and caveat of decedent's nuncupative will under N.C.G.S. § 31-3.5 because there are genuine issues of material fact: (1) whether decedent, at the time he dictated his desired dis-

position of his personal property, reasonably believed he was in the last stage of a chronic disease; and (2) whether he was indeed in the last stage of a chronic disease.

Appeal by duly appointed executor and propounder Plato S. Wilson from judgment filed 10 November 1998 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 21 September 1999.

Wyatt Early Harris & Wheeler, L.L.P., by William E. Wheeler, for propounder-appellant.

Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson and Elizabeth M. Koonce, for caveator-appellee.

GREENE, Judge.

Plato Wilson, Propounder-Appellant (Propounder), as executor for the estate of Kenneth Mason (Jack) Krantz, Jr. (Decedent), appeals the granting of summary judgment for Roger Krantz, Caveator-Appellee (Caveator), in a proceeding involving the probate in solemn form and caveat of Decedent's nuncupative will.

The facts reveal Decedent died at his residence in High Point, North Carolina, on Sunday, 1 June 1997, from cardiac arrest. Decedent was divorced, had no children, and had no close living relatives. Caveator, Decedent's cousin, is Decedent's closest living relative and only living heir-at-law. At the time of his death, Decedent was in poor health and suffered from severe hypertensive disease (high blood pressure), pernicious anemia, and alcoholism for many years. Decedent's decomposed body was not discovered until Wednesday, 4 June 1997, three days after his death.

Gordon B. Arnold, M.D. (Dr. Arnold), an internal medicine practitioner, had been Decedent's doctor since 1982. He treated Decedent for several infirmities, most notably high blood pressure. On 23 May 1997 Decedent visited Dr. Arnold at his office. During this visit, Dr. Arnold did not believe Decedent was suffering from a terminal condition, was in a life threatening condition, required hospitalization or nursing care, or was in imminent danger of death. In retrospect of Decedent's death, however, "something serious was culminating with Decedent," because his blood pressure was higher than on his previous visit, he was fatigued, he had insomnia, and he had lost weight since his last visit. Decedent "might have lived another five years with

his condition," if he was compliant with his treatment, but he "was at the peak, probably, of a deterioration in his cardiac status" on the 23 May 1997 visit.

Two of Decedent's closest friends were Propounder and Harriet (Hacky) Pitts. On Saturday, 31 May 1997, Decedent requested Propounder and Hacky to come to his home that evening for dinner, socializing, and to look over some of the decorating work Decedent had prepared for Propounder's cottage in the mountains. Propounder had no idea or impression Decedent's death was imminent on this day, but Decedent told Hacky that he was sick, and he was "just sitting . . . [there] waiting to die." Decedent was, however, able to drive to the grocery store earlier that day and to cook frozen lasagna for his guests that evening.

After looking at Decedent's decorative accessories for Propounder's cottage, gossiping over a glass of wine, and then eating dinner, Decedent, Hacky, and Propounder went into the living room where Decedent told Hacky and Propounder, "I want to dictate—give you my oral will." Propounder and Hacky were both taken aback by Decedent's statement. Eventually, after finding pens and paper, Propounder and Hacky began taking contemporaneous notes of Decedent's wishes for the disposition of his personal property. Propounder took more detailed notes of Decedent's dictation than Hacky. The dictation took about forty-five minutes. After Propounder had written Decedent's statements, Propounder and Hacky signed the bottom of Propounder's notes. Decedent did not sign these notes, and none of the notes are in his handwriting.

Hacky left shortly after she and Propounder witnessed Decedent's recitation because she had a previous engagement. Propounder congratulated Decedent for doing something verbally with his estate, and he and Decedent spent the rest of the evening talking about Decedent going to the Mountains to install the accessories for Propounder's cottage. After leaving Decedent's home that evening, Propounder took the handwritten notes home and placed them on his desk. The next day, before going to the mountains, Propounder moved the notes from his work area to his "to do" pile of papers on his desk. Following the evening of 31 May 1997, Propounder did not check on Decedent. Hacky spoke with Decedent by telephone the following morning, 1 June 1997. During this conversation, Decedent told Hacky he had driven to Harris Teeter to buy some groceries earlier that day. Decedent said he was embarrassed, because he had gotten dizzy while shopping and had to leave the

store and a cart full of groceries to go sit in his car before he could drive home. During this conversation, Decedent also told Hacky how much he appreciated her and Propounder coming over the night before and asked her if she would take care of his dog when he died. Hacky said "of course" she would.

Hacky then went out of town to visit a sick friend of hers and did not speak to Decedent after that telephone conversation. On her return journey from her sick friend's home, Hacky tried to reach Decedent by telephone several times but could not get any answer. Still worried about Decedent, Hacky had her son accompany her to go and check on him on the afternoon of Wednesday, 4 June 1997. When Hacky and her son arrived at Decedent's house, they saw Decedent's body on the floor of his living room with his dog beside him barking. To report what they had seen, they made a telephone call to the High Point Police Department and it was the police who broke into Decedent's house to discover his decomposing body.

Subsequent to Decedent's death, Propounder submitted an affidavit to the clerk of court seeking to probate the purported will of Decedent. On 11 June 1998, Caveator filed a Caveat challenging the validity of the purported will.

The dispositive issue is whether Decedent was in his "last sickness" at the time he dictated his desired disposition of his personal property.

Section 31-3.5 of the North Carolina General Statutes provides the basis for creating a valid nuncupative will. This statute provides:

> A nuncupative will is a will
>
> (1) Made orally by a person who is in his *last sickness* or in imminent peril of death and who does not survive such sickness or imminent peril, and
>
> (2) Declared to be his will before two competent witnesses simultaneously present at the making thereof and specially requested by him to bear witness thereto.

N.C.G.S. § 31-3.5 (1984) (emphasis added).

Propounder argues Decedent made the statements concerning how to distribute his estate in his "last sickness."[1]

1. Propounder makes no contention that Decedent's oral statements were made while he was "in imminent peril of death" and we need not, therefore, address that matter in this appeal.

Our legislature provides no statutory definition of "last sickness." It is well accepted, however, that "last sickness" has reference to the sickness or illness that eventually results in the decedent's death. 2 William J. Bowe & Douglas H. Parker, *Page on the Law of Wills* § 20.15, at 303 (1960). It is equally well accepted that "last sickness" "does not include early or intermediate stages of a chronic disease, although it is the disease of which testator eventually dies." *Id.* "It is therefore an acute disease, or the last stage of a chronic disease in which it assumes the form in which death directly ensues, that is meant by a 'last illness,' and not the entire duration of progressive disease which ultimately results in death." *Id.* at 304. Furthermore, the testator must reasonably believe that he suffers from an acute disease which results in his death or is in the last stages of a chronic disease which results in his death. *Id.* at 305. There is no bright line for determining whether the testator is in the *last stage* of a chronic disease, but the term generally has reference to whether death is "about to occur" or is "imminent." *See Kennedy v. Douglas*, 151 N.C. 336, 339, 66 S.E. 216, 217 (1909) (testator not in "last sickness" when she lived nine months after giving oral instructions for the disposition of her property).

Whether a person was in his "last sickness" is generally a question of fact for the jury and not subject to summary judgment.[2] 1 Norman A. Wiggins, *Wills and Administration of Estates in North Carolina* § 30, at 50 (3d ed. 1993); *In re Will of Belvin*, 261 N.C. 275, 277, 134 S.E.2d 225, 226 (1964) (issues raised in caveat proceeding to be decided by jury).

In this case, Decedent died as a result of a chronic disease. There are, however, genuine issues of fact as to whether Decedent reasonably believed he was in the last stage of a chronic disease and whether Decedent was indeed in the last stage of a chronic disease.[3] Accordingly, summary judgment was not appropriate and therefore must be reversed and remanded for trial. *See Ragland v. Moore*, 299

2. Indeed there is some argument, an issue we need not address in this appeal, that summary judgment is never appropriate in a proceeding challenging the validity of a will. *See Burney v. Holloway*, 225 N.C. 633, 636, 36 S.E.2d 5, 7 (1945) (caveat proceeding not subject to directed verdict at the instance of any of the parties). *But cf. In re Will of Edgerton*, 29 N.C. App. 60, 62, 223 S.E.2d 524, 526, (summary judgment proper to raise issue of whether caveator had standing to contest the will), *disc. review denied*, 290 N.C. 308, 225 S.E.2d 832 (1976).

3. We do not intend to suggest that multiple issues must be submitted to the jury. Indeed the single issue for the jury is whether Decedent was in his "last sickness" at the time he orally expressed his wishes for the disposition of his personal property.

N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (a trial court does not resolve issues of fact and must deny any motion for summary judgment if there is a genuine issue as to any material fact).

Reversed and remanded.

Judges WALKER and HUNTER concur.

BRENDA PENLAND AND DAVID PENLAND v. ANGELA AUSTIN HARRIS

No. COA98-1528

(Filed 19 October 1999)

1. **Child Support, Custody, and Visitation— custody sought by grandparent—constitutionally protected parental interest**

In a case involving an attempt by a grandmother and her husband to gain custody of her daughter's minor child, the trial court did not err in granting defendant-daughter's motion to dismiss because: (1) plaintiff-grandmother's dissatisfaction with defendant's husband and the couple's residence does not allege conduct so egregious as to be inconsistent with defendant's parental duties and responsibilities; (2) plaintiffs' assertion they would be able to afford the minor child a higher standard of living is not relevant to the issue of defendant's constitutionally protected parental interest; and (3) plaintiffs' concerns as to defendant's decisions regarding the child's associations, education and religious upbringing are squarely within parental rights and responsibilities.

2. **Appeal and Error— appealability—denial of motion to amend complaint—attached to appendix—not in record**

In a case involving an attempt by a grandmother and her husband to gain custody of her daughter's minor child, plaintiffs cannot appeal the denial of their motion to amend the complaint prior to the hearing of defendant's motion to dismiss because although plaintiffs have attempted to place the motion to amend as an appendix to their brief, Rule 9 limits appellate review to the record on appeal.

3. Appeal and Error— appealability—settling the record—certiorari

In a case involving an attempt by a grandmother and her husband to gain custody of her daughter's minor child, plaintiffs cannot appeal from the trial court's settling of the record on appeal because review of that order, if at all, may only be had by means of certiorari.

Appeal by plaintiffs from order entered 25 June 1998 by Judge Samuel A. Cathey in Iredell County District Court. Heard in the Court of Appeals 20 September 1999.

Parker, Setzer & Howes, L.L.P., by David P. Parker, for plaintiff-appellants.

Pope, McMillan, Kutteh, Simon & Baker, P.A., by Pamela H. Simon, for defendant-appellee.

MARTIN, Judge.

Plaintiffs filed this action on 20 April 1998 seeking joint custody of defendant's minor child. In their complaint, plaintiffs alleged that plaintiff, Brenda Penland, is defendant's mother and the natural maternal grandmother of the minor child; plaintiff David Penland is Brenda Penland's husband. Plaintiffs alleged that the minor child was born to defendant out of wedlock on 15 July 1992 and that the child's natural father is not named on the birth certificate. Plaintiffs alleged that defendant and the minor child lived in plaintiffs' home from the child's birth until 3 April 1998, when defendant married Andrew Harris and took the child to live with her in Harris' apartment. During the time when the minor child lived with plaintiffs, they alleged that they assumed parental roles and provided the child with food, health care, private schooling, and an overall healthy and stable environment while defendant earned a nursing degree. Since defendant's marriage to Harris, however, plaintiffs have been allowed only very limited contact and visitation with the minor child, to the detriment of the child's well being. Plaintiffs asserted that it was in the best interests of the child that they be awarded joint custody and "that her care, custody, and control be with the Plaintiffs at least 50% of the time." Plaintiffs also sought an *ex parte* order awarding them custody pending a hearing on the merits.

Defendant's motion to dismiss the complaint was granted by the trial court. Plaintiffs appeal.

There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child. Plaintiffs do not specify under which statute they proceed, however, it is clear that plaintiffs have no right to proceed under any of these statutes. Accordingly, we affirm the order dismissing their complaint.

G.S. § 50-13.2(b1) permits a grandparent to intervene in an ongoing custody dispute and request visitation with their grandchild. *Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998). G.S. § 50-13.5(j) permits a grandparent to petition for custody or visitation due to changed circumstances in those actions where custody has previously been determined. *Id.* at 797, 509 S.E.2d at 229, citing *McIntyre v. McIntyre*, 341 N.C. 629, 633, 461 S.E.2d 745, 748-49 (1995). Because neither situation contemplated by these statutes is present in this case, they are inapplicable to establish plaintiffs' standing to maintain this action.

A third statute, G.S. § 50-13.2A, permits a biological grandparent to institute an action for visitation rights where the minor child has been adopted by a step-parent or relative of the child, and a substantial relationship exists between the grandparents and the child. There is no allegation in the complaint before us in this case that Andrew Harris has adopted the minor child and, therefore, plaintiffs may not proceed under this statute.

Finally, G.S. § 50-13.1(a) permits "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child [to] institute an action or proceeding for the custody of such child, as hereinafter provided." In *McIntyre*, our Supreme Court held this statute does not grant grandparents standing to sue for visitation when no custody proceeding is ongoing and the minor's family is intact. *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750. In *Fisher v. Gaydon*, 124 N.C. App. 442, 477 S.E.2d 251 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997), this Court denied standing to grandparents to maintain an action for visitation where the grandchildren lived with their single mother, holding "that a single parent living with his or her child is an 'intact family' within the meaning of *McIntyre*." *Id.* at 445, 477 S.E.2d at 253. Similarly, we believe the term "intact family" should certainly include a married natural parent, step-parent and child living in a single residence.

More recently, in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), our Supreme Court, interpreting G.S. § 50-13.2(a), considered the rights of natural parents, both biological and adoptive, against the

rights of third parties. The Court held that a natural parent has a constitutionally protected paramount right in the care, custody, and control of his or her children which rises to the level of a liberty interest and is protected by the Due Process Clause of the Fourteenth Amendment. *Id.* The right is not absolute, however, and there is a corollary obligation on the part of the parent to care for his or her child and act in the child's best interest. Where a parent has acted in a manner inconsistent with his or her constitutionally protected custody right, that right must give way to a "best interest of the child" analysis under G.S. § 50-13.2(a). *Id.*

There is no bright line rule to determine what conduct on the part of a natural parent will result in a forfeiture of the constitutionally protected status and trigger application of a "best interest" analysis. Unfitness, abandonment, and neglect are certainly so egregious that a parent who engages in such behavior forfeits constitutional protections. *Price*, 346 N.C. at 79, 484 S.E.2d at 534, *McIntyre*, 341 N.C. at 632, 461 S.E.2d at 748, *Hill*, 131 N.C. App. at 796, 509 S.E.2d at 228. On the other hand, raising a child out of wedlock does not constitute such behavior. *Peterson v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). The fact that the third party is able to offer the minor child a higher standard of living does not overcome a natural parent's paramount interest in the custody and control of the child. *Id.* And, parental control over a child's associations is not behavior inconsistent with parental responsibilities; it is instead a fundamental part of the parent's right to custody. *Hill*, 131 N.C. App. at 799, 509 S.E.2d at 230, citing *Petersen*, 337 N.C. at 403, 445 S.E.2d at 904-05.

[1] We read *Price* as broadening the rule of *McIntyre* by requiring that a third party, including a grandparent, who seeks custody of a minor child as against the child's natural parent, must allege facts sufficient to show that the natural parent has acted in a manner inconsistent with his or her constitutionally protected status. "If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

The complaint in the present case falls far short of that requirement. Plaintiffs allege virtually no facts which would support a finding that defendant has engaged in conduct inconsistent with her parental responsibility. Plaintiffs allege their disapproval of defendant's choice of spouse, place of residence, and babysitters, and their

fear that defendant will not permit the child to attend the school and church which plaintiffs desire that she attend. The primary focus of the complaint is upon plaintiffs' loving relationship with the minor child and their ability to provide her with a higher standard of living if she were in their custody.

Plaintiffs' dissatisfaction with defendant's husband and the couple's residence does not allege conduct so egregious as to be inconsistent with defendant's parental duties and responsibilities. Their assertion that they would be able to afford the minor child a higher standard of living is not relevant to the issue of defendant's constitutionally protected parental interest. Nor are plaintiffs' concerns as to defendant's decisions regarding which school and church the child will attend; decisions regarding the child's associations, education and religious upbringing are squarely within parental rights and responsibilities. *See, e.g., Hill*, 131 N.C. App. at 799, 509 S.E.2d at 230, citing *Peterson*, 337 N.C. at 403, 445 S.E.2d at 904-05 (finding that control over a child's associations is one of the penumbra of constitutionally protected parental rights). Thus, we hold the complaint in the present case insufficient to state a claim under G.S. § 50-13.1(a) on behalf of plaintiffs for custody of the minor child of defendant.

[2] In their brief, plaintiffs assert that they moved to amend their complaint prior to the hearing of defendant's motion to dismiss and they have assigned error to the denial of the motion. However, neither plaintiffs' motion to amend nor any ruling by the court with respect thereto are contained in the record on appeal, having been excluded by the trial court's order settling the record on appeal. N.C.R. App. P. 9(a)(1)j requires that the record contain "copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned . . . ." Although plaintiffs have attempted to place the motion to amend before this Court by attaching it as an appendix to their brief, Rule 9 limits our review to the record on appeal; matters argued in the brief but not contained in the record will not be considered. *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 484 S.E.2d 435 (1997).

[3] Plaintiffs also assign error to the rulings of the trial court settling the record on appeal. A trial court's order settling the record on appeal is final and will not be reviewed on appeal. *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). Review of an order settling the record on appeal is available, if at all, only by way of *certiorari*. *Id.*

Plaintiffs have not applied for *certiorari* and we decline to consider their assignments of error directed to the trial court's order settling the record on appeal.

The order of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

JOE CAMERON NAPIER, PLAINTIFF v. DOTTIE SOUTHERN NAPIER, DEFENDANT

No. COA98-1583

(Filed 19 October 1999)

1. **Divorce— alimony—separation agreement—general release language of all marital rights—express release required to waive alimony**

The trial court erred in dismissing defendant-wife's counterclaim for alimony asserted in response to a complaint for absolute divorce because the language in the separation agreement providing for a general release of all claims and obligations or the settling of marital rights does not constitute an express release or settlement of alimony within the meaning of N.C.G.S. § 50-16.6 since it does not specifically, particularly, or explicitly refer to the waiver, release, or settlement of alimony or use some other similar language having specific reference to the waiver, release, or settlement of a spouse's support rights.

2. **Divorce— alimony—separation agreement—general release language of all marital rights—not a waiver of alimony—agreement restricted to equitable distribution and spousal rights not included**

The trial court erred in dismissing defendant-wife's counterclaim for alimony asserted in response to a complaint for absolute divorce because the general release language in the separation agreement does not include a waiver of alimony since its reference to N.C.G.S. § 50-20(d) reveals the parties' intent to restrict the agreement to marital property issues within the scope of marital distribution and issues of spousal support are not

within the province of the equitable distribution statute under N.C.G.S. § 50-20(f).

3. Divorce— alimony—classification of the right of support as a property right—validity of separation agreement made during marriage as it relates to waiver of alimony

In a case involving a claim for absolute divorce and a counterclaim for alimony, the classification of the right of support as a property right does not mandate that all agreements relating to that right be governed by N.C.G.S. § 52-10, and the validity of the separation agreement made during the marriage as it relates to the waiver of alimony is not to be judged in the context of N.C.G.S. § 52-10.

Appeal by defendant from judgment dated 30 October 1998 by Judge William T. Graham in Forsyth County District Court. Heard in the Court of Appeals 21 September 1999.

Morrow Alexander Tash Long & Kurtz, by C.R. "Skip" Long, Jr., for plaintiff-appellee.

Stowers & James, P.A., by Paul M. James, III, for defendant-appellant.

GREENE, Judge.

Dottie Southern Napier (Defendant) appeals from the dismissal of her counterclaim for alimony, asserted in response to a complaint for an absolute divorce filed by Joe Cameron Napier (Plaintiff).

The Plaintiff and Defendant were married on 27 February 1965 and separated on or about 1 June 1994. On 1 June 1994, at a time when the parties "continue[d] to reside together," and after having "reached an agreement with regard to their respective property rights arising out of the marriage" and "pursuant to North Carolina General Statutes Section 50-20(d)" they entered into a "Property Agreement" (the Agreement) dividing the real and personal property owned by them. The Agreement also included the following pertinent language:

ARTICLE I: PROPERTY

. . . .

L. Mutual release: Subject to the rights and privileges provided for in this Agreement, each party does hereby *release* and discharge the other of and *from all causes of action, claims,*

rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, known or unknown, by reason of any matter, cause or thing up to the date of the execution of this Agreement, except the cause of action for divorce based upon the separation of the parties. It is the intention of the parties that henceforth there shall be, as between them, only such rights and obligations as are specifically provided for in this Agreement, and the right of action for divorce.

. . . .

ARTICLE II: GENERAL PROVISIONS

Construction: This Agreement is not an agreement between the parties to obtain a divorce. The same is an *agreement settling their* property and *marital rights.*

. . . .

Representation by counsel: . . . Both parties have been fully advised of their rights and obligations arising from their marital relationship . . . . Each party understands that the *agreements* and obligations assumed by the other *are assumed with the express understanding and agreement that they are* in full satisfaction of all rights which each of them now has or might hereafter or otherwise have in the property or estate of the other and *in full satisfaction of all obligations which each of them now has or might hereafter or otherwise have toward the other.* (emphases added).

In the judgment of the trial court, it concluded that the "provisions of the . . . Agreement operate as a bar so as to prevent the Defendant from pursuing her claims against the Plaintiff for alimony."

The dispositive issues are whether Defendant's execution of the Agreement constitutes a waiver of her alimony rights: (I) within the meaning of section 52-10.1; and/or (II) within the meaning of section 52-10.

Defendant contends alimony can be waived only pursuant to a section 52-10.1 separation agreement and the waiver language must be explicit. In this case, Defendant asserts, the Agreement does not constitute a section 52-10.1 separation agreement and even if it did, there is no explicit language waiving alimony. Plaintiff first contends alimony, as a property right, can be waived in a section 52-10 contract

between a married couple and it is not, therefore, necessary that the agreement qualify as a separation agreement. Alternatively, Plaintiff contends the Agreement qualifies as a section 52.10.1 separation agreement and the waiver provisions are sufficiently explicit.

I

[1] Married couples are authorized to execute separation agreements, N.C.G.S. § 52-10.1 (1991), and alimony can be waived by "an express provision of a valid separation agreement." N.C.G.S. § 50-16.6 (1995). A separation agreement is a "contract between spouses providing for marital support rights and . . . executed while the parties are separated or are planning to separate immediately." *Small v. Small*, 93 N.C. App. 614, 620, 379 S.E.2d 273, 277, *disc. review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989).

In this case, the parties were living together at the time the Agreement was executed. Although there is no direct evidence the parties entered into the Agreement in contemplation of immediate separation, that is the undeniable inference. The Agreement was executed on 1 June 1994 and the parties separated on 1 June 1994. The language, however, is not sufficiently "express" to constitute a waiver of alimony within the meaning of section 50-16.6. "Express" is defined to mean: "[d]efinitely and explicitly stated. . . . [p]articular; specific." *American Heritage College Dictionary* 483 (3rd ed. 1993). A release of "all" claims and obligations or the settling of "marital rights," as occurred in the Agreement, does not constitute an "express" release or settlement of alimony claims, as it does not specifically, particularly, or explicitly refer to the waiver, release, or settlement of "alimony" or use some other similar language having specific reference to the waiver, release, or settlement of a spouse's support rights.

[2] Furthermore, and without regard to the "express" language requirement of section 50-16.6, the general releases in the Agreement cannot be construed to include a waiver of alimony. The preamble to the Agreement specifically states that it is entered into "pursuant to North Carolina General Statutes Section 50-20(d)." This statute deals with the right of married persons to make agreements with respect to the distribution of their marital property under the equitable distribution statutes. The reference to section 50-20(d) thus reveals the intent of the parties to restrict the Agreement to marital property issues within the scope of equitable distribution. Issues of spousal support are not within the province of the equitable distribution

statute. N.C.G.S. § 50-20(f) (Supp. 1998) (equitable distribution of marital property "without regard to alimony for either party").

Accordingly, the Agreement does not constitute a waiver of Defendant's alimony rights within the meaning of section 52-10.1.

II

[3] Our courts have held that the "right of support" is in the nature of a "property right." *E.g.*, *Kiger v. Kiger*, 258 N.C. 126, 128, 128 S.E.2d 235, 237 (1962). Thus it follows, Plaintiff suggests, that alimony can be waived pursuant to the provisions of section 52-10[1] and is not exclusively controlled by section 50-16.6.

It does not follow, however, that the classification of the "right of support" as a "property right" mandates all agreements relating to that right be governed by section 52-10. Indeed, we have specifically held that any waivers or agreements, made during the marriage, concerning the right of spousal support must be made in the context of a separation agreement and executed pursuant to section 52-10.1.[2] *Williams v. Williams*, 120 N.C. App. 707, 710, 463 S.E.2d 815, 818 (1995), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996). Accordingly, the validity of the Agreement as it relates to the waiver of alimony is not to be judged in the context of section 52-10.

The judgment of the trial court dismissing Defendant's counterclaim for alimony is therefore reversed.

Reversed and remanded.

Judges WALKER and HUNTER concur.

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1. (a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release . . . such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights . . . so released.

N.C.G.S. § 52-10(a) (1991).

2. Alimony may be waived in several contexts not relevant to this case. For example, alimony can be waived pursuant to a valid premarital agreement. N.C.G.S. § 52B-4(4) (1987).

CAROL ANN FRANZEN, PLAINTIFF v. WALTER JOSEPH FRANZEN, DEFENDANT

No. COA98-1300

(Filed 19 October 1999)

1. Divorce— equitable distribution—Ohio antenuptial agreement—accounting of contributions not required

In an equitable distribution case, the trial court did not misconstrue the Ohio antenuptial agreement by failing to account for the fact that most of the money used to buy the two pertinent properties titled as tenants by the entireties was defendant-husband's separate money that he either brought into the marriage or inherited from his mother during the marriage because the plain language of the agreement states an accounting of contributions is required only upon the sale of the real estate.

2. Contracts— extrinsic evidence—no ambiguity

The trial court did not err in excluding extrinsic evidence to show the parties' intent concerning their Ohio antenuptial agreement because there is no ambiguity in the agreement since it states separate assets do remain separate property, even if they change form, but only if they do not become marital property.

3. Divorce— equitable distribution—order not void for uncertainty—specific enough to ascertain rights and obligations

The trial court's equitable distribution order should not be rendered void for uncertainty based on the fact that it required defendant-husband to execute any documents submitted to him because the order is specific enough so that the parties can ascertain their respective rights and obligations, it specifically designates which property was to be encumbered by a security interest, and defendant was only required to sign those documents needed for plaintiff-wife to perfect her security interest and make a record of it.

Appeal by defendant from order entered 22 May 1998 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 18 August 1999.

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

Ralph S. Pennington for defendant-appellant.

LEWIS, Judge.

This controversy involves the construction and enforcement of an antenuptial agreement executed 19 July 1989 in the State of Ohio. Plaintiff and defendant married on 22 July 1989. Prior to their marriage, they signed the antenuptial agreement ("the Agreement") at issue here. The parties lived in Ohio for the first four years of their marriage and then moved to North Carolina in 1993. They divorced 16 August 1997.

[1] During their marriage, the parties acquired two pieces of property in North Carolina that they still owned at the time of their divorce: one located at 3600 Island Drive in North Topsail Beach ("the Topsail property") and the other located at 5816 Oak Bluff Lane in Wilmington ("the Oak Bluff property"). In its equitable distribution order, the trial court classified both of these as marital property under the terms of the Agreement and then divided them equally between the parties. Defendant contends that the trial court misconstrued the Agreement by failing to account for the fact that most of the money used to buy the Topsail and Oak Bluff properties was his separate money that he either brought into the marriage or inherited from his mother during their marriage. We disagree with defendant's proposed construction.

At the outset, we note that the parties specified Ohio law as the law governing the interpretation of their Agreement. Such choice of law provisions are valid and must be given effect. *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). Accordingly, we look to Ohio's laws in construing the parties' Agreement.

In Ohio, antenuptial agreements are treated as contracts, and general contract law is used to interpret them. *Fletcher v. Fletcher*, 628 N.E.2d 1343, 1346 (Ohio 1994). Under traditional contract principles, the plain language of the Agreement controls. *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 150 (Ohio 1978). The Agreement here undertakes to define the parties' separate and marital property. It further provides that, upon divorce, the trial judge has discretion as to how to equitably divide the marital property, but has no such discretion as to the parties' respective separate property. In order to properly address defendant's arguments, we must then begin with the definitions of separate and marital property outlined in the Agreement.

Section Four defines "separate property" as follows:

> [I]t is agreed and understood that the parties intend and desire that all property owned respectively by each of them, at the time of the marriage, and all property that may be acquired by each of them, individually and in their own names, from any source during their marriage . . . shall be respectively their separate property, . . . whether that asset or item has changed from one form to another, vested or reinvested. Such property shall be the separate property of that respective party, *unless otherwise provided in this Agreement.*

(emphasis added). The parties then proceed to define "marital property" in Section Five:

> "Marital property" shall be any funds or property accumulated by the parties during the marriage, *which is put into joint names as tenants in common, joint tenants with the right of survivorship or other similar designation. Any real estate purchased by the parties during the marriage in their joint names, shall be marital property* and upon the sale of said real estate for any reason whatsoever, the net proceeds from said sale shall be divided between the Prospective Husband and Prospective Wife in an amount equal to the percent of cash contribution made by each of them . . . .

(emphasis added).

Thus, according to the plain language of the Agreement, all property is either separate or marital. Separate property is any property that is either brought into the marriage or acquired individually during the marriage, unless it falls under the definition of marital property. Marital property is then defined as any property accumulated by the parties that is titled in their joint names. Pursuant to this definition, the Topsail and Oak Bluff properties were properly classified as marital property; both properties were titled as tenants by the entireties.

Defendant, however, contends the Agreement requires that, in dividing the marital property, the trial court should have accounted for any contributions of separate property used to purchase the marital property. The plain language of the Agreement, however, belies his contention. The Agreement specifically states that an accounting of contributions is required only "upon the *sale* of said real estate." Upon *divorce*, no such accounting is required; the trial court is sim-

ply to consider "what is a fair and equitable division of the property . . . which fits into the definition of marital property." The trial court did not err by refusing to order an accounting for any separate contributions defendant may have made towards the purchase of the Topsail and Oak Bluff properties.

[2] In the alternative, defendant argues that the Agreement is ambiguous and that the trial court should have therefore permitted the introduction of extrinsic evidence showing the parties' intent. Under Ohio law, no extrinsic evidence or other methods of construction may be employed unless an agreement is ambiguous. *Packer, Thomas & Co. v. Eyster*, 709 N.E.2d 922, 926 (Ohio Ct. App. 1998). Defendant's claimed ambiguity is that the provision in Section Five that any property titled jointly is to be considered marital property clashes with the statement in Section Four that all separate assets are to remain separate, even if those assets change form. His argument, however, overlooks the language in Section Four that separate assets remain separate property "unless otherwise provided in this Agreement." This caveat eliminates any ambiguity. Separate assets do remain separate property, even if they change form, but only if they do not become marital property. When the parties titled the Topsail and Oak Bluff properties as tenants by the entireties, any separate contributions by defendant were automatically transformed into marital property. Because the "unless otherwise provided" caveat removes any ambiguity between Sections Four and Five, the trial court did not err in excluding all extrinsic evidence regarding the parties' intent.

[3] Finally, defendant contends that part of the trial judge's order should be rendered void for uncertainty. As part of its equitable distribution order, the trial judge ordered defendant to make a distributional payment of $42,845.75 to plaintiff. The trial judge then provided a method by which plaintiff could secure the distributional money owed to her. Specifically, the trial court stated, "Wife shall be entitled to a security interest in the real estate distributed to Husband [the Oak Bluff property] for the payment of the same. Husband shall immediately execute and return for filing any documents submitted to him by Wife to secure this obligation." Defendant argues that this order is so vague and uncertain that it would be impossible to enforce. We disagree.

"A judgment must be complete and certain, indicating with reasonable clearness the decision of the court, so that judgment may be enforced. If the parties are unable to ascertain the extent of their

rights and obligations, a judgment may be rendered void for uncertainty." *Morrow v. Morrow*, 94 N.C. App. 187, 189, 379 S.E.2d 705, 706 (1989) (citation omitted), *cert. denied*, 326 N.C. 365, 389 S.E.2d 816 (1990). Here, the trial judge's order is specific enough so that the parties can ascertain their respective rights and obligations. The trial judge specifically designated which property was to be encumbered by the security interest: the Oak Bluff property. By requiring defendant to execute and return "any documents submitted to him," the trial court was only requiring defendant to sign those documents needed so that plaintiff could perfect her security interest and make it of record. This requirement is not so vague and uncertain as to warrant that it be rendered void.

AFFIRMED.

Judges MARTIN and HUNTER concur.

ROBBIE McCRAE WILBURN, PLAINTIFF v. TED WALLACE HONEYCUTT, DEFENDANT

No. COA98-1362

(Filed 19 October 1999)

1. Negligence— contributory—accident—directed verdict improper—evidence not clearly established

The trial court erred in granting defendant's motion for directed verdict in an accident involving defendant-motorist and plaintiff, who was riding a horse, on the issue of plaintiff's contributory negligence because taken in the light most favorable to plaintiff and resolving all inconsistencies in his favor, the evidence is not so clearly established that plaintiff had the opportunity to move off the road to avoid the accident.

2. Negligence— willful and wanton conduct—accident—directed verdict improper—reasonable persons could differ

The trial court erred in granting defendant's motion for directed verdict in an accident involving defendant-motorist and plaintiff, who was riding a horse, on the issue of defendant's willful and wanton conduct since reasonable persons could differ on their conclusion based on the evidence that: (1) defendant intentionally or with reckless indifference to the consequences

did not slow down and willfully ran into plaintiff; and (2) defendant drove on without stopping, knowing he hit plaintiff and his horse.

Appeal by plaintiff from judgment entered 27 April 1998 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 25 August 1999.

E. Gregory Stott for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by R. Scott Brown, Michael W. Washburn and Michael J. Byrne, for defendant-appellee.

LEWIS, Judge.

This appeal arises out of an accident that occurred between plaintiff and defendant on the morning of 15 January 1996 in Harnett County, North Carolina. On 4 March 1996 plaintiff filed this action alleging that defendant operated his vehicle negligently as well as willfully and wantonly and asking to recover both compensatory and punitive damages. Defendant answered and asserted the defense of contributory negligence.

At the close of plaintiff's evidence, defendant moved for directed verdict on the issues of contributory negligence and willful and wanton conduct. The trial court granted the motion without specifying on which ground and entered judgment for defendant. After a careful review of the record and briefs, we reverse.

At trial, the evidence tended to show that plaintiff and nine others were riding horses down a long, straight, single-lane dirt road. Plaintiff, who had six to seven years of experience riding horses, rode last in the group, about 40 yards behind the first rider. Defendant was driving a truck meeting the group along the same road. When defendant's truck reached plaintiff, having passed the others, the side mirror and rear bumper struck the horse, causing the horse and rider to fall. Defendant did not stop, but drove one-half mile down the road and parked his truck. Plaintiff and others from the group followed to speak with defendant about the accident.

On appeal, plaintiff argues that the trial court erred in granting a directed verdict for defendant. In reviewing the trial court's ruling on appeal, the scope of review is limited to those grounds argued by the moving party before the trial court. *Winston v. Brodie*, 134 N.C. App. 260, ——, 517 S.E.2d 203, 206 (1999). Accordingly, we will address the

trial court's grant of directed verdict on the issues of contributory negligence and willful and wanton conduct.

On a defendant's motion for directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient to take the case to the jury. N.C. Gen. Stat. § 1A-1, Rule 50(a) (1990); *Smith v. Wal-Mart Stores*, 128 N.C. App. 282, 285, 495 S.E.2d 149, 151 (1998). The jury must resolve any contradictions or discrepancies in the evidence, even when arising from plaintiff's evidence. *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

[1] For issues of contributory negligence, a motion for directed verdict is appropriate when the "plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn." *Peeler v. Railway Co.*, 32 N.C. App. 759, 760, 233 S.E.2d 685, 686 (1977). The issue of contributory negligence is ordinarily a question for the jury rather than an issue decided as a matter of law. *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 456, 406 S.E.2d 856, 862 (1991).

The defendant argues that the directed verdict should be sustained on the issue of contributory negligence because the evidence supports an inference that plaintiff had the opportunity to move off of the road to avoid the accident. Although there is evidence that defendant's truck was at least 150 yards away when plaintiff first saw him, plaintiff testified that he did not have time to move out of defendant's way; at almost the same moment plaintiff began to clear the roadway, he heard a motor accelerate and saw defendant's truck coming at him. Taken in the light most favorable to plaintiff and resolving all inconsistencies in his favor, the evidence of contributory negligence is not so clearly established that no other reasonable inference can be drawn. *Peeler*, 32 N.C. App. at 760, 233 S.E.2d at 686. We conclude, therefore, the trial court improperly granted defendant's motion for directed verdict as to the issue of contributory negligence.

[2] Plaintiff next argues that the trial court erred in granting defendant's motion for directed verdict on the issue of willful and wanton conduct. The record must be reviewed to determine whether there is sufficient evidence which, considered in the light most favorable to the plaintiff, would establish facts sufficient to constitute willful and

wanton negligence. If the facts are such that reasonable persons could differ as to whether the evidence amounts to willful or wanton conduct, the question is properly preserved for the jury. *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978).

An act is willful when there is a deliberate failure to discharge a duty imposed by law for the safety of others. Wantonness indicates a reckless and heedless disregard for the rights and safety of others. *Marsh v. Trotman*, 96 N.C. App. 578, 580, 386 S.E.2d 447, 448, *disc. review denied*, 326 N.C. 483, 392 S.E.2d 91 (1990). Plaintiff testified that after the accident, plaintiff and defendant had the following conversation:

> A. I said, do you care about horses. He said, not particularly. I said, do you know you struck me and my horse back there. He said, yes. This is my damn land and I'll do any damn thing I want to. That's a quote. And I'm just, like, okay. And I don't know why I asked this either, I said, does that include horses and kids. He said, yeah, I'll do what it takes. And I'm just really—I'm floored at this point that this man is telling me he hit me and he knows it. And he would do it again.

(Tr. at 16). Plaintiff also offered testimony from another rider who saw the accident and witnessed the conversation between plaintiff and defendant as follows:

> A. Well, [plaintiff] asked him didn't he see the children and all of us on horses. And he said, yes.
>
> Q. What did he say next?
>
> A. And [plaintiff] asked him, well, why didn't you slow down for us. He said because this is my land and I do what I want on my land.

(Tr. at 76-77).

Viewed in the light most favorable to plaintiff and resolving all discrepancies in plaintiff's favor, the evidence tends to show that defendant was driving on a long, straight road with no obstructions, that he saw plaintiff and his horse, and either intentionally or with reckless indifference to the consequences did not slow down and willfully ran into them. Furthermore, the testimony that defendant drove on without stopping, knowing he hit plaintiff and his horse tends to show that defendant heedlessly disregarded plaintiff's

safety. Plaintiff also testified that the defendant proceeded at a reasonable speed and did not deviate from his path or veer toward the riders. Since the facts are such that reasonable persons could differ as to whether the evidence amounts to willful or wanton conduct, the question is more properly left for the jury to resolve. *Siders*, 39 N.C. App. at 186, 249 S.E.2d at 860. Accordingly, the trial court erred in granting defendant's motion for directed verdict on the issue of willful and wanton conduct. The cause is reversed and remanded for trial.

Reversed and remanded.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. JIMMY DOIE SMITH

No. COA99-55

(Filed 19 October 1999)

Search and Seizure— trafficking in cocaine—motion to suppress—evidence of consent conflicting—need specific finding of voluntary consent

The trial court's denial of defendant's motion to suppress all evidence that was obtained as a result of the police entering his hotel room in a trafficking in cocaine case must be remanded for further consideration and findings because the evidence as to defendant's consent was conflicting and the trial court did not include a specific finding as to whether defendant voluntarily consented to the search of the hotel room.

Appeal by defendant from judgment entered 8 October 1998 by Judge James R. Vosburgh in Lenoir County Superior Court. Heard in the Court of Appeals 4 October 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hal F. Askins, for the State.

George L. Jenkins, Jr. for defendant-appellant.

McGEE, Judge.

A Lenoir County grand jury indicted defendant on 3 August 1998 for trafficking in cocaine by possessing in excess of 28 grams but less than 200 grams of cocaine. A jury found defendant guilty of the charge, and the trial court sentenced him to a term of thirty-five to forty-two months' imprisonment. From the trial court's judgment, defendant appeals.

The State introduced evidence at trial tending to show the following: On 12 February 1998, Kinston Police Detectives Robert Harrell and Jacob Rogers stopped a vehicle driven by Wesley Haywood Brown on the basis of information they had received from a confidential and reliable source. After obtaining Brown's consent, the detectives searched the vehicle. They seized a .38 caliber revolver which was in a little pocket on the back of the driver's seat. They placed Brown under arrest for carrying a concealed weapon. The detectives also seized numerous small plastic bags and a key to room 224 of the Kinston Motor Lodge. The detectives went to the Kinston Motor Lodge. When Detective Harrell began to testify about how they gained entry into room 224, defendant objected. After the jury was excused, defendant's attorney moved to suppress any evidence that was obtained as a result of the entry into the room.

During *voir dire*, Detective Harrell stated that as a result of his conversation with Brown, both he and Detective Rogers knocked on the room door two or three times. Defendant, who appeared to have just awakened, answered the door dressed in his underwear. Detective Harrell explained to defendant the information they had received and told him of Brown's arrest. He asked if defendant had any contraband in the room and if the detectives could search his room. Defendant stated he did not mind if they searched the room, and he did not subsequently revoke his consent.

During the room search, the detectives found a bag containing 1.1 grams of crack cocaine in a leather jacket. A canine officer located approximately 31 grams of crack cocaine in a jean coat which was in a clothing bag. Detective Rogers found a set of scales on a table and $280.00 above the bathroom's ceiling tile. An additional $155.00 was also recovered elsewhere in the room. After defendant was placed under arrest and taken to the police station, Detective Harrell spoke with him there. He informed defendant of his Miranda rights, and defendant signed a waiver of rights form. In a signed statement,

defendant stated that he had purchased the crack cocaine from some young boys in Kinston.

Defendant testified during *voir dire* that the detectives had come into the room, awakened him, and told him to get out of bed. He stated that the detectives did not request his permission to search the room, nor did he give them permission to search. Defendant denied giving a statement to police. He asserted that an officer had drawn a line on a blank piece of paper and told him to sign it and that he saw the written statement for the first time when his attorney presented it to him. While defendant admitted using heroin during the morning of 12 February 1998, he denied using cocaine. When asked if he had resisted or objected to the detectives' search, defendant said he was just waking up, the police were already in his room, and he did not know what was going on. The manager of the Kinston Motor Lodge testified that defendant had rented the room on a day-to-day basis from 9 February to 13 February 1998.

In denying defendant's motion to suppress, the trial court found that "Officer Harrell testified that he informed the defendant as to the reason for the presence of the officers, asked for permission to search the room, and testified that the defendant gave permission to search." While the trial court stated it had "some serious questions with the truthfulness" of both Detective Harrell and defendant, the trial court found there was sufficient evidence to deny defendant's motion to suppress.

Defendant contends the trial court erred by denying his motion to suppress and by admitting the evidence seized as a result of the detectives' search of the room. He argues the warrantless search was unreasonable and unconstitutional.

While a warrantless search and seizure inside a dwelling is presumptively unreasonable, such "a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citations omitted); *see also* N.C. Gen. Stat. § 15A-221(a) (1997) (officer may conduct warrantless search and seizure if consent is given). "Consent to search, freely and intelligently given, renders competent the evidence thus obtained." *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973) (citations omitted). " 'Knock and talk' is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant." *Smith*, 346 N.C. at 800, 488 S.E.2d at 214.

After conducting a hearing on a motion to suppress, a trial court "should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996) (citation omitted). The State's evidence in the form of both detectives' testimony was that defendant consented to the search of the room, while defendant's evidence was that the detectives neither requested nor received his permission to search the room. No evidence was presented to suggest coercion or intimidation by the detectives in obtaining defendant's consent to search.

The trial court's findings did not include a specific finding as to whether defendant voluntarily consented to the search of room 224 of the Kinston Motor Lodge. The State argues that even if the trial court failed to make a formal ruling, such failure does not by itself constitute reversible error. A finding may be implied by the trial court's denial of defendant's motion to suppress where the evidence is uncontradicted. *State v. Cobb*, 295 N.C. 1, 18-19, 243 S.E.2d 759, 769 (1978). However, in the case before us, as in *Smith*, the evidence as to defendant's consent to the search is conflicting. For this reason, we cannot determine as a matter of law whether or not the evidence seized violated defendant's Fourth Amendment rights. Accordingly, we remand to the trial court for reconsideration of, and further findings on, defendant's motion to suppress in accordance with this opinion.

Reversed and remanded.

Judges HORTON and SMITH concur.

STATE v. BRIGHT

[135 N.C. App. 381 (1999)]

STATE OF NORTH CAROLINA v. RODRICUS LAMONT BRIGHT

No. COA99-496

(Filed 19 October 1999)

Sentencing— structured—plea agreement—aggravating range—necessary written findings

The trial court erred in sentencing defendant, who entered a plea of guilty for assault with a deadly weapon inflicting serious injury, in the aggravating range even though the plea agreement gave the trial court discretion in sentencing because N.C.G.S. § 15A-1340.16(b) and (c) requires the trial court to make the necessary written findings before deviating from the presumptive sentence of Structured Sentencing.

Appeal by defendant from judgment entered 5 August 1998 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 27 September 1999.

Attorney General Michael F. Easley, by Associate Attorney General Christopher W. Brooks, for the State.

Daniel Shatz for defendant-appellant.

McGEE, Judge.

Defendant was charged with assault with a deadly weapon with intent to kill, inflicting serious injury. Pursuant to a plea agreement, defendant pled guilty to the lesser included offense of assault with a deadly weapon inflicting serious injury. The plea agreement provided that he would receive a Class E, level I sentence in the trial court's discretion. Accordingly, on 5 August 1998, the trial court sentenced defendant to thirty-one to forty-seven months' imprisonment, which was in the aggravated range for a Class E felony with a prior record level I. Defendant appeals.

The issue before our Court is whether the trial court must make written findings supporting its sentence when imposing a sentence in the aggravated range, where the plea agreement gave the trial court discretion in sentencing. This is a case of first impression, and therefore we will first look to the statute itself in addressing this issue.

The Fair Sentencing Act (Fair Sentencing) was repealed and replaced by the Structured Sentencing Act (Structured Sentencing),

which applies to all crimes committed on or after 1 October 1994. N.C. Gen. Stat. § 15A-1340.10 (1997). As defendant was found guilty of and sentenced for a crime occurring after 1 October 1994, Structured Sentencing controls. Under Structured Sentencing, the trial court is required to evaluate the defendant's criminal history to determine the defendant's prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (1997). The trial court must then determine the minimum term of imprisonment to which the defendant may be sentenced. N.C. Gen. Stat. § 15A-1340.13(c) (1997). The trial court has discretion to determine whether the defendant will be sentenced to a minimum term of imprisonment from the mitigated, presumptive, or aggravated range. N. C. Gen. Stat. § 15A-1340.13(c), (e) (1997). When the court does exercise its discretion to deviate from the presumptive range, the court must make written findings of aggravation and mitigation, and weigh the aggravating and mitigating factors to determine the defendant's sentence. N.C. Gen. Stat. § 15A-1340.16(b), (c) (1997).

In the case before us, defendant's plea agreement with the State provided that he would plead guilty and receive a Class E, level I sentence "in the discretion of the court." The trial court exercised that discretion and sentenced defendant within the aggravated range, but without making the necessary written findings as required by section 15A-1340.16(b) and (c). The trial court indicated on the judgment that the court "impose[d] the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A[,]" which provides procedures relating to guilty pleas in superior court.

We are aware that Fair Sentencing, like Structured Sentencing, required written findings upon deviation from the presumptive sentence. However, Fair Sentencing provided an exception to that requirement if the court "impose[d] a prison term pursuant to any plea arrangement as to sentence." N.C. Gen. Stat. § 15A-1340.4(a), (b) (repealed effective 1 October 1994); *see also State v. Williams*, 116 N.C. App. 354, 447 S.E.2d 437, *disc. review denied*, 338 N.C. 523, 452 S.E.2d 823 (1994); *State v. Washington*, 116 N.C. App. 318, 447 S.E.2d 799 (1994) (recognizing exception, under now repealed Fair Sentencing, to the requirement for written findings so long as prison term was pursuant to a plea arrangement). The General Assembly specifically excluded such an exception in repealing Fair Sentencing and enacting Structured Sentencing. Thus, absent clear legislative intent to the contrary, we must presume that the General Assembly acted to abrogate the exception to the requirement for written find-

ings in cases decided under Structured Sentencing. *See Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) ("[I]t is always presumed that the Legislature acted with full knowledge of prior and existing law."); *State v. Blackstock*, 314 N.C. 232, 240, 333 S.E.2d 245, 250 (1985) (noting that in construing a statute that has been repealed or amended, it may be presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of the statute).

As Structured Sentencing provides specifically and without exception that a trial court must make written findings when deviating from the presumptive sentence, we conclude, as the State concedes in its brief, that the trial court erred in imposing an aggravated sentence upon defendant without doing so. Accordingly, this matter must be remanded for resentencing.

Remanded for resentencing.

Judges HORTON and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 OCTOBER 1999

BRANDLE v. NATIONWIDE INS. CO. No. 98-1422	Rutherford (96CVS972)	Vacated and Remanded
CANNON v. CANNON No. 98-1476	Pitt (97CVS2062) (98CVS507)	Appeal Dismissed
CARLTON v. CITY OF SALISBURY No. 98-1637	Rowan (97CVS2251)	Affirmed
FARMER v. LANE No. 98-1353	Carteret (94CVS892)	Affirmed
GARBER v. GREAT-WEST LIFE & ANNUITY ASSURANCE CO. No. 98-1199	Wake (98CVS1023)	Affirmed
GOINS v. SHAFFER No. 98-1484	Stokes (96SP7)	Dismissed
GUNTER v. McINTYRE No. 98-1482	Stokes (96SP40)	Dismissed
HATLEY v. POPLIN No. 99-22	Stanly (96CVS931)	Dismissed
HOLDER v. BILLINGS No. 98-1551	Mecklenburg (96CVD2027)	Dismissed
IN RE MOREHEAD No. 99-488	Rockingham (97J4)	Affirmed
JONES v. PURINGTON No. 98-1462	Edgecombe (95CVS993)	Dismissed
JUST-IN-TIME KNITTING v. CADILLAC SHOE PRODUCTS No. 98-1415	Cabarrus (94CVS623)	Dismissed and remanded to the trial court for further proceedings
MYERS v. RANEY No. 98-1455	Rowan (97CVS877)	No Error
PARK LAKE RECREATION ASS'N v. GRANT No. 98-1635	Mecklenburg (97CVD5746)	Affirmed
PRINCE v. N.C. REAL ESTATE COMM'N No. 98-1144	Wake (96CVS9888)	Reversed and Remanded

STATE v. BARNETT No. 99-384	McDowell (95CRS5583) (98CRS384)	No Error
STATE v. BETHEA No. 99-386	Scotland (97CRS5009)	New Trial
STATE v. DALTON No. 99-443	Mecklenburg (98CRS112915) (98CRS112917)	No Error
STATE v. DECKELMAN No. 99-329	Lee (97CRS8622)	No Error
STATE v. DYE No. 98-1324	Guilford (97CRS60073)	No Error
STATE v. ELLIOTT No. 99-337	Ashe (97CRS1529) (97CRS1530)	No Error
STATE v. FONVILLE No. 99-363	Onslow (98CRS8632) (98CRS8633)	No Error
STATE v. HUDSON No. 98-1474	Forsyth (98CRS4051) (98CRS13403)	No Error
STATE v. KRAEMER No. 99-327	Mecklenburg (97CRS042928)	No Error
STATE v. McALLISTER No. 99-486	Johnston (98CRS17845) (98CRS19499)	No Error
STATE v. MEYERS No. 98-915	Cleveland (97CRS9953)	No error in the trial; sentence is vacated and remanded.
STATE v. MEYERS No. 98-1432	Gaston (97CRS16401) (97CRS17915)	No error in the trial; sentence is vacated and remanded.
STATE v. MORRIS No. 99-465	Rowan (96CRS1315)	No Error
STATE v. PUTNAM No. 99-534	Gaston (98CRS20152)	No Error
STATE v. REID No. 98-1392	Lee (96CRS1672) (96CRS1673)	No Error

STATE v. SHELTON No. 99-626	Wake (97CRS75697) (97CRS75698)	No Error
STATE v. SMITH No. 98-1341	Sampson (97CRS6039) (97CRS6040) (97CRS6041) (97CRS6042) (97CRS6043)	No Error
STATE v. SPENCE No. 98-1396	Forsyth (98CRS8251) (97CRS35933)	No Error
STATE v. SZABO No. 99-541	Yancey (96CRS280)	No Error
STATE v. THOMAS No. 98-775	Robeson (94CRS02397) (94CRS02398)	No Error
STATE v. WASHINGTON No. 99-422	Warren (97CRS398) (97CRS399)	Reversed
STATE v. WRIGHT No. 98-1189	New Hanover (97CRS6493)	No Error
WESTER v. WHETHINGTON No. 98-1357	Harnett (94CVS1786)	Affirmed

IN RE McLEAN

[135 N.C. App. 387 (1999)]

IN THE MATTER OF TAMARA BETH McLEAN

No. COA98-1457

(Filed 2 November 1999)

1. Child Abuse and Neglect— death of sibling—sufficiency of findings

In a child neglect action, findings of fact taken in their entirety were sufficient to support the conclusion that the child (Tamara) was neglected where the court found that the respondent parents intended to live in the home of the maternal grandparents where Tamara's sister, Katelynn, died; that her father had been convicted of causing the death of Katelynn; that although her mother had been advised that the death of Katelynn was by non-accidental means, she continued to support the claims of her husband (Tamara's father) that Katelynn's death was caused by being shaken as he ran with her to get help; that the parents were not cooperative with the social worker who was investigating the matter; that the respondent parents have neither expressed nor exhibited any concern for the future safety of Tamara in their home; and that the father extended most of the care for the juvenile during visits. The court carefully weighed and assessed the evidence and concluded that Tamara, then less than three months of age, would be at risk if allowed to reside with her parents in their home.

2. Child Abuse and Neglect— dispositional order—disassociation of mother from father

There was prejudicial error in a juvenile disposition order where the court made statements in open court (although not in the written order) about the mother's need to disassociate herself from the father where there were no findings that reasonable efforts to reunite the family would be futile, the statements made by the court could have left little doubt in the parties' minds that the separation of the parents was a pre-condition to the mother having a realistic chance to regain custody, and the integrity of the reasonable efforts process was further undermined by the statement of the trial court that it was only ordering reasonable efforts because it was required to do so.

3. Child Abuse and Neglect— dispositional order—oral comments by judge—disapproved

Statements by the trial court in a juvenile neglect action that referred to the family as ridiculous and that characterized the mother as abnormal were not approved even though they were made following the trial and the oral entry of adjudicatory and dispositional orders and there was no evidence of demonstrable prejudice during the trial.

4. Child Abuse and Neglect— retention of jurisdiction

The trial court erred in a juvenile neglect action by attempting to retain exclusive jurisdiction over future hearings. The legislature has not acted to grant authority to the trial court to retain jurisdiction in a domestic relations case, and, even if the court had had jurisdiction here, this portion of the dispositional order would have been vacated so that the appearance of neutrality could be preserved.

This is an appeal by respondent parents from a judgment entered 15 September 1998 by Judge Albert A. Corbett, Jr., in Harnett County District Court. Heard in the Court of Appeals 17 August 1999.

Sarah McLean (respondent mother) and Ronald Terrell McLean (respondent father) were the biological parents of Olivia Katelynn McLean (Katelynn), who was born in March of 1996. They were married following the death of Katelynn. Medical and autopsy reports indicated that three-month-old Katelynn died on 5 July 1996 due to "shaken-baby syndrome." The medical examiner's report indicated that there were both old and new manifestations of the syndrome. As there were no other children in the parents' home at that time, DSS closed the case.

On 24 February 1998 Tamara Beth McLean was born to the respondents in Harnett County. DSS filed a petition on 26 February 1998 which alleged that Tamara was a neglected juvenile because when she left the hospital she would be residing in the same home where Katelynn died due to non-accidental injuries; that at the time of Katelynn's death, she was in the sole care of her father, the respondent Ronald Terrell McLean; and that a charge of murder was pending against Ronald McLean in the death of Katelynn. The petition further alleged that Tamara would be living in an environment injurious to her welfare; that during the DSS investigation following Katelynn's death the respondent parents were uncooperative; that the mother

continued to support the father and refused to believe that the father had injured Katelynn; that Sarah McLean did not believe that the newly born Tamara would be in any danger if the infant were to be permitted to go home with her and Ronald McLean; and, finally, that the infant Tamara would be at risk if allowed to reside with her parents in their home. Based on the verified petition, a non-secure custody order was entered placing Tamara, who was then two days old, in the custody of DSS. As a result, the child has not resided with the respondents since her birth.

The case was tried on 8 May 1998, at which time all parties were present and represented by counsel. There was evidence that respondent father, Ronald McLean, pled guilty the previous day to involuntary manslaughter in the death of Katelynn, and that he would be sentenced later. The trial court found that placement of Tamara with her parents would be "against her welfare," and ordered that Tamara be placed in the custody of DSS, that the parents pay child support, and that the parents undergo psychological evaluation and testing. The trial court discussed with the parents in open court its concern about the respondent mother's continued cohabitation with the father, and told the mother that the "only chance" she had was to "separate [herself] from him . . . ." The trial court did not make that language a condition in its written order.

On 12 August 1998, the respondent father was sentenced in Harnett County Superior Court on the charge of involuntary manslaughter, and was placed on intensive probation. On 15 September 1998, the trial court entered its written adjudication and dispositional order, from which respondent parents appealed.

E. Marshall Woodall for petitioner-appellee Harnett County Department of Social Services.

C. Winston Gilchrist for respondent-appellant Sarah McLean.

Richard E. Jester for respondent-appellant Ronald Terrell McLean.

Donald E. Harrop, Jr., for appellee Guardian Ad Litem.

HORTON, Judge.

Respondent mother contends that (I) the evidence and findings of fact were insufficient to support the conclusion of the trial court that Tamara Beth McLean is a neglected juvenile. She also contends, as

does respondent father, that (II) the trial court erred in ordering DSS not to attempt to reunite her with Tamara unless she disassociates herself from respondent father. Respondent father argues that (III) the trial court was demonstrably prejudiced against respondents in this case, and that (IV) the trial court also erred in attempting to retain jurisdiction to hear future proceedings in this case.

I.

[1] Our Juvenile Code defines a neglected juvenile as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7A-517(21) (Cum. Supp. 1997). In addition, the decisions of this Court require " 'there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide "proper care, supervision, or discipline' " in order to adjudicate a juvenile neglected. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (listing cases holding that a substantial risk of impairment is sufficient to show neglect) (emphasis added)." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Whether a child is "neglected" is a conclusion of law which must be supported by adequate findings of fact. *Id.* at 510, 491 S.E.2d at 676. Furthermore, the allegations of neglect must be proven by clear and convincing evidence in order to sustain such a finding. N.C. Gen. Stat. § 7A-635 (Cum. Supp. 1997). In this case, the trial court made the following findings of fact:

> 5. [Tamara Beth McLean] is a neglected juvenile as defined by N.C.G.S. § 7A-517 (21), respectively, in that:
>
> A. The respondent parents of the juvenile herein were also the parents of Olivia McLean (hereinafter sometimes referred to as the infant) who died at 3½ months of age from [a] non-accidental injury.
>
> B. The respondent parents were the sole caretakers of the infant from the time of her birth until she received the injuries which caused her death.

C. At the time of the death of the infant, she was residing with the respondent parents in the home of the maternal grandparents at Route 7, Box 915, Harnett County, North Carolina.

D. On the morning of July 1, 1996, the parents reported that the infant was alert and feeding with playful interaction at 4:30 and 8:30 a.m. At approximately 8:00 a.m., the respondent father transported the respondent mother to Triton High School where she was a student. At that time, the infant was with the respondent parents. The father returned home and was the sole caretaker until approximately 12:20 p.m. when he (father) ran for help with the infant in his arms.

E. The respondent father reported that he placed the infant in a car seat under a tree while he worked on an automobile. He further reported that she began to cry and was consoled by him. At approximately 12:20 p.m., the father observed the infant to be limp and did not appear to be breathing well. After telephoning the mother at school, the father ran down the road with the infant in his arms. The infant received CPR at a nursing home and was taken to Betsy Johnson Emergency Room by ambulance.

F. The respondent father reported no injury to the infant and that the only shaking received by her during the day of July 6, 1996 [*sic*] was the shaking received while he was running down the road with the infant in his arms.

G. The infant was placed on life support systems immediately upon her arrival at the Betsy Johnson Hospital in Dunn and continued on life support systems until July 5, 1996. At no time during this period did the infant regain consciousness and it was subsequently determined by the medical personnel that the child was brain dead and the life support systems were turned off on July 5, 1996 and the child immediately died.

H. Medical records from the University of North Carolina Hospitals—Chapel Hill dictated by Pediatric Attending physician Dr. Lewis Romer, M.D., give a final diagnosis of Shaken Baby Syndrome and Battered Child Syndrome.

I. An autopsy performed on the infant at the Office of the Medical Examiner in Chapel Hill by Dr. Karen Chancellor, M.D. indicated that the "death resulted from willfully inflicted head

trauma." The medical examiner ruled the death of Olivia McLean to be a homicide.

J. Olivia McLean died as a result of non-accidental trauma most likely caused by severe shaking of the child within the two and one half hours prior to the father's seeking medical attention approximately 12:20 p.m., July 1, 1996.

K. Physical examination of the child at UNC Hospital revealed positive clinical findings of ecchymosis (bruises) in the back of the buttock in the lumbar region that was yellowish green color consistent with old ecchymosis (bruises) approximately 5 to 10 days old. Respondent mother told the social worker that she saw the bruises the day before Olivia went to the hospital.

L. Dr. Runyon testified that the injuries to Olivia McLean were the result of a severe shaking causing the blood vessels in the spinal chord to separate. Dr. Runyon further testified that this injury could not have been caused by accidental means such as described by the respondent father. He further testified that the injuries to Olivia most likely occurred between 11:45 a.m. and 12:20 p.m. during which time the respondent mother was at school.

M. The child's death was the result of a severe shaking causing severe injuries to the child's brain which caused the child's death.

N. Shortly after the death of the infant, the respondent parents married and have continued to live together from that time until the trial of this case in the maternal grandparent's home at Route 7, Box 915, Dunn North Carolina.

O. During the investigation in July, 1996, the respondent parents were not cooperative with the social worker during the time in which she was making [an] investigation in this matter.

P. The respondent mother in July, 1996 presently continues to support the father in his contention that the child had not been injured except be shaken while he was running down the road with the child in his arms. At the time, the respondent mother was told that the medical personnel at Chapel Hill, N.C., were of the opinion that the infant died from means other than accidental.

Q. The respondent mother has continued to support the father's claim that the child was not shaken other than such shaking motions as received while he ran with the infant (Olivia McLean) for help.

R. After the infant's death, the social worker made attempts to visit the parents at the home of the maternal grandparents; the social worker sent a letter asking for an appointment and made telephone calls in an attempt to reach the parents. The social worker was not able to make the visit and eventually closed the investigative case for the reason that the child had died. James Beaumont, maternal grandfather of the deceased child testified that he tried on at least two occasions in July or August 1996 to return calls to the social worker and left messages, but did not receive a response.

S. Since the death of Olivia McLean, the respondent parents have married, had another baby (Tamara McLean) and are presently living together.

T. On the 26th day of February, 1998, the petitioner's social worker began an investigation in this juvenile case and visited with both of the respondent parents who continued their insistence that the death of the juvenile's sibling was accidental (the respondent mother does not believe the father intentionally hurt their deceased daughter) and further they did not respond to calls or letters from the social worker. The respondents' families have supported the respondents in their efforts. The maternal grandparents have been told that the medical personnel were of the opinion the infant's (Olivia's) death was caused by means other than accidental.

U. The respondent parents' plan for the care of the juvenile was to place her in the home of the maternal grandparents where the parents were currently living. This household is the same in which the deceased child was living when she died. During petitioner's investigation in February 1998, the social worker expressed concern about the juvenile's safety in the parents['] home. During the social worker's discussion with them, neither respondent parent exhibited or expressed any concern for the juvenile's safety and both parents supported each other.

V. During the parents' visits with the juveniles [*sic*] since the filing of the petition herein, the respondent mother seemed

awkward and nervous with the child and the respondent father extended most of the care for the juvenile during the visits.

W. The juvenile's safety cannot be assured if placed with the respondent parents.

Where the trial court sits without a jury and hears the evidence in a neglect adjudication, the facts found by the trial court are binding on an appellate court if supported by clear and convincing competent evidence. *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. In this case neither appellant takes exception to any of the findings of fact made by the trial court. Appellant mother argues, however, that the findings made by the trial court do not support the conclusion that Tamara is a neglected child. She argues that the trial court impermissibly based its decision entirely upon the death of Tamara's sibling Katelynn prior to Tamara's birth, as evidenced by the trial court's third conclusion of law in which it stated that "the juvenile [Tamara] is a neglected juvenile as defined by N.C.G.S. § 7A-517(21) in that the juvenile was born to parents of another juvenile who died as a result of abuse at the hands of the respondent father and the household composition of the respondent parents remains the same as when the first juvenile was killed."

Under the definition of "neglect" in effect at the time this action was commenced, the trial court is allowed to consider as relevant evidence that a "juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7A-517(21). Here, the neglect petition was filed while the newly born Tamara Beth McLean was still in the hospital maternity ward, so that she had not actually lived in the home with her parents, the respondents. However, the trial court found that Katelynn died while living with her parents in the home of the maternal grandparents. The trial court also found that following the death of Katelynn, the respondents married and continued to live in the home of the maternal grandparents. Finally, the trial court found that the respondents' plan of care for Tamara was to have her live with them in the home of the maternal grandparents, the same home in which Katelynn was living when she died.

The purpose of the statutory amendment is self-evident: it allows the trial court to consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect. Here, the plan of her parents was to take Tamara to the same home, to live among the same persons, as did her deceased

sister Katelynn. We are aware that Tamara was not living in the home at the time Katelynn died. However, under these circumstances, respondents' plan to have Tamara live in the same home environment in which Katelynn died was a relevant factor which the trial court could consider in making a determination of whether there was a substantial risk of impairment to her.

We are aware that while the abuse of a child in the home is clearly relevant in determining whether another child is neglected, the statute "does not *require* the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse." *In re Nicholson and Ford*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994) (emphasis added). In *Nicholson*, the juveniles before the trial court were the siblings of a child who had died of a blunt trauma and shaken-baby syndrome. The parents, who rejected the medical findings, were charged with manslaughter. While charges were eventually dropped against the mother, the father pled guilty to involuntary manslaughter and was later convicted. When the father was released from jail and returned home, DSS filed a petition alleging both children to be neglected in that they resided in an environment injurious to their welfare. The trial court dismissed the petition as to the three-and-one-half-year-old sibling but found neglect as to the three-month-old sibling, noting that "shaken-baby syndrome is most deadly to infants under six months of age." *Nicholson*, 114 N.C. App. at 93, 440 S.E.2d at 853. In affirming the decision of the trial court, we held that removal of other children from a home in which a sibling died by non-accidental means is not mandatory; the statute "affords the trial judge some discretion in determining the weight to be given such evidence," and allows the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside. *Id.* at 94, 440 S.E.2d at 854.

The facts in the case before us are strikingly similar to those in *Nicholson*. Here, there is ample evidence that Katelynn died due to shaken-baby syndrome, but her parents contended that her death was accidental; Katelynn's mother married the respondent father after Katelynn's death, and feels comfortable in having him assist in the care of Tamara; the father has now been convicted of involuntary manslaughter in the death of Katelynn, but continues to live in the home; the mother and her parents continue to support the father in his version of the events surrounding Katelynn's death. We particularly note that at the time of the 8 May 1998 adjudicatory hearing in

this matter, Tamara was less than three months of age and thus at high risk for a non-accidental injury such as "shaken-baby syndrome." Finding that the home environment remained unchanged since the death of Katelynn and that the family did not share or understand the State's concern for the safety of Tamara, the trial court concluded that Tamara was neglected as a matter of law.

In cases of this sort, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case. In the case before us, the trial court found that the respondent parents intended to live with Tamara in the home of the maternal grandparents where Katelynn died; that her father had been convicted of causing the death of Katelynn; that although her mother had been advised that the death of Katelynn was by non-accidental means, she continued to support the claims of her husband, Tamara's father, that the death of Katelynn was caused by her being shaken as he ran with her to get help; that the parents were not cooperative with the social worker who was investigating the matter; that the respondent parents have neither expressed nor exhibited any concern for the future safety of Tamara in their home; that during the visits of the parents with the child, the respondent father "extended most of the care for the juvenile."

Here, the trial court carefully weighed and assessed the evidence, and concluded that Tamara—then an infant less than three months of age—would be at risk if allowed to reside with her parents in their home. Because the neglect statute "affords the trial judge some discretion in determining the weight to be given such evidence," we hold that the findings of fact taken in their entirety are sufficient to support the conclusion that Tamara was a neglected child. This assignment of error is overruled.

II, III, and IV

Because the remaining three assignments of error relate to statements made by the trial court following oral entry of the adjudicatory and dispositional orders, we discuss them together. After adjudicating Tamara to be a neglected child, the trial court held a dispositional hearing, and considered written reports filed by DSS and the Guardian Ad Litem, as well as oral testimony from witnesses called by the respondent father. The trial court was also advised that the father pled guilty the preceding day to involuntary manslaughter in the death of Katelynn and would be sentenced at a later date. The trial

court then outlined a dispositional order under which DSS would be granted legal and physical custody of Tamara, with a review hearing scheduled after six months. Visitation with the parents was to be scheduled by DSS. The trial court then made the following statements to the mother and father in open court:

> You know, ya'll must think I'm crazy. This child was obviously killed in 1996 by, ma'am, I['m] going to give you the benefit of the doubt, by him. You have supported him since then. I think it is totally ridiculous for you and your family to come up here and tell me [it was] an accident. There is no accident. It's a vicious act where a child was killed. I have no patience with it. The idea, and I'm going to tell you now, I am not giving you or anybody any child involving a death like this unless you totally and completely disassociate yourself from the person who did it. . . . The only chance you have, if at all, is separate yourself from him, get in the psychological evaluation and satisfy me and your family that you are going to totally dissociate [*sic*] your person from and that you are totally going to completely totally support that child. Today I do not have that feeling. . . .
>
> Mr. Jester, to your client, taking him a long time to come around to the fact that he's done something. He's not cooperated with Social Services and done anything. Now he comes into court and pleads guilty, involuntary manslaughter for the death of a child, shows as far as I'm concerned, no remorse, no understanding, still with his wife. I'm mortified that his wife is even still with him. I think most normal people would have disassociated themselves from him a long time ago, let him go his way. He has killed one child. Am I going to let him kill another one? No, if I can help it. [At the] [s]ame time[,] Mr. Jester, I'm going to give him the benefit of six months just like I am her. I'm not going to rule him out yet, totally and completely but he needs to get—We'll see about the evaluations.
>
> Social Services doesn't need to get too bogged down with all of these plans and worries and things and trying to cooperate. It's a very marginal situation, at best. I'm telling you now, if ya'll going to make plans for them to stay together and have this child, forget it. I'm not going to do it. . . . Your advice would be to separate your self [*sic*] completely, totally and give me the feelings you['re] going to totally and completely support your child. If I don't have that feeling there's somebody else that will. That concludes this hearing.

After a colloquy with counsel about child support, the trial court made the following statements to DSS representatives:

> So, the visitation[s] are . . . to be supervised, you're to be careful what you're doing. Ya'll have got too carried away with this, reasonable efforts. Ya'll need to break track a little bit. This is a very serious matter and it's marginal at best but I'm going to give them six months to try. The only reason because the law requires me to do it. If it won't for that, that would be it.

II. Order that Mother Separate From Respondent Father

[2] Both respondent parents contend that the trial court erred in instructing DSS not to attempt to reunite Tamara with her mother, unless her mother "disassociates" herself completely from her husband. Normally, DSS is under an obligation to make reasonable efforts to prevent or eliminate the need for placement of a juvenile in foster care, unless the trial court "finds through written findings of fact that efforts to eliminate the need for placement of the juvenile in custody clearly would be futile or would be inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time . . . ." N.C. Gen. Stat. § 7A-651(c)(2) (Cum. Supp. 1997). Here, there were no findings in the dispositional order that reasonable efforts to reunite the family would be futile, nor did the trial court incorporate any of its oral statements about the need for the mother to distance herself from her husband if she were to have any chance of regaining custody of Tamara. However, the statements made by the trial court in open court could have left little doubt in the parties' minds that the separation of the parents was a pre-condition to the mother having a realistic chance to regain custody.

The integrity of the reasonable efforts process was further undermined by the statement of the trial court that it was only ordering reasonable efforts because it was required to do so by law. That the trial court had the ability to carry out its directives was emphasized when the trial court expressly retained jurisdiction of the case in the written dispositional order it signed. Certainly it is reasonable to expect DSS to abide by the oral directives of a trial court which is going to retain jurisdiction in a matter, and thus will be the same trial court conducting review hearings in the matter. Thus, although the trial court did not expressly state its conditions in the written order, we believe that its statements in open court, coupled with the retention

of jurisdiction in the matter, were prejudicial error. As a remedy for this error, we have vacated below that portion of the dispositional order retaining jurisdiction in this trial court.

III. Prejudice Demonstrated by Trial Court

[3] It is the combination of these post-trial events which led respondent father to argue on this appeal that the trial court was "demonstrably prejudiced" against respondent parents. We note that the objectionable statements were made *following* the trial of this matter and the trial court's oral entry of adjudicatory and dispositional orders. We have carefully searched the record, and do not find evidence of "demonstrable prejudice" against respondents *during the trial of this case.* However, in order that our trial courts retain the confidence of the citizens who bring their cases there for decision, the process of decision making must not only be fair, but must appear to be fair. Although the tragic circumstances surrounding the death of Katelynn no doubt contributed to the frustration of the trial court and its post-trial statements, we cannot approve statements that refer to the family as "ridiculous," or characterize the respondent mother as abnormal.

IV. Retention of Jurisdiction

[4] Finally, we address the argument that the trial court erred in attempting to retain jurisdiction of future hearings in this case. While we are aware that as a matter of practice some trial courts have done this for reasons of consistency and efficiency, particularly in family law cases, there is no express statutory authority for this practice. This Court has previously discussed the practice in a child custody case in which the trial judge retained jurisdiction. *Wolfe v. Wolfe*, 64 N.C. App. 249, 307 S.E.2d 400 (1983), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 297 (1984). In *Wolfe*, this Court held that the trial court's effort to retain exclusive jurisdiction was erroneous and impractical, but found that the action was harmless error in the absence of evidence of some prejudice to the defendant in that case.

Although domestic practice has changed dramatically since *Wolfe* was decided in 1983, the legislature has not acted to grant authority to the trial court to retain jurisdiction in a domestic relations case. By contrast, the legislature has given the trial court the authority to retain jurisdiction when a defendant is placed on unsupervised probation as part of a criminal judgment. The trial judge may "limit

jurisdiction to alter or revoke the sentence . . . ." N.C. Gen. Stat. § 15A-1342(h) (1997). If the trial judge limits jurisdiction in that fashion, only the sentencing judge may reduce, terminate, continue, extend, modify, or revoke unsupervised probation, provided the sentencing judge is still on the bench. N.C. Gen. Stat. § 15A-1344(b) (1997). Therefore, the trial court in this case erred in attempting to retain exclusive jurisdiction over future hearings in this matter and that portion of the dispositional order must be vacated. In any event, we believe the trial court's post-trial statements already discussed herein, could be interpreted as an indication that the trial court had already formed an opinion about the order it intended to enter at future review hearings. Thus, even if the trial court had authority to retain jurisdiction over future hearings, a concept we reject herein, we would vacate that portion of the dispositional order so that the appearance of neutrality and impartiality could be preserved.

In summary, we affirm the adjudication of neglect by the trial court, modify the dispositional order by vacating the provision relating to the retention of jurisdiction by the trial court, and affirm the written dispositional order as modified.

Affirmed as modified.

Judges GREENE and TIMMONS-GOODSON concur.

IN THE MATTER OF NICHOLAS JONES, A JUVENILE

No. COA99-19

(Filed 2 November 1999)

1. Rape— juvenile petitions—sexual offense by older defendant against young victim—no allegation of ages—insufficient

Juvenile petitions alleging violations of N.C.G.S. § 14-27.4(a)(1) (a sexual act with a child under 13 by a defendant at least 12 years old and at least 4 years older than the victim) were fatally defective where they did not contain the crucial allegations of the ages of the victim and respondent and did not allege a violation of any other lesser or related sexual offense.

2. Rape— young victim and older defendant—no evidence of defendant's age—evidence insufficient

There was plain error in a prosecution of a juvenile for violation of N.C.G.S. § 14-27.2(a)(1) (rape of a child under 13 by a defendant at least 12 and at least 4 years older than the victim) where the court failed to dismiss the charge for insufficient evidence in that the State did not offer any evidence of respondent's age. No decisions of the North Carolina Supreme Court allow the trial court to find beyond a reasonable doubt the respondent's age in a juvenile prosecution for first-degree rape merely by observing the juvenile in the courtroom where the State offers no direct or circumstantial evidence of the respondent's age and where the respondent's age is an essential element of the crime charged.

Judge EDMUNDS concurring.

Appeal by respondent juvenile from an order entered 2 June 1998 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 23 September 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel D. Addison, for the State.

Public Defender J. Robert Hufstader, by Assistant Public Defender Patricia A. Kaufmann, for respondent appellant.

HORTON, Judge.

On 14 January 1998, Detective J. D. Owenby, Jr., of the Buncombe County Sheriff's Department, verified five juvenile petitions alleging that the respondent, Nicholas Jones, was a delinquent juvenile by reason of various sexual offenses involving L.G.C., a female juvenile. The petitions were approved for filing by the Juvenile Intake Counselor on 26 January 1998. The first of those petitions alleged, in pertinent part,

> [t]hat the juvenile [respondent] is a delinquent juvenile as defined by G.S. 7A-517(12), in that at and in the county named above [Buncombe], and on or about the 25th day of November, 1997, the juvenile unlawfully, willfully, and feloniously did engage in a sex offense with [L.G.C.].
>
> The offense charged here is in violation of G.S. 14-27.

The second and third petitions were identical to the first, except that both alleged the date of the offense to be 27 November 1997. The fourth petition was also identical to the first three petitions, except that it alleged the date of the offense to be 28 November 1997. We will discuss the fifth petition, which purported to charge the respondent with first-degree rape, below.

[1] We first note that N.C. Gen. Stat. § 14-27 was repealed in 1979. 1979 N.C. Session Laws, ch. 682, § 7, effective 1 January 1980. It appears from the record and the briefs of the parties that the State intended to charge respondent with a violation of N.C. Gen. Stat. § 14-27.4(a)(1) (Cum. Supp. 1998), first-degree sexual offense, which reads as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

The respondent's trial was conducted on the theory that he was charged with first-degree sexual offense, and the trial court adjudicated respondent to be delinquent "by reason of four counts of 1st degree sex offense in violation of G.S. 14-27." The four petitions described above, however, did not contain any allegation of the age of the victim or the respondent. Respondent argues that they were fatally defective on their faces, and that judgment should be arrested in the four cases. We agree.

N.C. Gen. Stat. § 7A-560 (1995), a part of our juvenile code, provides, in pertinent part:

> . . . In cases of alleged delinquency or undisciplined behavior, the petitions shall be separate.
>
> 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.

Respondent was, of course, entitled to adequate notice of the charges against him so that he can defend himself against the allegations of the petitions.

> "Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity."

State v. Drummond, 81 N.C. App. 518, 520, 344 S.E.2d 328, 330 (1986) (quoting *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969)). Here, the four petitions did not state respondent's alleged misconduct with particularity, in that they did not contain the crucial allegations of the ages of the victim and respondent as required for an alleged violation of N.C. Gen. Stat. § 14-27.4(a)(1). Further, it does not appear that the petitions in this case alleged a violation of any other lesser or related sexual offense described in Article 7 (Rape and Kindred Offenses) of Chapter 14 of our General Statutes. The petitions were fatally defective and the judgments based on them must be arrested.

II.

[2] The fifth petition alleges that respondent

> is a delinquent juvenile as defined by G.S. 7A-517(12), in that at and in the county named above, and on or about the 28th day of November, 1997, the juvenile did unlawfully and willfully and feloniously did ravish and carnally know [L.G.C.], by force and against the person[']s will.
>
> The offense charged here is in violation of G.S. 14-27.2.

The petition states a violation of N.C. Gen. Stat. § 14-27.2(a)(2), first-degree rape. Immediately prior to trial, the State moved to amend the fifth petition to allege a violation of N.C. Gen. Stat. § 14-27.2(a)(1) (Cum. Supp. 1998), which statute provides that:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old or is at least four years older than the victim[.]

Respondent objected to the amendment, and contends the trial court erred in overruling his objection. We need not reach the merits of respondent's argument, however, because the State did not offer any evidence at trial that respondent was at least 12 years old or at

least four years older than L.G.C. Respondent contends the trial court committed plain error in failing to dismiss the charge of first-degree rape for insufficiency of the evidence. We note that respondent did not move to dismiss the charges against him at trial, however, we have elected, pursuant to our inherent authority and Rule 2 of the Rules of Appellate Procedure, to consider whether there was sufficient evidence of every element of the offense of first-degree rape to submit the charge to the trial court as the trier of fact.

> Under the plain error rule, the error of the trial court
>
> must have "had a probable impact on the jury's finding of guilt." Defendant, therefore, "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result."

State v. Allen, 339 N.C. 545, 555, 453 S.E.2d 150, 155-56 (1995) (citations omitted), *abrogated by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). On a motion to dismiss,

> the question is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, so as to warrant submission of the charge to the jury. We must view the evidence in the light most favorable to the State and afford the State every reasonable inference that may arise from the evidence. There must be substantial evidence to support a finding that an offense has been committed and that the defendant committed it. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Jackson, 119 N.C. App. 285, 287, 458 S.E.2d 235, 237 (1995) (citations omitted). Respondent contends the State failed to offer evidence of his age at the time of the offense, that his age was an essential element of the offense, and that the charge of first-degree rape should be dismissed. We agree.

Our Supreme Court confronted the issue of a motion to dismiss on a sex offense charge in *State v. Rhodes*, 321 N.C. 102, 361 S.E.2d 578 (1987). In *Rhodes*, the defendant was charged with first-degree rape under N.C. Gen. Stat. § 14-27.2(a)(1). As in the case before us, the ages of the victim and defendant were elements of the offense. In *Rhodes*, the Supreme Court held that the evidence of the respective ages of the victim and defendant was sufficient to withstand the motion to dismiss:

> A person may be guilty of first degree rape if (1) he has vaginal intercourse with a child under the age of 13 years, (2) he is at least 12 years old and (3) he is at least four years older than the victim. In this case two witnesses, the ten year old prosecuting witness and her nine year old brother, testified the defendant had intercourse with the ten year old girl. *There was testimony from several witnesses that the prosecuting witness was ten years of age. The defendant testified he was born on 4 February 1956 which would make him 29 years of age on 4 January 1986. This evidence is sufficient to withstand a motion to dismiss on the charge of first degree rape.*

Rhodes, 321 N.C. at 104, 361 S.E.2d at 580 (emphasis added) (citation omitted). In the case before us, the defendant's age is an essential element of the offense of the amended offense of first-degree rape. The State bears the burden of proving each element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 25 L. Ed. 2d 368, 374 (1970). The State did not, however, offer any evidence, direct or circumstantial, of respondent's age at the time of the offense in question. In the context of a motion to dismiss, the State must present substantial evidence of each element of the offense charged. *State v. Nobles*, 350 N.C. 483, 504, 515 S.E.2d 885, 898 (1999). The State contends, however, that in North Carolina the jury may determine a criminal defendant's age merely by observing him in the courtroom. In support of that position, the State relies on the cases of *State v. Samuels*, 298 N.C. 783, 787, 260 S.E.2d 427, 430 (1979); *State v. Evans*, 298 N.C. 263, 267, 258 S.E.2d 354, 356 (1979), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989); *State v. Gray*, 292 N.C. 270, 286, 233 S.E.2d 905, 915 (1977); *State v. Overman*, 269 N.C. 453, 470, 153 S.E.2d 44, 58 (1967), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986). Careful analysis of the facts of the cases cited by the State, and other relevant North Carolina decisions, convinces us that our evidentiary rule does not allow a jury to determine the age of a criminal defendant beyond a reasonable doubt merely by observing him in the courtroom without having the benefit of other evidence, whether circumstantial or direct.

The first North Carolina decisions to deal with proof of the age of a defendant were *State v. Arnold*, 35 N.C. 184 (1851) and *State v. McNair*, 93 N.C. 628 (1885). In each case, the defendant contended he was less than fourteen years of age at the time of the offense in question, and thus presumptively incapable under the common law of

committing a criminal offense. "In cases of rape, the common law presumption of incapacity was conclusive to age fourteen." *State v. Rogers*, 275 N.C. 411, 424, 168 S.E.2d 345, 352 (1969), *cert. denied*, 396 U.S. 1024, 24 L. Ed. 2d 518 (1970). In *Arnold*, a prosecution for murder, the defendant offered no evidence of his age at trial, but insisted on appeal that he appeared to be under fourteen years of age, "and, therefore, that it was incumbent on the State to prove that he was over that age . . . ." *Arnold*, 35 N.C. at 187. Chief Justice Ruffin opined for the Court that "[a]s the subject of direct proof, the *onus* was certainly on the prisoner, as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved." *Id.* at 192. In *McNair*, the defendant also contended in defense of the charge of murder that he was under the age of fourteen years at the time of the alleged offense. There was testimony before the jury on the issue of his age, the "mother of the prisoner rendering it somewhat uncertain whether he was of that age, and a number of witnesses for the State placing it at about seventeen years." *McNair*, 93 N.C. at 630-31. In instructing the jury, the trial court stated: "It is for you to say whether he is under fourteen years of age or not, being, as you see him before you, grown to the stature of manhood." *Id.* at 631. The prosecutor suggested to the trial court that the instruction might be construed as expressing an opinion on the defendant's age, and the trial court gave the jury an additional instruction:

> What the court said to them in reference to the size and appearance of the prisoner was not to be taken by them as indicating the opinion of the court as to the prisoner's age, but that they had a right to consider his size and appearance to aid them in coming to a conclusion as to his age.

Id. at 631. In affirming McNair's conviction and death sentence, Chief Justice Smith noted that "it was competent for the jury to look at the prisoner and draw such reasonable inferences as to his youth as his appearance warranted. *Indeed, the burden rested on him to prove his incapacity from nonage to commit the imputed crime.*" *Id.* at 632 (emphasis added). Thus, in both *Arnold and McNair*, we note that the burden was on the *defendant* to prove the common law defense of "nonage." In *Arnold*, the defendant offered no direct evidence as to his age, and thus failed to carry his burden even though he was a "small boy," and appeared to be less than fourteen years of age. In *McNair* there was conflicting evidence from the defendant's mother and the State's witnesses, so that it was held proper for the

trial court to allow the jury to observe the defendant himself to "aid" the jury in resolving the conflicting testimony as to his age. Although neither of these early decisions hold that a jury may determine the age of a criminal defendant based entirely upon in-court observations, without other evidence, these early cases apparently led to the broad statement by Stansbury that the jury "may look upon the prisoner, although he is not in evidence, to estimate his age." Stansbury's, North Carolina Evidence, § 119 (2d ed. 1963).

In *Overman*, 269 N.C. 453, 153 S.E.2d 44, a prosecution for rape, our Supreme Court held that it was not improper for the assistant solicitor to comment in his argument to the jury on the relative *sizes* of the prisoner and the alleged victim. In finding that the argument was neither "offensive [n]or inflammatory," the Supreme Court cited the above statement from Stansbury relative to a jury "estimating" the age of a defendant. *Id.* at 470, 153 S.E.2d at 58. We note that in *Overman*, the size of the defendant was not an essential element of the offense charged.

A decade later, our Supreme Court decided *Gray*, 292 N.C. 270, 233 S.E.2d 905, in which the defendant was charged with rape, felonious assault, and first-degree burglary. The State was required to prove, as an essential element of the offense, that the defendant was more than sixteen years of age. The Supreme Court decided, as a matter of first impression, that when age is in issue, the trial court may properly admit into evidence the opinions of lay witnesses regarding a person's age. In *Gray*, numerous lay witnesses offered their opinions as to the defendant's age, and the defendant himself testified about his Navy duty, his marriage and his two children. "From defendant's own testimony the conclusion that he was more than sixteen years old, although admittedly one for the jury to draw, is simply inescapable." *Id.* at 286, 233 S.E.2d at 915. We note that the record indicates that the defendant Gray was in fact twenty-eight years of age at the time of his trial.

In *Evans*, 298 N.C. 263, 258 S.E.2d 354, the defendant was charged with first-degree burglary, assault on a female with intent to commit rape, and felonious larceny. The jury found the defendant guilty of first-degree burglary, not guilty of felonious larceny, and guilty of misdemeanor assault on a female. The trial court imposed an active sentence of life imprisonment on the charge of burglary, and imposed a concurrent two-year sentence on the misdemeanor of assault on a female. On appeal, the defendant argued in part that the State failed to offer evidence on an element of misdemeanor assault on a female

because there was no evidence that he was more than 18 years of age. In affirming defendant's conviction, the Supreme Court cited *McNair* and Stansbury for the proposition that "the jury may look upon a person and estimate his age." *Evans*, 298 N.C. at 267, 258 S.E.2d at 356. The Court continued, however, by pointing out that "any error . . . relative to the assault charge was harmless[,]" because the sentences ran concurrently. *Id.* at 267, 258 S.E.2d at 356-57.

Later in 1979, the question was again presented to our Supreme Court in *Samuels*, 298 N.C. 783, 260 S.E.2d 427. Defendant Samuels was charged with first-degree rape and with robbery with a dangerous weapon. He was convicted on the rape count, and sentenced to life imprisonment. On appeal to our Supreme Court, counsel for Samuels stated that he could find no error prejudicial to defendant, and asked that the Supreme Court review the record for possible prejudicial error. Justice Copeland, writing for the Court, stated that one of the essential elements of first-degree rape was that the defendant be more than sixteen years of age at the time of its commission. *Id.* at 787, 260 S.E.2d 430. "Here, the jury had ample opportunity to view the defendant and estimate his age. *See State v. Evans*, 298 N.C. 263, 258 S.E.2d 354 (1979)." *Id.* Although the brief opinion in *Samuels* gives the impression that there was no other evidence of defendant Samuel's age, requiring the jury to "estimate" his age, one investigating officer testified that the victim described the man who attacked her as "about 25 years of age, about 6 feet one inches tall, 190 lbs., medium complexion, black hair . . . ." Another officer also testified that the victim described her assailant as "about 25 years of age . . . ." The victim identified the defendant Samuels as her assailant. Thus, there was competent lay opinion evidence of Samuels' age upon which the jury could find that he was more than sixteen years of age at the time of the offense charged.

In *Barnes*, 324 N.C. 539, 380 S.E.2d 118, the defendant was convicted, among other things, for statutory rape. An element of the offense was that the defendant be at least 12 years of age and at least four years older than the victim. On appeal, defendant challenged the constitutionality of the decisions in *Evans*, *Gray*, and *McNair*, insofar as they allowed the jury to "determine a defendant's age based on their observations of the defendant." *Barnes*, 324 N.C. at 540, 380 S.E.2d at 119. Our Supreme Court did not reach the constitutional question in *Barnes*, however, because "the State [in *Barnes*] presented adequate circumstantial evidence from which the jury could determine defendant's age." *Id.*

In the case before us, the State offered no evidence, direct or circumstantial, of the respondent's age although the State itself moved to amend the juvenile petition and alleged that the respondent was more than 12 years of age and more than four years older than the alleged victim at the time of the offense. We do not believe that any of the decisions of our Supreme Court allow the trial court to find beyond a reasonable doubt the respondent's age in a juvenile prosecution for first-degree rape, merely by observing the juvenile in the courtroom, where the State offers no direct or circumstantial evidence of the respondent's age, and where the age of the respondent is an essential element of the crime charged. The difficulty of determining the age of a juvenile by merely observing the juvenile is exacerbated by the requirement that the age of the juvenile *at the time of the alleged offense* is the crucial determination, not the age of the juvenile at the time of trial. Further, the trial court made no specific finding as to respondent's age at the time of the offenses alleged; the Juvenile Adjudication Order merely states that "after hearing all the evidence in this matter that the juvenile did commit the acts alleged and finds the juvenile to be delinquent." In light of our decision, we need not reach the related constitutional questions which arise if we relieve the State of the burden of proving beyond a reasonable doubt an essential element of a felony charge against a juvenile respondent.

We hold the trial erred in failing to dismiss the four charges of first-degree sexual offense as fatally defective, and in failing to dismiss the charge of first-degree rape at the close of the evidence, the State having failed to offer any evidence of respondent's age. In light of our decision, we need not consider respondent's contention that the trial court erred in allowing the State to amend over his objection the juvenile petition charging him with first-degree rape.

Reversed.

Judge WYNN concurs.

Judge EDMUNDS concurs in result with separate opinion.

Judge EDMUNDS concurring in the result.

I concur with the majority holding that the four juvenile petitions that fail to allege the age of either the juvenile or the victim are fatally flawed. As to the fifth petition, I concur in the result, but on different

grounds. I believe the State should not have been allowed to amend the petition on the day of trial.

The petition in question originally charged that "the juvenile did unlawfully and willfully and feloniously [] ravish and carnally know [the victim], by force and against the persons [sic] will. The offense charged here is in violation of G.S. 14-27.2." On the morning of trial, the State moved to amend this charge to "a statutory offense." Over respondent's objection, the motion was allowed.

Section 7A-627 states:

> The judge may permit a petition to be amended when the amendment does not change the nature of the offense alleged or the conditions upon which the petition is based. If a motion to amend is allowed, the juvenile shall be given a reasonable opportunity to prepare a defense to the amended allegations.

N.C. Gen. Stat. § 7A-627 (1995) (repealed effective 1 July 1999). This statute does not define the critical term "nature of the offense." However, several cases provide guidance. In *State v. Clements*, 51 N.C. App. 113, 275 S.E.2d 222 (1981), a defendant was charged with death by motor vehicle. The State's motion to amend the underlying traffic offense from "following too closely" to "failure to reduce speed to avoid an accident" was allowed. This Court affirmed the conviction, noting that both before and after the amendment defendant was charged with causing a death while violating a statute pertaining to operation of a motor vehicle. The *Clements* Court held that substituting a "substantially similar" motor vehicle violation for the violation originally alleged did not change the nature of the offense of "death by motor vehicle." *Id.* at 116-17, 275 S.E.2d at 225. Similarly, in *In re Jones*, 11 N.C. App. 437, 181 S.E.2d 162 (1971), the respondent juvenile was charged with stealing lights from a parked vehicle. This Court held that an amendment that clarified the identity of the victim did not change the nature of the offense charged.

By comparison, in *In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994), we held that amending a petition to charge the burning of personal property, in place of the original charge of setting fire to a public building, impermissibly changed the offense alleged against the juvenile. Finally, in *State v. Drummond*, 81 N.C. App. 518, 344 S.E.2d 328 (1986), we held that N.C. Gen. Stat. § 14-27.2 (Supp. 1998) encompassed two types of first-degree rape and that a defendant

was entitled to adequate notice of which of the two types the State was pursuing.

Based on the statute and the foregoing cases, I believe that statutory rape is an offense of a different nature from forcible rape. On one hand, these two offenses are charged in the same statute (unlike the two burning charges in *Davis*) and both have the same penalty. On the other hand, these offenses have different elements. Statutory rape is a strict liability offense that focuses on the age of the participants. *See State v. Anthony*, 133 N.C. App. 573, 578, 516 S.E.2d 195, 198 (1999) (citing *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 674, 509 S.E.2d 165, 177 (1998)). The only intent necessary to commit statutory rape is the intent to have sexual intercourse. By contrast, forcible rape, in which the age of the parties is immaterial, requires an intent by the defendant to gratify his passions notwithstanding any resistance on the part of the victim. *See State v. Nicholson*, 99 N.C. App. 143, 392 S.E.2d 748 (1990). Statutory rape does not encompass violence, while forcible rape is a crime of violence as a matter of law. *See State v. Rose*, 335 N.C. 301, 439 S.E.2d 518 (1994). The significant differences between these forms of rape have led us to hold that a defendant was constitutionally entitled to be given notice of which form the State intended to prove at trial. *See Drummond*, 81 N.C. App. 518, 344 S.E.2d 328. I would hold that the amendment made by the State changed the "nature of the offense" and was therefore impermissible.

KEMESHA HOBBS, MICHAEL HOBBS AND MICHELAE HOBBS BY AND THROUGH HER GUARDIAN AD LITEM, ANNE WINNER, PLAINTIFFS V. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, WAKE COUNTY DEPARTMENT OF SOCIAL SERVICES, WAKE COUNTY MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES, WAKE COUNTY HUMAN SERVICES, MARIA SPAULDING, INDIVIDUALLY, AND IN HER CAPACITY AS DIRECTOR OF WAKE COUNTY HUMAN SERVICES, MARY DEYAMPERT, INDIVIDUALLY, AND IN HER CAPACITY AS DIRECTOR OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, THOMAS W. HOGAN, INDIVIDUALLY, AND IN HIS CAPACITY AS DIRECTOR OF THE WAKE COUNTY DEPARTMENT OF SOCIAL SERVICES, JAMES W. KIRKPATRICK, JR., INDIVIDUALLY, AND IN HIS CAPACITY AS DIRECTOR OF WAKE COUNTY MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES, DELICE COFFEY, INDIVIDUALLY, AND IN HER CAPACITY AS A WAKE COUNTY SOCIAL WORKER, HORACIO SANCHEZ, INDIVIDUALLY, AND IN HIS CAPACITY AS A WAKE COUNTY SOCIAL WORKER, MARTHA F. WATERS, INDIVIDUALLY, AND IN HER CAPACITY AS A WAKE COUNTY SOCIAL WORKER, SANDRA DELOATCH, INDIVIDUALLY, AND IN HER CAPACITY AS A WAKE COUNTY SOCIAL WORKER, FILICO C. BELL, INDIVIDUALLY, AND IN HIS CAPACITY AS A WAKE COUNTY SOCIAL WORKER, ROSA LEECH, INDIVIDUALLY, AND IN HER CAPACITY AS A WAKE COUNTY SOCIAL WORKER, TOBIAS H. SMITH, INDIVIDUALLY, AND IN HIS CAPACITY AS A WAKE COUNTY SOCIAL WORKER, JOHN C. HARVEY, INDIVIDUALLY, AND IN HIS CAPACITY AS A WAKE COUNTY SOCIAL WORKER, DEFENDANTS

No. COA98-1086

(Filed 2 November 1999)

1. Appeal and Error— preservation of issues—jurisdiction

Defendants Wake County DSS, Wake County Mental Health, Developmental Disabilities and Substance Abuse Services, and Wake County Human Services could not argue on appeal that there was no statutory authority for suit against them where they failed to raise the issue in their motion to dismiss in the trial court and stipulated to the Court of Appeals that they were properly before the trial court.

2. Immunity— public duty doctrine—foster child placement—special relationship

Dismissal of an action for negligence in the placement of a foster child into plaintiffs' home for failure to state a claim was inappropriate as to Wake County DSS, Wake County Mental Health, Developmental Disabilities and Substance Abuse Services, and Wake County Human Services where those defendants argued that they were protected by the public duty doctrine, but the facts arguably suggested a special relationship and special duty in that the parties had considerable direct contact and discussion, defendants visited in plaintiffs' home, and plaintiffs

alleged that they specifically asked and specifically were given assurances that the foster child would not be a threat to their small daughter.

3. Public Officers and Employees— official capacity suits— redundant

The dismissal of negligence claims against individuals in their official capacities was inappropriate where the dismissal of claims against the agencies was inappropriate. Official capacity suits are merely another way of pleading an action against the government entity and are redundant.

4. Public Officers and Employees— social workers—public officials

Dismissal of negligence claims against certain defendants in their individual capacities arising from the placement of a foster child was affirmed where these defendants were acting as public officials since they were acting for and representing the director of social services. Foster children and the families who provide homes for them present a wide range of circumstances, staff members who work with foster children and families certainly cannot rely on fixed and designated facts, and the process must involve defendants' personal deliberation, decision and judgment. Taking into account the language of N.C.G.S. § 108A-14(b) and *Meyer v. Walls*, 347 N.C. 548, these defendants were acting as public officials who cannot be held liable for mere negligence and there were no allegations of corrupt or malicious acts or omissions or of acts beyond the scope of their duties.

Appeal by plaintiffs from order entered 11 May 1998 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 29 April 1999.

Elizabeth F. Kuniholm, by Elizabeth F. Kuniholm and Toni M. Benham, for plaintiff-appellants.

Wake County Attorney's Office, by Michael R. Ferrell and Corinne G. Russell, for defendant-appellees.

HUNTER, Judge.

The record in this case tends to show that the adult plaintiffs, Kemesha and Michael Hobbs ("plaintiffs"), applied and became licensed to be foster parents in Wake County in the spring of 1993.

The licensing process was rather involved. Plaintiffs filled out considerable paperwork and provided information about themselves and their family life, including information about their daughter, Michelae, who was two-years-old at the time. Staff members of the Wake County Department of Social Services ("Wake County DSS") made an evaluation visit to the plaintiffs' home and met young Michelae. Plaintiffs attended meetings and training sessions, purchased additional insurance and fulfilled all the requirements to become foster parents.

In the summer of 1993, staff members of the Wake County DSS approached the couple about the placement of a particular child, a twelve-year-old boy, in their home. Over a period of weeks, one or both of the plaintiffs met with Wake County DSS staff members to discuss the child, his needs and whether the plaintiffs' home would be a suitable placement for him. At the time of these various meetings, Wake County DSS staff knew, but failed to inform plaintiffs, that the child had been a victim of sexual abuse and had been exposed to an environment in which his sisters were also victims of sexual abuse. Nevertheless, the child was placed with plaintiffs in August 1993.

In the fall of 1993, plaintiffs discovered that the child had sexually assaulted their daughter. The couple filed suit in 1996, alleging negligence in the placement of the child in their home. The complaint asserts that the defendants as professionals knew or should have known that a child who has been a victim of sexual abuse and who has lived in an environment of sexual assault is likely to re-enact the abuse on younger, more vulnerable children.

Summonses issued in October 1996 were returned as to all defendants except Rosa Leech. Plaintiffs filed a voluntary dismissal without prejudice of defendants North Carolina Department of Human Resources; Mary Deyampert, individually and in her capacity as director of the North Carolina Department of Human Resources; Maria Spaulding, individually; Thomas Hogan, individually; James W. Kirkpatrick, Jr., individually; and Horacio Sanchez, individually and in his capacity as a social worker. Defendants before us are Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; Wake County Human Services; Thomas W. Hogan in his capacity as director of the Wake County DSS; James W. Kirkpatrick, Jr., in his capacity as director of Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; Maria Spaulding in her capacity as director of Wake County

Human Services; and Delice Coffey, Martha F. Waters, Sandra Deloatch, Filico C. Bell, Tobias H. Smith and John C. Harvey, all six of whom are named in their official and individual capacities.

In May 1998, the trial court entered an order granting defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs appeal and assign error to the trial court's conclusion that the complaint fails to state a claim upon which relief can be granted.

[1] The complaint names, among others, Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; and Wake County Human Services. These three entities argue they may not be sued as individual entities. Citing N.C. Gen. Stat. §§ 108A (1997), 122C (1996) and 153A-77 (1991), they contend there is no statutory authority for lawsuits against the defendants Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; and Wake County Human Services. This amounts to an argument that the trial court had no jurisdiction over these defendants. Contrary to this argument, however, these defendants stipulated in the record before us that they were properly before the trial court and that the trial court had jurisdiction over them. Further, in their motion to dismiss, these parties cited N.C.R. Civ. P. 12(b)(6) (failure to state a claim) and N.C.R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction), but they did not cite N.C.R. Civ. P. 12(b)(2), which sets out "lack of jurisdiction over the person" as grounds for dismissal. "[A] defendant may raise the defense of lack of jurisdiction over his person by a pre-answer motion or by a responsive pleading. If the defendant fails to proceed in this manner, the defense of lack of jurisdiction is waived." *Harris v. Pembaur*, 84 N.C. App. 666, 669-70, 353 S.E.2d 673, 676 (1987) (citation omitted). We also note our Supreme Court has held that "an action against a county agency which directly affects the rights of the county is in fact an action against the county." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Having failed to raise this issue in their motion and having stipulated to this Court that they were properly before the trial court, these defendants may not now argue they are not subject to suit.

[2] Therefore, we must determine whether the trial court properly dismissed the complaint against defendants Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; and Wake County Human Services.

> "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " A motion to dismiss pursuant to Rule 12(b)(6) should not be granted " '*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' "

Isenhour v. Hutto, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999) (citations omitted) (emphasis in original).

Defendants did not file a response to plaintiffs' assertions; rather, they argue they are protected by the public duty doctrine.

Our Supreme Court adopted the public duty doctrine and the two exceptions to it 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):

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.
>
> "The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits."
>
> While this policy is a necessary and reasonable limit on liability, exceptions exist to prevent inevitable inequities to certain individuals. There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the

> promise of protection is causally related to the injury suffered." Although we have not heretofore adopted the doctrine with its exceptions, we do so now.

Id. at 370-71, 410 S.E.2d at 901-02 (citations omitted). Since *Braswell*, our Courts have applied the public duty doctrine in other contexts. *See Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711, *reh'g denied*, 348 N.C. 79, 502 S.E.2d 836, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998) (workplace inspections by state OSHA employees); *Simmons v. City of Hickory*, 126 N.C. App. 821, 487 S.E.2d 583 (1997) (home inspection by city building inspectors); *Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216, *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993) (release of dogs by animal control office and shelter).

Prior to *Braswell* and its progeny, this Court held that a violation of N.C. Gen. Stat. § 7A-544 (1995), which provides for the protection of abused or neglected juveniles, may give rise to an action for negligence. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988). *See also Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). Based on the case law of this state, it is clear that under some circumstances, negligence claims by abused or neglected juveniles against agencies and employees charged with their care may be actionable.

The provision of foster care is, without doubt, for the public good and comes under the broad umbrella of the public duty doctrine. But, by its nature, it also involves circumstances in which the agencies, officials and employees involved in the administration of foster care develop special relationships with the children and families with whom they work and, pursuant to N.C. Gen. Stat. § 7A-544 and the *Coleman* cases, have special duties.

In *Braswell*, the issue was whether remarks allegedly made by the sheriff to a woman created a special duty to protect the woman from her husband. The facts in that case show that a woman found evidence that her estranged husband, a deputy sheriff, had plans to kill her. She shared the information with the sheriff and expressed her fears that she would be killed. The sheriff, according to testimony, assured her that " 'he would see she got back and forth to work safely . . . [and] that his men would be keeping an eye on her.' " *Braswell*, 330 N.C. at 369, 410 S.E.2d at 900. A few days later, the woman's husband shot her to death while she was on a lunchtime

errand. The administrator of her estate sued the sheriff for negligent failure to protect. Citing the public duty doctrine as set out above, our Supreme Court found that the sheriff had no specific duty to protect the woman from her husband. The *Braswell* Court agreed with defense arguments that the sheriff's alleged statements "were general words of comfort and assurance, commonly offered by law enforcement officers in situations involving domestic problems, and that such promises were merely gratuitous and hence not sufficient to constitute an actual promise of safety." *Braswell*, 330 N.C. at 371-72, 410 S.E.2d at 902.

Even so, the *Braswell* Court acknowledged that the sheriff's promise to the woman to protect her as she went to and from work was arguably specific enough to create a special duty exception to the public duty doctrine. *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902. *See also Isenhour*, 350 N.C. at 606, 517 S.E.2d at 125. However, the *Braswell* Court did not pursue that point since the victim in that case was undisputedly killed while on a midday errand, not while traveling to or from work, "and hence was outside the scope of protection arguably promised by [the sheriff]." *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902.

Our Supreme Court has recently applied the special relationship exception to the public duty doctrine in *Isenhour*. In that case, a child was struck by a car and killed as he attempted to cross the street after having been signaled by a school-crossing guard that it was safe to cross. The child's family sued the city and the school-crossing guard alleging wrongful death. Our Supreme Court held that the city "by providing school crossing guards, has undertaken an affirmative, but limited, duty to protect certain children, at certain times, in certain places" and found the public duty doctrine inapplicable under those circumstances. *Isenhour*, 350 N.C. at 608, 517 S.E.2d at 126. The *Isenhour* Court also noted that "the relationship between the crossing guard and the children is direct and personal, and the dangers are immediate and foreseeable." *Id.* The *Isenhour* Court found the city and the crossing guard subject to suit.

We must determine whether one or both exceptions to the public duty doctrine apply to the facts before us.

In this case, plaintiffs allege that they "specifically asked whether it was safe" to have the foster child in question placed in their home with their toddler daughter. They assert they "were told that it would be safe[.]" Citing *Braswell*, 330 N.C. at 371-72, 410 S.E.2d at 902,

defendants argue that such assurances were gratuitous comments that would commonly be made in the context of describing a foster child to his prospective foster family and not "sufficient to create an actual promise of safety to the family." We do not agree that the facts before us are so simply analogous to those of *Braswell.*

In the case at bar, the complaint states that representatives of Wake County DSS visited the plaintiffs' home to decide if it was suitable for the placement of a foster child. The complaint states that representatives of Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; and Wake County Human Services met with one or both plaintiffs at least three times to discuss placement of the designated foster child in their home. The complaint refers to a "team meeting" attended by the plaintiffs and nine representatives of defendants Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; and Wake County Human Services to discuss the placement of the foster child. Treating plaintiffs' assertions as true, as we must, *Isenhour*, 350 N.C. at 604, 517 S.E.2d at 124, we conclude that these were purposeful meetings, not casual conversations. The meetings addressed the serious matter of whether placement of the foster child in plaintiffs' home was appropriate and were not a setting in which one might disregard the assurances as gratuitous comments. These facts distinguish the case before us from *Braswell.*

In light of *Isenhour*, the facts before us arguably suggest a special relationship between the plaintiffs and the defendants. The parties had considerable direct contact and discussion. Defendants visited in plaintiffs' home. The facts also arguably suggest a special duty in that, as discussed above, plaintiffs allege they specifically asked and specifically were given assurances that the foster child would not be a threat to their small daughter.

In the context of direct contact and purposeful meetings, were defendants' assurances gratuitous reassurance or did they create a special duty? Was there a special relationship between defendants and the prospective foster parents? These questions make dismissal at the pleading stage inappropriate.

[3] We now turn to the individuals named as defendants in only their official capacities. Those before us are Thomas W. Hogan in his capacity as director of Wake County DSS; James W. Kirkpatrick, Jr., in his capacity as director of Wake County Mental Health,

Developmental Disabilities and Substance Abuse Services; and Maria Spaulding in her capacity as director of Wake County Human Services.

"[O]fficial-capacity suits ' "generally represent only another way of pleading an action against an entity of which an officer is an agent." ' Thus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant." *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (citations omitted). "[O]fficial-capacity suits are merely another way of pleading an action against the governmental entity." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) (citation omitted). "A claim against [defendants DSS director, DSS supervisor and social worker] in their official capacities is a claim against DSS[.]" *Meyer v. Walls*, 347 N.C. at 111, 489 S.E.2d at 888. The claims against defendants Hogan, Kirkpatrick and Spaulding in their official capacities are effectively claims against Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; and Wake County Human Services. For the reasons explained above, the trial court's dismissal was inappropriate.

Finally, we turn to the defendants before us who were sued in their official and individual capacities. They are Delice Coffey, Martha F. Waters, Sandra Deloatch, Filico C. Bell, Tobias H. Smith and John C. Harvey. Our analysis with regard to these six defendants in their official capacities is identical to the analysis set out above, and the complaint against them in their official capacities was improperly dismissed.

[4] In addressing the complaint against defendants Coffey, Waters, Deloatch, Bell, Smith and Harvey in their individual capacities, we must address the question of whether they are properly designated as public officials or public employees.

> Public officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can.
>
> "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged

and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties. . . ."

Meyer, 347 N.C. at 112, 489 S.E.2d at 888 (citations omitted).

Our Supreme Court in *Meyer* set out the test for determining whether an individual is a public official or a public employee.

> "A public officer is someone whose position is created by the constitution or statutes of the sovereign. '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.' Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are 'absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.' "

Meyer, 347 N.C. at 113, 489 S.E.2d at 889 (citations omitted).

N.C. Gen. Stat. § 108A-14 recognizes the position of "county director of social services" and gives the director the duty and responsibility, *inter alia*, "[t]o accept children for placement in foster homes and to supervise placements for so long as such children require foster home care[.]" N.C. Gen. Stat. § 108A-14(a)(12) (Cum. Supp. 1998). Unquestionably, pursuant to the statute, a county director of social services is a public officer as defined in *Meyer*. The statute also gives the director the authority to "delegate to one or more members of his staff the authority to act as his representative." N.C. Gen. Stat. § 108A-14(b) (Cum. Supp. 1998). This statutory language contemplates that staff members of departments of social services may be responsible for duties identified in the statute. It creates a structure under which department of social services staff members may function as public officers.

Foster children and the families who provide homes for them present a wide range of circumstances. Staff members who work with foster children and families certainly cannot rely on " 'fixed and designated facts.' " *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889 (citations omitted). In the case before us, for example, the complaint states that defendants Bell and Smith visited plaintiffs' home to determine if it was suitable for the placement of a foster child. The complaint also states that one or more defendants met with one or both adult plain-

tiffs at least three times to discuss placement of the designated foster child in the plaintiffs' home. Common sense tells us that the home inspection and the meetings required the participating defendants to assess the individual characteristics and circumstances of the foster child and the prospective foster family. The process must have involved defendants' "personal deliberation, decision and judgment." *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889. It surely involved more than " 'the execution of a specific duty arising from fixed and designated facts.' " *Id.* Taking into account the language of N.C. Gen. Stat. § 108A-14(b) and *Meyer*, we conclude that defendants Coffey, Waters, Deloatch, Bell, Smith and Harvey were acting as public officials since they were acting for and representing the director of social services. Thus, we hold that defendants Coffey, Waters, Deloatch, Bell, Smith and Harvey may not be held individually liable.

As noted above, "[p]ublic officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties[.]" *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888. "[A]n official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Id.* Plaintiffs' complaint contains no allegations of corrupt or malicious acts or omissions by defendants and no allegations of acts outside or beyond the scope of defendants' duties.

We are aware that plaintiffs' complaint characterizes defendants Coffey, Waters, Deloatch, Bell, Smith and Harvey as social workers. We are further aware that this Court, in *Coleman*, 102 N.C. App. 650, 403 S.E.2d 577, treated a social worker as a public employee. *Coleman*, however, was decided before our Supreme Court embraced the test set out in *Meyer* and before N.C. Gen. Stat. § 108A-14 was amended to provide that a county social services director may "delegate to one or more members of his staff the authority to act as his representative." N.C. Gen. Stat. § 108A-14(b). Based on *Meyer* and N.C. Gen. Stat. § 108A-14(b), we conclude we are not bound by *Coleman* on this issue.

The trial court's dismissal is reversed as to defendants Wake County DSS; Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; Wake County Human Services; Thomas W. Hogan in his official capacity as director of the Wake County DSS; James W. Kirkpatrick, Jr., in his official capacity as director of Wake County Mental Health, Developmental Disabilities and Substance Abuse Services; Maria Spaulding in her official capac-

ity as director of Wake County Human Services; Delice Coffey in her official capacity as a Wake County social worker; Martha F. Waters in her official capacity as a Wake County social worker; Sandra Deloatch in her official capacity as a Wake County social worker; Filico C. Bell in his official capacity as a Wake County social worker; Tobias H. Smith in his official capacity as a Wake County social worker; and John C. Harvey in his official capacity as a Wake County social worker.

The trial court's dismissal as to defendants Coffey, Waters, Deloatch, Bell, Smith and Harvey in their individual capacities is affirmed.

Affirmed in part, reversed in part and remanded.

Judges WYNN and WALKER concur.

CARLA S. MARLEY AND KENNETH R. MARLEY, PLAINTIFFS V.
ROBERT G. GRAPER, M.D. AND PETER R. YOUNG, M.D., DEFENDANTS

No. COA98-1445

(Filed 2 November 1999)

1. **Trials— judge's comment—not an impermissible expression of opinion**

There was no impropriety in a medical malpractice action in the court's comment, when accepting an expert witness, "he's certainly qualified and accepted for those purposes in each of those areas" when he had earlier accepted experts with statements to the effect that the witness was qualified and would be permitted to offer an opinion in the appropriate area.

2. **Medical Malpractice— witnesses—medical expert—standard of practice in similar communities**

There was no error in a medical malpractice case from Greensboro where an expert did not testify that he was familiar with the standard of care for Greensboro, but the import of his testimony was that the defendant met the highest standard of care found anywhere in the United States. This testimony was sufficient to meet the requirements of N.C.G.S. § 90-21.12.

3. Evidence— exhibits—created during cross-examination

There was no abuse of discretion during a medical malpractice action where the court did not allow plaintiffs to generate an exhibit during trial while a witness was undergoing cross-examination by extracting and charting portions of the testimony because the court determined that the proposed chart or summary did not illustrate the testimony of the witness and was a form of premature final argument.

4. Evidence— medical malpractice—plaintiff's medical records—alcohol abuse

The trial court did not err in a medical malpractice action by allowing evidence of plaintiff's medical records indicating a possibility of a history of alcohol abuse to explain defendants' consideration of alcohol withdrawal as a potential cause of her confusion or hallucinations after surgery. It was both logical and appropriate for defendants to consider various causes for plaintiff's atypical behavior after surgery as part of the process of diagnosis and treatment. Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable.

Appeal by plaintiffs from judgment entered 15 September 1997 and order entered 12 January 1998 by Judge Raymond A. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 August 1999.

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

Golding Holden Cosper Pope & Baker, LLP, by John G. Golding, for defendant-appellee Graper.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendant-appellee Young.

EDMUNDS, Judge.

Plaintiffs appeal from judgment and order entered in a medical malpractice trial. We find no error.

On 1 February 1991, plaintiff Carla Marley (Marley) was admitted to Moses H. Cone Memorial Hospital in Greensboro, North Carolina, for a modified radical mastectomy, to be performed by defendant

Peter R. Young, M.D. (Young), and reconstructive surgery, to be performed by defendant Robert G. Graper, M.D. (Graper). Following surgery, Marley experienced memory loss, confusion, hallucinations, and vision impairment. On 7 February 1991, an oncologist diagnosed that Marley suffered from hypoxia and anemia and ordered a blood transfusion and oxygen. On 19 February 1991, a neuro-ophthalmologist examined Marley and diagnosed bilateral ischemic optic neuropathy, a condition caused by decreased blood flow to the end of the optic nerve, leading to tissue death.

Plaintiffs (Marley and her husband) filed suit against Young and Graper, alleging negligence, which proximately caused Ms. Marley's loss of vision, and loss of consortium. The trial began 18 August 1997. The jury returned a verdict of no negligence, and the court entered judgment in favor of defendants. Plaintiffs' motion for a new trial was denied by order entered 12 January 1998. Plaintiffs appeal.

I.

[1] Plaintiffs first contend that the trial court's comment, when accepting one of defendants' witnesses as an expert, was an impermissible expression of opinion. Although the trial court responded to the tender of other experts by both plaintiffs and defendants with statements to the effect that the witness was qualified as an expert and would be permitted to offer an opinion in the appropriate area of expertise, the trial court accepted defendants' witness as an expert in the fields of ophthalmology, pediatric ophthalmology, and neuro-ophthalmology, by stating, "[h]e's certainly qualified and accepted for those purposes in each of those areas. He may offer an opinion as appropriate in his area of expertise." Plaintiffs argue that "the court's manner and words recorded in the record clearly demonstrate that the court placed more significance and more credibility on the testimony of [defendants' witness]."

Although defendants initially contend that plaintiffs did not preserve this issue by objecting to the judge's comment, we need not address this argument because, preserved or not, this issue lacks merit. "The conduct of a trial is left to the sound discretion of the trial judge, and absent abuse of discretion, will not be disturbed on appeal." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 508, 320 S.E.2d 892, 899 (1984). More specifically, our Supreme Court has held:

> It is well recognized in this jurisdiction that a litigant has a right by law to have his cause tried before an impartial

> judge without any expressions from the trial judge which would intimate an opinion by him as to weight, importance or effect of the evidence. However, this prohibition applies only to an expression of opinion related to facts which are pertinent to the issues to be decided by the jury, and it is incumbent upon the appellant to show that the expression of opinion was prejudicial to him.

Kanoy v. Hinshaw, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968) (citations omitted).

This Court reviews remarks made by the trial judge in the presence of the jury through a two-step process: (1) we first determine whether the comments were improper and, if so, (2) whether they were prejudicial. The trial court's remark

> must be considered in the light of the circumstances under which it was made. This is so because "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103, 310 S.E.2d 338, 344 (1984) (citations omitted). Additionally, "[m]ore than a bare possibility of prejudice from a remark of the judge is required to overturn a verdict or judgment," and "[w]here a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial." *Id.* at 104, 310 S.E.2d at 345.

North Carolina appellate courts have been somewhat reluctant to find comments by a trial court to be either erroneous or prejudicial. Factors the courts have considered include whether the comment occurred in isolation, any ambiguity in the comment, and the degree to which the comment suggested lack of impartiality. *See, e.g.*, *Colonial Pipeline*, 310 N.C. 93, 310 S.E.2d 338 (holding not prejudicial judge's comment during colloquy with counsel that he did not believe particular evidence to be relevant); *Ward v. McDonald*, 100 N.C. App. 359, 396 S.E.2d 337 (1990) (holding that judge's comment to jury about need to shorten length of trial not prejudicial); *Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 391 S.E.2d 843 (1990) (holding that judge's explanatory statement to venire during jury selection for shoplifting trial that "[o]f course, [defendant] denies that she had engaged in shoplifting, and of course, for that reason she was

stopped" was not a comment on whether any fact had been proved); *Marcoin*, 70 N.C. App. 498, 320 S.E.2d 892 (holding that trial judge's comments such as "I don't want you gentlemen to play games" to attorneys for both parties not erroneous); *Financial Corp. v. Transfer, Inc.*, 42 N.C. App. 116, 256 S.E.2d 491 (1979) (holding the following statement by the trial court not improper in the context of entire instruction: "Ladies and gentlemen, you have been handed plaintiff's Exhibit 2. Each of you may examine it to the extent that you feel appropriate and necessary. Examine it very carefully."); *Lawrence v. Insurance Co.*, 32 N.C. App. 414, 232 S.E.2d 462 (1977) (holding that, when expert stated that he was not telling jury he knew what caused the fire in question, judge's comment "[w]ell, I think that's exactly what he has done" at most harmless error).

By contrast, where trial courts have made repeated or unambiguous comments indicating a lack of impartiality, reviewing courts have found prejudice so manifest as to require reversal. *See, e.g.*, *Sherrod v. Nash General Hospital*, 348 N.C. 526, 500 S.E.2d 708 (1998) (finding error in trial court's statement in presence of jury that defendant psychiatrist was expert in general psychiatry); *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 368 S.E.2d 619 (1988) (finding reversible error in cumulative effect of trial judge's thirty-seven hostile remarks toward defendant); *Key v. Welding Supplies*, 273 N.C. 609, 160 S.E.2d 687 (1968) (finding error where trial judge provided jury with extended review of defendant's contentions but failed to review plaintiffs' contentions); *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E.2d 861 (1966) (finding error in trial court's statement in the presence of the jury that defendant physician was expert in surgery); *Burkey v. Kornegay*, 261 N.C. 513, 135 S.E.2d 204 (1964) (holding that trial court's statement that witness was "of perhaps weak mentality" was prejudicial expression of opinion); *State v. Watson*, 1 N.C. App. 250, 161 S.E.2d 159 (1968) (finding prejudicial error in trial court's statement, "it is not in evidence so maybe it could not even be explained that this car went out of control on this slight curve").

Here, we find no impropriety in the court's statement. A judge is not required to recite an unvarying mantra every time an expert witness is qualified. The declaration that "[h]e's certainly qualified and accepted for those purposes in each of those areas" was no more indicative of judicial partiality than was the court's earlier statement that "I am satisfied with his qualifications," made upon accepting one of plaintiffs' experts. This assignment of error is overruled.

II.

[2] Plaintiffs next contend the trial court erred in allowing into evidence the video deposition of one of defendants' expert witnesses. Plaintiffs argue that "the questions by defense counsel did not comply with the statutory requirements for experts testifying in a medical malpractice case" in that the witness never testified that "he was familiar with the standard of practice among practitioners with similar training and experience in Greensboro or the same or similar communities."

N.C. Gen. Stat. § 90-21.12 (1997) sets out the standard of proof necessary to establish medical malpractice:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

We have observed that section 90-21.12 "was designed to overcome the strict 'locality' rule that had previously existed in this State. Therefore, it is apparent that the 'similar community' requirement in the statute is not confined to North Carolina but would apply to communities within and without our State." *Baynor v. Cook*, 125 N.C. App. 274, 278, 480 S.E.2d 419, 421 (1997) (citation omitted). As a result, while "it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers," *Page v. Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980), if the standard of care for a given procedure is "the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community," *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984); *see also Rucker v. Hospital*, 285 N.C. 519, 206 S.E.2d 196 (1974). Parties have latitude in formulating questions used to elicit the standard from an expert witness. "[T]he phrasing of the questions used . . . need not follow § 90-21.12 verbatim; to so require would improperly place form over substance. However, the questions asked must elicit the relevant standard of care as set out in that

statute." *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997).

In the case at bar, defendants offered expert testimony by means of a videotaped deposition. After the witness testified as to his training and credentials, the following exchange took place between the witness and defendant Graper's attorney:

> Q. [] And have you had opportunity to become familiar with accepted standards for the practice of plastic and reconstructive surgery throughout the various areas of the United States?
>
> A. Yes.
>
> Q. And how have you been able to do that?
>
> A. Well, as a teacher of plastic surgery, I travel routinely around the United States lecturing or operating in the various parts of the country, and therefore I'm familiar with all general areas of the country and the plastic surgery practice there.
>
> . . . .
>
> Q. Did you form an opinion as to whether the care rendered by Dr. Graper in connection with—first of all, with the surgery that he performed met accepted standards for the practice of plastic and reconstruction—reconstructive surgery in February of 1991 in a community like Greensboro or other similar communities?
>
> A. Yes.
>
> . . . .
>
> A. After reviewing the operative note and the informed consent as well as the postoperative care by the notes, I did not feel he deviated from the standard of care nor did the general surgeon.
>
> . . . .
>
> Q. All right. And did you form an opinion as to whether or not in the care rendered after the surgery of February 1, 1991 Dr. Graper met accepted standards of practice of plastic and reconstructive surgery in a community like Greensboro?
>
> . . . .

> A. My opinion, again after reviewing the notes and the data, was that he met the standard of care for plastic surgery not only in [Greensboro] but anywhere in the United States.

Additionally, the witness testified that Graper's care of Marley "met accepted standards for the practice of plastic surgery by a board certified plastic and reconstructive [surgeon]."

Although the witness did not testify that he was familiar with the standard of care for Greensboro, the testimony he did provide obviated the need for such familiarity. The import of the witness's testimony was that, in his opinion, Graper met the highest standard of care found anywhere in the United States. Therefore, if the standard of care for Greensboro matched the highest standard in the country, Graper's treatment of Marley met that standard; if the standard of care in Greensboro was lower, Graper's treatment of Marley exceeded the area standard. This testimony is sufficient to meet the requirements of section 90-21.12. This assignment of error is overruled.

III.

[3] Next, plaintiffs contend "the trial court erred when it refused to allow Marley's counsel to summarize . . . defendant Young's testimony during cross-examination." Counsel for plaintiffs sought to illustrate defendant Young's cross-examination testimony regarding Marley's blood loss by creating a chart while the cross-examination was under way. Plaintiffs argue that evidence of the loss was latent in Marley's medical charts.

Although plaintiffs cite North Carolina Rule of Evidence 1006, that rule does not address the question raised by this assignment of error. Rule 1006 states in pertinent part: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." N.C. Gen. Stat. § 8C-1, Rule 1006 (1992). In the absence of North Carolina cases addressing this rule in the context now before us, we turn for guidance to United States cases addressing the Federal Rules of Evidence. Federal Rule 1006, which is identical to the state rule, allows a summary of voluminous materials to be admitted into evidence even though the materials themselves are admissible but not necessarily admitted. *See U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

By contrast, plaintiffs here attempted to generate an exhibit during trial while the witness was undergoing cross-examination by extracting and charting portions of that testimony. Such a procedure is governed by Rule 611(a), which states: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (1992). North Carolina Rule 611(a) is identical to its federal counterpart and regulates use of demonstrative evidence during trial. *See* Fed. R. Evid. 611 advisory committee's note; N.C. Gen. Stat. § 8C-1, Rule 611 commentary. Consistent with the language of this rule, it lies within the sound discretion of the trial court to admit such evidence, *see U.S. v. Johnson*, 54 F.3d 1150 (4th Cir. 1995), or even allow use of such evidence in the courtroom, *see U.S. v. Bray*, 139 F.3d 1104 (6th Cir. 1998).

We find the standard set forth in these Federal cases persuasive. Therefore, we must decide whether the trial court abused its discretion in refusing to allow plaintiffs to create the requested exhibit. When the issue arose, the court excused the jury and conducted a hearing where counsel for both sides were heard. The record reveals that the court intuitively realized that Rule 1006 did not apply to the situation at hand. The court determined that the proposed chart or summary did not illustrate the testimony of the witness under cross-examination, but was instead a form of final argument delivered prematurely. Although the court recognized that evidence of this nature could be helpful to the jury under proper circumstances, he sustained defendants' objection.

The trial court was in the best position to hear the nature and complexity of the evidence being elicited from the witness, as well as the nature of the exhibit plaintiffs proposed to create. The trial court did not forbid counsel from arguing the significance of the witnesses' testimony. We are unable to find that the trial court abused its discretion in sustaining plaintiffs' objection. This assignment of error is overruled.

IV.

[4] Plaintiffs next contend that the trial court erred in admitting past medical records of Marley. During cross-examination of one of plain-

tiffs' experts, the witness was asked whether significant alcohol use could cause reactions similar to the one experienced by Marley after her surgery. The witness responded: "People who drink alcohol on a regular basis—they may say they are only social drinkers, but they can go into delirium tremors [sic]." Plaintiffs' counsel objected, stating: "There is no evidence in this record that this lady has had any kind of alcohol problem." Thereafter, defendants offered into evidence 1985 medical records of Marley, which indicated that she had been counseled about excessive drinking. Plaintiffs again objected, and, after hearing argument of counsel out of the jury's presence, the court concluded:

> [A] question has been asked about the condition, could it be aggravated by alcohol consumption, and there is a note that the jury can view along with the Doctor and the Attorney that said something about DT's or delirium tremors [sic]. In front of the jury [plaintiffs' counsel] made an objection saying there was no evidence of that, that there was any kind of alcohol consumption . . . .
>
> . . . I am not going to allow you to pass that exhibit at this point without further evidence to the jury because it contains a lot of irrelevant stuff about her life that they don't need to know about at this point. . . . I think the relevancy in this particular case outweighs the prejudice, but only as to the fact that this note was made. . . . Now, if you want to ask questions about this alcohol consumption in 1985, I don't find it to be irrelevant or overly prejudicial.

Plaintiffs claim that the evidence is irrelevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Although relevancy questions are not discretionary, the trial court is entitled to great deference on appeal. *See In re Will of Jones*, 114 N.C. App. 782, 786, 443 S.E.2d 363, 365 (1994).

After observing Marley's post-operative behavior, Graper noted on her charts the possibility that she was suffering from delirium tremens resulting from alcohol withdrawal; he also later discussed that possibility with Marley's husband. It was both logical and appropriate for defendants to consider various causes for Marley's atypical

behavior after surgery as part of the process of diagnosis and treatment. It was proper for the trial court to allow evidence of Marley's medical records indicating the possibility of a history of alcohol abuse to explain the reason defendants considered the possibility that alcohol withdrawal was a potential cause of Marley's confusion or hallucinations. This assignment of error is overruled.

V.

Finally, plaintiffs contend the trial court erred in denying their motions for new trial and for judgment notwithstanding the verdict. Because the record reveals that no motion for judgment notwithstanding the verdict was made, we address only the former motion. The granting or denial of a motion for new trial lies within the trial court's sole discretion. *See Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). As 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." [*Bynum*, 305 N.C. at 482, 290 S.E.2d at 602.] The trial court's discretion is " 'practically unlimited.' " *Id.* [at 482], 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) (last three alternations in original), *quoted in Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997). Using the aforementioned test, we see no abuse of discretion. As support for their motion, plaintiffs rely upon their other assignments of error, each of which we have held to be unfounded. There was sufficient evidence to support the jury's verdict, and the trial was without prejudicial error. This assignment of error is overruled.

No error.

Judges WYNN and JOHN concur.

STATE OF NEW YORK/KAREN ANDREWS, PLAINTIFF v. GEORGE PAUGH, DEFENDANT

No. COA98-1361

(Filed 2 November 1999)

1. Attorney General— standing—foreign child support order

The Attorney General had standing to file a brief on behalf of plaintiff-appellant mother in a URESA action. The issue here is enforcement of orders rendered in an action to register a foreign child support order and there is ample statutory authority obligating the Attorney General to represent the child support obligees on appeal. N.C.G.S. § 52A-10.1.

2. Child Support, Custody, and Visitation— URESA—jurisdiction—paternity tests

Although the appellate ruling was based on other grounds, the district court erroneously dismissed a mother's URESA action on the basis of her refusal to obey an invalid order to undergo paternity testing. The North Carolina version of URESA grants an obligor-father the right to a determination of paternity, but a prior adjudication of paternity by a foreign court of competent jurisdiction must be accorded full faith and credit. The father here does not allege that the New York court's adjudication of paternity was error and did not timely challenge or appeal the New York support orders.

3. Child Support, Custody, and Jurisdiction— URESA—jurisdiction—cease and desist order

An order to cease and desist attempts to enforce a New York child support order and a contempt order for violating the cease and desist order, both of which arose from disputed paternity, were void for lack of subject matter jurisdiction where the trial court had also dismissed the URESA action. Full faith and credit must be accorded the New York order unless its enforcement is within the discretion of the New York courts, but the New York courts do not have discretion to annul or modify prior pa-

ternity orders. Moreover, the father argued none of the exceptions from *Pieper v. Pieper*, 108 N.C. App. 722. The case ended and jurisdiction terminated when the trial court dismissed the URESA action.

Judge WALKER concurring.

Appeal by plaintiff from order entered 29 July 1998 by Judge Kevin M. Bridges in Union County District Court. Heard in the Court of Appeals 23 August 1999.

This is an appeal of a contempt order and judgment against plaintiff mother in a URESA action to register New York court orders for child support against defendant father, a North Carolina resident. See N.C. Gen. Stat. § 52A-1, et seq. (repealed effective 1 January 1996). Plaintiff-appellant Andrews, the mother, and defendant-appellee Paugh, the father, were divorced in New York on 29 November 1977. Without objection, the New York courts found their seven children to be children of the marriage, granted custody to the mother, and ordered the father to pay weekly child support until the children reached eighteen. The father did not contest paternity in two enforcement actions brought by the mother in New York in 1978 and 1984.

Prior to 1987, the father moved to North Carolina. On 15 June 1987, the mother, through a New York IV-D agency, filed a URESA request to register the New York support order in Union County and collect over $5000.00 in back support payments. The order was registered by operation of law pursuant to N.C. Gen. Stat. § 52A-29. The father challenged confirmation of the order pursuant to N.C. Gen. Stat. § 52A-30 at an 18 September 1987 hearing. At the hearing, he orally moved for blood testing of the mother and the four remaining minor children in order to ascertain paternity.

The district court allowed the motion for blood testing and entered an order to compel testing on 21 December 1987. The mother and her children failed to appear for testing at a New York site on two separate occasions. On 25 March 1988, the father filed a motion in Union County asking the district court to either dismiss the URESA action or again order blood testing. After the mother failed to appear at a hearing on the motion, the court ordered on 16 December 1988 that the entire URESA action be dismissed with prejudice and that the mother cease and desist from all further support collections. The mother did not appeal the order.

Counsel for the New York IV-D agency stated in a 13 March 1989 letter to Union County court officials that the mother felt the testing was "frivolous" and embarrassing for her children. Counsel also protested the dismissal of the case, arguing that: (1) dismissal was improper because the mother was neither present nor represented by counsel at the hearing (the father contends that the mother was represented by an assistant district attorney present at the hearing); (2) Union County court lacked jurisdiction because the URESA action had not been registered; and (3) the attempted withdrawal of the URESA action had been improperly ignored. Through New York child support enforcement authorities and the Social Security Administration, the mother continued to collect child support.

On 18 May 1998, ten years after the Union County cease and desist order, the father filed a Motion in the Cause and for Contempt in Union County District Court. The motion requested that the court order the mother to appear and show cause why she should not be held in contempt, to notify proper authorities to cease and desist from collections activities, to repay intercepted disability funds to the father, and to pay punitive damages and attorney's fees. Following a hearing on the motion, the court made the following relevant findings: (1) the mother's attempted withdrawal of the URESA action was improper; (2) the father timely challenged the URESA order; (3) the order was registered, but never confirmed, giving the court jurisdiction under URESA; (4) the father had the right under URESA to request blood testing; (5) the mother failed to submit to a valid court order compelling testing; (6) under URESA, by acting in a timely fashion the father could directly challenge the New York order in North Carolina; (7) the mother's URESA action was properly dismissed; (8) the mother, with the assistance of the State of New York and the Social Security Administration, "converted" the father's funds in violation of the 1988 cease and desist order and (9) the mother was in contempt of the order to submit to testing and to cease and desist from support collections. On 29 July 1998, the court ordered the mother to serve one-hundred and eighty days in jail for civil contempt, to repay over $10,000 in "converted" disability payments and tax refunds, to pay over $5,000 of the father's attorney's fees and costs, and to request the State of New York and the Social Security Administration to cease and desist from future collections. The mother appeals.

Attorney General Michael F. Easley, by Assistant Attorneys General Gerald K. Robbins and Kathleen U. Baldwin, for plaintiff-appellant.

W. David McSheehan and Franklin S. Hancock for defendant-appellee.

EAGLES, Chief Judge.

[1] We first decide whether the Attorney General of North Carolina had standing to file a brief on behalf of the plaintiff-appellant mother. The father argues that this case is a "private matter" of conversion of property by the mother, and therefore was not within the statutory authority allowing the Attorney General to represent the mother. We disagree. The issue here is enforcement of orders rendered in an action to register a foreign child support order. There is ample statutory authority *obligating* the Attorney General to represent the child support obligees on appeal. See N.C. Gen. Stat. §§ 52A-10.1 (URESA), 52C-3-308 (UIFSA) and 114-2. Accordingly, we hold that representation of the mother by the Attorney General is proper.

[2] The central issue here is whether the district court had jurisdiction to order the mother to cease and desist from support collections on 16 December 1988 and then to hold the mother in contempt of the cease and desist order on 29 July 1998. After careful consideration of the briefs and record, we hold that upon dismissal of the URESA action in 1988, the subsequent orders were void for lack of subject matter jurisdiction.

The father, Defendant Paugh, argues that jurisdiction is proper because (1) by filing the URESA petition, the mother submitted the entire issue of child support, including paternity, to the court, (2) the mother refused to submit to court-ordered paternity testing, and then (3) the mother continued collection efforts (termed "conversion" by the father) in New York despite a North Carolina cease and desist order. The father argues that "[i]t would not be good policy for this state, in the name of 'full faith and credit,' to allow and encourage another person or state to flaunt [sic] the laws of this state under the guise of uniformity" by asserting lack of jurisdiction as a defense.

Moreover, the father contends that "there is no presumption . . . that the [New York] child support order . . . is valid and enforceable without further inquiry under the law of the responding state." He maintains that the 1988 cease and desist order is a valid basis for

"other relief" granted by the court, exercising expansive "jurisdiction over all aspects of the . . . child support case," including recovery of "converted" funds under the 1998 contempt citation. *Pinner v. Pinner*, 33 N.C. App. 204, 206 S.E.2d 633, 635 (1977) (URESA initially provides for "registration, and if required, a hearing on whether to vacate the registration or grant the 'obligor' *other* relief").

We disagree.

A support obligee may register a foreign support order pursuant to URESA "if the duty of support is based on a foreign support order." N.C. Gen. Stat. § 52A-25; *see Williams v. Williams*, 97 N.C. App. 118, 121-22, 387 S.E.2d 217, 219 (1990). A North Carolina court hearing an obligee's challenge to confirmation of a foreign support order under N.C. Gen. Stat. § 52A-30 may dismiss the obligee's action to register the order (or refuse to confirm the registration) for lack of jurisdiction where it finds the obligor owes no duty of support to the obligee. N.C. Gen. Stat. §§ 52A-12-14. *See Pifer v. Pifer*, 31 N.C. App. 486, 489, 229 S.E.2d 700, 702-03 (1976) ("if the court of the responding state finds a duty of support, it may order the defendant to furnish support"); 2 Lee, North Carolina Family Law, § 169 at 342, 343. Pursuant to N.C. Gen. Stat. § 52A-8, our courts have held that the duty of support question is to be resolved under the "law of the state where the obligor was present during the legally material times provided for in the statute." *Williams* at 122, 387 S.E.2d at 219 (citing *Pieper v. Pieper*, 323 N.C. 617, 374 S.E.2d 275 (1988)). *Accord Reynolds v. Motley*, 96 N.C. App 299, 385 S.E.2d 548 (1989). North Carolina law applies here, since plaintiff-appellant does not present evidence to rebut the statutory presumption that the obligor was present in North Carolina during "the period or any part of the period for which support is sought." N.C. Gen. Stat. § 52A-8; *Williams* at 121, 387 S.E.2d at 219.

The North Carolina version of URESA grants obligor fathers the right to a determination of paternity, a condition precedent to a duty of support. N.C. Gen. Stat. § 52A-8.2; *Reynolds* at 304-05, 385 S.E.2d at 551. A prior adjudication of paternity by a foreign court of competent jurisdiction must be accorded full faith and credit in North Carolina. *See* N.C. Gen. Stat. § 110-132.1. Thus, once a foreign court of competent jurisdiction issues an order of support adjudicating the issue of paternity, principles of full faith and credit mandate that the issue not be relitigated under URESA in North Carolina. *Brondum v. Cox*, 292 N.C. 192, 199, 232 S.E.2d 687, 691 (1977). The father here

does not allege that the New York court's adjudication of paternity was error, nor did the father timely challenge or appeal the New York support orders in 1978 or 1984. Thus, the Union County District Court failed to accord full faith and credit to the valid New York determination of paternity and had no authority to invite relitigation of the paternity issue by ordering blood testing. The district court erroneously dismissed the mother's case in 1988 on the basis of her refusal to obey the invalid order to undergo testing. But because the mother failed to timely appeal the dismissal of her URESA action, we do not base our decision on that portion of the district court's ruling.

[3] The dispositive issue is whether the district court had jurisdiction to issue the 1998 contempt order based on the mother's disobedience of the cease and desist portion of the 1988 order. With very few exceptions, URESA does not confer jurisdiction on North Carolina courts to prevent a mother, a New York resident, from asserting her right to collect child support under a valid, unappealed-from New York court order for child support. This Court held in *Fleming v. Fleming*, 49 N.C. App. 345, 349-50, 271 S.E.2d 584, 587 (1980) that:

> The full faith and credit clause . . . requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered. A decree for the future payment of alimony or child support is, as to installments past due and unpaid, within the protection of . . . the Constitution. [Citations omitted.]

Here, the mother seeks to register a New York court order for child support to collect back child support owed on the New York court order from a North Carolina resident. Despite an unappealed-from prior adjudication of paternity in New York, the putative father seeks to avoid his parental duty of support by asserting in North Carolina that the children are not his offspring.

Under *Fleming*, we must accord full faith and credit to the New York order "*unless* by the law of the state in which the decree was rendered[,] its enforcement is so completely within the discretion of the courts in that state that they may annul or modify the decree as to overdue and unsatisfied installments." *Id.* (emphasis added). Thus, we first examine the discretion accorded to New York courts issuing orders for child support under New York law. We find that while New York courts may modify or cancel child support arrearages, New York

Domestic Relations Law § 244 (McKinney 1999), they may not allow a father to collaterally attack support orders on the issue of paternity where paternity was judicially determined as part of prior divorce and support proceedings. *Jeanne M. v. Richard G.* 465 N.Y.S.2d 60 (1983), *Matter of Montelone v. Antia*, 400 N.Y.S.2d 129 (1977), *Matter of Sandra I. v. Harold I.*, 388 N.Y.S.2d 376 (1976). Because New York courts have no apparent discretion to annul or modify the prior New York paternity orders, the child support order here is fully protected by the full faith and credit clause pursuant to *Fleming.*

In addition, this Court has held that valid foreign support decrees are immune to collateral attack in North Carolina unless (1) the foreign court lacked jurisdiction over the obligor at the relevant time, (2) there was fraud in the procurement of the decree in the foreign court, or (3) the foreign decree is against the public policy of North Carolina. *Pieper v. Pieper*, 108 N.C. App. 722, 725, 425 S.E.2d 435, 436 (1993) (citing *McGinnis v. McGinnis*, 44 N.C. App. 381, 388, 261 S.E.2d 491, 496 (1980)). Since the father here argues none of these exceptions, we conclude that constitutional considerations make it "improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based." *Fleming* at 345, 271 S.E.2d at 587 (citing *Sears v. Sears*, 253 N.C. 415, 417, 117 S.E.2d 7, 9 (1960)). The full faith and credit clause therefore limits the scope of the district court's jurisdiction to approving or dismissing the registration action in light of relevant North Carolina law. We hold that the district court had no jurisdiction to prevent a nonresident support obligee (the mother) from asserting her rights under a valid foreign court order.

Absent the expansive jurisdiction argued by defendant-appellee father, once the district court dismissed the URESA action with prejudice in 1988, the case ended and jurisdiction terminated. N.C. R. Civ. P. 41(b); *Barnes v. McGee*, 21 N.C. App. 287, 204 S.E.2d 203 (1974). Therefore, the subsequent cease and desist portion of the 1988 order and 1998 contempt order were void for lack of subject matter jurisdiction. *Harding v. Harding*, 46 N.C. App. 62, 64, 264 S.E.2d 131, 132 (1980) ("defendant cannot be held in contempt for his failure to comply with void portions" of an order).

We hold that the defendant-appellee father may not avoid his support obligations in New York by pleading a paternity defense to confirmation of the mother's URESA filing in North Carolina. Because we hold that the 1988 and 1998 orders are void for lack of subject matter jurisdiction due to constitutional and procedural limitations

on the district court which issued them, we need not discuss defendant-appellee father's remaining arguments as to the validity of the orders.

Reversed.

Judge WALKER concurs with a separate opinion.

Judge McGEE concurs.

Judge WALKER concurring.

I concur in this opinion; however, I write separately to express concern over the actions taken by the district court in this case.

The record shows that at the time the defendant made the motion to compel blood testing on 18 September 1987, an attorney for the State was listed who apparently represented the plaintiff's interest. Defendant was represented throughout by a court-appointed attorney. When the order to compel blood testing was entered on 21 December 1987, there is no evidence that plaintiff was represented by counsel. At that time, the youngest of the children ordered to submit to blood group testing was eleven years old.

Thereafter, there were five separate hearings resulting in orders entered by the district court, but there is no evidence that plaintiff was represented by counsel. Before proceeding with matters such as those involved in this case, the trial court should have inquired and insisted that plaintiff's interest in this Uniform Reciprocal Enforcement Action be represented by counsel. Ordinarily, the District Attorney's Office would represent a plaintiff's interest in these actions.

If the plaintiff's interest had been represented at the hearings, it is apparent that the district court would have had a different perspective on the issues before the court. The State of New York, as it expressed in correspondence contained in the record, had every reason to be disturbed by the actions taken by the district court.

GEORGE L. GAUNT, BARBARA G. FIELDS, CENTER FOR REPRODUCTIVE MEDICINE, P.A., DONALD S. HORNER, AND DONALD S. HORNER, P.A., PLAINTIFF-APPELLANTS v. DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, AND THE NALLE CLINIC, DEFENDANT-APPELLEES

No. COA98-823

(Filed 2 November 1999)

1. Appeal and Error— preservation of issues—judgments and orders from which appeal taken

Plaintiffs' request for appellate review of orders entered prior to 24 June 1997 under N.C.G.S. § 1-278 was immediately defeated by their failure to object to the orders. Even construing plaintiffs' notice of appeal liberally, it does not give rise to any inference, reasonable or otherwise, of an intent to appeal orders issued other than the 24 June orders and judgments.

2. Libel and Slander— limited purpose public figures—statements of opinion—no malice

The trial court did not err by granting summary judgment for defendants on libel claims arising from statements in a newspaper article about a doctor and clinic where plaintiffs were limited purpose public figures who had the burden of proving actual malice. These were statements of opinion affecting matters of pubic concern; moreover, even if the statements were not matters of opinion, plaintiffs failed to show malice.

Appeal by plaintiffs from orders and judgments entered 24 June 1997 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 March 1999.

Wood & Francis, PLLC, by John S. Austin; Wyrick, Robbins, Yates & Ponton, LLP, by Gary V. Mauney; for plaintiff-appellants.

Jones, Hewson & Woolard, by Harry C. Hewson and Lawrence J. Goldman, for defendant-appellees Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and The Nalle Clinic.

Koy E. Dawkins, P.A., by Koy E. Dawkins, for defendant-appellee Carolyn B. Coulam.

Dean & Gibson, L.L.P., by Michael G. Gibson and John W. Ong, for defendant-appellee Donald E. Pittaway.

F. Kevin Mauney for defendant-appellees Morgan D. Gainor and Charles J. Gainor.

McGEE, Judge.

This case arose from a newspaper story entitled " 'Miracle Baby' Attempts Raise Questions" (the story), which was published in *The Charlotte Observer* on 15 September 1991. The story was about infertility treatment, with special emphasis on *in vitro* fertilization and the type of medical training expected of physicians performing that procedure. The story focused on plaintiffs George L. Gaunt (Gaunt) and the Center for Reproductive Medicine, P.A. (the Center). Defendants Jack L. Crain, Richard L. Wing and Daniel B. Whitesides, all of whom were shareholders and employees of defendant The Nalle Clinic, are infertility specialists and were interviewed for the newspaper story as to their opinions of Gaunt's expertise as an infertility specialist and his work at the Center. Plaintiffs allege that several of the statements made by defendants Crain, Wing, and Whitesides in the story, and the interviews leading up to its publication, were defamatory and constituted unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1.

Defendant Donald E. Pittaway, Director of Reproductive Endocrinology at Bowman Gray School of Medicine, was similarly interviewed for the story and made several statements regarding his opinion of Gaunt's training and expertise in the field of *in vitro* fertilization. Pittaway also made statements to the effect that, in his opinion, Gaunt made a practice of ordering tests that were unnecessary or excessive. Plaintiffs filed this action alleging these statements were defamatory and constituted an unfair and deceptive practice.

Defendants moved to dismiss plaintiffs' claims for unfair and deceptive practices pursuant to N.C.R. Civ. P. 12(c), and the trial court granted the motion on 10 May 1994. Defendants then moved for partial summary judgment pursuant to N.C.R. Civ. P. 56(c) on the issue of whether plaintiffs were public figures for purposes of the newspaper story. Plaintiffs moved to strike certain exhibits defendants offered supporting their motion for partial summary judgment. Plaintiffs' motion to strike was denied and the trial court granted defendants' motion for partial summary judgment determining plaintiffs were public figures for purposes of the story in orders entered 25

July 1995. Defendants then moved for summary judgment on plaintiffs' defamation claims. These motions were subsequently granted in orders and judgments entered on 24 June 1997. Plaintiffs timely filed a notice of appeal of the 24 June 1997 orders and judgments on plaintiffs' defamation claims.

On appeal, plaintiffs argue the trial court erred in: (1) dismissing plaintiffs' claims of unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1; (2) granting defendants' motions for partial summary judgment, thereby establishing plaintiffs' status as limited purpose public figures; and (3) granting defendants' motions for summary judgment on plaintiffs' defamation claims.

I.

[1] Before addressing the arguments, however, we first consider whether the plaintiffs' appeals are properly before us. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 59 (1998) (citing *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)). Defendants filed a motion to strike plaintiffs' first assignment of error for plaintiffs' failure to designate all judgments and orders from which appeal was taken. Plaintiffs filed a response arguing that the first assignment of error was properly before our Court.

The substituted notice of appeal in the amended record on appeal stated:

> Plaintiffs George L. Gaunt and Center for Reproductive Medicine, P.A. hereby give notice of appeal to the North Carolina Court of Appeals from those Orders and Judgments by the Honorable Marvin K. Gray signed and filed in this action on June 24, 1997, granting all the defendants' motions for summary judgment, dismissing plaintiffs' actions with prejudice, and taxing costs against plaintiffs.

The substituted notice of appeal in the amended record on appeal clearly did not designate appeal from the orders entered by the trial court prior to 24 June 1997. The substituted notice of appeal in the amended record on appeal in this case designates appeal only from the "Orders and Judgments" the trial court entered on 24 June 1997. N.C.R. App. P. Rule 3(d) requires that the notice of appeal "designate the judgment or order from which appeal is taken[.]" Our Court has stated that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result

in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990). Even construing plaintiffs' notice of appeal liberally, it does not give rise to any inference, reasonable or otherwise, of an intent to appeal orders issued other than the 24 June 1997 orders and judgments.

The question before us then is whether the orders entered prior to 24 June 1997, which are not designated in the notice of appeal, are nevertheless reviewable. Defendants' motion to strike was directed only to plaintiffs' first assignment of error which addresses the trial court's order dismissing plaintiffs' claim of unfair and deceptive practices entered 10 May 1994. However, we must also determine whether the trial court's partial summary judgment entered 25 July 1995 on the issue of whether plaintiffs were public figures for purposes of the newspaper story is reviewable.

N.C. Gen. Stat. § 1-278 (1996) provides that: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." Defendants argue in their motion to strike that although plaintiffs may obtain review of the public figure partial summary judgment, plaintiffs may not assign error to the unfair and deceptive practices claim under N.C.G.S. § 1-278 because that claim did not involve the merits of the remaining claims of defamation and libel and did not affect the judgment. Plaintiffs disagree, arguing that case law establishes that the merits were involved, and courts interpret "necessarily affecting the judgment" broadly.

Our Supreme Court recently set out in *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51-52, 510 S.E.2d 156, 158-59 (1999) the conditions under which an interlocutory order may be reviewed under N.C.G.S. § 1-278: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Our Supreme Court twice noted in *Floyd* that the plaintiffs timely objected to an order that was later found to be reviewable on appeal under N.C.G.S. § 1-278 despite the order's absence from the notice of appeal. *Floyd*, 350 N.C. at 51-52, 510 S.E.2d at 159. The order in *Floyd* to which the plaintiffs objected was made during the actual trial of the case and only days before the final judgment. However, the orders

in the case before us were pre-trial orders dismissing one claim and granting partial summary judgment as to another issue. *Id.* at 49, 510 S.E.2d at 158. The Court stated in *Floyd* that "plaintiffs' timely objection to the order was overruled[,]" "plaintiffs duly objected to the election of remedies order at trial" and "it [was] quite clear from the record that plaintiffs sought appeal of the election order." *Id.* at 51-52, 510 S.E.2d at 159. Our Supreme Court concluded that "[t]he objection at trial to the election order properly preserved the question for appellate review." *Id.* at 52, 510 S.E.2d at 159. The record in the case before us, unlike *Floyd*, reflects nothing that could be construed as an objection by plaintiffs to the orders entered by the trial court prior to 24 June 1997.

Citing *Floyd*, our Court recently held in *Inman v. Inman*, 134 N.C. App. 719, 518 S.E.2d 777 (1999), that the plaintiff did not preserve his right to appeal from an order which was not issued at trial and which was omitted from the notice of appeal because, under N.C.G.S. § 1-278 and the *Floyd* opinion, the plaintiff did not object to the ruling of the trial court denying his relief in part. The plaintiff in *Inman* moved to dismiss a judgment of absolute divorce on 10 June 1997, and the defendant counterclaimed for equitable distribution. The trial court found that part of the separation agreement was void as against public policy and that the defendant's counterclaim was barred as to some property, and filed an order with these findings on 11 June 1997. After a bench trial on the equitable distribution issues on 18 March 1998, the plaintiff filed notice of appeal to our Court only from the 18 March 1998 judgment and not from the 11 June 1997 order. Regarding the 11 June 1997 order, our Court stated that "[t]he record reflects no objection to the order by either party, nor was notice of appeal entered by either party." *Inman*, 134 N.C. App. at 720, 518 S.E.2d at 778. Our Court then held that

> 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.

Id. at 723, 518 S.E.2d at 780.

The issue in the case now before us is very similar to the issue in *Inman* and this Court is bound by *Inman*. *See In The Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("We hold . . . that a panel of the Court of Appeals is bound by a prior

decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

Plaintiffs' request for appellate review of the orders entered prior to 24 June 1997 under N.C.G.S. § 1-278 is immediately defeated for plaintiffs' failure to object to the orders, and discussion of the two other requirements for review of an intermediate order under *Floyd* is obviated. Therefore, pursuant to N.C.R. App. P. Rule 4(b), we do not address the 10 May 1994 order dismissing plaintiffs' action for "unfair and deceptive acts or practices" for failure to state a claim nor the orders entered 25 July 1995 granting defendants' motions for partial summary judgment on the public figure issue.

II.

[2] Plaintiffs argue that the trial court erred by granting summary judgment to defendants on plaintiffs' claims of defamation. Our Court's standard of review on appeal from summary judgment requires a two-part analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c); *see also Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. *Id.* at 394, 499 S.E.2d at 775; *see also Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

There are two separate torts encompassed by the term "defamation," being 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). "[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 plaintiffs' complaint and arguments on appeal are based entirely upon libel, we address only the issue of libel.

> 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.

Aycock v. Padgett, 134 N.C. App. 164, 166, 516 S.E.2d 907, 909 (1999).

In its 25 July 1995 order, the trial court determined that plaintiffs were limited-purpose public figures for purposes of the newspaper story. That ruling will not be reviewed on appeal for the reasons stated above. Individuals found to be limited-purpose public figures bear the burden of proving that alleged defamatory statements against them were published with actual malice in order to recover damages. *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964); *see also Gertz v. Welch*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974), *cert. denied*, 459 U.S. 1226, 75 L. Ed. 2d 467 (1983). The United States Supreme Court has defined "actual malice" as publication of a statement with knowledge that it was false or with reckless disregard as to whether it was false. *New York Times Co.* at 279-80, 11 L. Ed. 2d at 706. Proving reckless disregard requires the plaintiff to offer "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267 (1968).

Because plaintiffs are limited-purpose public figures, they bear the burden of not only showing that defendants knew of the falsity of their statements, but also of proving that defendants acted with actual malice. Whether a plaintiff has proven actual malice on the part of a defendant is a matter that is properly determined by the trial court. *See Proffitt v. Greensboro News & Record*, 91 N.C. App. 218, 371 S.E.2d 292 (1988). When a public figure's libel action is considered at the summary judgment stage, "the appropriate question for the trial judge is whether the evidence in the record would allow a reasonable finder of fact to find either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 221, 371 S.E.2d at 293-94 (citation omitted).

The United States Supreme Court has held that statements of opinion relating to matters of public concern which do not contain provable false connotations are constitutionally protected. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1 (1990). Our review of the record in this matter reveals that the statements made by

defendants are statements of opinion affecting matters of public concern within the context of *Milkovich*. *See id.* at 19, 111 L. Ed. 2d at 18. Assuming *arguendo* that defendants' statements were not matters of opinion, plaintiffs failed to show malice on the part of defendants. For the foregoing reasons, the trial court did not err in granting summary judgment to the defendants on plaintiffs' defamation claims.

Affirmed.

Judges GREENE and MARTIN concur.

STATE OF NORTH CAROLINA v. KATHY WILLIS SHULER

No. COA98-1317

(Filed 2 November 1999)

Criminal Law— closing argument—evidence not introduced during cross-examination—right not waived

Defendant is entitled to a new trial in a judgment finding her guilty of twelve counts of embezzlement since the trial court erred in denying defendant the right to conduct the closing argument to the jury when it improperly concluded defendant waived this right by introducing evidence, within the meaning of Rule 10 of the Superior and District Courts' General Rules of Practice, during her cross-examination of a witness about the contents of three interviews.

Appeal by defendant from judgments dated 15 December 1997 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 9 September 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Marian Hill Bergdolt, for the State.

Eric J. Foster for defendant-appellant.

GREENE, Judge.

Kathy Willis Shuler (Defendant) appeals a judgment reflecting a jury verdict finding her guilty of twelve counts of embezzlement.

In April 1994, Defendant was employed as an administrative assistant by Mountain Health Services (Mountain Health), a subsidiary of St. Joseph's Health Services Corporation (St. Joseph's). Mountain Health managed a number of health-care related businesses including a medical building in which office space was leased to physicians, a retirement community, a pharmacy, and an inn used by hospital patients and their family members. As part of her employment responsibilities, Defendant accepted payment for rooms at the inn. Defendant also deposited payments received by the pharmacy and rental payments received for office space. Each morning, the previous day's cash, checks, and credit card receipts from the pharmacy were brought to Defendant, and rental payments for office space were generally received by mail.

In April 1995, Mountain Health began receiving complaints from customers that checks were not being credited to their accounts at the pharmacy. Mountain Health therefore began an internal investigation, which revealed it was missing approximately $25,000.00. The State's evidence, which included financial records in their complete and summary forms, tended to show that over a period of fifteen months Defendant manipulated bank deposits for the pharmacy, primarily by substituting checks in her control for cash taken from pharmacy deposits. The State's witnesses included Marlene Marshall (Marshall), chief accountant for St. Joseph's, Pat Jackson (Jackson), controller for St. Joseph's, and Wanda Frady (Frady), an employee in Mountain Health's pharmacy.

During direct examination, Marshall explained St. Joseph's accounting procedures, which included reconciling accounts, as well as investigating overages and underages in the financial records. On cross-examination, Marshall testified she was responsible for reconciliation for St. Joseph's and its subsidiaries, including Mountain Health. When reconciling accounts, Marshall would compile into financial statements reports provided by the manager of each subsidiary at the end of each month. Marshall also performed an overall reconciliation for Mountain Health on a computerized spreadsheet and reviewed bank deposits prepared by various employees, including Defendant.

Jackson testified on direct examination that she became aware of an accounting problem at Mountain Health when Frady told her payments had not been properly credited to some patients' accounts. Marvin Harrison (Harrison), a certified fraud investigator, was then

employed to assist Jackson in an investigation of financial records at Mountain Health. Jackson stated Defendant agreed to participate in an interview with Harrison and Jackson, which took place on 19 July 1995. During the interview, Defendant stated she prepared all pharmacy deposits for Mountain Health. When asked for an explanation for cash shortfalls, checks being held several days, and hotel checks being deposited as part of pharmacy receipts, Defendant stated checks may have gotten mixed up on her desk. When asked whether she knew of shortfalls, Defendant said she did not.

Jackson also testified regarding the preparation of numerous financial records, which were introduced into evidence by the State during Jackson's testimony. The records included deposit slips from the pharmacy prepared by Defendant and daily drawer balancing reports prepared for the pharmacy.

During cross-examination, Defendant's counsel placed a document before Jackson, marked "Defendant's Exhibit No. 9," which Jackson identified as a transcript of the 19 July 1995 interview with Defendant. Defendant's counsel read portions of the transcript to Jackson, including questions Harrison had asked Defendant and Defendant's answers. The questions concerned whether Defendant had knowledge of someone taking cash and substituting checks from Mountain Health, whether Defendant realized that she was the only "common thread" in the suspect transactions, whether Defendant had in fact taken cash and substituted checks, and whether Defendant had any information as to how such a transaction might have occurred.

Other statements made by Harrison, which were read during cross-examination, included Harrison's declaration of his belief Defendant took the money, and Harrison's request for permission to look into Defendant's personal financial records. Jackson testified she remembered the portions of the interview read by Defendant's counsel, including Defendant's statements during the interview that she did not know anything about the substitutions of checks for cash, she herself had not substituted checks for cash, and she would provide her personal records for examination.

Defendant's counsel also asked whether Jackson recalled Jackson's and Harrison's interview of Marshall, which took place on 27 July 1995, and Jackson responded that she did. Jackson testified she did not recall during that interview discussing hotel accounting procedures involving Ann Byers (Byers), a co-employee of Marshall,

or discussing the accounting office's sheet for Mountain Health deposits. Defendant's counsel then asked Jackson to identify a document, "Defendant's Exhibit No. 10," which Jackson identified as a transcript of the 27 July interview with Marshall. At the request of Defendant's counsel, Jackson read a portion of the transcript silently. She said it did not refresh her memory about the interview.

Defendant's counsel then asked Jackson if she was present during the 27 July interview, and she replied that she was present. Jackson recalled from the interview that Byers had some involvement with accounting procedures, but she did not remember specific details of that involvement. She also recalled Marshall and Byers did not take the deposit slips prepared by Defendant "verbatim," and that they prepared similar records to compare to Defendant's records.

Finally, Defendant's counsel also asked Jackson a question about a second interview with Defendant, which took place on 31 July 1995. He asked whether Jackson recalled Harrison telling Defendant in that interview that checks were used to replace cash, and Jackson responded that she did.

After the State completed the presentation of its evidence, Defendant chose not to present any evidence. Before allowing the attorneys to make their jury arguments, the trial court on its own motion stated Defendant had "got off with . . . Jackson and had her reading statements made by . . . Harrison, who did not testify, and documents that were not offered into evidence by the State, that that rises to putting on evidence." The trial court then, over Defendant's objection, denied her the closing jury argument.

The dispositive issue in this case is whether Defendant introduced evidence during her cross-examination of Jackson, thereby losing her right to conduct the closing argument to the jury.

When a defendant does not introduce evidence, he retains "the right to open and close the argument to the jury." Gen. R. Pract. Super. and Dist. Ct. 10, 1999 Ann. R. N.C. 66 (Rule 10). As a general proposition, any testimony elicited during cross-examination is "considered as coming from the party calling the witness, even though its only relevance is its tendency to support the cross-examiner's case." Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 170, at 559 (5th ed. 1998) [hereinafter *North Carolina Evidence*]. Indeed, the general rule also provides there is no right to offer evidence during cross-examination. *Id.*; *State v. Yoes*

and Hale v. State, 271 N.C. 616, 646, 157 S.E.2d 386, 409 (1967) (parties "not entitled to offer evidence of their own, under the guise of cross[-]examination"). Nonetheless, evidence may be "introduced," within the meaning of Rule 10, during cross-examination when it is "offered" into evidence by the cross-examiner, *State v. Hall*, 57 N.C. App. 561, 564, 291 S.E.2d 812, 814 (1982); *see North Carolina Evidence* § 18, at 70 (describing methods for offering different types of evidence), and accepted as such by the trial court. *North Carolina Evidence* § 170, at 560 n.592 (trial court has discretion to vary order of proof); *State v. Baker*, 34 N.C. App. 434, 441, 238 S.E.2d 648, 652 (1977) (defendant allowed to introduce, during cross-examination, a picture he used to cross-examine witness). Although not formally offered and accepted into evidence, evidence is also "introduced" when new matter is presented to the jury during cross-examination and that matter is *not* relevant to any issue in the case. *See State v. Macon*, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997) (cross-examination of State's witness about contents of defendant's statement, which had not been presented by the State and which "did not relate in any way" to testifying witness, constituted the "introduction" of evidence within meaning of Rule 10); N.C.G.S. § 8C-1, Rule 611(b) (1992) ("witness may be cross-examined on any matter relevant to any issue in the case"). New matters raised during the cross-examination, which are relevant, do not constitute the "introduction" of evidence within the meaning of Rule 10. *See* N.C.G.S. § 8C-1, Rule 401 (defining relevant evidence). To hold otherwise, "would place upon a defendant the intolerable burden of electing to either refrain from the exercise of his constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and un-impeached or forfeit the valuable procedural right to closing argument." *Beard v. State*, 104 So. 2d 680, 682 (Fla. Dist. Ct. App. 1958).

In this case, the State contends Defendant introduced evidence when he questioned Jackson during cross-examination about the contents of three interviews, which took place on 19 July 1995, 27 July 1995, and 31 July 1995. We disagree.

Jackson, Harrison, and Defendant were present at the 19 July interview and, on direct examination, Jackson testified regarding some of the statements made by Defendant during the interview. These statements were made in response to questions asked by Jackson and Harrison. On cross-examination, Defendant's counsel showed Jackson a transcript of the 19 July interview and read por-

tions of questions Harrison had asked Defendant during the interview. These questions put Defendant's answers into context, and Jackson had testified regarding those answers during direct examination. Although Jackson's testimony on cross-examination contained new matter regarding the 19 July interview, the new matter was relevant to Jackson's testimony during direct examination. Defendant therefore did not introduce evidence of the 19 July interview.

Jackson, Harrison, and Marshall were present at the 27 July interview. While this interview was not discussed during direct examination of Jackson, Defendant's counsel asked Jackson about the interview during cross-examination. Jackson testified, however, she did not recall the contents of the interview even after reviewing a transcript of the interview at the request of Defendant's counsel.

Although Jackson did not remember "specifics" of the interview, she stated Byers and Marshall, when reviewing accounting records, did not take figures supplied by Defendant "verbatim," but also prepared their own totals. Jackson's testimony regarding the preparation of financial records by Marshall and Byers is relevant to the reliability of those records, which were themselves introduced by the State during direct examination of Jackson. The State introduced deposit slips prepared by Defendant as well as daily drawer balance reports from the pharmacy, and Jackson relied on these documents during her investigation. Further, Marshall testified for the State about St. Joseph's accounting procedures, and on cross-examination stated she prepared an overall reconciliation for Mountain Health and reviewed deposits prepared by Defendant. Although the evidence of Marshall's and Byers' accounting procedures when reviewing deposits prepared by Defendant was not presented in direct testimony, it is nevertheless relevant to the financial records introduced by the State and Marshall's and Jackson's testimony about accounting procedures. Defendant therefore did not introduce evidence regarding Mountain Health's accounting procedures.

Finally, Jackson, Harrison, and Defendant were present at the 31 July interview. Defendant's counsel did not provide Jackson with a transcript of this interview but, referring to the transcript of the interview, did ask Jackson if she recalled Harrison telling Defendant checks were used to replace cash in the pharmacy. Jackson responded she did recall Harrison making this statement during the interview. Although the State did not ask Jackson about the 31 July interview during direct examination, Harrison's statement from that

interview that checks were being used to replace cash in the pharmacy was relevant to Harrison's and Jackson's investigation of missing funds. The same parties were present at both the 19 July and 31 July interviews, both interviews were conducted for the purpose of discussing with Defendant whether she had any knowledge of the missing cash from the pharmacy, and Harrison made similar statements to Defendant during both interviews. Because Harrison's statements from the 31 July interview were relevant to Harrison's and Jackson's investigation of Defendant, an issue brought out by the State during direct examination of Jackson, Jackson did not testify on cross-examination regarding new matters. It follows Defendant did not introduce evidence by asking Jackson about Harrison's statement during this interview.

Because Defendant did not introduce any evidence within the meaning of Rule 10, she was improperly deprived of her right to the closing argument to the jury. The improper deprivation of this right entitles Defendant to a new trial.[1] *Hall*, 57 N.C. App. at 565, 291 S.E.2d at 815.

We have reviewed the additional assignments of error brought forth by Defendant but, because they are unlikely to recur at a new trial, we do not address them.

New trial.

Judges TIMMONS-GOODSON and HORTON concur.

1. The State argues in its brief to this Court that Frady's testimony, elicited on cross-examination, constituted the introduction of evidence within the meaning of Rule 10. We first observe the record reveals the trial court did not rely on this cross-examination as a basis for determining Defendant had presented evidence. In any event, we have reviewed that cross-examination and have determined it to be relevant to issues in the case. This testimony therefore did not constitute the introduction of evidence.

STATE OF NORTH CAROLINA v. VERNON R. OWENS

No. COA98-1309

(Filed 2 November 1999)

1. **Criminal Law— joinder—sex offenses—multiple victims—improper but not prejudicial**

Although the trial court erred in permitting joinder of all offenses in a case involving defendant's numerous sex offenses against his girlfriend's three minor daughters because of the length of time between offenses and the differing nature of most of the individual acts indicating the charged acts did not constitute a single scheme or plan under N.C.G.S. § 15A-926(a), defendant was not prejudiced since: (1) evidence of the other molestations at the trial of any one offense would have been admissible pursuant to N.C.G.S. § 8C-1, Rule 404(b); and (2) there is no evidence defendant was hindered or deprived of his ability to defend one or more of the charges.

2. **Evidence— other offenses—uncharged instances of sexual abuse—common plan or scheme**

The trial court did not err in admitting the testimony of a fourth sister in a case involving defendant's numerous sex offenses against his girlfriend's three minor daughters because the evidence of uncharged instances of sexual abuse by defendant involving the fourth sister when she was a minor was relevant under Rule 404(b) to show a common plan or scheme.

3. **Indecent Liberties— sufficiency of the evidence**

In a case involving defendant's numerous sex offenses against his girlfriend's three minor daughters, the trial court did not err in denying defendant's motion to dismiss the three indecent liberties offenses, based on an incident where all three victims testified they watched as defendant stood in a doorway masturbating, because a reasonable juror could conclude from the evidence that defendant knew the girls were in the room.

Appeal by defendant from judgments entered 15 April 1998 by Judge William C. Griffin in Currituck County Superior Court. Heard in the Court of Appeals 26 August 1999.

Michael F. Easley, Attorney General, by James P. Erwin, Jr., Special Deputy Attorney General, for the State.

Gladden, Rose, Jones & Harrison, by Randy L. Jones, for defendant-appellant.

EDMUNDS, Judge.

Defendant Vernon Owens was indicted for committing numerous sex offenses against his girlfriend's three minor daughters. As to the eldest daughter, defendant was charged with committing first-degree statutory rape, indecent liberties, and first-degree sexual offense in July 1990; with taking indecent liberties in August 1996; and with taking indecent liberties in April 1997. As to the middle daughter, he was charged with first-degree sex offense and taking indecent liberties in June 1994. As to the youngest daughter, he was charged with first-degree sex offense and taking indecent liberties between August and December 1994, and with taking indecent liberties in August 1996. Over defendant's objection, the cases were joined for trial.

Defendant was tried in 1998. The oldest daughter, who was then fifteen years old, testified that the first incident occurred when she was seven or eight. Defendant took her into his bedroom, removed her underwear, and attempted to place his finger in her vagina. She described another incident that took place a few months later where defendant took her to his bedroom and penetrated her slightly with his penis. She testified that when she was nine years old, defendant attempted to force her to place her mouth on his penis. On another occasion, defendant stood in front of her bedroom door and masturbated while she and a sister watched. She stated that in 1997, defendant fondled her breasts, and that her sisters witnessed this incident.

The middle sister, who was fourteen years old at the time of trial, testified to an incident where defendant slid his hand down her pants and placed his finger between her vaginal lips. She further testified that she saw defendant place his hands over the shirt covering her older sister's breasts, and in 1996, she observed defendant masturbating. During this latter incident, all three sisters were in a room watching defendant, and he was looking into the room; however, she did not know if defendant knew the sisters were in the room. (This is apparently the same incident described by the older sister, above; there was a discrepancy in the sisters' testimony as to how many observed defendant's actions.)

The youngest sister was twelve years old at the time of trial. She testified that in the autumn of her third-grade year, defendant put his finger inside her vagina. She also testified that she observed defendant masturbating while standing in front of her sister's bedroom door.

Other evidence included testimony of an investigator, defendant's testimony denying the charges, and the testimony of the victims' mother that she did not believe her daughters. The jury returned verdicts of guilty of attempted statutory rape and both indecent liberties charges as to the oldest victim, guilty of attempted first-degree sex offense and indecent liberties as to the middle victim, and guilty of first-degree sex offense and both indecent liberties charges as to the youngest victim. Defendant received a life sentence for the first-degree sex offense conviction and lesser sentences for the other convictions, some to run concurrently. Defendant appeals.

[1] Defendant's first contention is that the trial court erred in permitting joinder of all offenses. Offenses may be joined for trial when "the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (1997). The law governing application of this rule is well settled. "This statute [15A-926(a)], which became effective in 1975, differs from its predecessor, in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses." *State v. Corbett*, 309 N.C. 382, 387, 307 S.E.2d 139, 143 (1983) (citations omitted).

> A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law.

State v. Silva, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981) (citations omitted).

Traditionally, North Carolina appellate courts have been willing to find a transactional connection in cases involving sexual abuse of children. In *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983), a noncustodial parent was charged with sexually molesting his juvenile stepson on 15 May 1982, and his juvenile daughter on 8 June 1982. Our Supreme Court, noting that (1) in less than one month, the defendant

took advantage of both children during visitations; (2) the defendant used his position of dominance as their father to molest the children; and (3) in each case the defendant waited until he was alone with the child at home, concluded: "The facts of this case present a unique set of circumstances which, although by no means compelling, provide grounds for permissible joinder of the charges." *Id.* at 752, 309 S.E.2d at 209.

In *State v. Street*, 45 N.C. App. 1, 262 S.E.2d 365 (1980), the defendant was charged with molesting his three stepchildren. He had frequent sexual intercourse with the oldest girl, and forced his stepson to have sex with his sister. Defendant attempted to have sex with the youngest daughter on numerous occasions. These events spanned approximately one year, and this Court held:

> We, like the defendant, can find no case in this jurisdiction where acts allegedly committed by a defendant five months apart were held to be parts of a single scheme or plan. Nonetheless, each of the offenses for which the defendant was charged allegedly occurred at the same place and under the same circumstances. All of the victims were members of the same family. The evidence tended to show that these incidents and similar incidents continued for a long period of time, and that the defendant sexually abused his children virtually each time his wife left the defendant home alone with the children. In each instance the defendant used his parental control over the children to force them to comply with his sexual desires. Consequently, we think that even though the time period between some of the acts was substantial, the acts were nonetheless so similar in circumstance and place as not to render the consolidation of the offenses prejudicial to the defendant. We also note that all of the offenses involved sexual abuses of stepchildren, and although N.C. Gen. Stat. § 15A-926 does not permit joinder of offenses solely on the basis that they are the same class, the nature of the offenses is a factor which may properly be considered in determining whether certain acts constitute parts of a single scheme or plan.

Id. at 5-6, 262 S.E.2d at 368 (citation omitted).

By contrast, in the case at bar, the length of time between offenses, along with the differing nature of most of the individual acts, indicates that defendant did not have a "single scheme or plan." N.C. Gen. Stat. § 15A-926(a). The first offense occurred in July 1990, when defendant attempted to have intercourse with the oldest victim.

After this 1990 offense, three years passed before defendant molested both younger sisters at different times in 1994. He then molested the oldest victim again in August 1996. The final offenses charged took place in 1997. Defendant's methods were not uniform. Some molestations took place when he was alone in the house with a single child. On other occasions, he would isolate a child in his bedroom while others were in the house. Defendant twice took indecent liberties while all three girls were present. In light of (1) the extended interval of as much as several years between some of these offenses and (2) the lack of a consistent pattern in defendant's molesting behavior, we hold that, as a matter of law, all of the charged acts did not constitute part of a single scheme or plan. The trial court erred in joining the cases for trial.

Even though the offenses were improperly joined, defendant has not articulated any resulting prejudice in his appellate brief, nor do we perceive any. If the offenses had not been joined, then at the trial of any one offense, evidence of the other molestations would have been admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1992) to show "intent, plan or design." *Effler*, 309 N.C. at 752, 309 S.E.2d at 209. Such a Rule 404(b) "plan" may be established by a lower threshold of proof than that needed to establish the "series of acts or transactions connected together or constituting parts of a single scheme or plan," which must be shown for joinder of offenses for trial under section 15A-926(a). The very terms used in section 15A-926(a) requiring a "single scheme or plan," are more exacting than the term "plan" used in Rule 404(b). We are therefore satisfied that a "plan" (Rule 404(b)) and a "single plan" (15A-926(a)) are not equivalent.

Other cases have confirmed the admissibility of such evidence pursuant to Rule 404(b). *See, e.g.*, *State v. Frazier*, 344 N.C. 611, 476 S.E.2d 297 (1996) (finding evidence of other molestations between seven and twenty-six years before offense for which defendant was tried admissible to show common plan or scheme); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986) (finding defendant's three-year-old daughter's testimony concerning defendant's sexual activity with her admissible in defendant's trial for molesting his two sons in order to establish common scheme or plan); *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982) (affirming trial court's admission of two stepdaughters' testimony of defendant's abuse in the prosecution of defendant for molesting another stepdaughter properly admitted to show common plan or scheme), *rev'd on other grounds*, 307 N.C. 699, 307 S.E.2d 162 (1983). "Our Court has been

very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule [of 404(b)]." *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978). While the admissibility of this evidence pursuant to Rule 404(b) is not conclusive evidence of the absence of prejudice, it is a factor that we may consider. *See Corbett*, 309 N.C. at 389, 307 S.E.2d at 144. There is no evidence defendant was "hindered or deprived of his ability to defend one or more of the charges." *Id.* (citation omitted). The trial court's error in joining the offenses for trial was harmless. This assignment of error is overruled.

[2] Defendant next contends the trial court erred in admitting the testimony of a fourth sister. This witness, older than the victims named in the indictments, was twenty-seven years old at the time of trial. Over defendant's objection, she was allowed to testify pursuant to Rule 404(b) that defendant touched her vagina when she was ten or eleven years old, and defendant forced her to have sexual intercourse with him when she was thirteen or fourteen.

As detailed above, North Carolina appellate courts have been very liberal in admitting evidence of similar sex crimes as an exception to Rule 404(b). *See Greene*, 294 N.C. at 423, 241 S.E.2d at 665. The uncharged instances of abuse involving the fourth sister, committed between thirteen and seventeen years prior to trial, were less remote than the uncharged instances of abuse whose admission was approved by our Supreme Court in *Frazier*, 344 N.C. 611, 476 S.E.2d 297. This evidence demonstrated that defendant gained access to these young girls by exploiting his relationship with their mother and is consistent with other evidence previously presented through the three victims named in the indictments. Therefore, the testimony of the fourth sister was relevant under Rule 404(b) to show a common plan or scheme.

Nevertheless, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Evidence of defendant's molestation of a fourth sister undoubtedly had probative value to show the existence of intent, plan or design, to corroborate the types of sexual abuse established by the testimony of the other three victims, and to confirm defendant's characteristic abuse of the children of the woman who was his friend and who later became his girlfriend. *See State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999). In light of the direct evidence presented by the three victims and the investiga-

tor, any unfair prejudice caused by evidence of a fourth victim was minimal. This assignment of error is overruled.

[3] Finally, defendant contests the sufficiency of the evidence to support his conviction of three indecent liberties offenses. Each of these offenses stemmed from the incident where all three victims testified they watched as defendant stood in a doorway masturbating. Defendant argues there was insufficient evidence to prove he knew the victims were watching, and therefore the trial court should have granted his motion to dismiss those charges at the close of the State's case and again at the conclusion of all the evidence.

"In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). A motion to dismiss for insufficient evidence will be denied if there is substantial evidence of each element of the crime. *See State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). Substantial evidence is such relevant evidence that a reasonable mind might find sufficient to support a conclusion. *See State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Masturbation by an adult in the presence of a child may constitute indecent liberties. *See State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981). Here, the oldest victim testified that defendant was masturbating while standing in the doorway of a bedroom where she and her sisters were watching. Although she did not know if defendant knew the victims were in the bedroom, she testified that, "yeah, he was looking in there." The other two sisters also testified about defendant's behavior on that occasion, and one testified that defendant knew the oldest victim was in the room. A reasonable juror could conclude from this evidence that defendant knew the girls were in the room. Defendant reiterates this argument in his assignment of error to the trial court's denial of his motion to dismiss all charges at the close of all the evidence. For the reasons stated above, this argument fails. This assignment of error is overruled.

No error.

Judges WYNN and JOHN concur.

FLOYD M. ANDREWS, PLAINTIFF v. DAVID R. CARR, M.D. AND SALEM SURGICAL ASSOCIATES, P.A., DEFENDANTS

No. COA99-265

(Filed 2 November 1999)

1. **Medical Malpractice— contributory negligence—failure to follow medical advice—acts subsequent to negligence—not bar to recovery—mitigation of damages**

   The trial court did not err in granting plaintiff-patient's directed verdict motion on the issue of contributory negligence because plaintiff's post-surgery activities after defendant-doctor's negligent treatment are properly considered in mitigation of plaintiff's damages and cannot constitute a bar to his claim.

2. **Medical Malpractice— expert testimony—standard of health care—negligent treatment—causation**

   Although a medical expert did not qualify under Rule 702 to offer opinion testimony with regard to the standard of health care at issue in this negligent treatment case, the trial court did not err in allowing the expert to testify because his testimony related to causation.

Appeal by defendants from judgment filed 22 July 1998 and from order filed 28 September 1998 by Judge Melzer A. Morgan, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 21 September 1999.

Kirby & Holt, L.L.P., by C. Mark Holt, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Kevin B. Cartledge, for defendant-appellants.

GREENE, Judge.

David R. Carr, M.D. (Dr. Carr) and Salem Surgical Associates, P.A. (collectively, Defendants) appeal a judgment against them in the amount of $375,000.00 after a jury found that Floyd M. Andrews (Plaintiff) was injured by Defendants' negligence.

Dr. Carr performed a bilateral hernia surgery on Plaintiff on 13 May 1996 at Memorial Park Hospital in Winston-Salem, North Carolina. Dr. Carr utilized an open surgical procedure with direct visualization of the operative field. Dr. Carr's plan was to reduce and

repair the hernia on the right side, utilizing Marlex mesh to provide support to the surgically repaired area, and then to do the same on the left side. The procedure began with Plaintiff under sedation but it was eventually converted to general anesthesia.

As part of the surgery, Dr. Carr planned to identify the spermatic cord on the right side and dissect around it to release and move it allowing him access to the hernial sac, which had descended into Plaintiff's scrotum. At that point in the surgery, Dr. Carr lost his point of anatomical reference. Dr. Carr confused Plaintiff's penis for his spermatic cord and dissected around the penis releasing the surrounding skin. This dissection went along the shaft of the penis where his dissection instrument exited the body causing a cut on the side of the penis.

After freeing the spermatic cord by dissection, part of Dr. Carr's surgical plan was to place a rubber tube called a penrose drain around the spermatic cord pulling it out of the way to access the hernia. Instead of pulling the spermatic cord away, Dr. Carr actually pulled Plaintiff's penis structure out of the dissected skin. Realizing what he had done, Dr. Carr then put Plaintiff's penis back into place and closed the open wound on the penis by suture. Dr. Carr continued with the hernia repairs, but because his surgical instrument had left the sterile operative field by exiting the body, Dr. Carr decided not to utilize mesh in the operation for fear he had created a risk of infection.

After awakening from surgery, Dr. Carr told Plaintiff he had cut his penis. He, however, did not tell Plaintiff about putting the drain around his penis and the dissection involved or that the cut came from the inside out. He also did not tell Plaintiff he had abandoned his plan to use mesh because of his fear he had created an avenue for infection. Plaintiff was given post-surgical instructions from Dr. Carr to refrain from sexual activity and from lifting any weight of more than twenty pounds for at least six weeks.

Plaintiff was released to go home within twenty-four hours after the surgery but saw Dr. Carr at his office for several post-operative visits on 20 May, 4 June, 12 June, and 26 June 1996.

Medical records show that on the 12 June 1996 visit, Plaintiff told Dr. Carr that the swelling in his scrotum was doing much better when he "did sit-ups." Plaintiff also testified he had engaged in sexual relations at the end of July or the beginning of August of 1996. Dr. Carr

again informed Plaintiff he should not engage in heavy lifting, exercise, or sexual activity until his wounds were fully healed and such activity could slow the healing process and increase the risks of infection, swelling, and additional hernia complications.

On 24 September 1996, Craig Donatucci, M.D. (Dr. Donatucci) performed surgery on Plaintiff to release his entrapped penis and to remove scar tissue and a draining sinus tract in the area of the dissection. This surgery was necessary because of the scar tissue that had formed around the shaft of Plaintiff's penis as a result of Dr. Carr's dissection.

Plaintiff testified that the surgery performed at Duke University by Dr. Donatucci only partially relieved the entrapment of his penis. Since that time, Plaintiff has experienced the following concerning his penis: lack of sensation, erectile dysfunction, and tingling pain. Plaintiff is unable to have sexual intercourse and has difficulty controlling his urine flow due to numbness. Part of Plaintiff's supra-pubic fat pad and his superficial dorsal vein are missing as a result of the dissection. Plaintiff has two scars on his penis and has to use a vacuum device prescribed at Duke University to aid erections.

William Boyce, M.D. (Dr. Boyce), was tendered by Plaintiff as an expert witness. Dr. Boyce is retired and is not currently engaged in clinical practice or professional teaching. In pertinent part, he testified in response to a question from Plaintiff's counsel, as follows:

> Q. Do you have an opinion about whether the laceration in the skin of the penis during the hernia operation, whether or not that was a cause of that infection?
>
> . . . .
>
> A. Opinion is—*I don't know how well it was prepared. I wasn't there and it isn't described in the literature, but it certainly was draped out of the field. That means the sterile field in which the operation was occurring. And it—it—to have a laceration out there of an unknown length of time was certain to have introduced organisms in—into the wound.* (emphasis added).

Defendant made a motion to strike this statement and that motion was denied by the trial court. Dr. Boyce went on to state that the laceration to Plaintiff's penis by Dr. Carr was a cause of the infection.

Dr. Carr and his experts, Sigmund Tannenbaum, M.D. (Dr. Tannenbaum) and Matthew Martin, M.D. (Dr. Martin), all testified that Plaintiff's damages were caused by an infection at the surgical site unrelated to either the nick or the use of the penrose drain on Plaintiff's penis during surgery. Dr. Tannenbaum testified that the performance of sit-ups by Plaintiff definitely would have contributed to the infection, which caused his post-operative problems. Dr. Tannenbaum also testified that if Plaintiff engaged in sexual activity before his surgical hernia wound had completely healed, this would have increased the chances of developing an infection at the surgical site. Dr. Martin testified that Plaintiff's post-operative exercise and sexual activities could have contributed to his post-operative complications.

At the end of Defendants' evidence, Plaintiff moved for a directed verdict on the issue of negligence and contributory negligence. The motion for directed verdict on the issue of negligence was denied and the motion for directed verdict on the issue of contributory negligence was granted. The trial court then instructed the jury regarding mitigation of damages:

> Evidence has been received in this case tending to show that Floyd M. Andrews failed to keep appointments with Salem Surgical Associates and failed to follow instructions regarding exercise and sexual intercourse.
>
> I instruct you that a party injured by the negligence of another is required to use ordinary care to see that his injury is treated and cared for. He must try to get well. He must keep the harmful consequences of his injury to a minimum if he can do so by reasonable diligence. A party is not permitted to recover for damages that he could have avoided by using means which a reasonably prudent person would have used to cure his injury or alleviate his pain. However, a party is not deprived of recovery for damages that he could have avoided unless his failure to avoid those damages was unreasonable.
>
> If you find that a physician advised the [P]laintiff to return for appointments or not exercise or not engage in sexual intercourse, you would not necessarily conclude that the [P]laintiff acted unreasonably in not following these instructions. In determining the reasonableness or unreasonableness of the [P]laintiff's conduct, you must consider all of the circumstances as they appear to the [P]laintiff at the times of such conduct.

> If you find by the greater weight of the evidence that the [P]laintiff failed to use ordinary care to see that his injury was treated or cared for and thereby keep the harmful consequences of his injury to a minimum, if he can [sic] do so by reasonable diligence, then you would not award damages to the Plaintiff, Floyd M. Andrews, for those consequences that you find he would have avoided by using means which a reasonably prudent person would have used to cure his injury or alleviate his pain.

Plaintiff made a post-trial motion for an award of attorneys' fees pursuant to Rule 37(c) of the North Carolina Rules of Civil Procedure, because Defendants failed to admit to one of Plaintiff's requests for admissions. On 27 April 1998, Plaintiff served Defendants with a set of requests for admissions. The tenth request for admission stated as follows: "10. That the injury to the plaintiff's penis which occurred during the operation named 'Bilateral inguinal hernia repairs with Bassini repair' which Dr. Carr performed on plaintiff on May 13, 1996 was caused by the negligence of Dr. Carr." Defendants denied the request. Plaintiff's motion for an award of attorneys' fees was subsequently denied by the trial court. Plaintiff cross-assigned as error the trial court's denial of this motion.

The issues are whether: (I) the failure of a patient to follow medical advice subsequent to negligent medical treatment constitutes contributory negligence; and (II) Dr. Boyce offered standard of care testimony.

I

[1] A directed verdict for the plaintiff on the issue of his contributory negligence must be sustained by the appellate court unless there is substantial evidence the plaintiff's negligence was a proximate cause of his injuries. *See Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). If, therefore, there is relevant evidence that a reasonable mind might accept as adequate to support the elements of contributory negligence, the trial court must deny plaintiff's motion and allow the issue of contributory negligence to go to the jury.

"Contributory negligence . . . is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury

of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). Thus, "[w]hen a patient's negligent conduct occurs subsequent to the physician's negligent treatment . . . , recovery by the patient should be mitigated and not completely defeated pursuant to a contributory negligence theory." *Cobo v. Raba*, 125 N.C. App. 320, 324, 481 S.E.2d 101, 104 (1997), *aff'd*, 347 N.C. 541, 495 S.E.2d 362 (1998) (citations omitted) (activities of patient took place prior to and contemporaneously with physician's treatment and thus constituted contributory negligence); *see McCracken v. Smathers*, 122 N.C. 799, 805, 29 S.E. 354, 356 (1898) (when liability established for malpractice, proof that patient disobeyed doctor's orders and aggravated the injury, after liability was incurred, does not discharge liability; but simply goes to mitigation of damages); *see also Powell v. Shull*, 58 N.C. App. 68, 77, 293 S.E.2d 259, 264, *disc. review denied*, 306 N.C. 743, 295 S.E.2d 479 (1982) (patient's failure to keep appointments with treating physician did not constitute contributory negligence when failure occurred after doctor's negligent treatment); *cf. McGill v. French*, 333 N.C. 209, 220, 424 S.E.2d 108, 114-15 (1993) (patient's failure to keep appointments and report symptoms to treating physician, occurring simultaneous with treating physician's negligence, constituted contributory negligence).

In this case, the jury found and Defendants do not now contest they were negligent in performing the hernia operation,[1] when a dissection occurred outside of the operative field and into Plaintiff's penis. Defendants, however, do now contend there is substantial evidence Plaintiff was also negligent when he, after the surgery and against the advice of Defendants, performed sit-ups and had sexual intercourse. Consequently, Defendants contend the issue of Plaintiff's contributory negligence should have gone to the jury.

Assuming the post-surgery activities of Plaintiff did contribute to his injuries, they cannot constitute contributory negligence because these activities occurred *subsequent* to Dr. Carr's negligent treatment. Any injuries Plaintiff caused to himself as a result of his failure to follow Dr. Carr's post-negligence treatment advice are properly considered in mitigation of his damages and cannot constitute a bar to the claim. The trial court, therefore, properly allowed Plaintiff's motion for directed verdict on Defendants' defense of contributory negligence and properly instructed on mitigation of damages.

1. Defendants did contest their negligence at trial, but do not raise that issue before this Court.

II

[2] Defendants argue the trial court erred in allowing Dr. Boyce to testify regarding the appropriate standard of health care in violation of Rule 702 of the North Carolina Rules of Evidence. We disagree.

There is no dispute that Dr. Carr's conduct would constitute negligence if his care "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities . . . ." N.C.G.S. § 90-21.12 (1997). It is also undisputed that a person is not permitted to offer expert testimony on the appropriate standard of care unless he qualifies under the provisions of Rule 702(b)(2) of the Rules of Evidence. N.C.G.S. § 8C-1, Rule 702(b)(2) (Supp. 1998).

In this case Dr. Boyce did not qualify under Rule 702 to offer opinion testimony with regard to the standard of health care at issue and he did not offer such evidence. His testimony, which has been questioned by Defendants, related to causation and it is not disputed that he was qualified to offer causation testimony.

We have carefully reviewed and reject the remaining arguments made by Defendants. We also have reviewed and overrule Plaintiff's cross assignment of error.

No Error.

Judges WALKER and HUNTER concur.

CARL F. ROTEN AND WIFE CELIA G. ROTEN, PETITIONERS v. DWIGHT CRITCHER, ROGER CRITCHER, SAMMY CRITCHER AND WIFE, GLORIA CRITCHER, RESPONDENTS

No. COA99-34

(Filed 2 November 1999)

Highways and Streets— neighborhood public road—summary judgment for respondents

The trial court correctly granted summary judgment for respondents in an action to establish a neighborhood public road where the issue was whether the road had been established by prescriptive easement in 1941, the enactment date of the applica-

ble statutory definition; petitioners' evidence of uses of the road did not show that the uses were not permissive, and uses must be assumed consensual in the absence of such a showing; and the establishment of a cartway in 1936 interrupted any continuity of use petitioners may have shown between 1921 and 1941.

Appeal by petitioners from judgment entered 29 September 1998 by Judge Jesse B. Caldwell, III in Superior Court, Watauga County. Heard in the Court of Appeals 20 September 1999.

Manning, Fulton & Skinner, P.A., by Cary E. Close, for petitioners appellants.

Clement & Yates, by Charles E. Clement, for respondents appellees.

TIMMONS-GOODSON, Judge.

Petitioners initiated a special proceeding by filing, *pro se*, a Petition for Establishment of a Neighborhood Public Road with the Watauga County Clerk of Superior Court. The Clerk entered an order dismissing the Petition and petitioners gave notice of appeal to the Superior Court. Judge Dennis J. Winner of the Watauga County Superior Court entered an order reversing the dismissal of the Petition and remanding the matter to the Watauga County Clerk for a hearing *de novo*. Upon motion of the Watauga County Clerk, the matter was transferred to the Avery County Clerk of Superior Court for hearing. The matter was heard by the Avery County Clerk of Superior Court, who entered an order denying the Petition. From this motion, petitioners gave notice of appeal to the Watauga County Superior Court.

On 14 September 1998, respondents' motion to dismiss for failure to state a claim and motion for summary judgment were heard by Watauga County Superior Court Judge Jesse B. Caldwell, III. Judge Caldwell denied respondents' Rule 12(b)(6) motion, but granted respondents' motion for summary judgment on the basis that the road serves an "essentially private use." Petitioners appeal.

Petitioners' evidence at the summary judgment hearing tended to show the following. Ridgewood Road ("the road") is located near the community of Deep Gap in the mountains of North Carolina. The portion of the road in issue begins at U.S. Highway 421 and continues north across the property of Carl F. Roten and wife Celia G. Roten

(collectively "respondents"), then across the property of Dwight Critcher, Roger Critcher, Sammy Critcher and wife Gloria Critcher (collectively "petitioners"). Petitioners use the portion of the road in issue as their only means of access to Highway 421.

Respondents have questioned petitioners' use of the road. Respondent Dwight Critcher told petitioner Carl Roten that he could "put up a gate" across that part of the road which runs across respondents' property. As a result, petitioners brought a special proceeding to have the portion of the road leading from Highway 421 to their property declared a neighborhood public road.

In 1936, petitioners' predecessors in title had the portion of the road which begins at Highway 421 and crosses respondents' property established as a cartway. Since 1918, the road has been used as a means of ingress and egress by families living on the road as well as by the general public. In the early 1900's through the 1920's, the road was used by people traveling from Deep Gap to reach the general store and the train station in the Brownwood area. Additionally, the road was used by a teacher and students who lived in Brownwood in order to reach the Deep Gap School. In the 1930's and 1940's, the road was used by people who lived in Deep Gap to travel home after fishing in Gap Creek. The doctor in Todd, North Carolina, and those visiting him traveled the road. In the past, travelers proceeded north on the road from Highway 421 in order to reach Highway 221, but at present locked gates along the road block access to Highway 221. The road is outside of the boundaries of any incorporated city or town.

Respondents' evidence at the summary judgment hearing tended to show the following. The portion of the road in issue is a short segment leading from Highway 421 to petitioners' property. Petitioners' evidence as to past usage of the road addresses the portion of the road beyond petitioners' residence, and does not address the portion of the road petitioners request to be declared a neighborhood public road. After 1936 when the cartway was established, there is no evidence that any use of the road was without the permission of respondents' predecessors in title.

Petitioners appeal the order granting respondents' motion for summary judgment on the basis that the road serves an "essentially private use."

The central issue of this appeal is whether Ridgewood Road was an established legal road by prescription in 1941. For the reasons

stated herein, we affirm the order granting summary judgment for respondents.

By their only assignment of error, petitioners argue that the trial judge erred in granting summary judgment in favor of respondents, and in failing to grant summary judgment in favor of petitioners, where there were no genuine issues of material fact with regard to whether the road at issue met the statutory definition of neighborhood public road. We cannot agree.

An entry of summary judgment by the trial court is fully reviewable by this Court. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). A party is entitled to summary judgment as a matter of law when there is no genuine issue of material fact as to any triable issue. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E.2d 419, 423-24 (1979). Following a motion for summary judgment, where the forecast of evidence available for trial demonstrates that a party will not be able to make out a *prima facie* case at trial, there is no genuine issue of material fact and summary judgment is appropriate. *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988).

The moving party must show the lack of a triable issue, and may do so by proving that an essential element of the nonmoving party's claim is nonexistent. *Id.* "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." *Id.* at 343, 368 S.E.2d at 858. Once the movant has shown the lack of a genuine issue of material fact, the burden shifts to the opposing party to show there is a genuine issue for trial. *Railway Co. v. Werner Industries*, 286 N.C. 89, 97, 209 S.E.2d 734, 738 (1974).

North Carolina General Statutes section 136-67 declares three types of roads to be neighborhood public roads. N.C. Gen. Stat. § 136-67 (Cum. Supp. 1998). The type of road in issue is the third one, described as:

> all . . . roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system.

Id. The above definition of a neighborhood public road was enacted in 1941. *See* 1941 N.C. Sess. Laws Ch. 183. The statute also contains a 1941 proviso which declares: "this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use[.]" N.C.G.S. § 136-67. In *Jarvis v. Powers*, 80 N.C. App. 355, 365, 343 S.E.2d 195, 201 (1986), this Court stated: "[t]he proviso allows for some public use, but requires a determination whether the road was 'essentially' a private or a public roadway." *See also Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E.2d 371, 373-74 (1946).

Whether a road constitutes a neighborhood public road must be "determined as of the enactment date of the applicable statutory definition." *Jarvis*, 80 N.C. App. at 364, 343 S.E.2d at 201 (instructing the trial court on remand to consider whether the roadway served an essentially private use in 1941 and if it did not, to declare the roadway a neighborhood public road).

As stated above, the definition of neighborhood public road in issue and the proviso regarding an "essentially private use" were enacted in 1941. Accordingly, the status of Ridgewood Road in 1941 is the relevant inquiry for determining whether it is a neighborhood public road for purposes of North Carolina General Statutes section 136-67.

The definition of neighborhood public road in issue refers to traveled ways which were "*established* easements or roads or streets in a legal sense" at the time of the 1941 amendment. *Speight*, 226 N.C. at 496, 39 S.E.2d at 373 (emphasis added). The General Assembly may not create a public way where none was established in 1941, "for, to do so, would be taking private property without just compensation." *Id.*

In a legal sense, the term "roads" means roads established by law by such means as dedication, condemnation or prescription. *West v. Slick*, 313 N.C. 33, 48, 326 S.E.2d 601, 610 (1985). Petitioners argue that Ridgewood Road was an established legal road in 1941 by prescription.

The claimant alleging prescriptive easement must prove twenty years of continuous use of the road prior to 1941. *Speight*, 226 N.C. at 496, 39 S.E.2d at 374. In other words, the relevant time period for proving the prescriptive easement is twenty years prior to the enactment of the statute, or from 1921 to 1941. In keeping with North

Carolina General Statutes section 136-67, the following elements must have been present in 1941 in order to establish a neighborhood public road:

(1) the road or portions thereof is outside of city or town limits;

(2) serves a public use and not an essentially private use;

(3) serves as a means of ingress or egress;

(4) for one or more families.

West, 313 N.C. at 48, 326 S.E.2d at 610. A fifth element must also be present in light of the Supreme Court's holding in *Speight*:

(5) the claimant alleging a prescriptive easement must show continuous and open public use for twenty years between 1921 and 1941.

Speight, 226 N.C. at 496, 39 S.E.2d at 374.

In the case *sub judice*, respondents concede petitioners have shown that the roadway in question is outside city or town limits, that it has served as a means of ingress and egress for one or more families, and that it has served members of the public at various points in time. At issue is whether petitioners forecasted evidence at summary judgment which would tend to establish a road by prescription.

A petitioner must prove the following elements by the greater weight of the evidence in order to prevail in an action to establish an easement by prescription:

(1) that the use is adverse, hostile or under claim or right;

(2) that the use has been open and notorious such that the true owner had notice of the claim;

(3) that the use has been continuous and uninterrupted for a period of at least twenty years; and

(4) that there is substantial identity of the easement claimed throughout the twenty-year period.

West, 313 N.C. at 50, 326 S.E.2d at 611 (citing *Accord Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981)). The law presumes the use of a way over another's land is permissive or with the owner's consent unless there is evidence to the contrary. *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989). Furthermore, mere permissive use can never ripen into an easement by prescription. *Id.*

Petitioners presented the following pertinent evidence of prescriptive easement at summary judgment. In the early 1900's through the 1920's, people used Ridgewood Road to travel from Deep Gap to the general store in the Brownwood area. Ridgewood Road was used by the general public to access the Deep Gap school which was located at the intersection of Ridgewood Road and U.S. Highway 421. At least one person used the road to haul railroad ties from Deep Gap to the train station at Brownwood. In the 1930's, people who lived in Deep Gap traveled home on the road after fishing in the Gap Creek. The doctor in Todd, North Carolina and his patients also traveled the road. In the past, travelers proceeded north on the road from Highway 421 in order to reach Highway 221.

We agree with respondents that petitioners' evidence fails to satisfy the requirements of prescriptive easement. Specifically, petitioners' evidence does not show that the above uses of the road were not permissive, and in the absence of such a showing, we must assume the uses were with the consent of the owner. *See Johnson*, 96 N.C. App. at 74, 384 S.E.2d at 579.

Furthermore, petitioners' evidence showed that their predecessor in title brought a cartway proceeding in 1936 after he was denied permission to use the road. A cartway was established over the same part of Ridgewood Road that petitioners currently seek to have declared a neighborhood public road. Petitioners contend that the establishment of the cartway in 1936 should not prevent this Court from finding that Ridgewood Road was a public road. Petitioners argue that they are not bound by any findings in the cartway proceeding and point out that the definition of neighborhood public road under which they are proceeding was not yet enacted at the time of the cartway proceeding.

We agree with respondents that the establishment of the cartway interrupted any continuity of use petitioners may have shown. The cartway was established in 1936 so that petitioners' predecessor in title could harvest timber from the land served by the cartway. Therefore, petitioners cannot show that the public continuously used the road between between 1921 and 1941. As petitioners' forecast of evidence does not show a prescriptive easement existed for the statutory period, they failed to make out a *prima facie* case that Ridgewood Road should be declared a neighborhood public road pursuant to North Carolina General Statutes section 136-67. Thus, the trial court did not err in granting summary judgment for respondents.

We note that our decision does not leave petitioners without any means of relief if their use of the road is challenged. As petitioners stated in their brief, they have the right to use the cartway established by their predecessor in title. Petitioners may enforce that right even though the road is not designated a neighborhood public road.

For the reasons stated herein, the order of summary judgment by the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

TOMIKA INVESTMENTS, INC., TOMIKA INVESTMENT CO. AND THOMAS LATIMER, PLAINTIFFS V. MACEDONIA TRUE VINE PENTECOSTAL HOLINESS CHURCH OF GOD, INC., DEFENDANT

No. COA98-1387

(Filed 2 November 1999)

1. **Appeal and Error— preservation of issues—partial summary judgment granted—interlocutory order—failure to timely object**

In a case involving defendant-church's failure to repay its loan and plaintiff's attempt to gain possession of the church's real estate holdings securing the loan, the issue of the trial court's order granting partial summary judgment in favor of plaintiff on defendant-church's claim that the deed to its property was void is not properly before the Court of Appeals because it is an interlocutory order and defendant failed to make a timely objection to the trial court's ruling.

2. **Evidence— value of church's property—video not allowed—irrelevancy to trial issues**

In a case involving defendant-church's failure to repay its loan and plaintiff's attempt to gain possession of the church's real estate holdings securing the loan, the trial court did not abuse its discretion in refusing to allow video evidence that could have been used to establish the value of defendant-church's property in an attempt to establish a claim to construe the conveyance of the church property as an equitable mortgage because the trial court

correctly considered the evidence in light of the issues presented at trial, and defendant did not previously attempt to advance the theory of equitable mortgage as a basis for relief.

3. Mortgages— judgment notwithstanding the verdict—sufficient evidence to support jury verdict—asserting new theory on appeal improper

In a case involving defendant-church's failure to repay its loan and plaintiff's attempt to gain possession of the church's real estate holdings securing the loan, the trial court did not err in denying defendant-church's motion for judgment notwithstanding the verdict because the record indicates: (1) the trial court correctly considered the evidence and found there was sufficient evidence to support the jury verdict; and (2) defendant is improperly asking the Court of Appeals to reconsider the evidence on the theory of equitable mortgage, which defendant at no time preceding or during the trial attempted to raise.

Appeal by defendant from judgment entered 22 May 1998 by Judge Melzer A. Morgan, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 24 August 1999.

In 1990, Macedonia True Vine Pentecostal Holiness Church of God, Inc. (Macedonia, or defendant), obtained a loan from Piedmont Federal Savings and Loan Association (Piedmont) and secured the loan with its real estate holdings, including its church buildings. Macedonia frequently had difficulty making the monthly payments in a timely manner. In August 1996 Piedmont sent a notice of foreclosure to Macedonia in response to the church's latest period of delinquency. The foreclosure sale was scheduled for 22 January 1997. Macedonia attempted to make other arrangements for financing but was unable to do so. Five days before the scheduled foreclosure sale, Macedonia retained Jay Parker (Parker) to attempt to find a lender to prevent the loss of the property at foreclosure. Parker negotiated with Thomas Latimer, the sole shareholder of Tomika Investment Company (Tomika), an arrangement whereby Macedonia would convey the property to Tomika and Tomika would pay the amount past due to Piedmont in order to prevent foreclosure, pay additional sums to other lienors (including the Internal Revenue Service), and allow Macedonia to lease the same property with an option to repurchase it. This agreement between Macedonia and Tomika was reached on 21 January 1997, the day before the foreclosure sale was scheduled and documents were prepared on the evening of that day.

Due to haste in preparing the documents, an error was made in the nomenclature of the grantee. While the proper corporate name was "Tomika Investment Company," it appeared as "Tomika Investments Incorporated." Despite this variance, it appears that all parties were aware of the entities and persons with whom they were dealing.

Tomika made the necessary payment to Piedmont to prevent foreclosure, and began making the monthly payments to Piedmont as they came due. Macedonia made the first monthly rental payment to Tomika in the amount of $7,000.00, as agreed in the lease, but failed to make any subsequent payments. Due to Macedonia's failure to make timely rental payments, Tomika instituted a summary ejectment action. A magistrate ruled against Macedonia, upon which Macedonia appealed to the district court.

Macedonia filed several counterclaims and defenses, including a claim for fraud, unfair and deceptive trade practices, a loan brokers' claim under N.C. Gen. Stat. § 66-106, *et. seq.* (Cum. Supp. 1998), a claim that the deed was void because of the misstatement of the name of one of the parties, and a claim for breach of contract. Defendant sought substantial damages from plaintiff, and the matter was removed to the superior court division as a matter of right. Plaintiff moved to amend its name on the complaint to the proper name of "Tomika Investment Company," and the trial court allowed "Tomika Investment Company" to be added as an additional plaintiff. Defendant moved to join Thomas Latimer as a necessary and proper party to the litigation, and the motion was allowed. Plaintiff moved for summary judgment on defendant's counterclaims, and the trial court granted the motion as to the claim that the deed was void and as to the loan brokers' claim under N.C. Gen. Stat. § 66-106. However, the motion for summary judgment was denied as to the remaining counterclaims. The record does not show any exception or objection by the defendant to the trial court's rulings on the motion for summary judgment.

The plaintiff's claim for possession and the defendant's counterclaims for breach of contract, fraud, and unfair and deceptive trade practices were submitted to a jury which found in favor of the plaintiff, and found that defendant was indebted to plaintiff in the sum of $102,655.96. The trial court awarded attorney fees, costs, and interest to plaintiff. Defendant appealed, assigning errors.

Parrish, Newton & Rabil, LLP, by Daniel R. Johnston, and T. Lawson Newton, for plaintiff appellees.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham; and Tucker & Hughes, P.C., by Clarence B. Tucker, Sr., for defendant appellant.

HORTON, Judge.

Defendant raises three questions on appeal: (I) whether the trial court erred in granting the motion for summary judgment on defendant's claim that the deed to its property was void; (II) whether the trial court erred during the trial of this matter in refusing to allow evidence that could have been used to establish the value of defendant's property; and (III) whether the trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

I.

[1] The order granting the motion for partial summary judgment was interlocutory. " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 50, 510 S.E.2d 156, 158, *disc. review denied*, 350 N.C. 830, — S.E.2d — (1999) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950)). Ordinarily, there is no right to an appeal of an interlocutory order unless it affects a substantial right which will result in harm if not reviewed before final judgment is pronounced. *Floyd*, 350 N.C. at 51, 510 S.E.2d at 158; *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 363 S.E.2d 642 (1988). " 'A nonappealable interlocutory order . . . which involves the merits and necessarily affects the judgment, is reviewable . . . on appropriate exception upon an appeal from the final judgment in the cause.' " *Floyd*, 350 N.C. at 51, 510 S.E.2d at 159 (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 382); *see also*, N.C.R. App. P. 10(b)(1). Here, defendant failed to make a timely objection to the trial court's ruling partially granting plaintiff's motion for summary judgment. Therefore, the issue raised by defendant's first assignment of error is not properly before this Court, and we decline to consider it. *See Inman v. Inman*, 134 N.C. App. 719, 518 S.E.2d 777 (1999) (appeal from an intermediate order granting partial summary judgment dismissed where the petitioner failed to make a timely objection to entry of that order).

II.

[2] The admissibility of evidence is governed by a threshold inquiry into its relevance. N.C. Gen. Stat. § 8C-1, Rules 401-403 (1992). Evidence is relevant if it has "any logical tendency to prove any fact that is of consequence" in the case being litigated. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *dismissal allowed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992); *see also, McNinch v. Henredon Industries, Inc.*, 51 N.C. App. 250, 276 S.E.2d 756 (1981). The trial court determines whether proffered evidence is relevant to the issues being tried. *State v. Meekins*, 326 N.C. 689, 392 S.E.2d 346 (1990); *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). The defendant argues that the video evidence of the value of the church property was relevant to establishing a claim to construe the conveyance of the church property as an equitable mortgage. An "equitable mortgage" may be created when real property is conveyed together with an option to repurchase the property, where the intention of the parties at the time of the transaction was to secure a debt. *McKinley v. Hinnant*, 242 N.C. 245, 87 S.E.2d 568 (1955). In determining whether the transaction was merely a deed with option to repurchase or was a mortgage, the fact that the value of the property conveyed was much greater than the amount of the debt secured thereby, is some evidence that the parties intended that the deed operate as a mortgage. *Id.* at 251, 87 S.E.2d at 573. Defendant further asserts that the issue of equitable mortgage is properly before this Court on review by virtue of its objection to the adverse evidentiary ruling below. We disagree.

While it is true that defendant's exception to the lower court's ruling on the video evidence preserves the issue of whether the evidence was properly excluded as irrelevant, it is not true that *any* legal theory that might have been supported by that evidence may be asserted on appeal. We have previously held that " '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.' " *Tedder v. Hodges*, 119 N.C. App. 169, 173, 457 S.E.2d 881, 883 (1995) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). We have carefully reviewed the record and have found no attempt by defendant to advance the theory of equitable mortgage as a basis for relief. Neither the pleadings, nor the pretrial conference that presumably narrowed the issues for trial, nor the trial itself evince any attempt by the defendant to advance

that theory. Therefore, the trial court correctly considered the evidence in light of the issues presented for trial and made its ruling accordingly. This Court will not intervene where the trial court has properly weighed both the probative and prejudicial value of evidence before it.

The standard of review regarding such evidentiary rulings is abuse of discretion. *Meekins*, 326 N.C. at 696, 392 S.E.2d at 352. Because we find that the trial court did not abuse its discretion in ruling on the relevance of the video evidence, we hold that no error was committed, and thus there was no resulting prejudice to the defendant.

III.

[3] A motion for judgment notwithstanding the verdict (JNOV) "is essentially a directed verdict granted after the jury verdict." *In Re Will of Buck*, 130 N.C. App. 408, 410, 503 S.E.2d 126, 129 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999).

> In considering a motion for JNOV, the trial court is to consider all evidence in the light most favorable to the party opposing the motion; the nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence; and contradictions must be resolved in the nonmovant's favor.

Smith v. Price, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986); *In Re Andrews*, 299 N.C. 52, 261 S.E.2d 198 (1980). On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. *Alston v. Herrick*, 76 N.C. App. 246, 249, 332 S.E.2d 720, 722, *aff'd*, 315 N.C. 386, 337 S.E.2d 851 (1986). The hurdle is high for the moving party as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998).

In the case *sub judice*, the record clearly indicates that the trial court correctly considered the evidence, giving the plaintiff the benefit of all reasonable inferences, and found that there was sufficient evidence to support the jury verdict. Although witnesses presented conflicting testimony, we emphasize that the jury is "entitled to draw its own conclusions about the credibility of the witnesses and the

weight to accord the evidence." *Price*, 315 N.C. at 530, 340 S.E.2d at 413.

Defendant would have us reconsider the evidence as if the case had been tried on a theory of equitable mortgage. We decline to do so. While equitable mortgage might have been an appropriate theory on which to proceed in this case, the record clearly indicates that at no time preceding or during the trial did the defendant attempt to raise this issue or advance that theory. Therefore, we will not consider it for the first time on appeal. *Russell v. Buchanan*, 129 N.C. App. 519, 521, 500 S.E.2d 728, 730, *disc. review denied*, 348 N.C. 501, 510 S.E.2d 655 (1998).

The judgment of the trial court is

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

VILLAGE CREEK PROPERTY OWNERS' ASSOCIATION, INC., JOHN GILLIAM WOOD, THURMAN D. REYNOLDS, JACQUELINE REYNOLDS, WILLIAM GARDNER, RODNEY HARRELL, JOYCE HARRELL, RON HEINIGER, NANCY HEINIGER, RICHARD WHITING, ISABEL WHITING, SUZANNE BURNSIDE, JAMES SMITH, NANCY SMITH, ROBERT ROSSMAN, WANDA ROSSMAN, BRIAN BERRY, MAUREEN BERRY AND ELIZABETH ANDREW, PLAINTIFFS V. THE TOWN OF EDENTON, A MUNICIPAL CORPORATION; ROLAND VAUGHAN, MAYOR; JIMMY ALLIGOOD, WILLIS PRIVOTT, JERRY PARKS, STEVE BIGGS, JERALD PERRY, DON LATHAM AND SAMUEL B. DIXON, COMMISSIONERS; TOWN OF EDENTON PLANNING BOARD; PRESTON SISK, CHAIRMAN, ROSS INGLIS, PHYLLIS BRITTON, DAVID TWIDDY, SAMUEL COX, MEMBERS; ANNE-MARIE KNIGHTON, TOWN MANAGER; CHRIS BRABBLE, ZONING ADMINISTRATOR TOWN OF EDENTON; G.P. COPELAND (ALSO APPARENTLY KNOWN AS GARRY P. COPELAND) AND COLONIAL VILLAGE, AND COLONIAL VILLAGE GROUP, INC., DEFENDANTS

No. COA98-1634

(Filed 2 November 1999)

1. Declaratory Judgments— standing—aggrieved person or special damages not required

In a declaratory judgment action seeking a declaration that the adoption of defendant Copeland's rezoning request was invalid and a mandatory injunction to compel the town council to

disapprove the rezoning request, the trial court erred in dismissing plaintiffs' complaint for lack of standing based on plaintiffs' failure to allege special damages under N.C.G.S. § 160A-388(b) because the Declaratory Judgment Act does not require a party seeking relief to be an "aggrieved" person or to otherwise allege special damages. N.C.G.S. ch. 1, art. 26.

2. Declaratory Judgments— subject matter jurisdiction—conditional use rezoning ordinance

In a declaratory judgment action seeking a declaration that the adoption of defendant Copeland's rezoning request was invalid and a mandatory injunction to compel the town council to disapprove the rezoning request, the trial court erred in dismissing plaintiffs' complaint based on lack of subject matter jurisdiction because a conditional use rezoning ordinance may be properly challenged by an action for declaratory judgment.

3. Costs— improper award of attorney fees—complaint contains justiciable issues

In a declaratory judgment action seeking a declaration that the adoption of defendant Copeland's rezoning request was invalid and a mandatory injunction to compel the town council to disapprove the rezoning request, the trial court erred in granting defendants' motion for attorney fees under N.C.G.S. § 6-21.5 because plaintiffs' complaint contains justiciable issues.

Appeal by plaintiffs[1] from two orders filed 6 August 1998 and from one order dated 8 September 1998 all by Judge J. Richard Parker in Chowan County Superior Court. Heard in the Court of Appeals 5 October 1999.

The Brough Law Firm, by Michael B. Brough and William C. Morgan, Jr.; Robin M. Hammond; and Edwards & Edwards, by Walter G. Edwards, Jr., for plaintiff-appellants.

1. We note the parties listed as plaintiffs in the complaint, the parties listed as having made the Rule 59 motion, the parties appealing the denial of the Rule 59 motion, and the parties appealing the Rule 12 dismissal are not in every instance the same. Because, however, this disparity has not been raised as an issue, we treat this appeal as having been entered by all those parties listed as plaintiffs in the complaint for declaratory judgment.

Poyner & Spruill, L.L.P., by Robin Tatum Morris; and by Town of Edenton Attorney W. Hackney High, Jr., for defendant-appellees The Town of Edenton; Roland Vaughan, Jimmy Alligood, Willis Privott, Jerry Parks, Steve Biggs, Jerald Perry, Don Latham and Samuel B. Dixon, Town of Edenton Planning Board; Preston Sisk, Ross Inglis, Phyllis Britton, David Twiddy, Samuel Cox, Anne-Marie Knighton, and Chris Brabble.

Herbert T. Mullen, Jr. for defendant-appellee Colonial Village.

GREENE, Judge.

Village Creek Property Owners' Association, Inc., John Gilliam Wood, Thurman D. Reynolds, Jacqueline Reynolds, William Gardner, Rodney Harrell, Joyce Harrell, Ron Heiniger, Nancy Heiniger, Richard Whiting, Isabel Whiting, Suzanne Burnside, James Smith, Nancy Smith, Robert Rossman, Wanda Rossman, Brian Berry, Maureen Berry, and Elizabeth Andrew (collectively, Plaintiffs) appeal two orders filed 6 August 1998 granting motions by G.P. Copeland (Copeland), Colonial Village, Colonial Village Group, Inc., The Town of Edenton (Edenton), Ronald Vaughn, Jimmy Alligood, Willis Privott, Jerry Parks, Steve Biggs, Jerald Perry, Don Latham, Samuel B. Dixon, Town of Edenton Planning Board, Preston Sisk, Ross Inglis, Phyllis Britton, David Twiddy, Samuel Cox, Anne-Marie Knighton, and Chris Brabble (collectively, Defendants) to dismiss Plaintiffs' complaint and for attorneys' fees; and an 8 September 1998 order denying Plaintiffs' Rule 59 motion.

On 20 August 1997, Copeland submitted to Edenton an application for a conditional use permit for property located on Coke Avenue in Edenton (the property), and on 21 August 1997 submitted an application for a conditional use rezoning of the property. On 14 October 1997, Edenton Town Council (the Council) held a public hearing on Copeland's applications and, on 11 November 1997, the Council voted to approve rezoning of the property and grant Copeland a conditional use permit.

On 7 January 1998, Plaintiffs filed a complaint for declaratory judgment in superior court, seeking, in pertinent part, a declaration that the adoption of Copeland's rezoning request was invalid, and a mandatory injunction compelling the Council to disapprove the rezoning request. Plaintiffs alleged in their complaint they are "residents and/or property owners of [Edenton] and are interested parties pursuant to N.C.G.S. 1-254 whose rights, status or other legal rela-

tions are affected by a municipal ordinance enacted by the Defendant [Edenton] on 11 November 1989."

On 6 May 1998, Defendants filed a motion to dismiss Plaintiffs' complaint on the grounds Plaintiffs did not have standing to file the complaint and the superior court lacked subject matter jurisdiction. On 30 June 1998, Defendants requested an award of attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5.

On 6 August 1998, an order granting Defendants' motion to dismiss Plaintiffs' complaint was filed on the ground the court lacked subject matter jurisdiction. The trial court further granted Defendants' motions for attorneys' fees on the ground there existed no justiciable issue of law.

The issues are whether: (I) a party seeking to challenge a zoning ordinance by way of a declaratory judgment action is required to allege special damages; (II) a conditional use rezoning ordinance may be challenged by an action for declaratory judgment; and (III) Plaintiffs' claim contains justiciable issues of law.

I

[1] Defendants argue Plaintiffs' complaint was properly dismissed for lack of standing because Plaintiffs failed to allege special damages in their complaint.[2] We disagree.

A party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it "has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (citations omitted). The standing requirement for a declaratory judgment action is therefore similar to the requirement that a party seeking review of a municipal decision by writ of certiorari suffer damages "distinct from the rest of the community." *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983). When a party seeks review by writ of certiorari, however, our courts have imposed an additional requirement that the party *allege* special dam-

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2. In this case, the trial court's order dismissing Plaintiffs' complaint did not address whether Plaintiffs had standing. We nevertheless address this issue because subject matter jurisdiction exists only if a plaintiff has standing and subject matter jurisdiction can be raised at any time in the court proceedings, including on appeal. *Union Grove Milling and Manufacturing Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478 (citations omitted), *aff'd*, 335 N.C. 165, 436 S.E.2d 131 (1993).

ages in its complaint. *Id.* This requirement arises from N.C. Gen. Stat. § 160A-388(b) and N.C. Gen. Stat. § 160A-388(e), which allow only "aggrieved" persons to seek review by writ of certiorari.[3] *Heery*, 61 N.C. App. at 613, 300 S.E.2d at 870.

In contrast, the Declaratory Judgment Act, authorizing the filing of declaratory judgment actions, does not require a party seeking relief be an "aggrieved" person or to otherwise allege special damages. N.C.G.S. ch. 1, art. 26 (1996). Furthermore, our courts have not previously held that special damages must be alleged in a declaratory judgment action. *E.g.*, *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 66, 344 S.E.2d 272, 281 (1986) (" 'owners of property in the adjoining area affected by [an] ordinance[] are parties in interest entitled to maintain [a declaratory judgment] action' " (quoting *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) (citations omitted))). Indeed our Supreme Court has specifically declined to decide whether special damages must be alleged in a declaratory judgment action. *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 503-04 n.4, 434 S.E.2d 604, 610 n.4 (1993).[4]

Because the zoning statute (the source of the requirement that special damages be alleged in the context of writ of certiorari petitions) does not require parties to be "aggrieved" in order to file a declaratory judgment action and because the Declaratory Judgment Act does not require a pleading of special damages, we hold it is not required. Plaintiffs' complaint should therefore not be dismissed for lack of standing based on Plaintiffs' failure to allege special damages.

II

[2] Plaintiffs argue a conditional use rezoning ordinance may be properly challenged by an action for declaratory judgment. We agree.

3. This statute does not address challenges made to municipal zoning ordinances by declaratory judgment actions.

4. We are aware of this Court's opinion in *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986), which states a party challenging a rezoning ordinance via a declaratory judgment action "must allege and show damages distinct from the rest of the community." *Id.* (citing *Heery*, 61 N.C. App. at 612, 300 S.E.2d at 869). The North Carolina Supreme Court addressed the *Davis* opinion in *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 503-04 n.4, 434 S.E.2d 604, 610 n.4 (1993), and, without deciding the issue, noted that *Davis* "alludes to a requirement for 'special damages' distinct from those of the rest of the community to confer standing to challenge a rezoning." *Id.* The *Lancaster* court also noted, however, that the test for standing provided in *Davis* was taken from cases challenging standing in quasi-judicial, rather than legislative, actions. *Id.* We therefore do not read *Davis* as requiring a party challenging a legislative zoning decision in a declaratory judgment action to allege special damages in its complaint.

Conditional use rezoning occurs "when a landowner requests that some property be placed in a new zoning district that has no permitted uses, only special or conditional uses." David W. Owens, *Legislative Zoning Decisions, Legal Aspects* 93 (2d ed. 1999) [hereinafter *Legislative Zoning Decision*]. This practice, approved by the North Carolina Supreme Court in *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988), requires "two separate decisions, with the rezoning decision meeting all of the statutory requirements for legislative decisions and the permit decision meeting all of the constitutional requirements for quasi-judicial decisions." *Legislative Zoning Decisions*, at 94. While, as a practical matter, a decision granting or denying a conditional use rezoning application may be made concurrently with a decision granting or denying a conditional use permit, the municipality is required to make separate decisions regarding a rezoning application and a permit application. *Id.*

Because conditional use rezoning involves a rezoning decision and a permit decision, it follows it is necessary to consider separately how permit and zoning decisions are generally reviewed. A decision to grant or deny a special use or conditional use permit is subject to review by an action before the superior court in the nature of certiorari. N.C.G.S. § 160A-381(c) (Supp. 1998). The municipality is the trier of fact, and proceedings in the superior court are limited to reviewing the record for errors of law and determining whether the municipality's decision is "supported by competent, material, and substantial evidence" in the whole record. *Ghidorzi Construction, Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547 (citation omitted), *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

In contrast, there is no statutory authority or case law addressing the proper method for the review of a conditional use rezoning ordinance.[5] Zoning and rezoning ordinances in general, however, are properly challenged by an action for declaratory judgment, *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583; *Blades*, 280 N.C. at 544, 187 S.E.2d at 42, and the trial court is the finder of fact, N.C.G.S. § 1-261 (1996).

5. Defendants contend this issue is controlled by *Gossett v. City of Wilmington*, 124 N.C. App. 777, 478 S.E.2d 648 (1996). In *Gossett*, this Court held a city council's conditional use rezoning ordinance was quasi-judicial in nature, and therefore must be challenged in the superior court by writ of certiorari. *Gossett*, 124 N.C. App. at 779, 478 S.E.2d at 649. The *Gossett* court, however, based its decision on the city's charter which was enacted by the legislature and which provided "*[e]very decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari.*" *Id.* (quoting *Wilmington*, N.C., Code § 23.6). Because the *Gossett* holding

Because conditional use rezoning requires a municipality to make a rezoning decision, which is made separate from the municipality's decision to grant or deny a permit, the conditional use rezoning ordinance is properly challenged in the same manner used to challenge zoning or rezoning ordinances in general, which is by a declaratory judgment action.[6] In this case, Plaintiffs' declaratory judgment action thus properly challenged the conditional use rezoning ordinance and the trial court's order dismissing Plaintiffs' complaint for lack of subject matter jurisdiction must be reversed.[7]

III

[3] Plaintiffs argue the trial court erred by awarding Defendants attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5. We agree.

A court may award an attorney's fee to a prevailing party under N.C. Gen. Stat. § 6-21.5 "if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C.G.S. § 6-21.5 (1997). We have determined Plaintiffs' complaint contains justiciable issues, and we therefore reverse the trial court's order granting Defendants' motions for attorneys' fees.

Reversed and remanded.

Judges WALKER and HUNTER concur.

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was based on the specific language in the city's charter, enacted by the legislature, we do not read it to hold that every action challenging a municipality's conditional rezoning ordinance must be in the nature of certiorari.

In contrast to the Wilmington charter, the Edenton ordinance provides for certiorari review only of decisions by the town "granting or denying a conditional use permit." Town of Edenton, N.C., Unified Development Ordinance § 116(a) (1996). It is silent on the method for review of its conditional use rezoning decisions.

6. A party may therefore challenge a conditional use permit by writ of certiorari under N.C. Gen. Stat. § 160A-381, while simultaneously challenging, by a declaratory judgment action, the rezoning ordinance under which the challenged permit has been granted. There is no requirement, as Defendants contend, that Plaintiffs first seek review of the grant of the conditional use permit and then, if that grant is sustained, seek review of the conditional use rezoning ordinance.

7. We note Plaintiffs do not challenge the issuance of the conditional use permit and that issue is not therefore before the superior court.

TEVEPAUGH v. TEVEPAUGH

[135 N.C. App. 489 (1999)]

RONALD JOSEPH TEVEPAUGH, PLAINTIFF v. ANGELA JONES TEVEPAUGH, DEFENDANT

No. COA98-1472

(Filed 2 November 1999)

Child Support, Custody, and Visitation— joint custody agreement—consent judgment—terms not followed—vacated and remanded

The trial court's order denying defendant-mother's motion to vacate the parties' joint custody agreement is reversed and remanded because although there is no legal requirement on the day the consent judgment is signed and entered by the trial court that the parties must acknowledge their continuing consent to the agreement or that the trial court must review the terms of the agreement with the parties, both actions were required in this case since the agreement specifically provided that both would occur.

Appeal by defendant from order dated 31 August 1998 by Judge Michael E. Helms in Wilkes County District Court. Heard in the Court of Appeals 9 September 1999.

Willardson, Lipscomb & Beal, L.L.P., by John S. Willardson, for plaintiff-appellee.

Peebles & Schramm, by John J. Schramm, Jr., for defendant-appellant.

GREENE, Judge.

Angela Jones Tevepaugh (Defendant) appeals a 31 August 1998 order denying her motion to vacate an 8 April 1998 Memorandum of Judgment/Order (the Agreement) awarding Defendant and Ronald Joseph Tevepaugh (Plaintiff) (collectively, the parties) joint custody of their twin daughters, Kimberly Anne and Katherine Lynn (the children).

Plaintiff and Defendant were married on 15 April 1989, and the children were born of the marriage on 20 February 1993. The parties separated on 8 February 1997. On 17 February 1997, Plaintiff filed a complaint requesting divorce from bed and board, custody of the children, child support, and attorney's fees. Defendant filed a counterclaim requesting, in pertinent part, divorce from bed and board, custody of the children, and child support.

The trial court heard Plaintiff's complaint and Defendant's counterclaim on 11 March 1997, and found it in the best interests of the children that the parties undergo psychological examinations prior to entry of a final custody order and have joint custody of the children pending entry of a final custody order.

On 7 April 1998, the trial court heard testimony regarding custody of the parties' children. Then, subsequent to the hearing, the parties and their attorneys signed the Agreement[1] providing for joint legal and physical custody of the children and containing child support provisions.

The Agreement stated: "With the signing of this [Agreement] by the presiding judge, this [Agreement] shall become a judgment/order of the court and shall be deemed entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure on the date filed with the Clerk." The Agreement also contained the following provision:

> Prior to accepting the stipulated agreement of the parties, the undersigned judge read the terms of the above stipulations and agreements to the parties, and made careful inquiry of them with regards to the voluntary nature of their agreement and their understanding thereof. The court explained to the parties the legal effect of their stipulations and agreements and determined that the parties understood the legal effect and terms of the agreement and stipulations. The parties acknowledged their voluntary execution of the agreements and stipulations, stated that the terms accurately reflected their agreement, and agreed of their own free wills to abide by them.

The trial judge signed the Agreement and, on 8 April 1998, it was filed with the clerk of court.

On 5 June 1998, Defendant brought a motion to vacate the Agreement on the ground that "[a]t the time the [Agreement] was signed by the parties, the terms and conditions of the same were not fully explained to [Defendant] and, as a result, she did not understand the full consequences of the [Agreement]." Defendant also requested a hearing on the issues of child custody, visitation, and support.

On 7 July 1998, the trial court conducted a hearing on Defendant's motion. Defendant testified at the hearing that when she mentioned some concerns about the Agreement to her attorney prior to signing

1. The Agreement was entered on Administrative Office of Court (AOC) form AOC-CV-220.

it her attorney responded, "Don't worry about it; we're negotiating. We'll go back later to our offices and we'll add some things and type this up and we'll both get together and see if we agree on the stipulation, the [A]greement, and a final copy will be signed and filed in the courts." Although her attorney went over the provisions of the Agreement with her, she believed, based on what her attorney had advised, that the Agreement was not a "final document." Defendant also stated the trial judge did not review the Agreement with the parties, and the trial judge similarly stated he was "convinced at this time that [he] probably did not come in and go over [the Agreement] with [the parties]."

On 31 August 1998, the trial court made the following pertinent finding of fact:

> 6. . . . . Plaintiff [sic] testified that she understood the contents of the [Agreement] but did not understand its finality and particularly did not understand that the joint custody arrangement would remain in effect indefinitely pursuant to [the Agreement]. She also testified that she was unable to read all of the handwriting of her former attorney, Dennis R. Joyce, who actually hand printed the [Agreement]. Nevertheless, . . . [P]laintiff [sic] acknowledged that it was her signature appearing thereon.
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> . . . .
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> 8. . . . . Plaintiff [sic] and her father testified that the Court did not read the [Agreement] to the parties in open court, ask the parties if they understood the [Agreement], etc. This Court has no independent recollection of whether it did or did not do so but for purposes of this hearing, will assume that it did not do so . . . .
>
> . . . .
>
> 10. Defendant testified that her attorney discussed with her all terms and provisions of the [Agreement] and that she signed it but did not understand the finality of the provisions relating to child custody, visitation, etc., and thought that those matters would be resolved in a separate, typewritten document.

The trial court further made the following conclusions:

> 1. . . . [P]laintiff [sic] understood, or reasonably should have understood, the terms and provisions of the [Agreement] which

were negotiated over a period of hours and she executed the [Agreement] freely and voluntarily . . . .

2. . . . [W]hether this Court did or did not [read the Agreement to the parties in open court, ask them if they understood the Agreement, etc.] is not controlling since the parties freely and voluntarily executed [the Agreement] resolving the issues described therein.

3. The [Agreement] is enforceable as an order of this Court and is fully binding upon the parties.

The sole issue on appeal is whether the Agreement, signed by Plaintiff, Defendant, and the trial court, and filed with the clerk of court, should be vacated because the trial court did not read its terms to the parties and inquire into the parties' understanding of the terms and voluntary consent to the terms.

"The 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." *Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948); *see Buckingham v. Buckingham*, 134 N.C. App. 82, 87, 516 S.E.2d 869, 873-74 (1999) (consent decree relating to child custody valid where parties signed written agreement and appeared in open court to acknowledge their consent). There is no requirement with consent judgments, including consent judgments relating to property, support and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment.[2] *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981) (where parties do not appear in court, trial court may sign and enter judgment if it contains the signatures of all the parties); N.C.G.S. § 52-10(c) (1991) (consent judgments do not have to be

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2. There is also no requirement, as a precondition to the execution of a consent judgment by the trial court, that it review the terms of a written and signed agreement with the parties, explain the legal effect of such agreement and/or determine if the written terms accurately reflect the agreement. *Thacker v. Thacker*, 107 N.C. App. 479, 483, 420 S.E.2d 479, 481, *disc. review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992); *see Wachovia Bank v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981). Of course, oral agreements and oral stipulations cannot support the entry of a consent decree unless the trial court complies with the teachings of *McIntosh*. *McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985) (court must make "inquiries of the parties").

acknowledged); N.C.G.S. § 52-10.1 (1991). The parties' failure, however, to acknowledge their continuing consent to the proposed judgment, before the judge who is to sign the consent judgment, subjects the judgment to being set aside on the ground the consent of the parties was not subsisting at the time of its entry.[3] *Ledford*, 229 N.C. at 376, 49 S.E.2d at 796; N.C.G.S. § 1A-1, Rule 60(b)(4) (1990).

In this case, the parties and the trial court signed the Agreement relating to child custody and support. The record does not reveal when the parties or the trial court signed the Agreement. Although there is no legal requirement that the parties acknowledge to the trial court, on the day the consent judgment is signed and entered by the trial court, their continuing consent to the Agreement or that the court review the terms of the Agreement with the parties, both actions were required in this case because the Agreement specifically provided that they would occur.[4] The Agreement was not to become a judgment *until* it was signed by the presiding judge and the judge was not to sign it *until* he had reviewed it with the parties and each of them had acknowledged they understood the legal effect of the Agreement. The evidence, as found by the trial court, reveals the trial court did not review the Agreement with the parties and for this reason the trial court should not have signed the Agreement. It follows the Agreement must be vacated.[5] The order of the trial court denying Defendant's motion to vacate the Agreement must therefore be reversed and remanded.

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3. To avoid this possibility, the trial court could require the parties to appear before it and acknowledge their consent at the time it signs and enters the consent judgment. Although this would appear to be the better practice, it may be the large number of consent judgments presented to the trial court make it impracticable.

4. We acknowledge that the Agreement used in this case was a form provided by AOC and not one prepared by the parties. Forms are useful in that they facilitate the flow of cases through our court system and their use is encouraged. When forms are used, however, the parties and the trial court have an affirmative obligation to be aware of and comply with all the provisions contained in the forms. If a particular provision is not deemed to be applicable, its deletion should be clearly noted and initialed by each of the parties.

5. Furthermore, the conclusion of the trial court that Defendant "understood, or reasonably should have understood, the terms and provisions" of the Agreement is simply not supported by the findings of fact or the evidence in this record. The trial court found that Defendant "did not understand the finality of the provisions [of the Agreement] relating to child custody, visitation, etc., and thought that those matters would be resolved in a separate, typewritten document." This finding is supported by Defendant's testimony that she mentioned her concerns about the Agreement to her attorney and was told that negotiations were continuing and that after we "go back later to our offices . . . we'll add some things . . . and a final copy will be signed and filed in the courts."

Reversed and remanded.

Judges TIMMONS-GOODSON and HORTON concur.

KATHY SAULS LANE, AS THE ADMINISTRATOR OF THE ESTATE OF SIMON CRAIG LANE, DECEASED, PLAINTIFF v. R.N. ROUSE & COMPANY, DEFENDANT

No. COA98-1402

(Filed 2 November 1999)

1. Employer and Employee— inherently dangerous activity— concrete finishing work—general contractor's duty to subcontractor's employee

In a negligence case where a subcontractor's construction foreman was doing concrete finishing work when he sustained fatal head injuries as a result of walking backwards and falling from an opening in the second floor to the first floor, the trial court did not err in refusing to find as a matter of law that concrete finishing is not inherently dangerous and that defendant-general contractor thus had no duty to decedent because: (1) the jury determined the nature of the work required a worker to walk backwards while paying close attention to the work in front of him; and (2) this work was susceptible to effective risk control through the use of adequate safety precautions.

2. Evidence— OSHA citations after accident—relevancy— negligence, gross negligence, punitive damages

In a negligence case where decedent-construction foreman was doing concrete finishing work when he sustained fatal head injuries as a result of walking backwards and falling from an opening in the second floor to the first floor, the trial court did not err in admitting evidence of OSHA citations against defendant-company after the accident because: (1) the citations arose from the inspection prompted by decedent's death and involved failure to comply with 29 C.F.R. § 1926.500, which addresses holes and openings in floors; (2) the evidence of the violations could be viewed as relevant to plaintiff's claims of negligence and punitive damages; and (3) a death caused by unprotected floor openings placed defendant on notice that evidence of continuing

violations several days after the death is relevant to the questions of negligence and gross negligence.

3. Evidence— corrective measures after accident—control of work site—feasibility of precautionary measures

In a negligence case where decedent-construction foreman was doing concrete finishing work when he sustained fatal head injuries as a result of walking backwards and falling from an opening in the second floor to the first floor, the trial court did not err in admitting measures taken by defendant immediately following decedent's death to cover the floor openings with plywood because it was evidence of defendant's control of the work site on the day of the accident and the feasibility of taking that precautionary measure under N.C. R. Evid. 407.

Appeal by defendant from judgment entered 20 November 1997 by Judge Ernest B. Fullwood in Wayne County Superior Court. Heard in the Court of Appeals 25 August 1999.

Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, and Taft Taft & Haigler, P.A., by Thomas F. Taft, Sr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter and Alison R. Bost, for defendant-appellant.

HUNTER, Judge.

This case arises from the death of Simon Craig Lane ("decedent") in a construction accident occurring on 21 June 1993 in Cumberland County. Defendant, R.N. Rouse & Co., Inc. ("Rouse") appeals from the judgment based on the jury verdict in favor of decedent's estate, finding negligence by the defendant but no contributory negligence by decedent. We find no error by the trial court.

Rouse was the general contractor on the Wellman building construction project on N.C. Highway 53 East near Fayetteville, North Carolina. Bill Howell and Sons Construction, Inc., ("Howell") was one of many subcontractors working at the construction site. Decedent was a foreman with Howell.

Howell had been hired to do concrete finishing work at the Wellman site. At the time of the accident on 21 June 1993, decedent was working on the second floor, smoothing out and finishing the concrete that had just been poured. As he walked backwards, dece-

dent stepped into an opening in the floor, fell to the first floor, and sustained fatal head injuries.

The opening through which decedent fell was more than eleven feet long and nearly three feet wide. The second floor had eighteen openings of these dimensions which were created to accommodate machinery.

Following trial, the jury found: (1) that decedent was killed by the negligence of Rouse; (2) that decedent did not by his own negligence contribute to his death; and, (3) that Rouse's conduct was willful or wanton. The jury awarded $735,000.00 in compensatory damages and $2,000,000.00 in punitive damages. Compensatory damages were to be reduced by the amount of workers' compensation benefits paid to decedent's estate on behalf of his employer. Rouse appeals.

[1] Rouse first assigns error to the trial court's refusal to find as a matter of law that concrete finishing is not "inherently dangerous" and that, therefore, Rouse had no duty to the deceased.

Our Supreme Court has distinguished between "ultrahazardous activities," such as blasting, and "inherently dangerous activities." *See Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

> Unlike ultrahazardous activities, inherently dangerous activities are susceptible to effective risk control through the use of adequate safety precautions. The mere fact that an activity can be done safely upon compliance with such procedures does not, for purposes of establishing liability, alter its fundamental characteristic of being inherently dangerous. . . .
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> . . .
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> "The courts have found no universal rule of application by which they may abstractly draw a line of classification in every case between work which is inherently dangerous and that which is not. . . ."
>
> "There is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."
>
> One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others:

"The liability of the employer rests upon the ground that mischievious [sic] consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that these precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another as an 'independent contractor' to perform."

The party that employs the independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken.

The rule imposing liability on one who employs an independent contractor applies "whether [the activity] involves an appreciable and foreseeable danger to the workers employed or to the public generally." The employer's liability for breach of this duty "is direct and not derivative since public policy fixes him with a nondelegable duty to see that the precautions are taken."

Imposition of this nondelegable duty of safety reflects "the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them." By holding both an employer and its independent contractor responsible for injuries that may result from inherently dangerous activities, there is a greater likelihood that the safety precautions necessary to substantially eliminate the danger will be followed.

Woodson, 329 N.C. at 351-53, 407 S.E.2d at 234-35 (citations omitted).

On the facts of this case, the trial court was correct in declining to conclude as a matter of law that concrete finishing was not inherently dangerous. The record before us shows that the nature of the concrete finishing work required decedent to walk backwards while performing a task requiring intense attention. The record also reflects that Rouse was aware of the floor openings and of the need to cover them for the safety of workers. A job requiring a worker to walk backwards while paying close attention to the work in front of him might well be construed to be inherently dangerous, and the jury in this case so found. It was work "susceptible to effective risk control through the use of adequate safety precautions." *Woodson*, 329 N.C. at 351, 407 S.E.2d at 234 (citation omitted). This assignment of error is without merit.

[2] Rouse also assigns error to the trial court's admission of evidence of OSHA citations against Rouse that the company received after the

accident and that Rouse contends were unrelated to decedent's fall. The OSHA citations in question arose from the inspection prompted by decedent's death and all involved failure to comply with 29 C.F.R. § 1926.500, which addresses holes and openings in floors. The inspection took place a few days after decedent's death.

"Our court has held that, '[w]hen substantial identity of circumstances and reasonable proximity in time is shown, evidence of similar occurrences or conditions may, in negligence actions, be admitted as relevant to the issue of negligence.' " *Smith v. Pass*, 95 N.C. App. 243, 248, 382 S.E.2d 781, 785 (1989) (citation omitted). Admission of evidence is "addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown." *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997) (citation omitted).

> The decision whether to exclude evidence due to the potential for unfair prejudice, confusion, or misleading the jury is within the sound discretion of the trial court and will not be disturbed absent a showing that the ruling was so arbitrary it could not have been the result of a reasoned decision.

McNamara v. Wilmington Mall Realty Corp., 121 N.C. App. 400, 413-14, 466 S.E.2d 324, 333, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996) (citations omitted).

The evidence of the OSHA violations following a death could well be viewed as relevant to plaintiff's claims of negligence and, for the purpose of punitive damages, gross negligence. Plaintiff argues persuasively that a death caused by unprotected floor openings placed defendant on notice and that evidence of continuing violations several days after the death is relevant to the questions of negligence and gross negligence. Defendant has failed to show that the trial court's decision to admit the evidence was "so arbitrary it could not have been the result of a reasoned decision." *Id.*

[3] Finally, Rouse assigns error to the trial court's admission of measures taken by Rouse, immediately following decedent's death, to cover the floor openings with plywood.

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures

when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.

N.C.R. Evid. 407. Here, Rouse argued repeatedly that it had no control of the construction site on the day of the accident. Rouse's witnesses also questioned the feasibility of covering the floor openings. However, we agree with the trial court that evidence of Rouse's actions in placing covers over the openings immediately after decedent's fall was admissible as evidence of Rouse's control of the work site on the day of the accident and of the feasibility of taking that precautionary measure.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. THEONDRAY OZELL WELCH, DEFENDANT

No. COA98-1388

(Filed 2 November 1999)

1. **Homicide— proximate cause—victim's refusal to accept blood transfusion—not intervening cause of death**

The trial court did not err in denying defendant's motion to dismiss the murder charge based on the theory that the victim's refusal to accept a blood transfusion was an independent and intervening cause of death cutting off defendant's responsibility for the victim's stabbing death because: (1) but for defendant's act of stabbing the victim, she would not have been in need of a blood transfusion; and (2) the doctor could not state with certainty whether the victim would have survived had she received a blood transfusion.

2. **Homicide— second-degree murder—sufficiency of evidence**

The trial court did not err in denying defendant's motion to set aside the jury's verdict of second-degree murder based on the victim refusing a blood transfusion after defendant repeatedly

stabbed her because substantial evidence existed to support the jury's verdict.

Appeal by defendant from judgment entered 2 April 1998 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 20 September 1999.

Attorney General Michael F. Easley, by Assistant Attorney General H. Dean Bowman, for the State.

George H. Whitaker for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Theondray Ozell Welch was indicted on 3 February 1997 for first-degree murder in the stabbing death of Marina Lemmons. At trial, the State's evidence tended to show that defendant and 19-year-old Marina Lemmons were living together at 543 Ryan Avenue in Sanford, North Carolina. At approximately 6:34 p.m. on the evening of 17 December 1996, defendant and Lemmons arrived at the emergency room of Central Carolina Hospital, whereupon Lemmons was admitted with stab wounds to her midsection, forearms, and hands.

Dr. Edward Stanton, a general surgeon, was called to the emergency room to treat Lemmons' injuries. Upon his examination of Lemmons, Dr. Stanton determined that, in addition to a number of non-life-threatening injuries, Lemmons had sustained a ten centimeter laceration of the lateral left chest wall beneath the ninth rib. Due to decreased breath sounds, Dr. Stanton believed that the stab wound had encroached Lemmons' chest and that it had caused abdominal injury. Lemmons had low blood pressure and a high heart rate, both of which indicated significant blood loss. Dr. Stanton estimated that at the time of his examination, Lemmons had already lost roughly four liters of blood—80 to 85% of her total blood volume. Dr. Stanton questioned Lemmons about the source of her injuries, and after some reservation, she confided that defendant had stabbed her.

Prior to surgery, Dr. Stanton discussed the nature and extent of the injuries with Lemmons and informed her that without a blood transfusion or the re-transfusion of her own blood, she would not likely survive. Nevertheless, Lemmons refused, citing her religious convictions as a Jehovah's Witness as the basis for her refusal. Dr. Stanton testified that when she elected to decline the transfusion,

Lemmons was alert and oriented. Subsequently, when Lemmons was under the effects of the anaesthesia, the hospital staff sought permission from her mother or brother to give Lemmons a transfusion of blood. They too refused, based on their religious beliefs.

Lemmons was stable following the surgery, but she later died, after developing complications with a slow heart rate and low oxygen saturation due to inadequate red blood cells needed to transport oxygen to her vital organs. Dr. Stanton was of the opinion that these complications would have been prevented had Lemmons received a blood transfusion earlier. He stated, however, that he could not be certain that she would have survived had she been given the transfusion.

Officer Ryan Weeks of the Sanford Police Department conducted an investigation into the stabbing. When he initially questioned defendant about the stabbing, defendant claimed that an unidentified perpetrator had entered the couple's apartment and attacked Lemmons. After examining the scene of the stabbing and observing defendant's blood-soaked clothing, however, Officer Ryan determined that defendant's version of the events did not ring true and placed defendant under arrest for the assault. Later, during an interview with Detective D.M. Smith, defendant gave the following statement:

> I have been living with Marina Lemmons for about nine months. We have been having problems off and on. Tonight I arrived home around 5:00 p.m. . . . Marina was in bed. I left and went up the street and smoked a cigarette. I returned and Marina was in the bath tub. I went into the bathroom and washed my ring finger on my left hand that I cut earlier. Marina was telling me she did not have time for any fake nigger. She was telling me this over and over. I went downstairs in the living room. Marina later came down and started talking on the phone. Marina was talking with some guy in front of me and this made me mad. After talking on the phone, she went back upstairs. After a few minutes I followed. I asked her how come you call other guys and go see other guys after we just broke up. Marina started laughing and saying something smart. I went downstairs and then went back upstairs. I don't remember where I got the knife. I stabbed Marina one time as far as I know. Marina was in the front bedroom facing the road. After I stabbed Marina, she started calling my name. I helped Marina up and helped her with her coat and shoes and helped her downstairs and helped her in the car, a blue Ford, and drove to

the hospital. I don't remember where the knife is, but it must be in the apartment. Its a knife that I carry for protection. The knife is a kitchen knife about 6 inches long.

At the close of the State's evidence, defendant moved to dismiss the charge of first-degree murder based on the insufficiency of the evidence. Following oral arguments, the trial judge denied the motion. The defense presented no evidence.

During the charge conference, defendant requested a special instruction on the doctrines of intervening agency and insulating acts as they relate to the element of proximate cause. The court denied the request, but after closing arguments, the court reversed its earlier ruling and gave the requested instruction. The jury convicted defendant of second-degree murder, and the court sentenced him to a term of 251 months imprisonment. Defendant appeals.

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[1] Defendant first argues that the trial judge erred by denying his motion to dismiss the murder charge at the end of the State's evidence and, again, at the close of all the evidence. It is defendant's contention that the State's evidence was insufficient as a matter of law to establish the proximate cause element of second-degree murder. We must disagree.

"When ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State; and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Fleming*, 350 N.C. 109, 142, 512 S.E.2d 720, 742 (1999). The question for the court is whether the State has presented substantial evidence of each element of the offense charged. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). Thus, "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). " 'Proximate cause is an element of second degree murder[.]' " *State v. Holsclaw*, 42 N.C. App. 696, 699, 257 S.E.2d 650, 652 (1979) (quoting *State v. Sherrill*, 28 N.C. App. 311, 313, 220 S.E.2d 822, 824 (1976)). A defend-

ant will be held criminally responsible for second-degree murder if his act caused or directly contributed to the victim's death. *State v. Jordan*, 333 N.C. 431, 439, 426 S.E.2d 692, 697 (1993). To escape responsibility based on an intervening cause, the defendant must show that the intervening act was "the sole cause of death." *Holsclaw*, 42 N.C. App. at 699, 257 S.E.2d at 652.

Defendant contends, based on the testimony of Dr. Stanton, that Lemmons' refusal to accept a blood transfusion was an independent and intervening cause of death, such as to cut off any responsibility defendant may have in the victim's death. However, it is clear from the evidence that Lemmons' act in declining a blood transfusion was not "the sole cause of death." *Id.* Indeed, all of Lemmons' injuries resulted from the stabbing inflicted by defendant. Thus, but for defendant's act, Lemmons would not have been in need of a blood transfusion. Furthermore, Dr. Stanton could not state with certainty whether Lemmons would have survived had she received a blood transfusion. Therefore, we hold that the State presented sufficient evidence of proximate cause to submit the charge of second-degree murder to the jury, and the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant further argues that the court erred in denying his motion to set aside the jury's verdict, because the evidence was insufficient to support his conviction of second-degree murder. Again, we disagree.

Whether to set aside a jury's verdict based on insufficient evidence is a matter within the sound discretion of the trial court. *State v. Reaves*, 132 N.C. App. 615, 513 S.E.2d 562 (1999). Accordingly, this Court will not disturb the trial judge's ruling on a motion to set aside the verdict, unless "it is clear from the record that the trial judge abused or failed to exercise his discretion." *Id.* at 624, 513 S.E.2d at 568. As previously discussed, substantial evidence existed to support the jury's verdict finding defendant guilty of second-degree murder. Therefore, this argument fails.

We have examined defendant's remaining argument and determine it to be wholly without merit. For the foregoing reasons, we hold that defendant was afforded a fair trial, free of prejudicial error.

NO ERROR.

Chief Judge EAGLES and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOE EARL WILSON

No. COA98-1407

(Filed 2 November 1999)

1. **Evidence— impeachment—State's own witnesses—prior inconsistent statements**

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by allowing the State to impeach its own witnesses with their prior inconsistent statements because the witnesses admitted giving the prior statements, and witnesses can be impeached concerning inconsistencies in their prior statements.

2. **Assault— serious injury—peremptory instruction**

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by instructing the jury that if it finds beyond a reasonable doubt that the victim's injuries consisted of a gunshot wound and such wound resulted in his hospitalization, the jury could find such serious injury has been proved, because the trial court can properly resolve this issue with a peremptory instruction when the evidence is not conflicting and reasonable minds could not differ as to the serious nature of the injuries inflicted.

3. **Assault— victim's name—variance between indictment and proof—rule of idem sonans**

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by refusing to dismiss the charges against defendant or to order a new trial because of an alleged fatal variance between the indictment's allegations of an assault upon "Peter M. Thompson" and the proof offered at trial of an assault upon "Peter Thomas" because under the rule of idem sonans, absolute accuracy in spelling names in legal proceedings, even in felony indictments, is not required and defendant was not confused regarding the identity of his accuser.

Appeal by defendant from judgment entered 11 June 1998 by Judge G.K. Butterfield, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 21 September 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Roy A. Giles, Jr., for the State.

William D. Spence for defendant-appellant.

WALKER, Judge.

Defendant was convicted of assault with a deadly weapon inflicting serious injury and sentenced to a minimum term of 23 months and a maximum term of 37 months in prison.

The State's evidence tended to show the following: During the early morning hours of 22 February 1997, shortly after midnight, the defendant met Peter Thomas on Orion Street in Kinston, North Carolina. Defendant and Thomas discussed a $30 debt which Thomas owed defendant for "coke" he had purchased from defendant. Thomas testified that after he told defendant he could not repay the debt at this time, defendant shot him in the left thigh. Although Thomas did not see the gun, he testified that defendant's "hand went down and a gunshot—a gun went off and it hit me" in the left thigh. Thomas then walked across the street and collapsed at the steps of his friend's mobile home because his "bone was shot in two." According to Thomas, he was then assaulted by a group of juveniles. He was taken to Lenoir Memorial Hospital and was transferred to Pitt Memorial Hospital, where he remained for three days.

Thomas further testified that a short time after the shooting, defendant approached him and apologized for shooting him. Thomas also testified that because he knew defendant, he did not want to pursue this case.

The police officers interviewed Thomas at his home on 26 February 1997. During the interview, he informed the officers that he and defendant had been arguing over $30 and as he turned away from defendant, the defendant shot him in the leg. The officers then obtained an arrest warrant for defendant and a search warrant for his residence. After knocking and announcing their presence at defendant's residence, the officers entered and searched the bathroom and found defendant standing in the shower, fully clothed, with the shower curtain closed and the water off. Defendant's sister was sitting on the toilet. The officers continued the search and found a silver .25 caliber semi-automatic handgun with wooden handles in between the mattresses.

The State called as witnesses Milton Edwards, Daniel Gadson, Rashawn Rhem and Devon Jones, all of whom had been convicted of assaulting Thomas after he collapsed following the gunshot wound. Edwards testified that he, Daniel Gadson, Devon Jones, Donnell Green, and Rashawn Rhem were sitting on Devon Jones' front porch during the early morning hours of 22 February 1997 and heard a gunshot. They left the porch and went to the street corner where they saw defendant and Thomas standing together. Edwards further testified that he did not see defendant with a gun.

Gadson testified that he did not hear a gunshot nor see defendant on 22 February 1997. Over defendant's objection, the prosecutor asked Gadson whether he recalled giving a statement to Detective Grady on 26 February 1997 regarding the assault committed against Thomas. Gadson answered that he did remember giving such a statement. The court then found Gadson to be an adverse witness and permitted the prosecutor to examine Gadson about the statement he had previously given to Detective Grady wherein he had stated that defendant shot Thomas.

Rashawn Rhem also testified that he did not hear a gunshot nor see defendant on the night of the shooting. Over defendant's objection, Rhem admitted giving a statement to Detective Grady regarding the assault on Thomas, and the prosecutor was allowed to examine Rhem regarding his statement.

Devon Jones testified that he was sitting on his porch on 22 February 1997 and heard a gunshot. He walked down the street and saw defendant with a gun in his hands. Defendant was trying to "put it up or unjam it." Jones described the gun as being silver with black or dark handles and identified two photographs of the gun recovered from defendant's house (State's Exhibits 4 and 5) as looking exactly like the gun he saw in defendant's hand on 22 February 1997. Jones also testified that State's Exhibit 3 looked like the same gun he saw in defendant's hands during the early morning hours of 22 February 1997.

The State then recalled Detective Grady to the stand. Over defendant's objection, Detective Grady was allowed to read Gadson's and Rhem's prior written statements to the jury.

[1] Defendant assigns as error the trial court's allowing the State to impeach its own witnesses with their prior inconsistent statements. Defendant argues that whether or not Gadson or Rhem gave prior

inconsistent statements was a collateral matter and that extrinsic evidence of prior inconsistent statements may not be used to impeach their testimony. Thus, defendant contends that a witness may not be impeached by his prior statement. *See State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988); *State v. Jerrells*, 98 N.C. App. 318, 390 S.E.2d 722, *disc. review denied*, 326 N.C. 802, 393 S.E.2d 901 (1990); *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). Relying on *Williams*, *Jerrells*, and *Hunt*, defendant argues that he is entitled to a new trial.

However, in each of these cases, our Supreme Court and this Court held that once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement. In *State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (1993), this Court found that the *Williams*, *Jerrells*, and *Hunt* decisions were distinguishable and upheld the trial court's finding that the defendant could be impeached regarding testimony he admitted giving to the grand jury, even though he contended that some of the testimony was false.

In *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984), the witness gave a statement to the detective. However, in testifying, she did not remember telling the detective certain things. *Id.* Our Supreme Court held that the witness could be impeached concerning the inconsistencies in her prior statement and stated that the trial court was correct in permitting the detective to read from her prior statement. *Id.*

Here, both Gadson and Rhem admitted giving statements to Detective Grady and signing them. Since neither Gadson nor Rhem denied making the prior statements, their introduction was not collateral and therefore the trial court properly allowed the State to use these witnesses' prior statements for impeachment purposes.

[2] Next, defendant contends that the trial court erred in instructing the jury as follows:

> Now, if you find beyond a reasonable doubt that the victim's injuries consisted of a gunshot wound and such wound resulted in his hospitalization, then you will find that such serious injury has been proved.

Thomas testified that after being shot, he collapsed because the bullet entered the bone in his leg. He also testified that he was treated at Lenoir Memorial Hospital and then transferred to Pitt Memorial Hospital, where he remained for three days. Further, Detective Grady

testified that when the bullet entered Thomas' leg, it ricocheted off the bone and fragmented into pieces which permeated his leg. In *State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E.2d 389, 392 (1982), this Court stated:

> . . . where, as here, the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted, the issue may properly be resolved by the Court by a peremptory instruction.

In light of the evidence in this case, which was not conflicting, we conclude that the trial court did not err in its instruction to the jury.

[3] The defendant also assigns as error the trial court's refusal to dismiss the charges against defendant or to order a new trial because of a fatal variance between the allegations of the indictment and the proof offered at trial. Defendant argues that a fatal variance existed because the indictment alleged an assault upon "Peter M. Thompson" while the proof offered at trial established an assault upon "Peter Thomas."

The term *idem sonans* means sounding the same. *State v. Culbertson*, 6 N.C. App. 327, 329, 170 S.E.2d 125, 127 (1969). Under the rule of idem sonans, absolute accuracy in spelling names in legal proceedings, even in felony indictments, is not required. *State v. Staley*, 71 N.C. App. 286, 287, 321 S.E.2d 551, 552 (1984). Names are used to identify people and if the spelling used, though inaccurate, fairly identifies the right person and the defendant is not misled to his prejudice, he has no complaint. *Id.* In *State v. Isom*, 65 N.C. App. 223, 309 S.E.2d 283 (1983), this Court held that the names "Eldred," "Elred," and "Elton" were sufficiently similar to fall within the doctrine of *idem sonans* and that the variance between the indictment and the proof at trial was wholly immaterial.

The arrest warrant served on defendant correctly named the victim of the assault as "Pete Thomas." Defendant's testimony indicated that he was aware that he was charged with assaulting "Peter Thomas." Defendant also testified that he apologized to Peter Thomas after the shooting. Thus, defendant was not confused regarding the identity of his accuser. Because the names "Thompson" and "Thomas" are sufficiently similar to fall within the doctrine of *idem sonans*, the defendant was not prejudiced by this misspelling in the indictment. Thus, we conclude there was no fatal variance between the indictment and the proof offered at trial.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Judges GREENE and HUNTER concur.

LARAINE B. RUSH v. LIVING CENTERS-SOUTHEAST, INC., D/B/A BRIAN CENTER HEALTH & REHABILITATION/HENDERSONVILLE AND WILLIAM T. HALL

No. COA99-31

(Filed 2 November 1999)

1. Employer and Employee— wrongful discharge—employee's refusal to testify—no public policy violation—matters concerning job duties

The trial court did not err in granting defendant-employer's summary judgment motion on plaintiff-bookkeeper's claim that she was wrongfully discharged in violation of public policy for refusing to testify in defendant's dispute with a deceased patient's spouse over an unpaid account because an employer may reasonably expect that its employees will voluntarily appear on its behalf to testify about matters associated with their job duties.

2. Employer and Employee— wrongful discharge—employee's refusal to testify—no risk of perjured testimony—no public policy violation

The trial court did not err in granting defendant-employer's summary judgment motion on plaintiff-bookkeeper's claim that she was wrongfully discharged for refusing to testify in defendant's dispute with a deceased patient's spouse over an unpaid account, even in light of her contention that her participation might have caused her to perjure herself, since: (1) plaintiff admitted that she was neither asked to lie nor given any direction by defendant's lawyers on the content or manner of her testimony; (2) defendant's insistence that plaintiff appear in court without more preparation is not enough to find a public policy violation; and (3) plaintiff needs more evidence than just her subjective feelings that she was being directed to testify untruthfully in order to state a valid claim for wrongful discharge.

Appeal by plaintiff from a judgment entered 26 August 1998 by Judge Ronald K. Payne in Henderson County Superior Court. Heard in the Court of Appeals 23 September 1999.

On 5 October 1989 Laraine Rush (plaintiff) began her employment with Brian Center (defendant) as a bookkeeper. Her duties included making entries of payments, keeping track of monies owed, and making occasional phone calls in attempts to collect those sums. During her tenure, a dispute arose between defendant and Mr. Sidney Murphy regarding the amount, if any, owed on the bill of his late wife. Defendant filed suit against Mr. Murphy in Henderson County Superior Court. Arbitration was ordered, and plaintiff appeared on behalf of Brian Center in her capacity as bookkeeper and custodian of records and testified concerning the Murphy account. The arbitrator found in favor of Mr. Murphy and Brian Center appealed to the Henderson County Superior Court.

Nearly a year passed during which time plaintiff heard nothing more concerning the Murphy case. On 11 March 1996, Ms. Rush received a phone call late in the afternoon informing her that she was required to appear in court the next day at 9:00 a.m. in order to testify on behalf of defendant in the trial of the case against Mr. Murphy. Plaintiff refused to testify because she did not feel she had adequate time to prepare to testify in an involved matter. When again requested by her immediate supervisor to appear in court the following day, plaintiff again refused, maintaining that there was difficulty in establishing payment dates and any amount owed on such short notice. In her deposition plaintiff stated:

> I told him I didn't wanna do it; I wasn't gonna do it and that I was not going to go in there unprepared and not be able to answer the questions and he told me that I knew that he knew, I knew what he meant when he said that I was gonna go to court and that I was to cooperate. And by him telling me that, you know what I mean, I know that he meant for me to do it, no matter what it took it, [sic] how I was to get there.

Ultimately, plaintiff was told to leave whatever documentation she had in a box for her supervisor to retrieve. Plaintiff did not appear in court the next day, nor did she appear later in the week when the Murphy case was tried. Judgment was entered in favor of Mr. Murphy. Plaintiff was suspended during a two-day investigation into her actions. She was then informed that her employment with Brian Center was terminated on grounds of insubordination.

Plaintiff subsequently filed suit against defendant alleging claims for wrongful discharge, corporate negligence and civil rights violations. Defendant moved for summary judgment and the trial court, finding that no genuine issue of material fact existed as to any of plaintiff's claims, found in favor of defendant. From the orders granting summary judgment, plaintiff now appeals.

Waymon L. Morris, P.A., by Waymon L. Morris, for plaintiff appellant.

Ball, Barden & Bell, P.A., by Ervin L. Ball, for defendant appellee.

HORTON, Judge.

[1] The issue before this Court is whether or not the trial court erred in granting summary judgment in favor of defendant on plaintiff's claim that she was wrongfully discharged.

Summary judgment is proper when the moving party establishes that no "triable issue" exists "by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Branks v. Kern*, 320 N.C. 621, 623, 359 S.E.2d 780, 782 (1987). Furthermore, "[a]ll inferences are to be drawn against the moving party and in favor of the opposing party." *Id.* at 624, 359 S.E.2d at 782. The trial court must view the evidence presented in the light most favorable to the nonmoving party. *McMurry v. Cochrane Furniture Co.*, 109 N.C. App. 52, 54, 425 S.E.2d 735, 736 (1993). Thus, we must decide whether the evidence, when viewed in the light most favorable to plaintiff, was sufficient to establish a genuine issue of material fact. We hold that it was not, and affirm the judgment of the trial court.

Defendant argues that plaintiff was an employee-at-will and thus could be fired for an arbitrary or irrational reason, or for no reason at all. Plaintiff contends that, although her employment was at-will, her employment contract was terminated in violation of public policy.

It is well settled in this state that the "common law rule . . . is that when a contract of employment does not fix a definite term the employment is terminable without cause at the will of either party." *Sides v. Duke University*, 74 N.C. App. 331, 336, 328 S.E.2d 818, 822-23, *disc. reviews denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). Recognizing the changing nature of employee-employer relationships, the courts of this state have carved out an exception to this rule. The

public policy exception acknowledges that "while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." *Id.* at 342, 328 S.E.2d at 826; *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989).

Sides and *Coman* were similar in that they both involved allegations that the employer affirmatively instructed the employees in those cases to violate the law. In *Sides*, the plaintiff alleged that her employer pressured her not to testify truthfully in a malpractice case, and discharged her because she refused to commit perjury and testified truthfully in the case. Similarly, the plaintiff in *Coman* alleged that he was fired when he refused to falsify federally required documents in violation of federal law. However, the case before us is distinguishable from these two cases.

When viewed in the light most favorable to plaintiff, the evidence tends to show that plaintiff's employer was involved in a dispute over an unpaid account with the spouse of a deceased patient; that plaintiff had previously participated in an ordered arbitration of the dispute in her capacity as bookkeeper for defendant; that this involvement left plaintiff hesitant to participate in such events in the future; that defendant appealed the decision of the arbitrator to the superior court; that plaintiff was unaware of the appeal and assumed the case was over; that almost one year later, defendant contacted plaintiff late one afternoon and instructed her to appear in court the next morning to testify in the pending case against Mr. Murphy; that plaintiff refused that request more than once, stating that it was a complex matter, and she did not have adequate time to prepare her testimony; that the case was tried without her participation; that plaintiff was then suspended pending an investigation and was ultimately terminated on grounds of insubordination.

Plaintiff argues that her termination violated the public policy exception to at-will employment because she was not subpoenaed and therefore was not required to appear in court; furthermore, that insistence that she testify without more time to prepare would have prevented her from giving "full, fair, and accurate" testimony. We are not persuaded by these arguments.

While the statutory law provides a mechanism whereby litigants may compel attendance of witnesses who might not otherwise voluntarily appear, it does not require that every prospective witness be

subpoenaed. *See* N.C. Gen. Stat. § 1A-1, Rule 45 (1990). Thus, an employer may reasonably expect that its employees will voluntarily appear on its behalf to testify about matters associated with their job duties. However, as discussed above, an employer may not insist that an employee appear and testify untruthfully.

[2] Second, plaintiff's contention that defendant's insistence upon her participation might have caused her to perjure herself is not supported by the record. In her deposition, plaintiff admitted that she was neither asked to lie nor given any direction by defendant's lawyers on the content or manner of her testimony. We find the following excerpt from her deposition particularly telling:

> Q. Alright. Did anybody from Brian Center tell you to go to testify, that you had to lie?
>
> A. Uh, it was inferred, go and do what you have to do. Go to court.
>
> Q. Okay. What did they say to infer that?
>
> A. Well, Mr. Hall said just answer the questions and even when I told him, I couldn't.
>
> Q. Just answer the questions. That's what he said that you inferred that he wanted you to lie from?
>
> A. Well, I don't know if he wanted to say, he didn't say the word lie, but it was sort of go and answer.

When plaintiff was given the opportunity to explain her understanding she further stated:

> A. When he called me, okay, he called me and I told him, you know, what I was gonna testify; I told him about the, you know, about my having everything at hand, how long it was gonna take me; I told him I couldn't give fair testimony; I told him I didn't wanna do it; I wasn't gonna do it and that I was not going to go in there unprepared and not be able to answer the questions and he told me that I knew that he knew, I knew what he meant when he said that I was gonna go to court and that I was to cooperate. And by him telling me that, you know what I mean, I know that he meant for me to do it, no matter what it took it, [sic] how I was to get there.

Defendant's insistence that plaintiff appear in court without more preparation is not enough for this Court to find a public policy viola-

tion. Without some evidence which would cause a reasonable employee to have a like understanding, we cannot hold that plaintiff states a valid claim against defendant for wrongful discharge based on her subjective "feelings" that she was being directed to testify untruthfully. In *Daniel v. Carolina Sunrock Corp.*, 110 N.C. App. 376, 430 S.E.2d 306, *rev'd in part*, 335 N.C. 233, 436 S.E.2d 835 (1993), we held in a divided decision that the plaintiff stated a claim for wrongful discharge where she was instructed by her employer not to "say anymore than she had to" when testifying in a case involving the employer, and to " 'remember that you work for me and represent me and my company.' " *Id.* at 380, 430 S.E.2d at 309. The plaintiff in *Daniel* considered the statements by her employer to be both threats and pressure to alter her testimony, if necessary. *Id.*

In a dissent, Judge Lewis reasoned that

> if such innocuous statements as this are sufficient to support a claim for wrongful discharge, then employers will have to stand mute when faced with a similar situation for fear that no matter what they say their employees may perceive it as a threat. Surely an eggshell sensitivity of perception should not override the rule of reasonable application. Such a result would take the public policy exception too far . . . .

Id. at 385, 430 S.E.2d at 312. The dissent also pointed out that more than a year lapsed before Ms. Daniel was discharged from her employment with defendant. Our Supreme Court reversed the majority decision and adopted the reasoning set out in the dissent. *Daniel v. Carolina Sunrock Corp.*, 335 N.C. 233, 436 S.E.2d 835 (1993).

The language of *Daniel* seems particularly appropriate for application to the case before us. We are persuaded that, even if the testimony of plaintiff is taken as entirely true, a reasonable employee would not have understood the employer's statements to plaintiff to be directives that she testify untruthfully in the case against Mr. Murphy. Therefore, plaintiff's perceptions, being unsupported by evidence of record, are insufficient for us to find that her discharge contravened the public policies of this state.

The judgment of the trial court is

Affirmed.

Judges WYNN and EDMUNDS concur.

HILL v. LASSITER

[135 N.C. App. 515 (1999)]

ELLIS HILL, PLAINTIFF v. WOODROW LASSITER, DEFENDANT

No. COA98-1475

(Filed 2 November 1999)

Civil Procedure— bench trial—directed verdict improper—involuntary dismissal—findings required

Although the trial court erred in allowing defendant's improper motion for a directed verdict in an unfair and deceptive trade practices case tried before the bench without a jury since the proper motion would have been one for involuntary dismissal under Rule 41(b), the Court of Appeals treated defendant's motion as one for involuntary dismissal and concluded the trial court's order dismissing plaintiff's action is vacated and remanded for a new trial because the trial court did not set forth any findings of fact to support its order of dismissal.

Appeal by plaintiff from judgment entered 18 June 1998 by Judge J. Richard Parker in Superior Court, Jones County. Heard in the Court of Appeals 9 September 1999.

Henderson, Baxter, Alford & Taylor, P.A., by David S. Henderson, for plaintiff appellant.

Robert G. Bowers for defendant appellee.

TIMMONS-GOODSON, Judge.

Ellis Hill ("plaintiff") appeals from the 18 June 1998 judgment dismissing his claim against Woodrow Lassiter ("defendant") for unfair and deceptive trade practices. Plaintiff's evidence at the bench trial in Superior Court, Jones County tended to show the following. Defendant contracted to sell real property ("the subject property") to plaintiff in consideration for which plaintiff would survey the subject property at plaintiff's expense and pay $1,000.00 for each acre within the parcel. Additionally, plaintiff agreed to clear a second tract of land owned by defendant at plaintiff's expense. As a result, plaintiff had the second tract of land cleared and paid two bills for said service, one for $3,500.00 and another for $2,000.00. Plaintiff also paid $3,000.00 to defendant towards the purchase price of the subject property and $754.30 for the survey of the subject property.

The survey of the subject property was performed by Mayo & Associates ("Mayo"). Mayo visited the land on three occasions to sur-

vey the subject property and determined that a portion of it belonged to the Weyerhaeuser Company ("Weyerhaeuser"). Defendant bulldozed the subject property and the Weyerhauser property so that it appeared to be one field. Defendant believes that he owns all of the land he agreed to sell plaintiff, and is involved in a lawsuit with Weyerhaeuser to clear title.

Counsel for plaintiff researched the title to the subject property and determined that it was subject to a deed of trust held by Federal Land Bank. Defendant assured plaintiff that the deed of trust would be satisfied and released by the lending institution upon the sale of the property to plaintiff. Counsel for plaintiff wrote defendant demanding a deed for conveyance of the subject property, but plaintiff received neither a deed nor reimbursement from defendant for the expenses incurred surveying and clearing defendant's property.

Plaintiff informed defendant that he would pay the balance of the money owed for the purchase of the subject property once defendant cleared the title and provided a deed. The parties modified their agreement to omit that portion of the subject property claimed by Weyerhaeuser. Plaintiff agreed to pay defendant for a portion of the subject property, and then upon presentation of good title, to pay defendant for the portion claimed by Weyerhaeuser.

Counsel for plaintiff drafted a deed for defendant to convey the subject property to plaintiff based on the surveys provided. Defendant refused to sign the deed and also refused to sign a release deed of trust on the property as defendant was unsatisfied with the survey and description contained in the deed. Defendant refused to refund any money to plaintiff.

Following a bench trial, Judge J. Richard Parker dismissed plaintiff's action for treble damages based on unfair and deceptive trade practices. The Court then denied plaintiff's request to amend his complaint to conform the pleadings to the evidence as to unjust enrichment based on breach of contract. Plaintiff appeals.

The dispositive issue on appeal is whether the trial court erred by granting a directed verdict for defendant at the close of all the evidence on plaintiff's claim for unfair and deceptive trade practices.

Plaintiff argues that the trial court erred in finding that plaintiff failed to make a *prima facie* case for unfair and deceptive trade practices and in dismissing plaintiff's case. For the reasons that follow, we hold that the trial court erred in dismissing plaintiff's case.

In a bench trial, Rule 41(b) of the Rules of Civil Procedure is the proper motion to dismiss on the ground that "upon the facts and the law the plaintiff has shown no right to relief." *Kelly v. Harvester Co.*, 278 N.C. 153, 159, 179 S.E.2d 396, 398 (1971). *See also Hamm v. Texaco, Inc.*, 17 N.C. App. 451, 454, 194 S.E.2d 560, 562 (1973). In contrast, in a jury trial, the proper motion to dismiss is one for directed verdict pursuant to Rule 50(a). *Neff v. Coach Co.*, 16 N.C. App. 466, 470, 192 S.E.2d 587, 590 (1972).

In the present case, the trial court allowed defendant's motion for "directed verdict" even though the action was tried before the bench without a jury. The proper motion would have been one for involuntary dismissal pursuant to Rule 41(b). When a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal. *Neasham v. Day*, 34 N.C. App. 53, 54-55, 237 S.E.2d 287, 288 (1977). Therefore, this Court will treat defendant's motion as one for involuntary dismissal pursuant to Rule 41(b) in order to pass on the merits.

The test of whether dismissal is proper under Rule 41(b) differs from the test of whether dismissal is proper for directed verdict under Rule 50(a). *Neff*, 16 N.C. App. at 470, 192 S.E.2d at 590. On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Instead, "the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him." *Id.* The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them. *Bridge Co. v. Highway Comm.*, 30 N.C. App. 535, 544, 227 S.E.2d 648, 653-54 (1976).

A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits. *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 660, 301 S.E.2d 523, 527, *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983).

If the trial court grants a defendant's motion for involuntary dismissal, he must make findings of fact and failure to do so constitutes reversible error. *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980) (citation omitted).

> Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purposes of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts.

Helms v. Rea, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973) (quoting Wright, *Law of Federal Courts* § 96, at 428-29 (1970)).

In granting the dismissal in the case *sub judice*, the trial court ruled that plaintiff "had not made a case to establish its claim for relief against Defendant." The judgment does not make known the grounds on which the court dismissed plaintiff's claim, because the trial court did not set forth any findings of fact to support its order of dismissal. While a review of the transcript reveals that the trial court dismissed plaintiff's claim because plaintiff had not shown that defendant's acts were "in or affecting commerce," this Court is unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court. We hold that the failure of the trial court to make findings of fact was error and we vacate the order of dismissal and remand for a new trial.

Plaintiff further assigns error to the denial by the trial court of his motion to amend the complaint to conform the allegations to the evidence presented. In light of our previous holding, we need not reach this issue.

For the reasons stated herein, we vacate the order of the trial court dismissing plaintiff's action and remand for a new trial.

Vacated and remanded for a new trial.

Judges GREENE and HORTON concur.

STATE OF NORTH CAROLINA v. RAYMOND FREDRICK GILLEY, DEFENDANT

No. COA98-1124

(Filed 16 November 1999)

1. **Constitutional Law— double jeopardy—violation of domestic violence protective order—criminal contempt—convictions for substantive offenses**

In a case where defendant was prosecuted for the substantive criminal offenses of first-degree kidnapping, domestic criminal trespass, communicating threats, assault on a female, and first-degree burglary following an adjudication of criminal contempt based upon violation of a domestic violence protective order, defendant's conviction of assault on a female violated defendant's Fifth Amendment double jeopardy rights because a comparison of the offense actually deemed to have been violated in the contempt proceeding versus the elements of the substantive criminal offenses reveals the prohibition in the protective order that defendant not assault his estranged wife met the same legal elements necessary for assault on a female under N.C.G.S. § 14-33(b)(2). However, defendant's convictions of first-degree kidnapping, domestic criminal trespass, communicating threats, and nonfelonious breaking or entering did not violate defendant's double jeopardy rights because these crimes contained elements not present in the domestic violence protective order.

2. **Sentencing— non-vacated convictions—remand for resentencing**

In a case where the double jeopardy clause constituted a bar to defendant's conviction for assault on a female, but not for the other convictions for first-degree kidnapping, domestic criminal trespass, communicating threats, and non-felonious breaking or entering, the non-vacated convictions must be remanded for resentencing because it cannot be assumed that the trial court will reach the same sentencing result absent consideration of the assault on a female conviction.

Appeal by defendant from judgment entered 15 August 1996 by Judge Jerry Cash Martin in Guilford County Superior Court. Heard in the Court of Appeals 19 May 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. Harris, for the State.

Clifford, Clendenin, O'Hale and Jones, L.L.P., by Walter L. Jones, for defendant-appellant.

JOHN, Judge.

Defendant appeals judgment entered upon convictions by a jury of first degree kidnapping, domestic criminal trespass, communicating threats, misdemeanor breaking and entering, and assault on a female. We vacate the latter conviction.

The State's evidence at trial tended to show the following: Defendant and Vicky Gilley (Mrs. Gilley) were married in March 1989 and separated 5 February 1995. Mrs. Gilley continued to reside in the marital residence with the couple's daughter and Mrs. Gilley's twin daughters from a previous marriage. After two violent incidents between defendant and Mrs. Gilley, one occurring at the former marital residence and the other at the home of Mrs. Gilley's parents, a domestic violence protective order (the order), effective until 16 March 1996, was issued 16 March 1995 and served upon defendant that same date.

Notwithstanding, defendant entered the marital residence on 7 January 1996 armed with a knife. Following a physical altercation with Mrs. Gilley, defendant forced her into his truck, but she jumped out and escaped while he was operating the vehicle.

On 23 January 1996, Mrs. Gilley filed a Motion for Order to Show Cause. Plaintiff alleged defendant "kicked the [house] door in," "physically abused" her, "ripped off [her] clothes," "kidnapped [her] from the residence," and "abducted the [couple's] daughter—Erica." At a hearing conducted in Guilford County District Court, defendant admitted he went to Mrs. Gilley's residence on 7 January 1996, kicked in the door, "slapp[ed] Vicky around," ripped off her clothes, and took her outside to his truck, and that he knew the order was in effect when he committed the foregoing acts. Defendant thereupon was ordered committed to the Guilford County jail for 30 days based upon the court's determination he had "willfully failed to comply with the Domestic Violence Protective Order and [wa]s in Criminal Contempt."

On 18 March 1996, defendant was indicted upon charges of first degree burglary, first degree kidnapping, domestic criminal trespass,

communicating threats, and assault on a female in connection with the 7 January 1996 incident. On 8 August 1996, defendant filed a "Plea of Former Jeopardy," moving for dismissal (defendant's motion) of all criminal charges except that of communicating threats based upon the principle of double jeopardy. The trial court rejected defendant's motion and defendant was subsequently convicted by a jury at trial on all counts save that of burglary. In the latter instance, he was found guilty of non-felonious breaking or entering. The offenses were consolidated for judgment and defendant was ordered "imprisoned for a minimum term of 145 months [and] for a maximum term of 183 months." Defendant timely appealed.

On appeal, defendant contends the trial court erred in failing to grant his motion to dismiss. We agree in limited part.

[1] In defendant's motion, he alleged prosecution of the criminal charges would violate the double jeopardy prohibitions contained in "the North Carolina Constitution and the Constitution of the United States." *See* U.S. Const. amend. V and N.C. Const. art. I, § 19. Neither defendant's assignment of error nor the arguments in his appellate brief address provisions of our North Carolina Constitution. Accordingly, any argument based thereon is not properly before us. *See* N.C.R. App. P. 10(a) (scope of appellate review "confined to . . . consideration of those assignments of error set out in the record on appeal") and N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). Nonetheless, we note that

> [b]oth the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution protect against multiple punishments for the same offense.

State v. Elliott, 344 N.C. 242, 277, 475 S.E.2d 202, 218 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997).

In pertinent part, the Fifth Amendment to the United States Constitution (the Double Jeopardy Clause) provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause protects against

> (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

State v. Gardner, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted); *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 802, 104 L. Ed. 2d 865, 874-75 (1989). Criminal contempt enforced through nonsummary proceedings, as in the instant case, is "a crime in the ordinary sense," *Bloom v. Illinois*, 391 U.S. 194, 201, 20 L. Ed. 2d 522, 528 (1968), and therefore the prohibition against "a second prosecution for the same offense after conviction," *Gardner*, 315 N.C. at 451, 340 S.E.2d at 707, is implicated herein; *see United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568 (1993) (constitutional protection of the Double Jeopardy Clause applies to nonsummary criminal contempt prosecutions).

Defendant's argument presents an issue of first impression in North Carolina, *i.e.*, the extent to which the Double Jeopardy Clause relates to subsequent prosecution for a substantive criminal offense following an adjudication of criminal contempt based upon violation of a court order forbidding such criminal act. As this Court has noted, " 'the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage,' " and is applicable to the States through the Fourteenth Amendment. *State v. Perry*, 52 N.C. App. 48, 55, 278 S.E.2d 273, 279 (1981), *modified in part on other grounds*, 305 N.C. 225, 287 S.E.2d 810 (1982) (quoting *Benton v. Maryland*, 395 U.S. 784, 794, 23 L. Ed. 2d 707, 716 (1969)). Accordingly, the validity of defendant's convictions following his being held in contempt " 'must be judged . . . under [the United States Supreme] Court's interpretations of the Fifth Amendment double jeopardy provision.' " *Id.* (quoting *Benton*, 395 U.S. at 796, 23 L. Ed. 2d at 717). *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *overruled on other grounds*, *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) ("[s]tate courts are no less obligated to protect and no less capable of protecting a defendant's federal constitutional rights than are federal courts . . . [and] [i]n performing this obligation a state court should exercise and apply its own independent judgment, treating . . . decisions of the United States Supreme Court as binding").

The most recent "binding," *id*, decision of the United States Supreme Court (the Supreme Court) pertinent to our inquiry herein is that of *United States v. Dixon*, 509 U.S. 688, 125 L. Ed. 2d 556 (1993), in actuality two cases joined for appeal which resulted in a multiplicity of opinions. The majority holdings were constructed by interweaving the Supreme Court's five separate opinions.

In *Dixon*, a majority of the Supreme Court held that the sole test applied to determine whether a successive prosecution—based upon conduct which had resulted in an adjudication of contempt—is barred by the Double Jeopardy Clause was the "same-elements" test set out in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932):

> The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

Dixon, 509 U.S. at 696, 125 L. Ed. 2d at 568.

However, the Supreme Court had written in *Blockburger* that

> [t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304, 76 L. Ed. at 309. A majority of the justices in *Dixon* refined *Blockburger* by overruling *Grady v. Corbin*, 495 U.S. 508, 109 L. Ed. 2d 548 (1990), to the extent that decision required, in addition to the "same-elements" test, subsequent prosecution to satisfy a "same-conduct" test, *Dixon*, 509 U.S. at 704, 125 L. Ed. 2d at 573. According to *Dixon*, the "same-conduct" test prohibited a second prosecution if,

> to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Id. at 697, 125 L. Ed. 2d at 568 (quoting *Grady*, 495 U.S. at 510, 109 L. Ed. 2d at 557).

Although a majority of the Supreme Court in *Dixon* agreed the *Blockburger* test was equivalent to the "same-elements" test, differing applications thereof were proffered in the Court's multiple opinions. In rendering the opinion of the Supreme Court on most issues, Justice Scalia emphasized examination of the content and language of the previous court order, while Chief Justice Rehnquist, in an opinion concurring in part and dissenting in part, focused upon "the elements of contempt of court in the ordinary sense," *Dixon*, 509 U.S. at 714,

125 L. Ed. 2d at 579, as compared with the elements of the substantive crime.

Justice Scalia concluded that defendant Dixon's prior "conviction" of criminal contempt for having violated a court order prohibiting "comm[ission] [of] any criminal offense," *id.* at 691, 125 L. Ed. 2d at 565, which "conviction" was based upon Dixon's possession of drugs with the intent to distribute, barred his subsequent prosecution on a charge of possession of cocaine with intent to distribute, *id.* at 698-700, 125 L. Ed. 2d at 569-70. Justice Scalia reasoned that

> [b]ecause Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violate[d] the Double Jeopardy Clause.

Id. at 700, 125 L. Ed. 2d at 570.

As to defendant Foster, Justice Scalia determined Foster's subsequent prosecution on an indictment charging assault,

> based on the same event that was the subject of his prior contempt conviction for violating the provision of the [civil protective order] forbidding him to commit simple assault,

id., under the identical statute the trial court construed to govern his indictment, *id.* at 700 n.3, 125 L. Ed. 2d at 570 n.3, "fail[ed] the *Blockburger* test, and [wa]s barred," *id.* at 700, 125 L. Ed. 2d at 570.

On the other hand, Chief Justice Rehnquist noted the elements of contempt of court are 1) an extant court order made known to the defendant, and 2) willful violation thereof by the defendant. *Id.* at 716, 125 L. Ed. 2d at 580. He then asserted,

> it is clear that the elements of the governing contempt *provision* are entirely different from the elements of the substantive crimes,

id. (emphasis in original), and that

> [n]either of th[e contempt] elements is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no element of either of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court,

id. at 716, 125 L. Ed. 2d at 581. According to Chief Justice Rehnquist, therefore, "none of the criminal prosecutions in this case were barred under *Blockburger*." *Id.* at 713, 125 L. Ed. 2d at 579.

In selecting which approach to apply herein, we are advertent to the State's assertion of a distinction between the interests served by criminal contempt proceedings and those served through prosecution for substantive criminal offenses. According to the State, a contempt proceeding

> preserve[s] the power and . . . vindicate[s] the dignity of the court and . . . punish[es] for disobedience of its processes or orders,

while a criminal prosecution is "designed to seek conviction and punishment for violations of the criminal law."

This stance, however, was disapproved by a majority of the Supreme Court in *Dixon. Commonwealth v. Yerby*, 679 A.2d 217, 221 (Pa. 1996). Justice Scalia wrote that

> the distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the offenses are the same, not the interests that the offenses violate.

Dixon, 509 U.S. at 699, 125 L. Ed. 2d at 570. Further, according to Justices White, Stevens and Souter, concurring in part and dissenting in part in *Dixon*, although two interests may be implicated, the circumstance that alleged criminal conduct constitutes a violation of a court order does not "render the prosecution any less an exercise of the sovereign power of the United States." *Id.* at 726, 125 L. Ed. 2d at 587.

The State also contends legislative intent to punish contempt violations and substantive offenses separately must be considered and should be determinative of the double jeopardy issue if that intent is unambiguous. The State relies upon *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), for this proposition; however, such reliance is misplaced.

Gardner involved "multiple punishments for the same offense," *id.* at 451, 340 S.E.2d at 707, and our Supreme Court held that clear legislative intent to punish cumulatively must be respected, "regardless of the outcome of the application of the *Blockburger* test," *id.* at 455, 340 S.E.2d at 709. Significantly, however, the distinction between cases involving multiple punishments in a single prosecution and those involving successive prosecutions, as in the instant case, was articulated in *Gardner* as follows:

> [s]uccessive-prosecution cases involve the core values of the Double Jeopardy Clause, the common-law concepts of *autrefois*

> *acquit* and *convict*. Where successive prosecutions are involved, the Double Jeopardy Clause protects the individual's interest in not having to twice "run the gauntlet," in not being subjected to "embarrassment, expense and ordeal," and in not being compelled "to live in a continuing state of anxiety and insecurity," with enhancement of the "possibility that even though innocent he may be found guilty."
>
> . . . .
>
> Different interests are involved when the issue is purely one of multiple punishments, without the complications of a successive prosecution. The right to be free from vexatious proceedings simply is not present. The only interest of the defendant is in not having more punishment imposed than that intended by the legislature. The intent of the Legislature, therefore, is determinative.

Id. at 452, 340 S.E.2d at 707 (quoting *People v. Robideau*, 355 N.W.2d 592, 602-03 (Mich. 1984) (citations omitted)); *see also Ohio v. Johnson*, 467 U.S. 493, 499, 81 L. Ed. 2d 425, 433 (1984) (protection against cumulative punishments "designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"). Therefore, where successive prosecution is initiated following a previous conviction, "the core values of the Double Jeopardy Clause," *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707, control in determining whether the offenses are the same, *see Dixon*, 509 U.S. at 724, 125 L. Ed. 2d at 586. However, an analysis according deference to expressed legislative intent is applicable only to cases involving multiple punishments. *See Gardner*, 315 N.C. at 452, 340 S.E.2d at 707.

Further, comparison of the literal elements of contempt with the elements of the substantive criminal offense as propounded by Chief Justice Rehnquist would nearly always result in the conclusion that neither of the general elements of contempt was necessary to prove the substantive criminal offense, and that the latter contained additional elements beyond those required for contempt. *See Yerby*, 679 A.2d at 220-22 (approach of Chief Justice Rehnquist, "while purporting to embrace the concept that criminal contempt convictions implicate double jeopardy protections, rings hollow" and "renders double jeopardy protections illusory at best"; "approach that scrutinizes anything other than the actual offense or offenses prosecuted in the contempt proceeding, undermines th[e] very constitutional guarantee being questioned").

In short, decisions of the Supreme Court are "binding" upon us in the area of constitutional interpretation, *McDowell*, 310 N.C. at 74, 310 S.E.2d at 310, and we therefore adopt the approach enunciated by Justice Scalia in *Dixon* for a majority of the Supreme Court, *see Perry*, 52 N.C. App. at 55, 278 S.E.2d at 279 (citation omitted) ("validity of defendant's dual convictions . . . must be judged" by our state courts according to U.S. Supreme Court's "interpretations of the Fifth Amendment double jeopardy provision"). Thus, under the circumstances *sub judice*, rather than comparison of the general literal elements of contempt with elements of the subsequent substantive criminal offense, the test involves comparison of

> the elements of the offense actually deemed to have been violated in th[e] contempt proceeding against the elements of the substantive criminal offense(s).

Yerby, 679 A.2d at 222.

> In other words, we must look to the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the subsequently charged criminal offenses . . . . The focus . . . is on the offense(s) for which the defendant was actually held in contempt.

Id. at 221. Such an approach follows the position of at least five justices in *Dixon*, *see id.* at 221 n.10, and best ensures protection of "the core values of the Double Jeopardy Clause," *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707; *see also State v. Gonzales*, 940 P.2d 185, 187 (N.M. Ct. App.), *cert. denied*, 938 P.2d 204 (N.M. 1997); *Yerby*, 679 A.2d at 221; *State v. Miranda*, 644 So.2d 342, 344 (Fla. Dist. Ct. App. 1994); *People v. Stenson*, 902 P.2d 389, 390-91 (Colo. Ct. App. 1994); *People v. Allen*, 868 P.2d 379, 381 (Colo. 1994), *cert. denied*, 513 U.S. 842, 130 L. Ed. 2d 73 (1994).

In the instant case, defendant was convicted of assault on a female, first degree kidnapping, non-felonious breaking and entering, domestic criminal trespass, and communicating threats. The indictments were handed down after defendant had served a thirty-day prison sentence pursuant to an adjudication of criminal contempt based upon his violation of the protective order dealing with the same conduct. Defendant has conceded that his plea of former jeopardy was inapplicable to the charge of communicating threats. Our review is therefore limited to the remaining four offenses.

The protective order decreed, *inter alia*:

> 1. The defendant shall not assault, threaten, abuse, follow, harass, or in any way interfere with [Mrs. Gilley];
>
> 2. The defendant shall not assault, threaten, abuse, follow, harass, or in any way interfere with any of the minor children who are currently in the physical custody of [Mrs. Gilley];
>
> . . . .
>
> 4. The defendant shall stay away from the parties' residence[.]

Under N.C.G.S. § 14-33(b)(2) (1993), the essential elements of assault on a female are (1) assault (2) upon a female person by a male person. *State v. Craig*, 35 N.C. App. 547, 549, 241 S.E.2d 704, 705 (1978). Assault is defined as

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Jeffries, 57 N.C. App. 416, 418, 291 S.E.2d 859, 860-61 (1982).

The record before us contains no transcript of the contempt proceeding and the 28 February 1996 contempt order recites only that "[t]he defendant willfully failed to comply with the Domestic Violence Protective Order and is in Criminal Contempt." It is therefore unclear as to whether defendant was adjudicated in contempt for violation of a single prohibition in the order or for several or all. Moreover, the protective order specifically referenced none of the substantive elements of assault on a female, but rather simply directed in general terms that defendant "not assault, threaten, abuse . . . or in any way interfere" with Mrs. Gilley.

Nonetheless, in our review of defendant's subsequent conviction for assault on a female, any ambiguity surrounding the phrase "assault" in the order and the terseness of the contempt judgment must be construed in favor of defendant. *See Dixon*, 509 U.S. at 724, 125 L. Ed. 2d at 586 ("interests of the defendant are of paramount concern"), and *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) ("criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards"), and *see Gardner*, 315 N.C. at 452, 340 S.E.2d at 707. We therefore con-

clude the prohibition in the protective order that defendant, a male, not assault Mrs. Gilley, a female, met the legal elements necessary for assault on a female under G.S. § 14-33(b)(2), and that defendant's subsequent prosecution on such charge was barred by the Double Jeopardy Clause. Accordingly, under the circumstances of this case, defendant's conviction for assault on a female must be vacated.

Prior to discussing defendant's remaining convictions, we note that although the Supreme Court in *Dixon* held further prosecution of defendant Foster on the charge of simple assault was barred by the Double Jeopardy Clause, the Court found no error regarding his subsequent conviction of assault with intent to kill. *See Dixon*, 509 U.S. at 701-02 & n.7, 125 L. Ed. 2d at 571 & n.7. Query then as to the result under the facts *sub judice* had defendant subsequently been convicted of assault with a deadly weapon as opposed to assault on a female.

In any event, as to the charges of kidnapping, non-felonious breaking or entering, and domestic criminal trespass, we hold there was no error in regards to the convictions thereon. For example, the order expressly prohibited defendant from "interfer[ing]" with and "follow[ing]" Mrs. Gilley. Such language does not encompass the elements required under N.C.G.S. § 14-39 (1993) for first degree kidnapping:

> a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> b) If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree. . . .

G.S. § 14-39(a)&(b).

Comparison of the foregoing with the prohibitions of the protective order reveals several elements contained within the statutory language, including confinement and a purpose to do serious bodily harm or to terrorize, not set out in the protective order. Defendant's prosecution for the crime of kidnapping thus was not barred by the

constitutional prohibition against double jeopardy. *See Yerby*, 679 A.2d at 221-22.

The statutory offense of non-felonious breaking or entering requires a wrongful breaking or entrance into a building. *See* N.C.G.S. § 14-54(b) (1993). However, the protective order required simply that defendant "stay away from the parties' residence," and did not include language pertaining to the breaking or entering of the residence. Again, defendant's conviction for breaking or entering was not barred by the Double Jeopardy Clause. *See Yerby*, 679 A.2d at 221-22.

Similarly, as to the offense of domestic criminal trespass, N.C.G.S. § 14-134.3 (1993), the order directed defendant to "stay away" from the marital residence, while the statute forbids a person from "enter[ing] after being forbidden to do so or remain[ing] . . . upon the premises occupied by a present or former spouse." G.S. § 14-134.3. The Double Jeopardy Clause thus did not prohibit defendant's prosecution on the charge of domestic criminal trespass. *See Yerby*, 679 A.2d at 221-22.

[2] In sum, the Double Jeopardy Clause did not constitute a bar to defendant's subsequent prosecution on charges of kidnapping, non-felonious breaking or entering, and domestic criminal trespass; however, defendant's conviction of assault on a female must be vacated. Further, a recent decision of our North Carolina Supreme Court requires that the non-vacated convictions be remanded for re-sentencing.

In *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), the defendant's conviction of solicitation to commit murder was vacated, but a conspiracy to commit murder conviction which the trial court had consolidated for sentencing with the solicitation charge was remanded, *id.* at 199, 213-14, 513 S.E.2d at 61, 70. The Court noted it could not "assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed." *Id.* at 213, 513 S.E.2d at 70. While the case *sub judice* may be one "where, on remand, the trial judge will . . . reach the same result," *State v. Futrell*, 112 N.C. App. 651, 672, 436 S.E.2d 884, 895 (1993), absent consideration of the misdemeanor conviction we have vacated, this Court is bound by rulings of the North Carolina Supreme Court, *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998).

No. 96 CRS 23155, assault on a female, vacated. Nos. 96 CRS 23151-23154, kidnapping, non-felonious breaking or entering, and domestic criminal trespass, no error; remanded for re-sentencing.

Judges TIMMONS-GOODSON and HUNTER concur.

WILLIAM T. COMER, PLAINTIFF-APPELLANT v. JUDGE JAMES F. AMMONS, JR., JUDGE ROBERT J. STIEHL, III, AND THE STATE BOARD OF ELECTIONS, DEFENDANTS-APPELLEES

No. COA98-1441

(Filed 16 November 1999)

1. Appeal and Error— mootness—election statutes—dual candidacies

Even though the 1998 election statutes N.C.G.S. §§ 163-323 and 163-106 have been rewritten to disallow superior court candidates from running for other offices during the same election and the same fact scenario will not be repeated, the Court of Appeals denied defendants' motion to dismiss plaintiff's appeal as moot because if the statutes in question were in violation of the North Carolina Constitution, then defendant-judges would be holding office unlawfully and there would have been no eradication of the effects of the alleged violation.

2. Declaratory Judgments— constitutionality of election statutes—removal of officials from office—action by Attorney General not required

In a declaratory judgment action involving the constitutionality of 1998 election statutes N.C.G.S. §§ 163-323 and 163-106, defendants improperly argue that N.C.G.S. § 1-515, concerning the removal of an elected official in an action instituted by the Attorney General, is the appropriate action for this case since: (1) plaintiff is not disputing the election or its results; and (2) the removal of defendant-judges from office would only be the byproduct of the constitutional claim, and not the result of a direct challenge to the election.

3. Elections— dual candidacies—constitutionality of statutes—rational and neutral classification

The trial court did not err in refusing to declare 1998 election statutes N.C.G.S. §§ 163-323 and 163-106 unconstitutional and in granting summary judgment in favor of defendant-judges who simultaneously ran for a superior court judgeship and a district court judgeship during the same election period since: (1) dual candidacies are not forbidden by the North Carolina Constitution unless other provisions serve to render them unconstitutional; (2) nonlawyers were not denied equal protection of the law, even though anyone who ran for two offices during the same filing period under the "loophole" had to be a lawyer, because of the rational and neutral classification governing the qualifications of superior court judges; and (3) the limitation that the candidate had to be a lawyer only applied when one of the offices was a superior court judgeship.

4. Elections— dual candidacies—constitutionality of statutes—empty seats getting appointed—requested relief at odds with argument

Even though plaintiff-voter contends that 1998 election statutes N.C.G.S. §§ 163-323 and 163-106 are unconstitutional since they allow candidates to run for more than one office and effectively remove the election process from the voters because a candidate winning both elections means the empty seat gets appointed, the trial court did not err in granting summary judgment in favor of defendant-judges who simultaneously ran for a superior court judgeship and a district court judgeship during the same election period since plaintiff's requested relief is to remove the two elected officials and any harm done to the election process would have been done by the appointed official.

5. Elections— dual candidacies—constitutionality of statutes—person prohibited from holding two offices

Although the North Carolina Constitution prohibits a person from holding more than one office, the trial court did not err in refusing to declare 1998 election statutes N.C.G.S. §§ 163-323 and 163-106 unconstitutional and in granting summary judgment in favor of defendant-judges who simultaneously ran for a superior court judgeship and a district court judgeship during the same election period since: (1) dual candidacy does not necessarily lead to the holding of dual offices; (2) the North Carolina

Constitution does not provide a fundamental right to vote, thereby allowing appointments of officials instead of relying entirely on elections; and (3) there is no implied promise that the candidate will serve in the office for which he is nominated.

Judge JOHN voting to dismiss appeal in a separate opinion.

Appeal by plaintiff from judgment entered 18 September 1998 by Judge Robert F. Floyd, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 26 August 1999.

Winfrey & Leslie by Ronald E. Winfrey, and Walen & McEniry by James M. Walen for plaintiff.

Michael F. Easley, Attorney General, by Susan K. Nichols, Special Deputy Attorney General for defendant State Board of Elections.

Poyner & Spruill L.L.P., by David W. Long, for defendant Judge Stiehl.

Armstrong & Armstrong P.C., by L. Lamar Armstrong, Jr., for defendant Judge Ammons.

WYNN, Judge.

In 1998, our General Statutes allowed a nominee for a superior court judgeship to run for another elected office during the same election. The plaintiff argues that the laws that allowed the defendant judges in this case to simultaneously run for a superior court judgeship and a district court judgeship were unconstitutional. We uphold the constitutionality of those laws and therefore affirm the trial court's grant of summary judgment in favor of the defendant judges.

I. Statutory History

In 1996, the North Carolina General Assembly amended the State's election laws to allow a candidate for a superior court judgeship to run for more than one office on the same election day, beginning in 1998. Candidates could also run for *any* two offices, so long as the filing periods for the offices were not the same.

Although these sections have since been amended to prevent dual candidacies, the issues in the case before this Court are based on the

sections as they were in 1998. Therefore, all discussions and references, unless otherwise noted, will be to the statutes as they were in 1998.

The 1998 version of N.C. Gen. Stat. § 163-323 (Supp. 1997) read, in pertinent part:

> (e) Candidacy for More Than One Office Prohibited. No person may file a notice of candidacy for more than one office or group of offices described in subsection (b) of this section for any one election. If a person has filed a notice of candidacy with a board of elections under this section for one office or group of offices, then a notice of candidacy may not later be filed for any other office or group of offices under this section when the election is on the same date unless the notice of candidacy for the first office is withdrawn under subsection (c) of this section.

The referenced subsections (b) and (c) included only judgeships of the superior court.

The 1998 version of N.C. Gen. Stat. § 163-106 (Supp. 1998; 1995 N.C. Sess. Laws (1996 Second Extra Session) Chap. 9, §§ 8 and 24) read, in pertinent part:

> (h) No person may file a notice of candidacy for more than one office described in subsection (c) of this section for any one election. If a person has filed a notice of candidacy with a board of elections under this section for one office, then a notice of candidacy may not later be filed for any other office under this section when the election is on the same date unless the notice of candidacy for the first office is withdrawn under subsection (e) of this section; provided that this subsection shall not apply unless the deadline for filing notices of candidacy for both offices is the same.

The referenced subsections (c) and (e) applied to various state and federal elective offices, but did not include the office of superior court judge.

Taken together, §§ 163-323 and 163-106 created a "loophole" which allowed a candidate to run for a superior court seat and another office on the same election day, regardless of the filing periods. Other dual candidacies were allowed for any two offices, provided that the filing periods for nominations were not the same.

II. Facts and Procedural History

Defendants Ammons and Stiehl were both incumbent district court judges for the 12th Judicial District for Cumberland County. They filed for reelection during the filing period of the first Monday in January to the first Monday in February 1998. Both ran unopposed for their district court seats in the general election.

On 28 February 1998, Judge Coy E. Brewer, Jr. resigned from his seat on the 12th District's Superior Court, leaving a vacancy. The State Board of Elections opened a one week filing period in March 1998 for this seat and both Judge Ammons and Judge Stiehl filed for the seat. Neither withdrew as candidates for the district court.[1] A total of six candidates filed for the superior court election.

Judge Stiehl was reelected without opposition to his district court seat on 3 November 1998. Judge Ammons won both the district court and the superior court elections, and has since been sworn in as a superior court judge. The vacancy he left in the district court has been filled by Judge Donald Clark, Jr., who was appointed by Governor James B. Hunt, Jr.

The plaintiff, William T. Comer, was a registered voter living in Cumberland County. He was not a candidate for any office in the 1998 elections. On 12 May 1998—after Judges Ammons and Stiehl filed their notices of candidacy but before the general election—Mr. Comer filed an action for declaratory judgment, urging the court to find N.C. Gen. Stat. §§ 163-106 and 163-323 unconstitutional under Article I, section 19 and Article VI, section 9 of the North Carolina Constitution. However, upon considering a forecast of the evidence to be presented at trial, the trial court granted summary judgment for the defendant judges. Following our denial of his request for a temporary stay and supersedeas, Mr. Comer perfected his appeal to this Court.

III. Motion to Dismiss

A. Mootness Argument

[1] Judges Ammons and Stiehl along with the State Board of Elections initially move this Court to dismiss Mr. Comer's appeal as moot. We deny that motion.

1. It should be noted that in 1998, while judicial candidates for District Court ran in partisan races, judicial candidates for Superior Court ran in non-partisan races. In this appeal, the plaintiff does not contend that this distinction creates any issues for this Court to consider.

An appeal which presents a moot question should be dismissed. *See Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 443 S.E.2d 127, *review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994). If the issues giving rise to the action become moot at any time during the proceedings, the court should dismiss the action. *See In Re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L. Ed. 2d 297 (1979). This is true even if the action is for a declaratory judgment. *See Pearson v. Martin*, 319 N.C. 449, 355 S.E.2d 496, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 789 (1987).

In *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L. Ed. 2d 642, 649 (1979), the United States Supreme Court set forth a two-pronged test which renders a case moot when (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

In the case under consideration, Mr. Comer challenges the constitutionality of N.C. Gen. Stat. §§ 163-106 and 163-323 as they were in 1998. Those statutes have since been amended and therefore the alleged violation of the North Carolina Constitution has ceased. Moreover, the statutes have been rewritten to disallow superior court candidates from running for other offices during the same election, so this fact scenario will not be repeated. Since the allegedly unconstitutional statute has been repealed and no one else will be able to hold a dual candidacy, part of the *Davis* test has been satisfied.

However, part of the *Davis* test has *not* been met. Significantly, if the statutes in question were in violation of the North Carolina Constitution, then Judges Ammons and Stiehl are holding office unlawfully. If that is the case, then this violation has not ceased and there has been no eradication of the effects of the alleged violation. Thus, since the *Davis* test is not fully satisfied, we will address the merits of the case.

B. *Quo Warranto* Argument

[2] Judges Ammons and Stiehl along with the State Board of Elections also argue that the case at hand should not be heard because the removal of an elected official must be done *quo warranto* (or more accurately, by its modern statutory equivalent) and therefore a request for declaratory judgment is no longer the proper means of redressing the problem. We disagree and find that a justiciable question remains for this Court to decide.

N.C. Gen. Stat. § 1-514, et. al. (1996), which codifies the common law doctrine of *quo warranto*, reads in relevant part:

> 1-515. Action by Attorney General.
>
> An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:
>
> (1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State . . . .

Mr. Comer argues that § 1-515 is not appropriate to this action because he is challenging the constitutionality of an election statute, not disputing the election or its results. We agree.

In *Newsome v. N.C. State Bd. of Elections*, 105 N.C. App. 499, 415 S.E.2d 201 (1992), we addressed a similar situation. In that case, the plaintiffs filed an action to enjoin a special election of a mayor and Board of Aldermen. The injunction was denied, the election was held, and the new mayor and board were seated. On appeal, the appellees argued that the case was moot because the elected officials had been seated, and therefore a new action must be brought under § 1-515. This Court rejected that argument on the grounds that the plaintiffs were not challenging the election or its results, but were instead challenging the Board of Election's authority to call the election.

Similarly, Mr. Comer is not directly challenging the election or its results; rather, the main thrust of his argument is that the election statutes were unconstitutional. Although Mr. Comer cannot avoid arguing that the defendant judges are holding office in an unlawful manner (having been elected via an unconstitutional election),[2] his main argument lies not against the judges themselves, but against the statutes that allowed their election to office. Likewise, although a ruling for Mr. Comer might result in the removal of the judges from office, this would only be the by-product of the constitutional claim and would not be the result of a direct challenge to the election.

IV. Appellant's Constitutional Arguments

[3] Having decided that a justiciable issue still remains, we now address the substantive issue of whether the trial court properly

2. As noted earlier, this argument creates a justiciable issue for this Court to consider.

refused to declare N.C. Gen. Stat. §§ 163-106 and 163-323 unconstitutional. We affirm the trial court's ruling.

In general, our statutes are presumed to be constitutional. As the Supreme Court of North Carolina said in *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 5, 413 S.E.2d 541, 543 (1992):

> Unless the Constitution expressly or by necessary implication restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision . . . .

However, because the presumption that a statute passes constitutional muster is not conclusive, we must still determine if any provisions of the North Carolina Constitution serve to render the statute invalid.

Dual candidacies are not forbidden *per se* by the North Carolina Constitution. Therefore, the statutes in question that allow dual candidacies are constitutional unless other provisions serve to render them unconstitutional.

Mr. Comer first argues that N.C. Gen. Stat. §§ 163-106 and 163-323 should be declared unconstitutional because together they create a special class of favored candidates without a rational basis for creating such a class. He contends that because *only lawyers* are allowed to take advantage of the "loophole" and run for more than one office, lawyers have been granted a benefit which in effect denies non-lawyers the equal protection of the law. This argument, however, is flawed.

First, the State has a rational basis for allowing only lawyers to run for a superior court seat—judges should be qualified to handle the cases before them; in fact, the North Carolina Constitution requires that our superior court judges be authorized to practice law. N.C. Const. art. IV, § 22. Thus, anyone who ran for two offices under the "loophole" had to be a lawyer not because the State wanted a special class to be able to run for two offices, but because of the rational and neutral classification governing the qualifications of superior court judges.

Second, it was not only lawyers that were allowed to run for more than one office if the filing deadlines were different for the two offices. The limitation that the candidate be a lawyer applied when

one of the offices was a superior court judgeship, but other dual candidacies were available for nonlawyers. N.C. Gen. Stat. §§ 163-106(c) and 163-106(h) permitted nonlawyers to run for more than one of several offices so long as the filing periods were not the same. Given this fact, Mr. Comer cannot reasonably argue that lawyers, and lawyers only, were singled out for special treatment by being allowed to hold a dual candidacy.

[4] Mr. Comer's second argument is that by allowing candidates to run for more than one office, the election process is effectively removed from the hands of the voters. This assertion too is without merit.

To begin, although Mr. Comer does not actually argue that his fundamental right to vote has been infringed, we consider it prudent to address that issue.

A fundamental right is a right explicitly or implicitly guaranteed to individuals by the United States Constitution or a state constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L. Ed. 2d 510 (1965). Fundamental rights are afforded the highest level of protection, and they can only be infringed upon if the state can show it has a compelling need to do so.

The right to vote *per se* is not a fundamental right granted by either the North Carolina Constitution or the United States Constitution. *See State ex rel Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989); *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 102 S.Ct. 2194, 72 L. Ed. 2d 628 (1982). What *is* fundamental is that once the right to vote has been conferred, the *equal* right to vote is a fundamental right. *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983); *Rivera-Rodriguez v. Popular Democratic Party.*

Mr. Comer makes no claim that he was denied the same right to vote as other voters in his district. He therefore can make no claim that his fundamental right to an equal right to vote was infringed upon.

However, Mr. Comer does argue that the election process was frustrated by the dual candidacies because the power to choose officials was taken out of the hands of the voters. He argues that because the election process is the favored way to choose officials, appointments frustrate the election process. But, the relief requested by Mr. Comer does not match the harm he asserts.

Notably, he had the opportunity to vote for both the district court judgeship and the superior court judgeship. Nonetheless, he contends that because Judge Ammons—an elected official to the district court—chose instead to take the superior court seat, the filling of the empty district court seat by an appointed, not elected, official has caused him and other voters harm. Yet, Mr. Comer requests only that the election for the superior court seat be voided, and that Judges Ammons and Stiehl be barred from seeking election to that seat. Indeed, Mr. Comer does *not* request that the *district court* election also be voided and that the appointed judge—Judge Clark—be removed from office. Surely, if *any* harm was done to the election process, it was done when a judge was appointed, not elected, to the bench. Instead, Mr. Comer seeks to remove only the two *elected* officials. Patently, Mr. Comer's requested relief is at odds with his argument that the voting process was removed from the hands of the voters.

[5] Mr. Comer next contends that because the North Carolina Constitution prohibits a person from holding more than one office, a person should be barred from seeking election to more than one office. Despite the fact that the latter is not necessary to achieve the former—that is, a dual candidacy does not necessarily lead to the holding of dual offices—the weight of authority clearly allows dual candidacies when no affirmative prohibitions exist.

In pertinent part, Art. VI, § 9 of the North Carolina Constitution reads,

> (1) *Prohibitions.* It is salutary that the responsibilities of self-government be widely shared among the citizens of the State and that the potential abuse of authority inherent in the holding of multiple offices by an individual be avoided . . . No person shall hold concurrently any two offices in this state that are filled by election of the people.

In *Moore*, the Supreme Court of North Carolina explored the scope of the dual officeholding prohibition. *See Moore*, 331 N.C. 1, 413 S.E.2d 541. In that case, a North Carolina statute that required current office holders to resign from their office before running for a new office violated Art. VI, § 6 of the North Carolina Constitution because it added an extra qualification for office not required by the Constitution. Although the Court noted that the "resign to run" statute may have advanced the prohibition against dual officeholding found in § 9, the Court also found that

> Article VI, Section 9 itself contains no provision that prevents pursuing one office while holding another. Instead, for reasons apparent in its own text it condemns dual officeholding . . . The evil the section seeks to prevent is that of holding more than one office simultaneously. This evil is not present in the mere pursuit by an officeholder of another office.

Id. at 8-9, 413 S.E.2d at 545.

Extending the rationale of *Moore* to situations where one candidate seeks two offices—such as in the case before the Court—is appropriate. Allowing dual candidacy may not advance the prohibition against dual officeholding, but it would not, in and of itself, be an evil that the North Carolina Constitution seeks to prevent.

Other states have considered the question as to whether dual candidacy is permitted when dual officeholding is not. Indeed, several courts have found that dual candidacy should be allowed and their rationales help guide our decision in this case. *See, e.g., In Re Nomination Petitions of Michael A. O'Pake*, 422 A.2d 209 (Pa. Cmwlth. 1980) (compared dual candidacy to a candidate who runs for office while still holding another office). *See also, Kelly v. Reed*, 355 P.2d 969 (Nev. 1960); *Misch v. Russell*, 26 N.E. 528 (Ill. 1891); and *State ex rel Neu v. Waechter*, 58 S.W.2d 971 (Mo. 1933) (a prohibition against dual officeholding does not require a prohibition against dual candidacy).

In contrast, a lesser number of cases from other states have forbidden dual candidacy, but the particulars of those cases can be distinguished from the case at hand. For instance, in *Burns v. Wiltsie*, 102 N.E.2d 569 (N.Y. 1951), the New York Supreme Court disallowed dual candidacies despite the lack of constitutional or statutory prohibitions. The court relied on a provision of the New York Constitution which granted "the right of every citizen to vote 'for all officers that are now or hereafter may be elective [sic] by the people.' " *Id.* at 572. This language created an affirmative right in the citizens of New York to vote for all officers of the state. As discussed earlier, North Carolina's Constitution provides no such fundamental right to vote, thereby allowing appointments of officials instead of relying entirely on elections.

Similarly, *State ex rel Fair v. Adams*, 139 So.2d 879 (Fla. 1962) can also be distinguished from the present case. After finding no guidance under the Florida Constitution, statutes, or case law, the Florida

Supreme Court relied on an oath that all candidates had to take which said, in essence, that the candidate was qualified to accept the office he was running for. The implication was that the candidate promised to serve in the position for which he was nominated, and could therefore not truthfully promise to serve in two offices. North Carolina's candidacy requirements, on the other hand, contain no such oath—the law requires only proof of residency, party affiliation, and voter registration. N.C. Gen. Stat. §§ 163-106 and 163-323. There is no implied promise that the candidate will serve in the office for which he is nominated.

Finally, Mr. Comer argues that N.C. Gen. Stat. §§ 163-106(c) and 163-106(h) somehow act to bar a person from running for both the district court and the superior court judgeships. We summarily dismiss this argument since Mr. Comer recognizes in his brief that the statutory language *does* actually allow dual candidacy.

V. Conclusion

Since Mr. Comer offered no viable challenge to the constitutionality of N.C. Gen. Stat. §§ 163-106 and 163-323, the trial court correctly refused to declare the statutes unconstitutional. Likewise, because there was no genuine dispute as to questions of fact or any reasonable dispute as to questions of law, the trial court correctly granted the defendants' motions for summary judgment. (Summary judgment is appropriate if there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. N.C.R. Civ. P. 56(c) (1990).)

The decision of the trial court is,

Affirmed.

Judge EDMUNDS concurs.

Judge JOHN concurs in a separate opinion.

Judge JOHN concurring in the result only with separate opinion.

The majority properly points out that

Mr. Comer is not directly challenging the election or its results; rather, the main thrust of his argument is that the election statutes were unconstitutional.

The majority further acknowledges that the statutes challenged by Mr. Comer

> have since been amended and therefore the alleged violation of the North Carolina Constitution has ceased. Moreover, the Statutes have been rewritten to disallow superior court candidates from running for other offices during the same election, so this fact scenario will not be repeated.
>
> Our Supreme Court has stated,
>
> [w]henever 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. . . . 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.

Simeon v. Hardin, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citations omitted). This is true even if, as here, the action is brought as a declaratory judgment action. *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 498 (1997).

In the case *sub judice*, the "questions originally in controversy between the parties are no longer at issue [and] the case should be dismissed." *Simeon*, 339 N.C. at 370, 451 S.E.2d at 866. However, the majority having elected to address Mr. Comer's appeal, I concur in the result reached in the majority opinion.

STATE OF NORTH CAROLINA v. FLOR PEREZ, III

No. COA98-1383

(Filed 16 November 1999)

1. Constitutional Law— effective assistance of counsel—jury argument—concession of guilt

Defendant did not receive ineffective assistance of counsel in a first-degree murder case when his trial counsel conceded to the jury in opening and closing arguments that defendant was responsible for the victim's death and was guilty of some offense less than first-degree murder because: (1) the trial court ques-

tioned defendant under oath and found that defendant knowingly, willingly, and with clear understanding allowed his attorneys to admit to the jury that his acts resulted in the death of the victim; and (2) counsel's concession of defendant's guilt of some offense less than first-degree murder was a reasonable trial strategy.

2. Homicide— testimony of medical examiner—strangulation—corroboration—relevancy to premeditation, deliberation, and intent

The trial court did not err in a first-degree murder case by admitting testimony of the medical examiner that it usually takes several seconds to maybe a minute for a victim to die from strangulation, but it can take longer than a minute for a victim to die if he is engaged in a struggle, because the medical examiner's testimony: (1) was corroborative of defendant's statement that he strangled the victim for a few minutes, and an accomplice's testimony that it took the victim approximately ten minutes to die with defendant eventually stomping on the victim's neck because defendant's hands were tired; and (2) was relevant to the issues of premeditation, deliberation, and intent because the testimony revealed defendant had a substantial opportunity to cease the attack before the victim's death.

3. Evidence— letter stating killed before—threat to do it again—not predisposition to violence—relevancy—admission—intent to kill

The trial court did not err in a first-degree murder case by admitting into evidence portions of a letter which defendant wrote to his girlfriend from jail several months after the victim was killed, stating he would hunt her estranged husband down and really kill somebody since he did it once and it did not take too much to have one more under his belt, because the statements in defendant's letter were not admitted in violation of N.C.G.S. § 8C-1, Rule 404(b) to show defendant's predisposition to act violently, but instead were relevant to an admission with respect to the victim's death and also to show defendant's deliberate intent to kill.

4. Criminal Law— closing argument—four to five minute period of silence—failed to object—failed to show grossly improper

The trial court did not err in failing to intervene ex mero motu in a first-degree murder case when the prosecutor observed a

four to five minute period of silence during her closing argument because: (1) defendant did not object to the argument at trial; and (2) defendant did not show the prosecutor's conduct was grossly improper since the evidence indicates defendant's strangulation of the victim lasted as long as ten minutes.

5. Criminal Law— jury request for evidence—trial court exercised discretion and did not abuse discretion

In a first-degree murder case, the trial court did not abuse its discretion or fail to exercise its discretion in its response to the jurors' request to review certain evidence because: (1) the trial court could consider the court reporter's absence as a factor in exercising its discretion since it is permissible to weigh the time, practicality, and difficulty involved with granting the request; (2) the trial court's statement for the record that it is allowing or denying a jury's request to review testimony in its discretion is presumed to be in accordance with N.C.G.S. § 15A-1233; and (3) the trial court explained that allowing the request might lend undue importance to the portions of the evidence reviewed without giving equal importance to the other evidence in the case, and it was the jurors' duty to recall and consider all of the evidence.

Appeal by defendant from judgments entered 7 May 1997 by Judge Jack A. Thompson in Wake County Superior Court. Heard in the Court of Appeals 20 September 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Marilyn R. Mudge, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janet Moore, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his convictions of first-degree murder, credit card theft, and felonious larceny of an automobile.

Summarized only to the extent necessary to an understanding of the issues raised in this appeal, the State's evidence at trial tended to show that defendant and his girlfriend, Michelle Locklear, came to Raleigh in September 1995. Locklear was a parole violator from Maryland. Shortly after coming to Raleigh, defendant and Locklear became acquainted with Charles Murphy, a 63 year old retired vet-

eran. Locklear told Murphy that she could not find work due to her criminal record and he offered to pay her to clean his house. After Murphy made sexual advances toward Locklear, she told defendant, who confronted Murphy. Murphy claimed that Locklear had made advances toward him. Subsequently, without defendant's knowledge, Locklear again visited Murphy, undressed for him, and allowed him to kiss her neck and breasts in exchange for $20.

Sometime thereafter, Locklear learned that her parole officer knew she was in Raleigh. She and defendant discussed whether she should turn herself in or whether they should leave Raleigh. Locklear told defendant about the sexual encounter with Murphy. Defendant and Locklear then made a plan to kill Murphy and use his car and money to leave Raleigh. They discussed their plan several times during December, 1995.

On 2 January 1996, pursuant to their plan, Locklear called Murphy and told him that defendant was out of town and that she did not want to stay by herself. Murphy invited Locklear to come to his house; she told him to keep the porch light off. Locklear and defendant walked together to Murphy's house and Locklear knocked on the door. Murphy answered the door, clad only in his underwear. Locklear entered the house, followed by defendant, whose face was obscured by a hood. Murphy turned and started walking towards the back of the house. Defendant grabbed Murphy from behind, pulled him down to the floor, and choked him with his hands for approximately 10 minutes. Defendant complained that his hands were getting tired, stood up, and stomped on Murphy's neck. Locklear testified that she heard something pop. Locklear took Murphy's keys and wallet and she and defendant dragged Murphy's body out of the house and put it into the trunk of his car. They drove to Johnston County, where they disposed of the body in a wooded area. They then drove Murphy's car to Norwich, Connecticut, using his credit cards to pay for their trip. They were arrested in Norwich.

After they were arrested, both Locklear and defendant made statements to the police. Defendant initially stated that he had acted alone and had gone to Murphy's house to confront him about his involvement with Locklear. He said that he had killed Murphy in self-defense because he thought Murphy "was going for his gun." After being advised that Locklear had made a statement in which she had admitted complicity, defendant gave a second statement in which he acknowledged Locklear's involvement and said that he had not

intended to kill Murphy but wanted him to stop making advances toward Locklear.

Defendant did not testify nor did he offer evidence on his own behalf.

Defendant contends he was denied a fair trial in four respects. First, he contends his trial counsel conceded his guilt to the jury without his knowing and voluntary consent in violation of rights guaranteed him by the North Carolina and United States Constitutions. In addition, he contends the trial court erred in its rulings admitting certain evidence and in permitting the prosecutor to argue such evidence to the jury. Finally, he contends the trial court failed to exercise its discretion, or abused such discretion, in responding to the jurors' request to review certain evidence. For the following reasons, we reject defendant's contentions and conclude that he received a fair trial.

I.

[1] Defendant first contends that his constitutional rights were violated when his trial counsel conceded to the jury, in opening and closing arguments, that defendant was responsible for Murphy's death and was guilty of some offense less than first degree murder. Defendant argues that the trial court did not obtain his knowing, intelligent, and voluntary consent to this concession of guilt and that the actions of his trial counsel in making the concession amounted to ineffective assistance of counsel.

A.

A concession of guilt by a defendant's counsel has the same practical effect as a guilty plea, because it deprives the defendant of his right against self-incrimination, the right of confrontation and the right to trial by jury. *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed.2d 672 (1986). Therefore, a decision to make a concession of guilt as a trial strategy is, like a guilty plea, a decision which may only be made by the defendant and a concession of guilt may only be made with the defendant's consent. *Id.* Due process requires that this consent must be given voluntarily and knowingly by the defendant after full appraisal of the consequences, *see Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274 (1969), and a clear record of a defendant's consent is required. *State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995). We reject, however,

defendant's argument that an acceptable consent requires the same formalities as mandated by statute for a plea of guilty. *See* N.C. Gen. Stat. § 15A-1022(a). Our Supreme Court has found a knowing consent to a concession of guilt in compliance with *Harbison* where the record showed the defendant was advised of the need for his authorization for the concession, defendant acknowledged that he had discussed the concession with his counsel and had authorized it, and the defendant thereafter acknowledged that his counsel had made the argument desired by him. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991).

Prior to jury selection in the present case, defendant's counsel apprised the court of the possibility that a *Harbison* issue would arise at trial. Upon inquiry of defendant, the trial court determined that he had not conferred with his counsel about the matter and had not given his consent to an admission that he had caused the victim's death. The trial court advised defendant to confer with counsel about the matter and ruled that counsel could not admit defendant's culpability without his consent. Later, before jury selection had begun, the following colloquy occurred outside the presence of the prospective jurors:

> MR. GASKINS: I think also, Your Honor, if you'd like we can return to the issues which we raised earlier dealing with the Harbinger [sic] case and our intention to concede certain facts to the jury.
>
> BY THE COURT:
>
> Q. Okay. Mr. Perez, you're still under oath. I'm going to talk back with you concerning what your attorney has told the Court.
>
> Have you now talked again with your attorney concerning their presenting to the jury, either through questions, either through argument or evidence that an admission that your acts resulted in the death of the victim in this case?
>
> A. Yes.
>
> Q. Have you considered the effect of the attorneys' telling the jury that you are in fact responsible for the death of the victim?
>
> A. Yes, sir.
>
> Q. Have you given your attorneys permission to present that information to the jury?
>
> A. Yes.

Q. And you have conferred with counsel about that and understand what they intend to do; is that correct?

A. Yes, I have.

Q. Do you feel it—based upon your conversations with your attorneys, do you feel it is in your best interest for your attorneys as part of your defense to admit that your actions resulted in the death of the victim?

A. Yes, sir.

The trial court found that defendant "knowingly, willingly and with clear understanding of the effect, has allowed his attorneys to admit to the jury during the course of this trial that his acts resulted in the death of the victim in this case."

After all of the evidence had been presented, defendant's counsel again notified the court of his intent to admit, in his argument to the jury, defendant's guilt of some offense less than first degree murder. Outside the presence of the jurors, the trial court addressed the defendant as follows:

THE COURT: Mr. Perez, I previously talked with you concerning this issue. Your attorneys have told me in open court that they intend to admit culpability or wrongdoing on your part relative to the homicide of the victim in this case.

MR. PEREZ: Yes, sir.

THE COURT: Do you understand that that argument to the jury is, in effect, an admission of guilt—

MR. PEREZ: Yes. Sir, I do.

THE COURT: —of some offense?

MR. PEREZ: Yes, sir, I do.

THE COURT: Have you conferred with your attorneys concerning that?

MR. PEREZ: Yes, sir, I have.

THE COURT: And have you given them your permission to make that argument—

MR. PEREZ: Yes, sir.

THE COURT: —an admission to the jury?

MR. PEREZ: Yes, sir, I do.

THE COURT: No one has coerced you to do that; is that right?

MR. PEREZ: No, sir.

THE COURT: And this is of your own free will; is that correct?

MR. PEREZ: Yes, sir.

We believe the foregoing establishes the same clear record of defendant's understanding consent for his counsel to admit some degree of culpability less than first degree murder as was found in *McDowell.* Defendant testified under oath that he understood the consequences of the concession, had discussed it with his attorney, and believed that the strategy was in his best interest.

B.

Nevertheless, defendant argues that his counsel's strategy to concede guilt was so unreasonable as to constitute ineffective assistance of counsel. Because we agree with the trial court's determination that defendant knowingly consented to the concessions made by his counsel, we review his contentions with respect to ineffective assistance of counsel under the traditional ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 82 L.Ed.2d 864 (1984), and adopted in this State by our Supreme Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). *See also McDowell*, 329 N.C. 363, 407 S.E.2d 200. To establish that his right to effective assistance of counsel has been violated, a defendant must show, first, that his counsel's performance was so deficient that counsel was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and, second, the deficient performance deprived defendant of a fair trial. *State v. Sanderson*, 346 N.C. 669, 684-85, 488 S.E.2d 133, 141 (1997) (quoting *Strickland*, 466 U.S. 668, 80 L.Ed.2d 674.)

The concession of guilt of some offense less than first degree murder in this case was made in furtherance of counsel's strategy to argue "imperfect" self-defense. Defendant apparently contends his counsel unreasonably abandoned a "perfect" self-defense strategy, which would have totally exonerated defendant.

In order to prevail on a theory of perfect self-defense, a defendant must show the existence of four elements:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

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

State v. Williams, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (citations omitted).

If elements one and two are present, but the defendant was the aggressor or used excessive force so that either element three or element four is not present, defendant will not be totally exonerated of the killing, but is guilty of voluntary manslaughter. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998), *cert. denied*, — U.S. —, 143 L.Ed.2d 559 (1999) (citations omitted); *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981). A failed perfect self-defense attempt is called imperfect self-defense.

A perfect self-defense claim was clearly untenable in this case. Even if the jury had believed defendant's claim that he attacked Murphy to prevent him from getting a gun kept in a back room, defendant admitted in his statement to police that he had gone to Murphy's house of his own volition and he made no claim that Murphy, who was considerably older than defendant and was dressed only in underpants, had a gun on or near his person when defendant tackled him, pinned him on the floor, and choked him. Thus, the evidence shows that defendant was the aggressor and that he used excessive force in preventing Murphy from gaining access to the gun. An imperfect self-defense strategy, therefore, may have been viable under the evidence, reducing defendant's culpability from murder to voluntary manslaughter.

Counsel's concession to the jury reflected this strategy. During jury selection and in opening arguments counsel admitted that

defendant had participated in the events leading to Murphy's death and suggested that while defendant "might be guilty of some crime—some level of homicide . . . he is not guilty of first degree murder." In closing arguments, counsel urged the jury to find Flor Perez guilty of voluntary manslaughter rather than second degree murder." We conclude, under the evidence in this case, that counsel's concession of defendant's guilt of some offense less than first degree murder was a reasonable trial strategy. Counsel's performance was not deficient and defendant's claim of ineffective assistance of counsel must fail.

II.

[2] Defendant assigns error to the admission of testimony by the medical examiner, Dr. Karen Chancellor, that it usually takes "several seconds to maybe a minute" for a victim to die from strangulation, but can take longer than a minute for a victim to die if he is engaged in a struggle. Defendant argues that there was no evidence of a struggle in this case and that the doctor's testimony regarding a struggle was inadmissible conjecture. We find no merit in his argument. Dr. Chancellor's testimony that manual strangulation may not result in death for several minutes if pressure is not consistently applied to the victim's neck was corroborative of defendant's statement that he strangled Murphy for a few minutes as well as Locklear's testimony that it took Murphy approximately ten minutes to die and that defendant eventually stomped on Murphy's neck because his hands were tired. Dr. Chancellor's testimony was also relevant to the issues of premeditation, deliberation, and intent, as the testimony pointed out that defendant had a substantial opportunity to cease the attack before Murphy's death occurred. This assignment of error is overruled.

III.

[3] Next, defendant assigns error to the trial court's decision to admit into evidence portions of a letter which defendant wrote to Locklear from jail on 17 July 1996, several months after Murphy was killed. In the letter, defendant urged Locklear to divorce her estranged husband, and expressed displeasure at the prospect that the estranged husband was visiting Locklear. He wrote:

> Then I will really break out of here and hunt his ass down and really kill somebody. I did it once. It don't take too much to have one more under my belt, for real.

Citing *State v. Franklin*, 327 N.C. 162, 393 S.E.2d 781 (1990), defendant contends that the admission of these statements was inflammatory, had no purpose other than to show a predisposition to act violently, and violated G.S. § 8C-1, Rule 404(b). We disagree.

While G.S. § 8C-1, Rule 404(b) prohibits evidence of other acts to prove character, such as a propensity for violence, in order to show that a person acted in conformity therewith, the rule is generally one of inclusion of relevant evidence of such acts if offered for other purposes. *State v. White*, 340 N.C. 264, 457 S.E.2d 841, *cert. denied*, 516 U.S. 994, 133 L.Ed.2d 436 (1995). Here, the statements in defendant's letter were clearly relevant as an admission with respect to Murphy's death and also to show defendant's deliberate intent to kill. *See State v. Scott*, 343 N.C. 313, 471 S.E.2d 605 (1996). This assignment of error is overruled.

IV.

[4] Defendant also contends the prosecutor engaged in grossly improper argument to the jury by observing a four to five minute period of silence during her closing argument. Because defendant did not object to the argument at trial, he must show that the prosecutor's conduct was grossly improper in order to warrant a new trial. *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979).

Defendant cites *State v. Artis*, 325 N.C. 278, 323-25, 384 S.E.2d 470, 495-97 (1989) for the proposition that a prosecutor's use of any moment of silence in arguing to the jury during the guilt-innocence phase of a murder trial is highly prejudicial, and that such a tactic is permissible only in sentencing-phase arguments. We disagree. While the Court in *Artis* noted in *dicta* that such silences might be prejudicial if made during the guilt phase of trial, subsequent cases which have directly addressed this question have established no such bright-line rule. In *State v. Hoffman*, 349 N.C. 167, 505 S.E.2d 80 (1998), *cert. denied*, —— U.S. —— 143 L.Ed.2d 522 (1999), our Supreme Court found that a "prosecutor's use of two minutes of silence" during the guilt-innocence phase of the trial to demonstrate how long a victim spent bleeding on the floor before dying "was not so grossly improper as to merit *ex mero motu* intervention by the trial court." *Id.* at 185, 505 S.E.2d at 91. Similarly, in *State v. Jones*, 346 N.C. 704, 487 S.E.2d 714 (1997), the Court found that a prosecutor's use of five minutes of silence during the closing argument of the guilt-innocence phase of the trial was not grossly improper. *Id.* at 713-14, 487 S.E.2d at 720-21. Rather, the use of silence in these arguments fell within the range of

permissible inferences a prosecutor may draw for a jury during closing arguments. "A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence as well as any reasonable inferences therefrom." *Id.* at 712, 487 S.E.2d at 719 (quoting *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, —— U.S. ——, 134 L.Ed.2d 478 (1996)). "Prosecutors may create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable." *Id.* at 712, 459 S.E.2d 719 (quoting *State v. Bishop*, 343 N.C. 518, 543, 472 S.E.2d 842, 855 (1996), *cert. denied*, 519 U.S. 1097, 136 L.Ed.2d 723 (1997)). In accordance with *Hoffman* and *Jones*, and in light of the evidence in this case indicating that defendant's strangulation of Murphy lasted as long as ten minutes, we cannot say the argument was grossly improper. The trial court did not err in failing, *ex mero motu*, to intervene.

V.

[5] Finally, we consider defendant's assignments of error with respect to the trial court's response to the jurors' request to review certain evidence. After beginning their deliberations, the jurors submitted a written request to review copies of all statements made to the police by Michelle Locklear and defendant, a copy of the entire letter written to Locklear by defendant, and "transcripts of the court testimony" of Locklear and two other witnesses. Over defendant's objection, the trial court permitted the jury to review copies of the statements, which had been admitted into evidence. The court sustained defendant's objection to the juror's request to see the letter, only a portion of which had been admitted into evidence. The trial court stated that it would deny the request for transcripts of the witnesses testimony "in the discretion of the court." Defendant assigns error, arguing that the trial court's rulings were either a failure to exercise discretion or an abuse of discretion.

A trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof. N.C. Gen. Stat. § 15A-1233(a); *State v. Hough*, 299 N.C. 245, 262 S.E.2d 268 (1980). Such a request, however, requires that the trial judge exercise its discretion, and where the trial court fails or refuses to exercise its discretion in the erroneous belief that it has no discretion to grant the jurors' request, it is error to refuse the request. *State v. Johnson*, 346 N.C. 119, 484 S.E.2d 372 (1997); *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980).

Defendant contends the trial court based its ruling on the fact that the court reporter who had taken the testimony was no longer available, having been assigned elsewhere by the Administrative Office of the Courts. From the transcript, it is apparent that the trial court considered the reporter's absence as a factor in exercising its discretion, however, it is permissible for the trial court to weigh, in exercising its discretion, the time, practicality, and difficulty involved with granting the request. *State v. Fullwood*, 343 N.C. 725, 472 S.E.2d 883 (1996), *cert. denied*, 520 U.S. 1122, 137 L.Ed.2d 339 (1997); *State v. Jeune*, 332 N.C. 424, 420 S.E.2d 406 (1992). Here, the trial judge clearly exercised his discretion in ruling upon the jurors' request to review the evidence, allowing their request in part and stating on no less than three occasions that the denial of their requests to review the transcripts was made in his discretion. "When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C.G.S. § 15A-1233." *State v. Weddington*, 329 N.C. 202, 208, 404 S.E.2d 671, 675 (1991) (citing *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988)).

Thus, we review the ruling under an abuse of discretion standard, i.e., whether the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996). We find no abuse of discretion here. The trial court explained that to allow the request might lend undue importance to the portions of the evidence reviewed without giving equal importance to the other evidence in the case and cautioned the jurors that it was their duty to recall and consider all of the evidence.

The remaining assignments of error set forth in the record on appeal have been abandoned. N.C.R. App. P. 28(a), 28(b)(5). Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

PAMELA NUNNERY, PLAINTIFF v. ERIC JONATHAN BAUCOM AND BAUCOM'S NURSERY COMPANY, DEFENDANTS

No. COA98-841

(Filed 16 November 1999)

1. Trials— allowance of exhibit in jury room—absence of consent by defendants—failure to show prejudice

Although the trial court erred in a four-car automobile collision case by allowing the police report to go to the jury room during jury deliberations without defendants' consent, defendants are not entitled to a new trial because defendants have failed to show any prejudice since: (1) the trial court found the copy of the report delivered to the jury room was the redacted version and defendants failed to include in the record on appeal either evidence or the verbatim transcript of the hearing relating to defendants' motion under N.C. R. App. P. 9(a)(1)(e); and (2) defendants' contention that prejudice is manifest regardless of which copy of the report was received by the jury in light of the fact the jury was not allowed to review testimony of certain defense witnesses is not preserved because defendants failed to present to the trial court a timely request, objection, or motion that any witness testimony be made available to the jury under N.C. R. App. P. 10(b)(1).

2. Evidence— police report and testimony relating to police report—waiver of objections

The trial court did not err in a four-car automobile collision case by admitting into evidence certain notations contained in the police report and the testimony of a sergeant relating to the report because: (1) defendants' objection at the time the report was introduced into evidence was limited to the diagram of the accident scene and the narrative contained in the "describe what happened" portion of the report; and (2) having once allowed the evidence to come in without objection, defendants waived their objections to the evidence.

3. Evidence— hearsay—business records exception—descriptions in police report—first-hand knowledge

The trial court did not err in a four-car automobile collision case by admitting into evidence descriptions in the police report relating to vehicle #3 even though that vehicle fled the scene

since the business records hearsay exception under Rule 803(6) expressly provides for the use of information of those having first-hand knowledge of the incident in question and the record indicates several other witnesses with knowledge of the acts were present.

4. Appeal and Error— preservation of issues—liability insurance—motion in limine—failure to object at trial

The trial court did not err in a four-car automobile collision case by admitting into evidence the existence of liability insurance during cross-examination of a witness employed by the insurance company because defendants' pre-trial motion in limine to exclude all references to insurance is insufficient to preserve for appeal the question of the admissibility of evidence if the movant fails to further object to the evidence at the time it is offered at trial under Rule 10(b)(1).

Appeal by defendants from order entered 9 February 1998 by Judge Dennis J. Winner in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 February 1999.

Crews & Klein, P.C., by Paul I. Klein and James N. Freeman, Jr., for plaintiff-appellee.

Caudle & Spears, P.A., by L. Cameron Caudle, Jr. and J. Scott Lewis, and Anderson, Daniel & Coxe, by Henry L. Anderson, Jr., for defendants-appellants.

JOHN, Judge.

Defendants appeal the trial court's denial of their motion for judgment notwithstanding the verdict or, in the alternative, for new trial (defendants' motion). We find no reversible error.

Pertinent facts and procedural history include the following: On 15 November 1991, plaintiff Pamela Nunnery and defendant Eric Jonathan Baucom (Baucom) were each traveling eastbound on Rural Paved Road 2665 in Mecklenburg County, North Carolina. Baucom was operating an automobile registered to defendant Baucom's Nursery Company. Two vehicles separated those being operated by plaintiff and Baucom. Plaintiff stopped her automobile in a line of traffic waiting at a red light; Baucom failed to stop and struck the vehicle immediately preceding his. That automobile, driven by William Doggette, collided with the next preceding vehicle (whose

driver fled the scene shortly thereafter), which in turn struck plaintiff's automobile. Sergeant V.C. Lessane of the State Highway Patrol (Sergeant Lessane) prepared an accident report (the report) in the course of his investigation of the collision and issued a citation to Baucom for "failure to reduce speed."

Plaintiff complained of injuries at the scene and visited a local hospital emergency room the next day complaining of headache and soreness in her neck. Over the next three years, plaintiff sought treatment from numerous physicians for symptoms she attributed to the collision, including headaches, diffuse muscle pain and sleep paralysis.

Plaintiff filed the instant suit 14 November 1994 alleging "severe and painful injuries to her person" caused by Baucom's negligent driving. Sometime thereafter, defendants engaged the services of Laurie Rountree (Rountree), a private investigator. Rountree, using a pretext, developed a friendly relationship with plaintiff and visited her on several social occasions. Rountree testified regarding her impressions of plaintiff's physical condition, and conceded on cross-examination that she was being paid by defendants' insurance company.

At trial, the jury found Baucom negligent and returned a verdict in favor of plaintiff in the amount of $350,000.00. Defendants' motion followed, based

> primarily on the action by the Trial Court allowing an unredacted State Highway Patrol report . . . [to be] sent to the jury room during deliberations . . . .

The trial court denied defendants' motion 9 February 1998 and the latter timely appealed.

Defendants raise nine assignments of error, condensed into five main issues for our review. Assignments of error 5, 7, 8, 11, and 12 are not set out in appellant's brief and thus 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").

[1] Defendants first assert the trial court erroneously allowed the report to be sent to the jury room during jury deliberations. In a related argument, defendants assign error to the court's denial of their new trial motion based upon receipt of the report by the jury during deliberations. We conclude each contention is unavailing.

It is well settled that trial exhibits introduced into evidence may not be present in the jury room during deliberations unless both parties consent. *Doby v. Fowler*, 49 N.C. App. 162, 163, 270 S.E.2d 532, 533 (1980). Further,

> the failure to make a timely objection to the taking of the exhibits to the jury room does not waive the error; "specific consent is required" of all parties,

Robinson v. Seaboard System Railroad, 87 N.C. App. 512, 528, 361 S.E.2d 909, 919 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988) (quoting *Doby*, 49 N.C. App. at 164, 270 S.E.2d at 533), and "an indication of an unwillingness to consent is sufficient," *Dixon v. Taylor*, 111 N.C. App. 97, 109, 431 S.E.2d 778, 784 (1993) (citation omitted).

Plaintiff maintains defendants specifically consented, while defendants contend their objection was clear. Relevant portions of the trial transcript read as follows:

> THE COURT: They [the jury] want the accident report and the damage estimates. I take it that means—I don't remember what exhibits they were but the car damage. I presume they are wanting the car damage estimates. I guess that's all. Do you object?
>
> [DEFENDANTS' ATTORNEY]: No, I don't object for them having either one.
>
> THE COURT: You've both—
>
> [DEFENDANTS' ATTORNEY]: We've both got to consent, that's right.
>
> . . . .
>
> Your Honor, let me tell you what happened. We don't object to the two appraisals, we objected to the actual report. It's got stuff on there that it's my belief should have never gone on it. I object to that going back there. . . . .
>
> THE COURT: What do you all say.
>
> [PLAINTIFF'S ATTORNEY]: We propose sending it all back; sending the three items requested.
>
> THE COURT: . . . Well, the Court, in its discretion, is going to allow those exhibits to be submitted to the Jury.

Interpretations of the foregoing by plaintiff and defendants differ markedly. Plaintiff suggests that

> defense counsel clearly consented to the requested exhibits being given to the jury during deliberations, when asked by the Trial Court[, and was merely reiterating] his previous objection to the accident report being admitted into evidence

in the first instance. Defendants maintain their objection was unambiguously indicated by counsel's statement, "I object to that going back there."

We conclude defendants' reading of the cited exchange is the more accurate. The first statement of defendants' counsel simply comprised a response to the trial court's inquiry as to whether there was an objection to the damage estimates being sent to the jury. Defendants' counsel stated he did not "object [to] them having either one," an apparent reference to the appraisals, and shortly thereafter clarified, "[w]e don't object to the two appraisals, we objected to the actual report. . . . *I object to that going back there*" (emphasis added).

The acknowledgment of plaintiff's counsel that "three items [were] requested" and the court's directive that examination of the exhibits in the jury room was being allowed "in its discretion" support our reading of the transcript. As defendants point out,

> [i]f the trial judge believed that Mr. Anderson had consented, there would have been no reason for the judge to use his perceived discretionary powers in making this ruling.

Significantly, moreover, even under plaintiff's interpretation that defendants' counsel merely reiterated his objection to introduction of the report into evidence, nothing in the record indicates defendants registered the "specific consent" required by *Robinson*, 87 N.C. App. at 528, 361 S.E.2d at 919, to sending the report into the jury room. To the contrary, the record reflects "an indication of an unwillingness to consent," *Dixon*, 111 N.C. App. at 109, 431 S.E.2d at 784, on the part of defendants. Accordingly, the trial court erred in allowing the report to be viewed by the jury during the latter's deliberations. *See Robinson*, 87 N.C. App. at 527, 361 S.E.2d at 919.

Nonetheless, defendants are "not entitled to a new trial absent a showing that the error was prejudicial." *Gardner v. Harriss*, 122 N.C. App. 697, 700, 471 S.E.2d 447, 450 (1996); *see also Robinson*, 87 N.C. App. at 528, 361 S.E.2d at 919 ("party asserting the error must demon-

strate that he has been prejudiced thereby"). As our Supreme Court has stated,

> [n]ew trials are not granted for error and no more. The burden is on the appellant not only to show error but also to show that he was prejudiced to the extent that the verdict of the jury was thereby probably influenced against him.

Freeman v. Preddy, 237 N.C. 734, 736, 76 S.E.2d 159, 160 (1953) (citations omitted).

Defendants insist that allowing the report into the jury room was prejudicial for two reasons. First, defendants maintain the jury was allowed to view an unredacted version of the exhibit. When the report was first offered into evidence, defendants objected to Sergeant Lessane's entries in the "Estimated Original Traveling Speed" and "Estimated Speed at Impact" portions of the report. The trial court received the report into evidence upon redaction of the challenged entries.

According to defendants, however, an unredacted copy actually was delivered to the jury room. Defendants cite the affidavit of one juror, LaVera Bunn (juror Bunn), indicating the report sent to the jury room contained the complained of entries.

However, in ruling on defendants' motion, the trial court pointedly found, on the basis of the "arguments of counsel as well as the papers submitted in favor of and in opposition to the [m]otion," that the copy of the report "furnished to the jury had completely redacted from it all written entries for 'Estimated Original Traveling Speed' and 'Estimated Speed At Impact.' "

> [F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, *arguendo*, there is evidence to the contrary.

Lumbee River Electric Corp. v. City of Fayetteville, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). Although there is contrary evidence in the form of juror Bunn's affidavit, we must presume the trial judge's findings were based upon competent evidence in that defendants failed to include in the record on appeal either evidence or the verbatim transcript of the hearing relating to defendants' motion. *See Baker v. Baker*, 115 N.C. App. 337, 339, 444 S.E.2d 478, 480 (1994) (where plaintiff-appellant failed to include evidence or verbatim transcript in record, appellate court will not consider

assignments of error directed at trial court's findings of fact, but "must assume that the trial court's findings of fact [we]re supported by competent evidence").

> N.C.R. App. P. 9(a)(1)[(e)] requires that the record on appeal contain so much of the evidence, either in narrative form or in the verbatim transcript of the proceedings, as is necessary for an understanding of all errors assigned. *See also* N.C.R. App. P. 9(c). Where such evidence is not included in the record, it is presumed that the findings are supported by competent evidence, and the findings are conclusive on appeal.

In re Botsford, 75 N.C. App. 72, 74-75, 330 S.E.2d 23, 25 (1985).

In this context, we note with interest that among plaintiff's Objections to Proposed Record on Appeal was the following:

> 11. Appellee objects to the failure to include in the Proposed Record on Appeal the following items:
>
> . . . .
>
> (d) The transcript of the hearing before the [trial court] on the Defendants' Motion for Judgment Notwithstanding the Verdict 50(B)/Motion for New Trial . . . .

Upon defendants' request that the trial court settle the record on appeal, the parties resolved several of plaintiff's objections. The court, after "having heard arguments of counsel" on the matter, thereupon entered an order excluding the transcript. The absence of the transcript from the record thus apparently resulted from *defendants'* failure to include it therein and their subsequent resistance to plaintiff's objection challenging its omission.

In any event, defendants continue, prejudice is manifest whichever copy of the report was received by the jury because the jury was not allowed to review testimony of certain defense witnesses. According to defendants, plaintiff's "entire theory of [the] case . . . was based upon the accident occurring" as set out in the report, and

> [i]n effect, the jurors were given a summary of the plaintiff's entire case to review, while the defendants had no similar opportunity.

However, although the trial court acceded to defendants' request "to send every single exhibit so that they [the jury] can look at the dam-

age to the cars and the pictures," defendants failed to "present[] to the trial court a timely request, objection or motion" that any witness testimony be made available to the jury. N.C.R. App. P. 10(b)(1) (Rule 10(b)(1)). Therefore, defendants' argument has not been properly preserved for our review in that defendants made no "timely request" to the trial court. *Id.*

As noted above, it is defendants' burden to demonstrate prejudice resulting from erroneous receipt by the jury during deliberations of the report absent defendants' consent. *Freeman*, 237 N.C. at 736, 76 S.E.2d at 160. Having rejected defendants' two arguments asserting prejudice, we conclude they have failed to meet this burden.

In addition,

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

Pinckney v. Van Damme, 116 N.C. App. 139, 148, 447 S.E.2d 825, 831 (1994) (citations omitted). Having held defendants failed to demonstrate prejudice resulting from the jury's viewing of the report during deliberations without defendant's consent, we cannot say the trial court abused its discretion in denying defendants' motion based upon the jury's receipt of the report.

[2] Defendants also challenge the admission into evidence of certain notations contained in the report as well as the receipt of testimony from Sergeant Lessane related to the report. Defendants concede the report was admissible pursuant to N.C.G.S. § 8C-1, Rule 803(6) (1992) (Rule 803(6)); *see also Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988). However, defendants take issue with: (1) the notation therein that Baucom's "failure to reduce speed" was a "contributing circumstance[];" (2) the entry indicating $3500.00 as "estimated damages" to the Baucom and Doggette vehicles; (3) the diagram of the accident scene reflecting the location of "vehicle no. 3," the hit and run vehicle; and, (4) the portions of Sergeant Lessane's testimony wherein he repeated to the jury entries in the "describe what happened" and "tire impressions before impact" sections of the report.

Plaintiff interjects that several of defendants' contentions have not been properly preserved for appeal. We agree, based on the following portion of the trial transcript:

> [PLAINTIFF'S ATTORNEY]: Your Honor, at this time, I would move Plaintiff's Exhibit Number One [the accident report] into evidence.
>
> [DEFENDANTS' ATTORNEY]: Judge, we would object just to portions of that report.
>
> . . . .
>
> THE COURT: All right, to what do you object?
>
> [DEFENDANTS' ATTORNEY]: Judge, we would just simply object to the narrative portion where trooper—where Sergeant Lessane indicates that this was a four-car collision initiated by Mr. Baucom.
>
> . . . .
>
> [A]nd we would also object to the diagram that was drawn. The diagram was based upon where the vehicles were when Sergeant Lessane arrived at the scene. . . . .
>
> THE COURT: Is there any other portion to the accident report to which you object?
>
> . . . .
>
> [DEFENDANTS' ATTORNEY]: Judge, we just object to the diagram and the description.
>
> THE COURT: Overruled as to that. . . . .

The foregoing reveals that defendants' objection at the time the report was introduced into evidence was limited to (a) the diagram of the accident scene and (b) the narrative contained in the "describe what happened" portion of the report. Therefore, defendants' assertions of error relating to sections of the report labeled "contributing circumstances," "estimated damages" and "tire impressions before impact" have not been properly preserved for our review. *See* Rule 10(b)(1). Notwithstanding, defendants point to a later objection to testimony related to the tire impression portion of the report. However,

> [h]aving once allowed th[e] evidence to come in without objection, the defendants waived their objections to the evidence and lost the benefit of later objections to the same evidence.

State v. Burnett, 39 N.C. App. 605, 610, 251 S.E.2d 717, 720, *cert. denied*, 297 N.C. 302, 254 S.E.2d 924 (1979) (citations omitted).

[3] Defendants' surviving contentions both find fault with admission into evidence of descriptions in the report concerning "vehicle no. 3." Specifically, defendants assert that, in view of the failure of Sergeant Lessane to interview the operator of that automobile who fled the scene, the designation on the diagram of "vehicle no. 3" as being in contact with plaintiff's automobile should have been redacted, as well as that portion of the narrative "dealing with the motions and actions of vehicle no. 3." We do not agree.

This Court has previously held accident reports may be admissible under the business records exception to the hearsay rule, Rule 803(6), if several requirements are met:

> such reports must be authenticated by their writer, prepared at or near the time of the act(s) reported, by or from information transmitted by a person with knowledge of the act(s), [and] kept in the course of a regularly conducted business activity . . . .

Wentz, 89 N.C. App. at 39, 365 S.E.2d at 201.

Defendants do not dispute that the report herein was authenticated, prepared near the time of the acts, and kept in the regular course of business. Rather, defendants maintain that virtually no information relative to "vehicle no. 3" should have been admitted because the driver thereof was not present when Sergeant Lessane prepared the report. However, the record indicates several other witnesses "with knowledge of the act(s)," *id.*, were present.

> The business records exception expressly provides for the use of information from those having first-hand knowledge of the incident in question.

Id. at 40, 365 S.E.2d at 201. Sergeant Lessane testified he prepared the report "from the statements that were presented to me by the drivers at the scene," each of which possessed "first-hand knowledge," *id.*, of the collision and the involvement therein of "vehicle no. 3," and that none, including Baucom, objected to the narrative contained in the report. The trial court thus did not err in admitting the report notwithstanding that Sergeant Lessane was unable to obtain a statement from the operator of "vehicle no. 3." *See id.; see also Keith v. Polier*, 109 N.C. App. 94, 98, 425 S.E.2d 723, 726 (1993) (accident report "sufficiently trustworthy" and admissible under Rule 803(6) when based

upon information received from drivers involved in collision who registered no objection to conclusions contained therein upon review at the collision scene).

[4] Lastly, defendants maintain the trial court erroneously admitted evidence relating to the existence of liability insurance during cross-examination of Rountree. Preliminarily, we examine plaintiff's assertion that this assignment of error has not been properly preserved for appellate review. *See* Rule 10(b). Based upon a recent ruling of our Supreme Court, we hold it was not.

Defendants filed a pre-trial motion *in limine* to exclude all references to "insurance companies, proceeds, policies, et cetera." Several days later, after reading the transcript of Rountree's deposition and after conducting two *voir dire* examinations of Rountree, the trial court ruled that Rountree could be "cross-examined about [being] employed by [defendants'] insurance company," but that it would instruct the jury to consider this testimony only as it related to witness bias. Defendants concede they interjected no objections to individual questions regarding insurance during plaintiff's cross-examination of Rountree.

A motion *in limine* seeks "pretrial determination of the admissibility of evidence proposed to be introduced at trial," and is recognized in both civil and criminal trials. *State v. Tate*, 44 N.C. App. 567, 569, 261 S.E.2d 506, 508, *rev'd on other grounds*, 300 N.C. 180, 265 S.E.2d 223 (1980). The trial court has wide discretion regarding this advance ruling and will not be reversed absent an abuse of discretion. *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff'd*, 328 N.C. 88, 399 S.E.2d 113 (1991).

In addition, a trial court's ruling on a motion *in limine* is not final, but rather interlocutory or preliminary in nature, and the court's ruling on such motion is subject to modification during the course of the trial. *State v. Swann*, 322 N.C. 666, 686, 370 S.E.2d 533, 545 (1988). Accordingly,

> [t]he rule is that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to the evidence at the time it is offered at trial."

Martin v. Benson, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)).

Defendants insist a different rule should apply, citing simultaneous decisions by this Court in *Pack v. Randolph Oil Co.*, 130 N.C. App. 335, 502 S.E.2d 677, *disc. review denied*, 349 N.C. 361, — S.E.2d — (1998), and *State v. Hayes*, 130 N.C. App. 154, 502 S.E.2d 853 (1998), which appeared to alter the established rule. However, these cases have recently been expressly "disavow[ed]" and the "old" rule reaffirmed by our Supreme Court in the appeal from the *Hayes* decision. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (motion *in limine* insufficient to preserve for appeal question of admissibility of evidence if movant fails to object to evidence at time evidence is offered at trial).

Based on the foregoing, we hold that defendants have failed to preserve for our review their objection to testimony by Rountree tending to show the existence of liability insurance. *See* Rule 10(b)(1) (to preserve question for appellate review, party "must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired"; complaining party must also obtain a ruling on the objection). We further note that

> the apparent rule change in *Pack* and *Hayes* came well after trial of the case *sub judice*, so [defendants] could in no wise have been prejudiced by any language therein.

Heatherly v. Industrial Health Council, 130 N.C. App. 616, 623, 504 S.E.2d 102, 107 (1998).

No Error.

Judges WALKER and McGEE concur.

BURKE HEALTH INVESTORS, L.L.C. D/B/A BURKE HEALTH CARE CENTER, PETITIONER/APPELLANT V. N.C. DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT/APPELLEE, AND CAROLINA HEALTH CARE CENTER, OF BURKE, L.L.C., RESPONDENT-INTERVENOR/APPELLEE

No. COA98-1399

(Filed 16 November 1999)

1. Hospitals— certificate of need—application—no improper amendment

A certificate of need (CON) applicant did not impermissibly amend its application when it commented during the review process that it had made a typographical error in the private pay rate and a transcription error in the working capital requirement. The applicant neither sought to amend its application to set forth the higher pay rate nor requested that the Department accept the higher rate and the transcription error was apparent on the face of the application because the correct figure was clearly shown in another section and was relied upon by the Department. The information provided in the comments neither changed the application nor had any impact on the agency's determination.

2. Hospitals— certificate of need—application—Medicaid rates

The Department of Human Resources did not err in its decision that a certificate of need applicant's projected Medicaid rate was not in violation of Medicaid regulations and that the applicant had not overstated its projected Medicaid revenues where the rate projected by the applicant was the gross rate rather than the actual rate of reimbursement, but the applicant also projected a Medicaid payback which was lower than the projected private pay rates, as required, and which was found to be reasonable by the Department.

3. Hospitals— certificate of need—application—errors—insignificant

The Department of Human Resources' decision to grant a certificate of need was not arbitrary or capricious and was not made upon unlawful procedure where the errors pointed out by petitioner in the winning applicant's application were insignificant and did not affect the feasibility of the project.

4. Hospitals— certificate of need—application—financial feasibility

The Department of Human Resources did not err by approving a certificate of need application because it was allegedly financially infeasible where a letter of interest was sufficient evidence of a bank's intent to commit funds, the immateriality of a $750 shortfall was supported by evidence of personal assets which were more than sufficient to cover the shortfall, and a challenged line of credit and source of funds were not relied upon by the department because other assets exceeded the total costs of the project.

5. Hospitals— certificate of need—conditional approval

The Department of Human Resources did not act inappropriately by approving a certificate of need application subject to certain conditions where the conditions were not essential to the approval and did not render the application nonconforming. The practice of conditioning applications is authorized by N.C.G.S § 131E-186 and N.C.G.S.§ 131E-87 (a) and has been approved by the Court of Appeals.

6. Hospitals— certificate of need—proper procedure

The Department of Human Resources adhered to the procedure in *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, in granting a certificate of need where it first analyzed each individual application to determine the extent to which each application conformed to the statutory criteria, then entered exhaustive findings with respect to the relative merits of the applications before concluding that one application was comparatively superior.

Appeal by petitioner Burke Health Investors, L.L.C., from the final agency decision entered 6 July 1998 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 25 August 1999.

Smith Helms Mulliss & Moore, L.L.P., by Maureen Demarest Murray and Susan M. Fradenburg, for Burke Health Investors, L.L.C., petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Melissa L. Trippe, for the State.

Bode, Call, & Stroupe, L.L.P., by Robert V. Bode, S. Todd Hemphill, and Anthony D. Taibi, for Carolina Health Care Center, L.L.C., respondent-intervenor-appellee.

MARTIN, Judge.

Petitioner-appellant Burke Health Investors, L.L.C., ("Burke") appeals from a final decision of the North Carolina Department of Health and Human Services (formerly Department of Human Resources) ("the Department") to issue a Certificate of Need to respondent-intervenor-appellee Carolina Health Care Center, L.L.C., ("Carolina") for ninety nursing facility beds in Burke County.

The 1997 State Medical Facilities Plan established a need for ninety nursing facility beds in Burke County. Ten applicants, including Burke and Carolina, filed competing applications with the Department's Division of Facility Services, CON Section, for a Certificate of Need to fulfill this need. On 27 June 1997, the CON Section completed the review process prescribed by G.S. § 131E-185 and issued its written decision conditionally approving Carolina's application and denying approval of all of the competing applications.

Burke and another unsuccessful applicant, which is no longer involved in this proceeding, petitioned for contested case hearings pursuant to G.S. § 131E-188(a). An administrative law judge ("ALJ") issued recommended decisions essentially advising that neither Burke's application nor Carolina's application conformed with statutory criteria for a CON and that neither application should be approved. On 6 July 1998, the Department issued its Final Decision reversing the recommended decision of the ALJ and affirming the initial decision of the CON Section to approve Carolina's application for a Certificate of Need and to disapprove Burke's application. Burke appeals the final agency decision directly to this Court pursuant to G.S. § 131E-188(b).

The standard of judicial review of a final decision of the Department of Health and Human Services, appealed pursuant to G.S. § 131E-188(b), is governed by G.S. § 150B-51(b), which provides, in pertinent part:

> (b) Standard of Review.—. . .[T]he court reviewing a final [Agency] decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the peti-

tioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150(b)-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Where the appealing party alleges that the agency made an error of law, seeking review under subsections (1), (2), (3) or (4), the agency's decision is reviewed *de novo*, meaning that this Court looks at the question anew. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Where the appellant argues that the agency decision was unsupported by the evidence, or was arbitrary and capricious, the "whole record test" is applied. *Id.* The whole record test requires the reviewing court to examine all competent evidence in order to determine whether the agency decision is supported by substantial evidence. *Fearrington v. Univ. of North Carolina at Chapel Hill*, 126 N.C. App. 774, 487 S.E.2d 169 (1997). More than one standard of review may be utilized if the nature of the issues raised so requires. *Amanini v. North Carolina Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994).

I.

[1] Burke first argues the Department's decision was made upon unlawful procedure in that Carolina was permitted to amend its application in violation of CON regulation 10 N.C.A.C. 3R.0306, which prohibits an applicant from amending its application after the filing deadline. *See Presbyterian-Orthopaedic Hosp. v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 470 S.E.2d 831 (1996). Burke's contentions require a *de novo* standard of review.

In its application, Carolina stated a second year private pay skilled care rate of $121.43. In addition, Carolina stated that the total working capital required for the project was $93,203. Subsequently,

during the review process mandated by G.S. § 131E-185(a1), Carolina commented that it had made a typographical error in the private pay rate listed in the application and that the private pay rate should have been $127.43. In addition, Carolina commented that the working capital requirement of $93,203 listed in its application was a transcription error, but that the working capital requirement had been correctly listed as $181,639 in another section of the application. Burke contends these comments amounted to impermissible amendments to Carolina's application. We disagree.

While Carolina acknowledged the private pay rate error in its comments, it neither sought to amend its application to set forth the higher rate nor requested that the Department accept the higher rate; revenues using the lower rate were still financially feasible. The transcription error with respect to the required working capital was apparent on the face of the application; the correct figure was clearly shown in another section of the application and was relied upon by the Department in its analysis of the application. The information provided by Carolina in its comments neither changed its application nor had any impact on the agency's determination that the application met the statutory criteria. Therefore, its comments were not an unauthorized amendment to the application. *See In Re Conditional Approval of Certificate of Need*, 88 N.C. App. 563, 364 S.E.2d 150, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 220 (1988); *Humana Hosp. Corp. v. Dept. of Human Resources*, 81 N.C. App. 628, 345 S.E.2d 235 (1986). The Department's determination that Carolina did not impermissibly amend its application was correct.

II.

[2] Burke also contends the department's decision was affected by error of law because Carolina's application violated State and Federal Medicaid requirements. This contention also requires a *de novo* standard of review.

In its application, Carolina listed a proposed skilled care Medicaid rate which was higher than its proposed skilled care semi-private rate. Under State and Federal Medicaid regulations, Medicaid payments may not exceed the rates charged private patients and a nursing facility is limited to the lesser pay rate. *CCH NC Medicare and Medicaid Guide* ¶ 15,622 at 6581-4 (1997). Burke argues that Carolina's application violated these regulations, and further, that because the revenues based on the proposed Medicaid rates proposed in Carolina's application were overstated, the application was

not financially feasible, was not cost effective, and did not conform to statutory criteria contained in G.S. § 131E-183(a)(4), (5), and (18a). We reject these contentions.

The Medicaid rate projected by Carolina was a gross Medicaid rate, based on a formula provided CON applicants by the CON Section. The Medicaid rate projected in the application was not the actual rate at which a facility is reimbursed for Medicaid patients; the actual rate is based on the facility's actual costs as reported to the Division of Medical Assistance at the end of each year and is generally lower than the gross rate projected by CON applicants. In its application, Carolina projected a Medicaid "payback" based upon the projected costs of its services. The Medicaid "payback" projected by Carolina results in a projected actual net Medicaid rate which is lower than its projected private pay rates. These projections of costs and revenues were found to be reasonable by the Department and Burke has taken no exception to this finding. Thus, we affirm the Department's decision that Carolina's projected Medicaid rate was not violative of Medicaid regulations and that Carolina did not overstate its projected Medicaid revenues.

III.

[3] Next Burke argues that the Department made findings based upon information contained in Carolina's application which the Department knew was incorrect. Therefore, Burke contends, the decision was made upon improper procedure and was arbitrary and capricious. These contentions require both *de novo* and whole record standards of review.

As examples of the incorrect information upon which it contends the Department relied, Burke points us to Carolina's error in stating the private pay skilled nursing care rate in its application and an error in Carolina's pro formas with respect to the cost of its medical director. However, as we have already noted, Carolina accepted the lower private pay rate stated in the application and the Department's analysis assumed those rates in assessing the financial feasibility of the project. Similarly, the Department's project analyst, Mr. Loftin, recognized the error in the stated cost for the medical director. Mr. Loftin then carefully scrutinized Carolina's financial data and determined that Carolina budgeted sufficient funds to pay for the position of medical director without affecting costs. The errors pointed out by Burke in its brief are insignificant, did not affect the feasibility of the project, and were considered in the Department's analysis of Carolina's

application. Thus, the Department's decision was not made upon unlawful procedure and was neither arbitrary nor capricious, having been based upon a comprehensive, logical and reasonable review of Carolina's application.

IV.

[4] Grouping seven assignments of error under its next argument, Burke contends the Department erred in approving Carolina's application because it was not financially feasible as required by G.S. § 131E-183(a)(5). Because Burke claims the financial information submitted by Carolina was insufficient to show the availability of funds for the project, we review its contentions utilizing a whole record standard of review.

The final decision of the Department found Carolina's application consistent with the review criterion set forth in G.S. § 131E-183(a)(5):

> (5) Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

After determining that the total expenditures necessary for the project totaled $3,282,626, the Department found that the following funds were available for the project: (1) a $2,325,000 First Union Bank Loan; (2) $112,899 in cash from Karen Waldron; (3) $1,613,438 of marketable securities belonging to Karen Waldron; (4) $300,000 in cash from Heywood Fralin; and (5) $508,730 of marketable securities belonging to Heywood Fralin, a total of $4,860,067, and exceeding the funds necessary for the project by over a million dollars.

Burke challenges both the availability and the amount of the bank loan, and the availability of two other funding sources listed in the Carolina application; a $4,000,000 line of credit, and cash and marketable assets of Elbert Waldron. Each of these challenges must fail.

The availability of the bank loan was evidenced by a letter of interest provided by First Union Bank. Citing *Retirement Villages, Inc. v. North Carolina Dept. of Human Resources*, 124 N.C. App. 495, 477 S.E.2d 697 (1996), Burke argues that First Union's letter of interest is too speculative, a "mere expression of interest," rather than a

specific intent to commit funds. Burke's reliance on *Retirement Villages* is misplaced.

In *Retirement Villages*, the applicant failed to provide sufficient evidence that all of the financial sources listed on the CON application were committed to the project. Beaver Properties, the applicant, planned to procure funding from Brian Center Management Corporation ("BCMC") and Brian Center Corporation ("BCC"). BCMC would receive its funding from NationsBank. NationsBank provided a letter indicating its interest in loaning BCMC the amount necessary for the project. BCC submitted a letter indicating its interest in loaning Beaver Properties a portion of the necessary funding. BCMC provided no letter indicating its intent to provide the remaining funds to Beaver Properties. In other words, Beaver Properties failed to evidence an essential link in the funding chain. No such problem is inherent in the present case. First Union expressed an interest in loaning $2,325,000 to Carolina, the applicant proposing the project. The letter of interest was sufficient evidence of First Union's intent to commit funds.

Burke also claimed that the amount of the loan was deficient because the loan amount listed in the letter of interest submitted by First Union was $750 less than the amount Carolina indicated they would borrow from First Union. The Department found: "This shortfall is not material because the personal assets of Heywood Fralin and Karen Waldron are more than sufficient to cover the $750 shortfall." As Burke does not challenge the availability of the Fralin and Waldron assets, the immateriality of the $750 shortfall is supported by sufficient evidence in the record.

Burke also argued that the project was not financially feasible because a $4,000,000 line of credit and certain funds alleged to be available through Elbert Waldron were not, in fact, available; no documentation was presented to evidence the line of credit, and Elbert Waldron was deceased. However, the Department found that Carolina had sufficient funds for the project "irrespective of the $4,000,000 line of credit referenced in the CHCC application." Further, finding number 31 stated that "the CON section did not rely upon the financial statements of Elbert Waldron in concluding that there were sufficient funds to finance its proposal." There is sufficient evidence in the record to support these findings; the bank loan and the unchallenged assets of Karen Waldron and Haywood Fralin exceed the total capital costs for the project. These assignments of error are overruled.

V.

Burke next contends the Department erred when it approved Carolina's application and did not approve Burke's application. Burke contends Carolina's application did not meet all applicable criteria, as evidence by the CON Section's imposition of conditions upon its approval, and that Burke's application met all of the statutory criteria. Burke's argument presents essentially two questions; (1) whether the Department may find that an application is consistent with the statutory criteria while imposing conditions upon it; and (2) whether the Department erred by approving Carolina's application rather than Burke's. These contentions raise legal questions and we review them *de novo*.

A.

[5] In its initial agency decision, the CON Section approved Carolina's application subject to certain conditions which included additional documentation of information contained in Carolina's application. Burke argues the Department acted inappropriately by imposing these conditions, asserting that the conditions would not have been necessary if Carolina's application had conformed to the statutory criteria. However, the practice of conditioning applications is authorized by the Certificate of Need statute itself, *see* N.C. Gen. Stat. § 131E-186 and N.C. Gen. Stat. § 131E-187(a), and has been approved by this Court in *Humana Hosp. Corp. v. North Carolina Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986), where we stated "the law does not require that applications for certificates of need be approved precisely as submitted or not at all, and it would be folly if it did so."

Moreover, the conditions placed upon Carolina's application were not essential to its approval. The application was conditioned upon the provision of documentation from Fralin and Waldron showing which of them would be responsible for the owner's equity portion of the capital expenses, and which would be responsible for the start up and initial operating expenses. This documentation was not crucial to a finding of financial feasibility, however, because the evidence shows that Fralin and Waldron intended the funding to be available for whatever purpose necessary. The funding itself is evidenced by copies of financial statements. The conditions did not render the application nonconforming.

B.

[6] Burke argues further that the decision to grant Carolina the certificate rather than Burke was made upon improper procedure. The procedure by which the Department is to weigh superiority among competing applications is not specifically mandated by statute. In *Britthaven, Inc. v. North Carolina Dept. of Human Resources*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460, *disc. review denied*, 451 N.C. 418, 461 S.E.2d 754 (1995), this Court noted that "[a] two stage process . . . is consistent with the language, purpose and overall scheme of the statute." The first of these steps requires the Department to "batch" all applications for competing proposals and determine whether each individual application conforms with the criteria of G.S. § 131E-183(a). *Id.* The second step requires the Department to decide which of the competing applications should be approved. Factors to consider include "whether and to what extent the applications meet the statutory and regulatory criteria, but it may also include other 'findings and conclusions upon which it based its decision.' " *Id.* at 385, 455 S.E.2d at 461 (quoting N.C. Gen. Stat. § 131E-186(b)). The Department adhered to this procedure in this case. It first analyzed each individual application to determine the extent to which each application conformed to the statutory criteria, then entered exhaustive findings with respect to the relative merits of the applications, comparing such things as Medicaid access, costs for services, operating costs, types of services, staffing, and location before concluding that Carolina's application was comparatively superior.

VI.

We have considered the remaining assignments of error brought forward in Burke's final argument and conclude they are without merit and do not entitle Burke to any relief. The Department's final agency decision granting Carolina a Certificate of Need is affirmed.

Affirmed.

Judges LEWIS and HUNTER concur.

STATE OF NORTH CAROLINA v. BRUCE CHISHOLM

No. COA98-1302

(Filed 16 November 1999)

1. Appeal and Error— mootness—amended statute

An appeal from a DWI vehicle seizure statute which has been amended was not mooted because a decision regarding the constitutionality of the statute also impacts other vehicle owners whose cars have been seized and because the underlying premise of the statute remains the same.

2. Motor Vehicles— DWI vehicle seizure—Fourth Amendment

The trial court had no basis for finding that the seizure of an automobile under DWI statutes violated the Fourth Amendment where defendant was arrested for driving while intoxicated and with a revoked license, and a magistrate found probable cause for the arrest and probable cause for the seizure of the vehicle. The warrantless seizure of a motor vehicle does not violate the Fourth Amendment if the officer has probable cause to believe that the vehicle is subject to forfeiture. N.C.G.S. § 20-28.3.

3. Motor Vehicles— DWI vehicle seizure—due process

Due process was not violated when defendant's car was seized under DWI statutes; a long line of cases holds that due process is met when a motor vehicle is seized without prior notice or a proper hearing.

4. Motor Vehicles— DWI vehicle seizure—equal protection

Equal protection was not violated by the seizure of defendant's automobile under the DWI statutes because the statutes in question made no classifications. Even if the "innocent owner" exception was a classification, it was quite rational.

5. Motor Vehicles— vehicle seizure—Law of the Land Clause

The DWI seizure statutes are constitutional under Article 1, Section 19 of the North Carolina Constitution because they have a legitimate objective (keeping impaired drivers and their cars off the roads) and the means (seizing the cars) are directly related to the goal.

Judge JOHN voting to dismiss appeal.

Appeal by the State of North Carolina and Carteret County from judgment entered 18 September 1998 by Judge Paul Quinn in District Court, Carteret County. Heard in the Court of Appeals 26 August 1999.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General for the State.

Hallett S. Ward, III for petitioner-appellee.

WYNN, Judge.

North Carolina allows a driver's vehicle to be seized and forfeited if the driver violates the State's impaired driving and license revocation laws. In this case, the district court found that the seizure and forfeiture statutes were unconstitutional under both the United States Constitution and the North Carolina Constitution. We, however, uphold the constitutionality of the seizure and forfeiture statutes; accordingly, we reverse the decision of the district court.

I. Facts and Procedural History

On 19 April 1998, an officer charged the defendant Bruce Chisholm with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 (1993) and driving while his license was revoked in violation of N.C. Gen. Stat. § 20-28 (Supp. 1997). The officer seized and impounded the vehicle driven by Chisholm under N.C. Gen. Stat. § 20-28.3 (Supp. 1997).

Before recent amendments, N.C. Gen. Stat. §§ 20-28.2 through 20-28.7 (Supp. 1997) (hereafter the "DWI Seizure Statutes") provided for the seizure and possible forfeiture of any vehicle driven by a person under the influence while his license was revoked as the result of a prior impaired driving incident. The seized vehicle would be towed and stored until the driver's hearing. If the district court dismissed the charges or found the driver not guilty of impaired driving while his license was revoked, the vehicle would be released. If the driver was found guilty, the vehicle would be forfeited—either kept by the school board of the county in which the vehicle was seized, or sold.

The DWI Seizure Statutes had an "innocent owner" defense which allowed a non-operator owner of a seized vehicle to regain his vehicle regardless of whether the defendant was found guilty or not guilty. An "innocent owner" was an owner who either did not know that the driver of the vehicle had his license revoked, or *did* know about the revocation but did not give permission for the defendant to use

the car. An innocent owner could regain possession of his car before the defendant's trial, but only by proving his "innocence," paying all storage and towing fees, and filing a bond worth twice the value of the seized vehicle. If the defendant was found not guilty, a seized vehicle would be released to its owner, along with any fees paid for the pre-trial release of the car.

In this case, the officer seized and impounded the vehicle driven by defendant Chisholm under the authority of N.C. Gen. Stat. § 20-28.3. The car, a 1990 Ford, belonged to the petitioner, Lummie Dillard, who moved in the cause to have the car returned to him without payment of towing and storage fees. He argued that the DWI Seizure Statutes were unconstitutional as applied to him as well as to lienholders and others similarly situated.

Following a hearing in the District Court of Carteret County, the trial judge agreed with Mr. Dillard and found that the DWI Seizure Statutes were unconstitutional in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Accordingly, the trial judge released the vehicle to Mr. Dillard. The State appealed from that determination to this Court.

Since the filing of this appeal, the General Assembly has amended the DWI Seizure Statutes to allow a faster and easier return of a vehicle to a non-driver owner. For instance, the owner does not have to prove his "innocence" before the car may be returned—innocence may be determined later—and the bond filed in lieu of the car must be equal to the value of the car, not twice its value. However, the general nature of the statutes are unchanged—the provisions which allow seizures and forfeitures of vehicles for violations of the DWI Seizure Statutes are still in place.

II. Is This Case Moot?

[1] On appeal, Mr. Dillard initially urges this Court to dismiss the State's appeal as moot. We, however, find that this matter is not moot.

An appeal which presents a moot question should be dismissed. *See Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 443 S.E.2d 127, *dismissal allowed and review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994). If the issues giving rise to the action become moot at any time during the proceedings, the court should dismiss the action. *See In Re Peoples*, 296 N.C. 109, 250 S.E.2d 890, *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L. Ed. 2d 297 (1979). An exception

exists where the question involved is a matter of public interest. *See Matthews v. N.C. Dep't of Transp.*, 35 N.C. App. 768, 242 S.E.2d 653 (1978).

Since the trial court's decision regarding the constitutionality of the DWI Seizure Statutes will also impact other vehicle owners whose cars have been seized, a resolution of this case may be required if only to establish the rights of non-parties whose vehicles were seized under the statutes in question.

Moreover, regardless of whether the requisite "public interest" is present, we hold that the case is not moot because a controversy still exists. While the procedures for handling seized vehicles have been amended, the underlying premise of the applicable statute is still the same—namely, that a motor vehicle used contrary to North Carolina's impaired driving and license revocation statutes can be seized and forfeited. If the decision of the district court is reversed, findings of fact by the trial court on remand may still allow the vehicle to be seized and forfeited. It will of course be up to the trial court to determine whether Mr. Dillard qualifies as an "innocent owner" and whether the statutes in question dictate the forfeiture of the car, but since such issues of fact may be determined even after the changes in the statutes, this case is not moot.

III. Constitutional Arguments

The State first argues that the DWI Seizure Statutes were not unconstitutional under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and under Article I, section 19 of the North Carolina Constitution. We agree.

We note at the outset that Mr. Dillard offers very little in the way of support for his arguments. His statements of the law are eloquent, but very general, and they pale next to the strength and specificity of the State's arguments. However, since we cannot accept the State's version of the law on its face, we will address each constitutional point in turn.

A. The Fourth Amendment

[2] The trial court concluded that the DWI Seizure Statutes violated the Fourth Amendment of the United States Constitution in that the seizure of an innocent person's property is unreasonable and bears no rational relationship to any legitimate government purpose. We disagree.

Indeed, the Fourth Amendment does not prohibit all seizures, only unreasonable ones. *See Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L. Ed. 1399, *reh'g denied*, 331 U.S. 867, 67 S.Ct. 1527, 91 L. Ed. 1871 (1947); *State v. Flemming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). The warrantless seizure of a motor vehicle does not violate the Fourth Amendment if the officer has probable cause to believe that the vehicle is subject to forfeiture, *see Florida v. White*, —— U.S. ——, 119 S.Ct. 1555, 143 L. Ed. 2d 748 (1999), or that the vehicle is the instrument of a crime, *see State v. Islieb*, 319 N.C. 634, 356 S.E.2d 573 (1987).

The defendant, Bruce Chisholm, was arrested for driving while intoxicated and while his license was revoked. The magistrate found probable cause for the arrest and probable cause for the seizure of the vehicle the defendant drove. Since the record shows that there was probable cause to believe that the vehicle was being used illegally, the district court had no basis for finding that the seizure of Mr. Dillard's automobile violated the Fourth Amendment.

B. The Fifth and Fourteenth Amendments

[3] The trial court also concluded that the DWI Seizure Statutes violated the Fifth and Fourteenth Amendments to the United States Constitution. Again, we disagree.

The Fifth Amendment's Due Process Clause imposes limits on the federal government, not the state governments. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713, 102 S.Ct. 2099, 2110, 72 L. Ed. 2d 492, 508 (1982).

It is the Fourteenth Amendment's Due Process Clause that protects individuals from violations by the states, *id.*, so any due process arguments must be supported by this Amendment. However, the trial court's finding that the DWI Seizure Statutes violated the Fourteenth Amendment is also in error since both United States and North Carolina precedent say otherwise.

First, the district court found that the seizure of Mr. Dillard's vehicle violated the Due Process Clause of the Fourteenth Amendment. However, a long line of both United States and North Carolina cases hold that due process is met when a motor vehicle is seized without prior notice or a proper hearing.

> Although the general rule is that procedural due process requires notice and an opportunity to be heard before there can be a

denial of any vested property right or interest, courts have consistently upheld statutes that provide for the immediate seizure or forfeiture of vehicles that have been used in violation of the law.

State v. Richardson, 23 N.C. App. 33, 37, 208 S.E.2d 274, 276, *cert. denied*, 286 N.C. 213, 209 S.E.2d 317 (1974) (citing *United States v. Mills*, 440 F.2d 647 (6th Cir. 1971), *cert. denied*, 404 U.S. 837, 92 S.Ct. 127, 30 L. Ed. 2d 70 (1971); *Weathersbee v. U.S.*, 263 F.2d 324 (4th Cir. 1958); *Fell v. Armour*, 355 F.Supp. 1319 (M.D. Tenn. 1972); *C.I.T. Corp. v. Burgess*, 199 N.C. 23, 153 S.E. 634 (1930).) The seizure of Mr. Dillard's vehicle was the result of Mr. Chisholm's violation of the DWI Seizure Statutes. Thus, due process was not violated when his car was seized.

Moreover, although the statutes in question contained "innocent owner" provisions, such defenses are not required for a seizure statute to pass constitutional muster. In *Bennis v. Michigan*, 516 U.S. 442, 116 S.Ct. 994, 134 L. Ed. 2d 68, *reh'g denied*, 517 U.S. 1163, 116 S.Ct. 1560, 134 L. Ed. 2d 661 (1996), the United States Supreme Court held that due process does not require an innocent owner defense. A vehicle used to facilitate criminal activity can be seized and forfeited even if the owner is unaware of what the car is used for. The Court also said that such a forfeiture is not a taking requiring just compensation because it is an exercise of the state's police powers. *Id.* at 442, 116 S.Ct. at 996, 134 L. Ed. 2d at 72.

[4] Second, the district court concluded that the DWI Seizure Statutes denied equal protection of the law to innocent parties. However, the Equal Protection Clause of the Fourteenth Amendment protects citizens from irrational classifications. To invoke the protection of this Amendment, a classification must be made. *See Phelps v. Phelps*, 337 N.C. 344, 350, 446 S.E.2d 17, 20, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 750 (1994). The statutes in question made no classifications—they applied equally to all persons whose vehicles were used in an illegal manner.

Nonetheless, the district court found that the DWI Seizure Statutes "denie[d] equal protection of the laws to innocent persons." However, the seizure of vehicles still applied equally to all owners. And, while the "innocent owner" exception allowed innocent owners to recover their vehicles while others could not, that exception served only to protect those vehicle owners who were without fault in the commission of a crime. Thus, even if the "innocent owner" exception was a classification, it was most assuredly quite rational.

C. Article I, Section 9

[5] The district court also ruled that the DWI Seizure Statutes violated the Law of the Land Clause under North Carolina Constitution Art. I, § 19. The Law of the Land Clause is the equivalent of the Fourteenth Amendment's Due Process Clause. *See State v. Collins*, 169 N.C. 323, 84 S.E.2d 1049, 1050 (1915); *Buchanan v. Hight*, 133 N.C. App. 299, 515 S.E.2d 225, 230 (1999). Since the clauses are equivalent, "a decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C. App. 1, 510 S.E.2d 170, 174 (1999).

Having already determined that the DWI Seizure Statutes did not violate the Fourteenth Amendment's Due Process Clause, there is a presumption the Statutes did not violate the Law of the Land Clause. Nonetheless, a statute can still be unconstitutional under Art. I, § 19 even if it passes muster under the United States Constitution. *See In re Meads*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998). The constitutional inquiry under the Law of the Land Clause is two-fold: (1) does the statute have a legitimate objective, and (2) if so, are the means chosen to implement that objective reasonable? *Id.*

We hold that the DWI Seizure Statutes have a legitimate objective—keeping impaired drivers and their cars off of the roads. The means chosen to further the goals of the statutes—seizing the cars to remove them from the roads—is directly related to the goal of the statutes. Using the two-prong test, the DWI Seizure Statutes are constitutional under Art. I, § 19 of the North Carolina Constitution.

III. The State's Other Arguments

The State also argues that the district court improperly decided this case because (1) the court lacked jurisdiction to decide the constitutional questions, and (2) Mr. Dillard failed to serve the State Attorney General under N.C. Gen. Stat. § 1-260 (1996), which requires that the Attorney General be served in any matter challenging the constitutionality of a statute. Since we have now determined that no constitutional questions remain, the only issues for the lower court to decide are the factual issues involved in the DWI Seizure Statutes. This being the case, the petitioner does not need to serve the Attorney General and the remaining issues can be decided in the district court.

IV. Conclusion

For the reasons given above, the district court incorrectly declared N.C. Gen. Stat. §§ 20-28.2 through 20-28.7 (Supp. 1997) unconstitutional. The decision of the district court is reversed and remanded to determine the fate of Mr. Dillard's vehicle under the current version of the statutes.[1]

Reversed and remanded.

Judge EDMUNDS concurs.

Judge JOHN dissents in a separate opinion.

Judge JOHN voting to dismiss appeal.

Because I believe the issues raised by the instant appeal are moot, I neither concur in nor dissent from the majority opinion, but vote to dismiss the appeal.

Our Supreme Court has observed,

> [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) (citation omitted).

Further,

> [w]henever 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. . . . 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.

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1. Since the trial court awarded possession of the vehicle to Mr. Dillard and the State did not obtain a stay of that order pending this appeal, it may well be that any attempt to obtain the vehicle will be futile. Nonetheless, we answer only the question before us—the constitutionality of the DWI Seizure Statutes—and not the issue of how the State may now enforce those statutes as to the vehicle delivered under court order to Mr. Dillard over a year ago.

Simeon v. Hardin, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citations omitted). This is true even if, as here, the action is brought as a declaratory judgment action. *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 498 (1987).

Petitioner originally challenged seizure of his vehicle under N.C.G.S §§ 20-28.2 -28.7 (Supp. 1997). As the majority acknowledges, those statutes were amended by 1998 N.C. Sess. Laws ch. 182, sec. 2-8, which amendments became effective 15 October 1998 and 1 December 1998, nearly one year ago, and are now codified at N.C.G.S. §§ 20-28.2 -28.9 (Supp. 1998). The amendments pertain, *inter alia*, to procedures for determination (1) of qualification as an innocent owner, G.S. § 20-28.2(a1)(2), (e); (2) of when a seized vehicle may be released before trial, G.S. § 20-28.3(e1); (3) of when a seized vehicle may be released without a hearing, *id.*; and, (4) of when a defendant convicted of impaired driving must reimburse an innocent owner for costs associated with seizure of his vehicle, G.S. § 20-28.3(*l*).

I believe the constitutional issues *sub judice* have been rendered moot by the foregoing comprehensive amendments. As petitioner properly observes,

> [w]hile the underlying premise of the [DWI Seizure Statutes] as revised may be the same, with the opportunity now for a pre-trial determination of innocent ownership and the permanent return of the seized motor vehicle, the possibility of reimbursement for the cost of towing and storage fees and expedited DWI trials involving motor vehicles subject to forfeiture, the framework within which a constitutional analysis of the [DWI Seizure Statutes] as revised should take place has dramatically changed.

Determination regarding the constitutionality of superseded statutes is an "action merely to determine abstract propositions of law" and should be dismissed. *Simeon*, 339 N.C. at 370, 451 S.E.2d at 866. Because of the substantial changes effected by 1998 N.C. Sess. Laws ch. 182, sec. 2-8, the issue of the constitutionality of the DWI Seizure Statutes at the time petitioner's vehicle was seized has been rendered moot. Accordingly, I vote to dismiss the State's appeal.

N.C. DEPARTMENT OF CORRECTION, PETITIONER v. DONALD P. MCNEELY, RESPONDENT

No. COA98-1131

(Filed 16 November 1999)

1. Administrative Law— whole record test—not explicitly stated

The trial court used the appropriate standard of review, the whole record test, when reviewing the dismissal of a correctional officer where the court's order did not specify the standard of review employed, but stated that the Personnel Commission's conclusion was not supported by substantial evidence in the record and that there was no evidence that any other officer assigned to that duty violated the applicable rule.

2. Public Officers and Employees— correctional officer— dismissal—personal conduct

The Department of Correction met its burden of showing just cause for terminating respondent-correctional officer's employment, and the Personnel Commission's conclusion to the contrary was error, where respondent left his post without authorization and failed to remain alert while on duty. This conduct constituted unacceptable personal conduct for which an employee may be dismissed without prior warning. While there was evidence that other correctional officers read books and smoked while on duty, there was no evidence that any other officer assigned to the control room left his duty post without authorization and lost visual contact with dorm officers for more than three minutes in violation of published work rules. Respondent's willful violation of the written work rule was a serious breach of security which jeopardized the custody and security of inmates and the safety of his co-workers.

Appeal by respondent from judgment entered 29 June 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 June 1999.

Attorney General Michael F. Easley, by Associate Attorney General Buren R. Shields, III, for the State.

C. Gary Triggs, P.A., by C. Gary Triggs, for respondent appellant.

TIMMONS-GOODSON, Judge.

Donald P. McNeely (hereinafter, "respondent"), a correctional officer with the North Carolina Department of Correction (hereinafter, "DOC"), was dismissed for misconduct effective 22 June 1994. The stated grounds for the dismissal were: "(1) leaving [his] post without authorization and (2) failure to remain alert on duty." From the Superior Court's Memorandum of Decision instructing the Personnel Commission (hereinafter, "the Commission") to enter an order upholding the dismissal, respondent appeals.

The evidence tends to show that on 5 June 1994, respondent was assigned as Control Officer from 10:00 p.m. to midnight at McDowell County Correctional Center. The Control Officer is primarily "responsible for maintaining the safety and security of the inmates and staff in the dormitory area."

In pertinent part, the published work rules for the Control Officer post state the following:

> (1) No officer is to leave this post until properly relieved. The Officers shall be alert at all times and shall not engage in any activity which will distract their attention from their responsibilities.
>
> (2) The Control Officer will maintain visual contact with the Dormitory Patrol Officer. If the Control Officer does not see the Dormitory Officer for 3 minutes, then call the Officer-In-Charge (OIC).

Respondent was familiar with the aforementioned duties of the Control Officer, having repeatedly served in that capacity while employed with the DOC.

At approximately 10:55 p.m., while conducting an inspection of the officers on duty, Sergeant Elkins, the shift supervisor, observed respondent away from his assigned work post, the control room, without authorization. Respondent was standing in a corridor adjacent to the control room, smoking a cigarette and reading a novel. From this position, respondent could observe only two-thirds of the dormitory area, and as a result of leaving his post, respondent lost sight of the two Dorm Officers, Tim Frady and Steven Edwards, for a period of six to ten minutes. The two officers, armed only with cans of mace, were walking among the prisoners. Both officers testified

that they had a heightened concern for their own safety due to respondent's actions.

This incident was not respondent's first warning concerning his conduct at work. Respondent received three prior warnings about his performance, two of which were specifically related to his failure to remain vigilant while assigned to the dormitory area. On 30 July 1993, respondent was issued a final written warning for failing to stay alert in the dormitory when he was observed sitting down with his head resting on his chest and his eyes closed. Thereafter, on 23 September 1993, respondent was again issued a written warning for failing to perform assigned duties in an acceptable manner by watching television in lieu of making assigned rounds in the dormitory. Both of these warnings were instigated by Sergeant Elkins.

On 22 June 1994, DOC dismissed respondent from his position as a correctional officer for "unacceptable personal conduct" occurring on 5 June 1994. Respondent filed a petition for wrongful termination, and a hearing was held before an Administrative Law Judge (hereinafter, "ALJ") on 10 October 1995. On 12 February 1996, the ALJ found that respondent's misconduct met the regulatory definition of "unsatisfactory job performance" rather than "unacceptable personal conduct." Therefore, the ALJ concluded that respondent was not dismissed for just cause and recommended that the dismissal be reversed and respondent be reinstated with a final written warning for "unsatisfactory job performance" or, alternatively, with a five percent pay reduction. The Commission considered the ALJ's recommendation on 6 June 1996 and entered an order upholding the decision with slight modifications. The Commission ordered respondent's reinstatement, after concluding that respondent's misconduct failed to meet the definition of "unacceptable personal conduct." On 30 August 1996, the DOC petitioned for judicial review of the Commission's order on the grounds that the legal and factual bases of its decision, as stated in Conclusion of Law Number 3, were arbitrary and capricious, unsupported by substantial evidence, and erroneous as a matter of law. In an order dated 29 June 1998, the trial court reversed the Commission and upheld the DOC's decision to dismiss respondent. Respondent now appeals the ruling.

By his sole assignment of error, respondent argues that the trial court erred in reversing the Commission's decision. Specifically, respondent contends that the trial court erroneously determined that the Commission's Conclusion of Law Number 3 was not supported by substantial evidence in the record. We must disagree.

Judicial review of administrative agency decisions is governed by the Administrative Procedure Act, North Carolina General Statutes sections 150B-1 to 150B-52. N.C. Gen. Stat. §§ 150B-1 -150B-52 (1995); *Eury v. North Carolina Employment Security Comm.*, 115 N.C. App. 590, 596, 446 S.E.2d 383, 387, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Section 150B-51(b) states the following:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b). Although section 150B-51(b) lists the grounds upon which the superior court may reverse or modify a final agency decision, "the proper manner of review depends upon the particular issues presented on appeal." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

> If [petitioner] argues the agency's decision was based on an error of law, then "de novo" review is required. If, however, [petitioner] questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

Id. (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). " 'De novo' review requires a reviewing court to consider a question anew, as if not considered or decided by the agency." *Amanini* at 674, 443 S.E.2d at 118. Under the "whole record" test, a reviewing court must consider all competent evidence, including that which fairly detracts from the Commission's findings, con-

clusions, or ultimate decision, to determine whether the decision has a rational basis in the evidence. *Beauchesne v. University of N.C. at Chapel Hill*, 125 N.C. App. 457, 465, 481 S.E.2d 685, 691 (1997).

[1] Under section 150B-52 of the General Statutes, this Court's review of a trial court's order "is the same as in any other civil case;" thus, we must examine the trial court's order for error of law. *In re Appeal by McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 (citation omitted); N.C.G.S. § 150B-52. The reviewing process of a superior court order concerning an agency decision is two-fold. We must (1) determine whether the trial court utilized the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly. *Eury*, 115 N.C. App. at 597, 446 S.E.2d at 388. Because the order in the instant case does not specify which standard of review the trial court employed, we will look to how the alleged error was characterized by the parties on appeal to the superior court. *See In re Appeal of Willis*, 129 N.C. App. 499, 500 S.E.2d 723 (1998).

In its petition for judicial review, DOC argued that the Commission's Conclusion of Law Number 3 was "arbitrary and capricious, unsupported by substantial evidence in view of the entire record, and erroneous as a matter of law." Thus, the trial court should have reviewed the matter under the "whole record" test. *Amanini*, 114 N.C. App. 668, 443 S.E.2d 114. In reversing the Commission's decision, the trial court's order states that the "Commission's modified conclusion was not supported by substantial evidence in the record." The order further provides that "[t]here is no evidence that any other correctional officer assigned to control room duty violated this rule." In view of this language, we are satisfied that the trial court used the appropriate standard of review—the "whole record" test—in reaching its decision. We now must determine whether the trial court properly applied the "whole record" test.

[2] As previously stated, under the "whole record" test, the reviewing court must examine "all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). This test, however, is not "a tool of judicial intrusion," *North Carolina Dept. of Correction v. Gibson*, 58 N.C. App. 241, 257, 293 S.E.2d 664, 674 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)), and

thus, does not permit the court "to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*," *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Instead, the "whole record" test "merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Gibson*, 58 N.C. App. at 257, 293 S.E.2d at 674 (quoting *In re Rogers*, 297 N.C. at 65, 253 S.E.2d at 922). Therefore, if the Commission's findings are supported by substantial evidence—that amount of evidence that a reasonable mind would accept as adequate to support a decision, the reviewing court must uphold the Commission's decision. *ACT-UP Triangle*, 345 N.C. at 707, 483 S.E.2d at 393 (quoting *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)); N.C.G.S. § 150B-51(b).

After a thorough review of the record, we conclude that the trial court was correct in determining that the record lacked substantial evidence to support the Commission's Conclusion of Law Number 3, which reads as follows:

> [Petitioner (DOC)] has not met its burden of showing just cause for terminating [respondent's] employment. While [respondent] acted inappropriately in leaving his post to smoke and read a novel for a period of 6-10 minutes, because this type of conduct was routinely engaged in by correctional staff at this unit without any disciplinary action being taken, this constituted, at best, a violation of the standard operating procedures of the unit and unsatisfactory job performance. While a professional Correctional Officer should know better, no detriment to state service was shown by the [Petitioner]. [Respondent] remained in full control of the keys to the dorms at all times.

Section 126-35 of the General Statutes provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35 (1995). The State Personnel Manual divides "just cause" into two categories: (1) unsatisfactory job performance and (2) personal conduct detrimental to State service. "Unsatisfactory job performance" is defined as "the failure to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by management of the work unit or agency." "Unacceptable personal conduct" refers to:

(1) conduct for which no reasonable person should expect to receive prior warnings;

(2) job-related conduct which constitutes a violation of state or federal law;

(3) conviction of a felony or an offense involving moral turpitude;

(4) the willful violation of known or written work rules; or

(5) conduct unbecoming a state employee that is detrimental to state service.

According to the provisions of the DOC Personnel Manual, examples of "unsatisfactory job performance" include poor performance of duties, misuse of state property, absence without approved leave, failure to report for duty at an assigned time or place, and failure to follow established safety policies and procedures. Among the examples of "unacceptable personal conduct" listed in the DOC Manual are willful acts that would endanger the lives and property of others, leaving an assigned post without specific authorization from a superior, failure to remain alert while on duty (threatening the security and safety of the State, department, citizens, employees, inmates, probationers, or parolees), engaging in activity which seriously jeopardizes the safety of fellow employees or inmates, and failure to follow established safety policies and procedures which results or could result in the endangerment of life and/or property. Before an employee may be dismissed for "unsatisfactory job performance," he must receive at least three prior written warnings. However, an employee may be dismissed for "unacceptable personal conduct" without any prior warning.

Based on the State Personnel Manual, the DOC Personnel Manual and the published work rules for the Control Officer post at McDowell County Correctional Center, respondent's behavior in leaving his post without authorization and failing to remain alert while on duty falls squarely within the category of "unacceptable personal conduct." The evidence shows that at approximately 10:55 p.m., respondent left his assigned post as Control Officer without authorization from his superiors. Officers Elkins, Frady and Edwards testified that they witnessed respondent reading a novel and smoking a cigarette in the corridor outside the control room for approximately six to ten minutes. The Commission stated that "this type of conduct was routinely engaged in by correctional staff at this unit without any disci-

plinary action being taken," and thus, the conduct constituted "unsatisfactory job performance" rather than "unacceptable personal conduct." We cannot agree with the Commission's conclusion.

While there is evidence in the record that other correctional officers read books and smoked while on duty, we find no evidence that any other correctional officer assigned to the control room left his duty post without authorization and lost visual contact with the Dorm Officers for more than three minutes. The published work rules for the Control Officer post at McDowell County Correctional Center clearly provide that "[n]o officer is to leave [the control room] post until properly relieved" and that "[t]he officers shall be alert at all times and shall not be engaged in any activity that will distract their attention from their responsibilities." Respondent's willful violation of a written work rule was a serious breach of security which jeopardized the custody and security of the inmates and the safety of his coworkers. Therefore, the DOC has met its burden of showing just cause for terminating respondent's employment, and the Commission's conclusion to the contrary was error.

For the foregoing reasons, the trial court's Memorandum of Decision reversing the Commission's order and instructing the Commission to enter an order upholding respondent's dismissal is affirmed.

AFFIRMED.

Judges JOHN and EDMUNDS concur.

CONNIE BATES, PLAINTIFF-APPELLANT v. DEBBIE JARRETT, MICHAEL JARRETT, AND MICHAEL BATES, DEFENDANTS-APPELLEES

No. COA98-1338

(Filed 16 November 1999)

1. Parties— standing—equitable distribution—transferred title to automobile

The defendants Jarrett had standing as real parties in interest to challenge the court's jurisdiction over defendant Bates where plaintiff, a North Carolina resident, filed an equitable distribution claim against Bates, a Virginia citizen, and claims against defend-

ant Debbie Jarrett for the insurance proceeds from a wrecked automobile sold by defendant Bates to Debbie Jarrett.

2. Divorce— equitable distribution—jurisdiction—minimum contacts

The trial court erred in an equitable distribution action by dismissing the claim against defendant Bates for lack of jurisdiction where plaintiff and defendant Bates were married and resided in North Carolina from 1985 until 1992 or 1993, when they moved to Virginia; plaintiff and defendant Bates acquired an automobile in Virginia which was titled in defendant Bates' name; plaintiff moved to North Carolina after the separation in 1997 and brought the automobile with her with defendant Bates' consent; Bates subsequently appeared at a domestic violence hearing in North Carolina without being served; a court order gave plaintiff possession of their automobile for 90 days; Bates conveyed title to the automobile to defendants Jarrett one week later; the automobile remained continuously in North Carolina until it was wrecked; and the insurance proceeds were paid to defendants Jarrett and deposited in their account here. The actions of Bates involving an automobile constitute sufficient minimum contacts with North Carolina that he should have reasonably anticipated being haled into court here over the issues of possession and ownership of the vehicle.

Appeal by plaintiff from judgment entered 10 July 1998 *nunc pro tunc* to 10 June 1998 by Judge Kimbrell Kelly Tucker in Cumberland County District Court. Heard in the Court of Appeals 16 August 1999.

Bruce Allen for plaintiff-appellant.

Robin Weaver Hurmence for defendants-appellees Debbie and Michael Jarrett.

WALKER, Judge.

The plaintiff, a resident of Cumberland County, North Carolina, filed an equitable distribution claim against defendant Michael Bates, a citizen of Virginia, and claims against defendant Debbie Jarrett, a citizen of this State. Included was a claim to set aside the conveyance of a 1992 Subaru Loyale by defendant Bates to defendant Debbie Jarrett and to recover the insurance proceeds received by Jarrett after the Subaru was wrecked. After defendant Debbie Jarrett filed a motion to dismiss, an answer, and counterclaims, plaintiff filed a

motion to add defendant Michael Jarrett as a necessary party. Plaintiff's motion was granted. Defendants Jarrett then filed a motion to dismiss, an answer, and counterclaims.

The trial court held a hearing on the motion of defendants Jarrett to dismiss the equitable distribution claim against defendant Bates for lack of jurisdiction. At the hearing, the trial court reviewed the pleadings and considered plaintiff's affidavit with attachments, as well as the arguments of counsel. After finding there was no personal jurisdiction over defendant Bates, the trial court dismissed the plaintiff's claim for equitable distribution against defendant Bates as well as the remaining claims against defendants Jarrett.

[1] The plaintiff first contends that the trial court erred in allowing defendants Jarrett to challenge the court's subject matter jurisdiction over defendant Bates. The record indicates that the Subaru was wrecked shortly after title was transferred by defendant Bates to defendant Michael Jarrett. The insurance proceeds were paid to defendants Jarrett and deposited in their account in this State. Since plaintiff has asserted claims against defendants Jarrett, we conclude they have standing as real parties in interest to challenge our courts' jurisdiction over defendant Bates.

[2] Plaintiff next assigns as error the dismissal of her claim for equitable distribution against defendant Bates for lack of jurisdiction. Exercise of jurisdiction in an equitable distribution action must meet the minimum contacts standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945). *Carroll v. Carroll*, 88 N.C. App. 453, 455, 363 S.E.2d 872, 874 (1988). The resolution of whether the trial court acquired *in personam* jurisdiction over defendant involves a two-fold determination. *Godwin v. Walls*, 118 N.C. App. 341, 345, 455 S.E.2d 473, 478 (1995). First, our statute must permit the exercise of jurisdiction, and second, such exercise must comport with due process of law under the Fourteenth Amendment to the U.S. Constitution. *Id.*

The question on appeal is whether the second prong of this test was met. The requirements of due process are well settled:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

International Shoe Co., 326 U.S. at 316, 90 L. Ed. at 102. To effectuate minimum contacts, a defendant must have acted to purposefully avail itself of the privileges of conducting activities within this State, thus invoking the benefits and protection of our laws. *International Shoe Co.*, 326 U.S. at 319, 90 L. Ed. at 103. The Supreme Court later clarified the standard: "Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980). As the United States Supreme Court has explained:

> [T]he 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985).

The trial court found that there were insufficient minimum contacts between defendant Bates and this State whereby our courts could exercise personal jurisdiction over him in this matter. The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact for the trial court. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974). Whether minimum contacts are present is determined not by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances. *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 462 S.E.2d 832 (1995). The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court. *Id.*

In its order of dismissal, the trial court's findings included the following:

> 1. The Court has carefully examined the filed documents in Case No. 97 CvD 5938 and also 97 CvM 785; In Case No. 97 CvD 5938, the Defendant was personally served within the State of North Carolina in reference to the TRO and for that action he was per-

sonally served in the State of North Carolina which then had personal service over him the TRO.

. . .

6. In the pro se domestic violence action filed in 97 CvD 5938, Cumberland County, North Carolina, the Plaintiff points out that there was a Protective Order most likely in the State of Virginia which expired on June 6, 1997; the Defendant Bates did not voluntarily return to the State of North Carolina.

7. In the Small Claims action 97 CvM 785 in Cumberland County, North Carolina, the Defendant Bates was named as a Defendant and was not served and this action was dismissed.

8. All that is left to argue in reference to minimum contacts within the State of North Carolina is that Defendant Bates permitted the 1992 [Subaru] Loyale to be brought into the State of North Carolina by the Plaintiff.

9. Pursuant to the United States Supreme Court case International Shoe, the Court can proceed if it is reasonable and fair to proceed against a Defendant, in this instance it is not reasonable and fair to proceed in this matter and the Plaintiff's claim for Equitable Distribution is dismissed pursuant to a lack of personal jurisdiction over the Defendant Bates, there is not sufficient minimum contacts with the state.

Our review of the record reveals the following: Plaintiff and defendant Bates married in 1985 and resided in North Carolina from 1985 until 1992 or 1993, when they moved to Virginia. While living in Virginia, plaintiff and defendant Bates acquired the Subaru which was titled in defendant Bates' name and registered in Virginia. After separating from defendant Bates, plaintiff moved to Cumberland County, North Carolina, in March 1997. At that time, defendant Bates consented to plaintiff bringing the Subaru to North Carolina and according to plaintiff's affidavit, he was to pay the car payments on the Subaru in lieu of paying plaintiff child support for their two children.

On 20 August 1997, plaintiff sought a domestic violence protective order in the District Court of Cumberland County. Although he had not been served with any process, defendant Bates appeared at the hearing. A domestic violence protective order was entered and defendant Bates was served with the order on 20 August 1997. The order gave plaintiff possession of the Subaru and was effective for 90

days. On that same day, defendants Jarrett instituted a small claims action in Cumberland County against plaintiff and defendant Bates to recover the Subaru. This action was later dismissed.

On 26 August 1997, defendant Bates transferred title to the Subaru to defendant Michael Jarrett. The title was registered with the Department of Motor Vehicles on 27 August 1997. On 28 August 1997, defendants Jarrett, with the assistance of a Hope Mills police officer, took possession of the Subaru.

From March 1997 until it was wrecked on 23 September 1997, the Subaru remained continuously in North Carolina. After the Subaru was wrecked, the insurance proceeds were paid to defendants Jarrett and deposited in their account in North Carolina.

Among the authorities cited by the parties are the following cases which we address: *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988); *Shamley v. Shamley*, 117 N.C. App. 175, 455 S.E.2d 435 (1994); and *Tompkins v. Tompkins*, 98 N.C. App. 299, 390 S.E.2d 766 (1990). In *Carroll,* the plaintiff and defendant were married in 1975 and lived together in the State of Washington. *Carroll*, 88 N.C. App. 453, 363 S.E.2d 872. They separated in 1985 and plaintiff moved to North Carolina. *Id.* Although defendant had not lived in North Carolina during any part of the marriage, certain property of the parties was located in this State. *Id.* This Court stated:

> The fact that there exists some personal property in North Carolina in which the defendant may have an interest because of the equitable distribution statutes is not alone sufficient to establish jurisdiction over the defendant or his property. If there [were] evidence the defendant brought the property into North Carolina or consented to the placement of property in North Carolina, this would be some evidence of contacts with the forum State. . . .

Id. at 456, 363 S.E.2d at 874. This Court held that because the facts did not indicate who brought the property into North Carolina or whether defendant even consented to the property being in North Carolina, the trial court lacked jurisdiction over the defendant and could not properly determine the equitable distribution claim. *Id.*

In *Shamley*, the plaintiff and defendant were married in New York in 1965 and resided in New Jersey for 20 years until 1991. *Shamley*, 117 N.C. App. 175, 455 S.E.2d 435. In 1991, plaintiff moved from New Jersey to this State, bringing certain personal property with him. *Id.* Plaintiff purchased real property here, which he titled in both par-

ties' names without defendant's participation or knowledge. *Id.* This Court upheld the finding of the trial court that it lacked jurisdiction over defendant, stating:

> Plaintiff's purchase of land in North Carolina and construction of a house thereon was done without defendant's participation. Defendant's only voluntary contacts with North Carolina were during a brief visit in which she looked at houses with defendant and another visit in which she purchased an automobile.

Id. at 182, 455 S.E.2d at 439.

In *Tompkins*, the plaintiff argued that defendant had sufficient contacts with this State in that he abandoned her within the State and the marital relationship was still in existence at the time the action was brought. *Tompkins*, 98 N.C. App. 299, 390 S.E.2d 766. The defendant, by affidavit in support of his motion to dismiss, stated:

> [H]e had left North Carolina more than three and a half years prior to the commencement of the action, had resided in South Carolina since that time, owned no property in North Carolina, conducted no business in this State, and had not invoked the protection of North Carolina law for any purpose or reason since leaving this State.

Id. at 300, 390 S.E.2d at 767. This Court found that the pleadings did not indicate "where the parties were married, that they shared a marital domicile in this State, that defendant has conducted activities here, owns property here, or otherwise has invoked the protection of North Carolina laws." *Id.* at 304, 390 S.E.2d at 769. This Court held:

> Plaintiff's allegations of defendant's marital misconduct, absent any allegations going to a nexus between such misconduct and this State, are simply insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired in this case.

Id.

However, we distinguish our case from the decisions in *Carroll*, *Shamley*, and *Tompkins*. Plaintiff and defendant Bates were married in 1985 and resided in this State from 1985 until 1992 or 1993. After the parties separated, defendant Bates consented to plaintiff bringing the Subaru to this State. Subsequently, defendant Bates had additional contact with the State. He appeared at the domestic violence hearing without being served with process. After being served with

the domestic violence protective order, defendant Bates, in disregard of the order, which gave plaintiff possession of the Subaru for 90 days, conveyed title to the Subaru to defendant Michael Jarrett on 26 August 1997, approximately one week after the order was entered.

From March 1997 until it was wrecked on 23 September 1997, the Subaru remained continuously in this State. After the Subaru was wrecked, the insurance proceeds were paid to defendants Jarrett and deposited in their account here.

As a result, we conclude that the actions of defendant Bates involving the Subaru constitute sufficient minimum contacts with this State such that he should have reasonably anticipated being "haled into Court" here over the issues of possession and ownership of this vehicle. Thus, we reverse the decision of the trial court and remand for further proceedings.

Reversed and remanded.

Chief Judge EAGLES and Judge McGEE concur.

VONDA C. TREXLER, PLAINTIFF v. DAVID C. POLLOCK, M.D., HUGH CHATHAM MEMORIAL HOSPITAL, INC., COASTAL EMERGENCY SERVICES, INC., COASTAL EMERGENCY GROUP, INC., COASTAL EMERGENCY PHYSICIANS, P.A., COASTAL EMERGENCY SERVICES MANAGEMENT GROUP, INC., COASTAL EMERGENCY SERVICES OF THE MID-ATLANTIC, INC., C.H.G. PROPERTIES, INC., DEFENDANTS

No. COA98-1629

(Filed 16 November 1999)

1. Statute of Limitations— medical malpractice—continuing course of treatment—prescription

The trial court correctly dismissed a medical malpractice action as barred by the statute of limitations where plaintiff checked into an emergency room, Dr. Pollock gave her a prescription lasting several days to control nausea, plaintiff did not see Dr. Pollock again, and another physician subsequently diagnosed plaintiff as suffering from a ruptured appendix. Although plaintiff argued that Dr. Pollock's initial act of negligence continued throughout her consumption of the medicine, she saw Dr.

Pollock only one time, her cause of action is based upon the alleged failure to properly diagnose her illness, and the medicine was not the cause of her illness. The doctrine of continuing course of treatment is not extended to cover the time during which a patient consumes prescription medication, absent a showing of an ongoing relationship with the doctor and further treatment by the same doctor, or evidence that the medication itself was the cause of the patient's injury.

2. Statute of Limitations— hospitals—continuing course of treatment—not applicable

The continuing course of treatment doctrine did not apply to extend the statute of limitations in a medical malpractice claim against a hospital based upon two discrete visits to an emergency room where plaintiff was not under the continuing care and observation of any hospital employee.

Appeal by Plaintiff from judgment entered 8 October 1998 by Judge Julius A. Rousseau, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 23 September 1999.

Randolph M. James, P.C. by Randolph M. James for plaintiff.

Bennett & Guthrie, P.L.L.C. by Richard V. Bennett and Stanley P. Dean for defendant Hugh Chatham Memorial Hospital and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. by Samuel G. Thompson, Deanna L. Davis, and Michael R. Gordon for defendants David C. Pollock, M.D., Coastal Emergency Services, Inc., Coastal Emergency Group, Inc., Coastal Emergency Physicians, P.A., Coastal Emergency Services of the Mid-Atlantic, Inc. and C.H.G. Properties, Inc.

WYNN, Judge.

[1] The continuing course of treatment doctrine tolls the statute of limitations for a medical malpractice claim upon the last act of a defendant physician. The plaintiff urges us to hold that a prescription medication, absent any other contact with a doctor, constitutes a continuing course of treatment and thereby extends the statute of limitations period. Since the drug prescription was neither continuous nor evidence of subsequent treatment by a physician, we affirm the trial court's dismissal of the case as time barred by the applicable statute of limitations.

On the night of 6-7 May 1995, Vonda C. Trexler checked into the emergency room of Hugh Chatham Memorial Hospital complaining of stomach cramps, lower back pain, poor appetite, weakness, chills, and vomiting. Dr. David Pollock examined Ms. Trexler and immediately gave her Phenergan to treat the nausea and Demerol to treat the abdominal pain. He also gave her a several day prescription for Phenergan. Although Ms. Trexler had been to Hugh Chatham Memorial Hospital before this event, she had never seen Dr. Pollock. Ms. Trexler's condition improved and she left the hospital that night at approximately 1:00 a.m. She took the prescribed medication for the next several days; however, she did not see Dr. Pollock again.

Ms. Trexler returned to Hugh Chatham Memorial on 17 May 1995, presenting symptoms similar to those that she presented on her earlier visit to the hospital. This time another physician correctly diagnosed that she suffered from a ruptured appendix. Apparently, the medicine that Dr. Pollock prescribed may have suppressed the symptoms of the appendicitis.

On 18 May 1998, Ms. Trexler brought a medical malpractice action against Dr. Pollock, Hugh Chatham Memorial, and the institutions which supplied the hospital with its emergency services and physicians (the "Coastal Entities"). On 28 July, Ms. Trexler filed her First Amended Complaint, in which she first asserted that the medication prescribed by Dr. Pollock constituted a continuing course of treatment. In response, the defendants moved to dismiss her action under N.C.R. Civ. P. 12(b)(6) (1990) on the grounds that the action was time barred by the applicable statute of limitations. On 28 September, the trial court dismissed Ms. Trexler's action as time barred. She appealed to this Court.

Did Dr. Pollock's prescription constitute a continuing course of treatment thereby extending the time within which Ms. Trexler could file her medical malpractice claim? We answer: No.

N.C. Gen. Stat. § 1-52(5) (Cum. Supp. 1998) provides a three-year statute of limitations for filing negligence actions. Under N.C. Gen. Stat. § 1-15(c) (1996) the period of limitation for malpractice actions is,

> deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . .

Ms. Trexler argues that even though the alleged act of negligence occurred on the night of 6-7 May 1995, the statute of limitations was

tolled until 17 May 1995 under the continuing course of treatment doctrine.[1]

Our courts recognize the continuing course of treatment doctrine to allow a patient to extend the statute of limitations when a series of acts on the part of a doctor add up to negligence. *See Hensell v. Winslow*, 106 N.C. App. 285, 416 S.E.2d 426, *review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992). The doctrine applies to situations in which the doctor continues a particular course of treatment over a period of time.

> The theory is that "so long as the relationship of surgeon and patient continued, the surgeon was guilty of malpractice during that entire relationship for not repairing the damage he had done and, therefore, the cause of action against him arose at the conclusion of his contractual relationship."

Ballenger v. Crowell, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978) (cites omitted).

To benefit from the continuing course of treatment doctrine, a patient must show two things. First, she must show that she had a continuous relationship with her physician. Where there is no ongoing contact between the patient and her doctor, there is no continuous relationship. *See Hensell* at 290, 416 S.E.2d at 430. The absence of any follow-up visits reveals that the patient-physician relationship has ended. *See id.*

Second, a patient must show that she received subsequent treatment from the physician who committed the negligent act. *See Sidney v. Allen*, 114 N.C. App. 138, 441 S.E.2d 561 (1994), *aff'd by*, 341 N.C. 190, 459 S.E.2d 237 (1995). This prong is not met unless the patient sees the same doctor. *See id.*

In the case at hand, Ms. Trexler satisfied neither of the two prongs. She saw Dr. Pollock only one time—on the night of 6-7 May. There is no evidence in the record showing that Dr. Pollock treated Ms. Trexler after the night in question. In fact, upon her return to the hospital on 17 May, she was treated by another doctor.

Ms. Trexler argues that whether she had a continuing relationship with Dr. Pollock should be a question of fact for the jury. She relies on *Goins v. Puleo*, 130 N.C. App. 28, 502 S.E.2d 621 (1998), *rev'd on*

1. Since 17 May 1998 was a Sunday, the three-year statute of limitations expired on 18 May 1998. N.C.R. Civ. P. 6(a) (1990).

other grounds, 350 N.C. 277, 512 S.E.2d 748 (1999), in which we addressed the issue of whether a series of visits to *two* doctors constituted a continuing course of treatment. However, to present a question to the jury, there must be an issue of fact in dispute. In the case at bar, the parties agree as to the facts—the only question that remains is whether a prescription, standing alone, constitutes a continuing course of treatment. Under the undisputed facts of this case, the trial court properly determined that a drug prescription alone does not constitute a continuing course of treatment.

Moreover, while Ms. Trexler cannot show that she had a continuous relationship with Dr. Pollock, she nevertheless argues that Dr. Pollock's initial act of negligence continued throughout her consumption of the medication. First, she points out that under North Carolina law, a "drug" is an article "intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man . . . ." N.C. Gen. Stat. § 106-121(6)(b) (Cum. Supp. 1998). She further notes that our statutes define "Practitioner" as "a physician . . . permitted to distribute, dispense, conduct research with respect to or administer a drug so long as such activity is within the normal course of professional practice or research." N.C. Gen. Stat. § 106-121(14)(b) (Cum. Supp. 1998). From these two definitions, Ms. Trexler concludes that Dr. Pollock owed her a continuing duty of care throughout the prescription period, and therefore, her prescription medication constituted a continuing course of treatment.

To further support this conclusion, she relies on *Kraus v. Cleveland Clinic*, 442 F. Supp. 310 (N.D. Ohio 1977) wherein a federal district court extended Ohio's continuing course of treatment doctrine to include a patient's prescription medication. However, aside from the fact that we are not bound by that decision, the facts of the *Kraus* case are quite different from the facts of the case at bar. In *Kraus*, the plaintiff had seen her doctor several times, during which he continued to refill her prescription for prednisone. In addition, the drugs she took directly caused the injury which served as the basis for her claim.

In the case at bar, Dr. Pollock was not Ms. Trexler's regular physician—in fact, he only saw her once. Moreover, Ms. Trexler's medicine was not the cause of her illness. While it is true that the inappropriate prescription may have served to mask her symptoms and increase the damage caused by appendicitis, Ms. Trexler's cause of action is based upon Dr. Pollock's failure to properly diagnose her illness. Since

Kraus is distinguishable from the case presently before us, we cannot accept *Kraus* as persuasive authority.

Ms. Trexler offers one North Carolina case to support her argument—*Lackey v. Bressler*, 86 N.C. App. 486, 358 S.E.2d 560 (1987). In *Lackey* we said that the last act of a doctor giving rise to a claim for medical malpractice was the expiration of a one-year prescription. However, our holding in that case has limited precedential value as applied to the present case for three reasons. First, the plaintiff in that case brought her medical malpractice suit 12 years after the defendant doctor's prescription ran out. Our statement that his last act of negligence occurred when the prescription ran out had no bearing on whether the statute of limitations had tolled in that case. Notably, we were not deciding whether the continuing course of treatment doctrine should extend to the prescription of medication as a general rule. Second, the plaintiff in that case claimed that her injury was directly caused by the medication prescribed to her. Finally, the physician in *Lackey* had been the patient's longtime physician and therefore the facts more closely fit the two-prong test necessary to invoke the continuing course of treatment doctrine.

[2] Ms. Trexler further argues that her action against Hugh Chatham Memorial and the Coastal Entities is not barred by the statute of limitations because the continuing course of treatment doctrine applies to those institutions. However, we do not agree with her argument.

In *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996), our Supreme Court held that the continuing course of treatment doctrine applies to institutional medical providers as well as individual physicians. However, unlike the facts of this case, the patient in *Horton* was continuously under the care of the hospital staff. She was admitted to a hospital to repair damage done to her bladder by a catheter, and she remained there from the time of the injury until it was repaired. She was continually under the care and observation of hospital employees. In contrast, in this case, Ms. Trexler went to the hospital for two discrete visits—she was not under the continuing care and observation of any hospital employee.

Finally, we point out that as a matter of policy, to extend the alleged negligence of Dr. Pollock to include Ms. Trexler's second visit to the emergency room would result in a virtually unlimited statute of limitations for medical malpractice claims. If we established such a

precedent, a patient could bring a medical malpractice claim long after an initial act of negligence by one doctor, merely by returning to the same hospital for a checkup. Statutes of limitations exist for a reason—to afford security against stale claims.

> With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action.

Estrada v. Burnham, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989).

In summation, Ms. Trexler failed to show that the continuing course of treatment doctrine should extend to cases such as this—where a one-time doctor prescribes medication which is not the cause of the patient's illness. A ruling in her favor would only serve to create an uncertain and perhaps unlimited statute of limitations.

The statute of limitations for medical malpractice is three years. The continuing course of treatment doctrine tolls the statute of limitations until the last act of the physician which gave rise to the cause of action. We decline to extend this doctrine to cover the time during which a patient consumes prescription medication, absent a showing of an ongoing relationship with the doctor and further treatment by the same doctor, or evidence that the medication itself was the cause of the patient's injury. Since Ms. Trexler's complaint is barred under the applicable statute of limitations, we uphold Judge Rousseau's decision to dismiss her complaint.

Affirmed.

Judges HORTON and EDMUNDS concur.

BRINKLEY v. BRINKLEY

[135 N.C. App. 608 (1999)]

TERICA BRINKLEY (HARVEY), PLAINTIFF-APPELLANT v. JEFFREY CLARK BRINKLEY, DEFENDANT-APPELLEE

No. COA99-38

(Filed 16 November 1999)

1. **Child Support, Custody, and Visitation— support—modification—college fund—findings not supported by evidence**

In a case involving modification of child support, the trial court's findings of fact that defendant-father testified the parties agreed the excess payments would be invested in a college fund is not supported by the evidence because: (1) defendant merely testified that he "thought" plaintiff-mother was investing the increased amount in a college fund of some sort; (2) if the trial court found plaintiff credible, there was ample evidence from which the trial court could find the parties agreed on an increase in child support just as she testified; and (3) even if defendant's contention was true, any breach of such an agreement would be more properly the subject of a breach of contract action instead of part of this child support action.

2. **Child Support, Custody, and Visitation— support—modification—improper credit—obligations owed between spouses—college fund**

Although the trial court properly modified defendant-father's child support to $927.00 each month pursuant to the child support guidelines, it improperly gave him a credit for the amount he paid above his 1989 court-ordered child support obligation and for the amount plaintiff-mother owed defendant under the parties' equitable distribution judgment because: (1) as a matter of sound public policy, child support obligations may not be offset by other obligations owed by one spouse to the other spouse; (2) credit is appropriate only when an injustice would exist if credit were not given; and (3) any amounts defendant voluntarily paid to establish a college fund for the minor child could not be considered child support since defendant could not be required to pay college expenses.

Appeal by plaintiff from order entered 24 August 1998 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 7 October 1999.

Terica Brinkley Harvey (plaintiff) and Jeffrey Clark Brinkley (defendant) are former spouses. Plaintiff has custody of the minor child born to their marriage. In 1989, upon the dissolution of the marriage, defendant was ordered to pay child support in the amount of $420.00 per month. In 1995, after discussions between the parties and without modification of the 1989 court order, defendant increased the support payments to $750.00 per month.

In 1998, plaintiff moved to modify the child support order based on a substantial change in circumstances. In response, defendant moved that the trial court deviate from the child support guidelines because application of the guidelines would result in an amount of support which would "exceed the reasonable needs of the minor child and result in an unjust and inappropriate support obligation." Defendant also moved that he be given a credit against future child support for both the increased amount of child support he had paid since 1995 and for an additional $500.00 owed to him by plaintiff pursuant to an equitable distribution judgment. Defendant testified that he thought the 1995 increase in child support was to be used to establish a college fund for the child, that plaintiff did not do so, and that defendant should be entitled to a credit for the amount he paid in excess of $420.00 per month. Plaintiff testified that defendant's child support obligation in 1995, calculated pursuant to the guidelines then in effect, was $787.00 per month. She further testified that defendant agreed to pay $750.00 per month as child support to avoid court action.

Following a bench trial, the trial court ordered that, pursuant to the child support guidelines, the defendant's monthly child support obligation be increased to $927.00 per month effective 1 August 1998. However, the trial court also ordered that the defendant was to have credit against future child support payments in the total amount of $12,935.50, which sum represented the increased amount of child support he had paid since 1995 in the amount of $12,435.50, and an additional $500.00 for the amount due him under the parties' equitable distribution judgment. Defendant was allowed to reduce his child support payments to an amount no less than $500.00 per month until he had exhausted his total credit, at which time the child support payments would revert to $927.00 per month. Plaintiff appealed.

Mary Elizabeth Arrowood for plaintiff appellant.

Robert E. Riddle for defendant appellee.

HORTON, Judge.

Plaintiff assigns as error the deviation from the child support guidelines by the trial court, as well as the findings of fact made by the trial court.

At the time this matter was heard in the trial court, plaintiff had gross monthly income of $1,775.00 and defendant had gross monthly income of $7,080.00. The trial court applied the guidelines and determined that the defendant's portion of the child's monthly support was $927.00. Neither party objected to that calculation. The trial court then ordered that the defendant pay the sum of $927.00 each month to be disbursed to plaintiff as support for their child. Thus, the trial court did not deviate from the amount of child support which resulted from application of the child support guidelines. The question actually raised by plaintiff's argument is whether defendant is entitled to a "credit" against his future child support payments for the $12,435.50 defendant paid over and above his court-ordered obligation and credit for the $500.00 plaintiff owes him as a result of the equitable distribution judgment. The trial court made the following findings with regard to this issue:

> 5. That the plaintiff was ordered by Judge Roda on September 26, 1990 to reimburse the defendant $500.; the plaintiff did not do so and it would be equitable for the defendant to get a $500.00 credit on his child support obligation.
>
> 6. That the defendant has paid $12,435.50 as of July 10, 1998 in excess on the child support obligation that was ordered. The defendant testified that he did so because the plaintiff and defendant *agreed* the extra sums would be applied to a college fund on behalf of the minor child. The plaintiff testified it was pursuant to an oral agreement between the plaintiff and defendant to increase child support. That there are no written agreements or court orders addressing the overpayments and how they should be considered. That there is insufficient evidence to find meeting of the minds on this issue.

(Emphasis added.)

Based on those findings, the trial court concluded as a matter of law:

> 2. That the defendant is entitled to a credit in the amount of $12,435.50 on his child support obligation. There is insufficient

evidence to conclude there was a contractual agreement by the parties for an increase in support. A $500 credit should be applied to the child support obligation to satisfy the requirements of Judge Roda's order.

[1] Plaintiff contends, among other things, that the findings of the court are not supported by evidence of record. We agree.

In this case the parties did not submit a transcript of the motion hearing, but included in the record on appeal a narrative summary of the testimony at that hearing. According to the narrative, plaintiff testified that in 1995 she contacted the Buncombe County Child Support Enforcement Office (Buncombe CSE) to seek assistance in obtaining an increase in child support. Plaintiff was informed by that agency that defendant should be paying $787.00 as child support pursuant to the guidelines. The Buncombe CSE in turn contacted defendant. Plaintiff further testified that defendant contacted her and agreed to pay the sum of $750.00 per month if she disengaged the Buncombe County CSE; that plaintiff accepted the offer, and that defendant began paying $750.00 per month. Plaintiff testified that at no time did she agree that a part of the child support payment would be for college expenses and that she would not have agreed to such an arrangement. Defendant testified as follows:

> I was ordered to pay child support in the amount of $420.00 per month and I have exceeded those payments. *I thought Mrs. Harvey was investing the extra money into a college fund for Brittany.* I have overpaid child support and should have a credit.
>
> . . . .
>
> Plaintiff has not paid the $500.00 she owes to me pursuant to the Equitable Distribution Judgment for the ITT debt and I should receive a credit against child support.

(Emphasis added.)

Defendant's testimony that he "thought" plaintiff was investing the increased amount of child support in a college fund of some sort does not support the finding of the trial court that the defendant testified that the parties agreed that the excess payments would be invested in a college fund. Plaintiff testified clearly and unequivocally about the agreement between the parties. If the trial court found her testimony to be credible, there was ample evidence from which the trial court could find that the parties agreed on an increase in child

support just as plaintiff testified. Furthermore, even if we accept, for the purposes of argument, the defendant's contention that there was a contractual agreement between plaintiff and defendant regarding the establishment of a separate college fund for the parties' child, any breach of such an agreement would be more properly the subject of an action for breach of contract, not part of this child support action.

[2] Our legislature has declared that the purpose of child support is to provide for the "reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties . . . ." N.C. Gen. Stat. § 50-13.4(c) (Cum. Supp. 1998). Child support may not be used as a bargaining chip in the resolution of property or custody disputes. Our view is supported by the fact that equitable distribution actions are decided independently of support actions. *See* N.C. Gen. Stat. § 50-20(f) (Cum. Supp. 1998) ("[t]he court shall provide for an equitable distribution without regard to . . . support of the children of both parties[]"). As a matter of sound public policy, child support obligations may not be offset by other obligations owed by one spouse to the other spouse.

We further note that the imposition of a credit is not an automatic right even when the trial court finds that one party has overpaid his child support obligation. We held in *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), that there are no "hard and fast rules" when dealing with the issue of child support credits. Instead, "the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given." *Id.* at 81, 231 S.E.2d at 182. *See, in accord, Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981). Thus, in those rare cases in which the trial court properly awards a credit against a child support award, it should conclude in its written order that, as a matter of law, an injustice would exist if the credit were not allowed and should support that conclusion by findings of fact based on competent evidence.

In *Goodson*, the payor father contended that he was entitled to credit for "certain expenses incurred for clothing, food, recreation, and medical treatment [for the child]." *Id.* In *Jones*, the payor father claimed credit for amounts expended for clothing, food, day-care costs, YMCA fees, and medical expenses for the children. *Jones*, 52 N.C. App. at 106-07, 278 S.E.2d at 262. Neither case supports the proposition that a child support payor could be entitled to credit for the alleged breach by the child support recipient of a contract to

establish an education fund for the child. Here, defendant does not contend that he paid his child support in advance, or that he paid the additional amounts *as child support*, but contends that he was paying an amount to be used to establish a college education fund for the child. Since the defendant could not be required to pay college expenses for his child, any such amounts voluntarily paid by him could not be considered *child support* within the normal meaning of that term. *Bridges v. Bridges*, 85 N.C. App. 524, 528, 355 S.E.2d 230, 232 (1987) ("[I]n the absence of an enforceable contract otherwise obligating a parent, North Carolina courts have no authority to order child support for children who have attained the age of majority unless the child has not completed secondary schooling . . . ."); *see* N.C. Gen. Stat. § 50-13.4(b) (Cum. Supp. 1998).

In conclusion, we affirm that portion of the judgment establishing child support of $927.00 each month pursuant to the child support guidelines, but reverse that portion of the judgment giving defendant a credit for the amount he paid above his 1989 court-ordered child support obligation, and for that amount due defendant under the parties' equitable distribution judgment.

Affirmed in part, reversed in part.

Judges WYNN and EDMUNDS concur.

DOUGLAS D. ROBERTS, PLAINTIFF-APPELLEE v. CARROLL E. SWAIN, JR., J.B. McCRACKEN AND ALANA M. ENNIS, DEFENDANTS-APPELLANTS

No. COA99-25

(Filed 16 November 1999)

Costs— Rule 68—costs incurred after offer

The trial court abused its discretion by awarding under Rule 68 costs and attorney fees incurred after an offer of judgment where the offer was for $50,000, the jury awarded $18,100 in damages, and the trial court added both attorney fees and costs before the offer and attorney fees and costs after the judgment to reach $87,334.69. Costs incurred after the offer of judgment should not be included in calculating the "judgment finally

obtained" under Rule 68. The correct calculation here totaled $40,667.10.

Appeal by defendants-appellants from judgment entered 16 October 1998 by Judge James C. Spencer, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 23 September 1999.

Michael F. Easley, Attorney General, by Bruce S. Ambrose, Harold F. Askins, Isaac T. Avery III, Christine Ryan, and Reuben Young, for the State.

Ronald W. Merritt for the plaintiff-appellee.

WYNN, Judge.

N.C. Gen. Stat. § 1A-1, Rule 68 provides that a plaintiff who rejects a defendant's offer of judgment must bear the costs and attorney fees incurred after the offer of judgment if the "judgment finally obtained" is less favorable than the offer of judgment. The plaintiff in this case contends that attorney's fees awarded under 42 U.S.C. § 1988 are subject to this cost-shifting provision. Because we find that the "judgment finally obtained" in this case was less favorable than the offer of judgment, we conclude that the trial court abused its discretion in awarding the plaintiff costs and attorney's fees incurred after the offer of judgment.

Douglas D. Roberts brought a civil rights action against three University of North Carolina at Chapel Hill police officers alleging, *inter alia*, that their arrest of his person deprived him of his rights under 42 U.S.C. § 1983.[1] Based on this claim, Mr. Roberts sought a reasonable attorney's fee award under 42 U.S.C. § 1988. Specifically, § 1988 provides that "[i]n any action to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."

Before trial, the officers made an offer of judgment under Rule 68 of the North Carolina Rules of Civil Procedure, "for the total sum of $50,000.00, which include[d] all costs and attorney fees accrued at the time [the] offer [was] filed." Mr. Roberts, however, refused their offer of judgment.

1. Although the officers moved for summary judgment on the basis that their claims were barred by sovereign immunity and qualified immunity, the trial court denied their motion. This Court, in an earlier appeal, affirmed the trial court's denial of their motion. *See Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760, *review denied by* 347 N.C. 270, 493 S.E.2d 746 (1997).

Following a trial on the matter, a jury awarded Mr. Roberts $18,100 in damages. Thereafter, to determine the "judgment finally obtained" for purposes of Rule 68, the trial court added Mr. Robert's attorney fees, incurred before the offer of judgment ($21,810), his costs before the offer ($757.10) to his attorney's fees incurred after the offer ($36,945), and his costs after the offer ($9,722.59), for a sum total of $87,334.69. Since that sum for the "judgment finally obtained" exceeded the officers' $50,000 offer of judgment, the trial court awarded Mr. Roberts all costs including attorney's fees awarded under 42 U.S.C. § 1988. This appeal followed.

On appeal, the officers assert that the trial court abused its discretion in calculating the "judgment finally obtained" under Rule 68 by including costs incurred after the offer of judgment. We agree.

Rule 68 provides that:

> If judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay costs incurred after the making of the offer. . . .

N.C. Gen. Stat. § 1A-1, Rule 68 (1990).

Costs incurred under Rule 68 include attorney's fees recovered under 42 U.S.C. § 1988. *See Purdy v. Brown*, 307 N.C. 93, 96, 296 S.E.2d 459, 462 (1982) (stating that "attorney's fees under § 1988 are 'cost then accrued' within the meaning of that phrase as it is used in Rule 68"). And the phrase "judgment finally obtained" for purposes of Rule 68 means the amount ultimately entered as representing final judgment. *See Poole v. Miller*, 342 N.C. 349, 464 S.E.2d 409 (1995). Thus, the phrase encompasses more than just the jury's verdict determination. *Id.*

In this case, to reach the "judgment finally obtained" sum of $87,334.69 which exceeded the $50,000 offer of judgment, the trial court interpreted *Poole* to hold that the "judgment finally obtained" for purposes of Rule 68 encompassed all costs incurred after the offer of judgment. We, however, disagree with the trial court's application of *Poole* to this case.

In *Poole*, our Supreme Court addressed the narrow issue of whether the "judgment finally obtained" for purposes of Rule 68 equaled the jury verdict; it did not specifically address the issue of whether the costs incurred after the offer of judgment are included in calculating the "judgment finally obtained". *Id.*

In holding that the "judgment finally obtained" did not equal the jury verdict, the Supreme Court in *Poole* merely held that "judgment finally obtained" is calculated by using the jury verdict along with costs. *Id.* The Court in that case did not direct the trial court to include costs incurred after the offer of judgment in that calculation. The issue in this case is therefore novel to North Carolina: Should costs incurred after the offer of judgment be included in calculating the "judgment finally obtained" under Rule 68. We answer: No.

Although no other North Carolina case directly addresses this issue, we are guided by federal cases which do. *See House v. Hillhaven*, 105 N.C. App. 191, 412 S.E.2d 893 (1992). We note from the outset that Rule 68 of the Federal Rules of Civil Procedure is nearly identical to Rule 68(a) of the North Carolina Rules of Civil Procedure. *See* Fed. R. Civ. P. 68; N.C. Gen. Stat. § 1A-1, Rule 68; *see also Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (stating that "[t]he North Carolina Rules of Civil Procedure are, for the most part, verbatim recitation of the federal rules. . . . Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules."). Moreover, the purpose of Rule 68 of the Federal Rules of Civil Procedure, like Rule 68 of the North Carolina Rules of Civil Procedure, is to encourage settlement.

Significantly, the United States Supreme Court in *Marek v. Chesny*, 473 U.S. 1, 87 L. Ed.2d 1 (1985) determined that Rule 68's policy of encouraging settlement was consistent with the policies and objectives of 42 U.S.C. § 1988 and in no way "cut against the grain" of § 1988.

> There is no evidence . . . that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned.

It follows that since our Courts have construed North Carolina's Rule 68 to be consistent with the federal Rule 68 that our Rule 68 is also consistent with the policies and objectives of § 1988—the grounds on which Mr. Roberts bases his claim for attorney's fees in the case *sub judice*.

In a case strikingly similar to the case at hand, the United States Court of Appeals for the Fourth Circuit reviewed an appeal from a trial court's award of attorney fees under 42 U.S.C. § 1988. *Marryshow v. Flynn*, 986 F.2d 689 (1993). In that case, the Fourth

Circuit held that the "judgment finally obtained" for purposes of Rule 68 of the Federal Rules of Civil Procedure included not only the verdict of the jury but also costs actually awarded by the court for the period that preceded the offer—not costs incurred after the offer of judgment. *Id.*

We agree with the holding in *Marryshow*. In calculating the "judgment finally obtained" under N.C.G.S. § 1A-1, Rule 68, the court should not include any costs incurred after the offer of judgment.

Since the trial court in the instant case included all costs and attorney's fees incurred before and after the offer of judgment in calculating the "judgment finally obtained", the court's calculation was erroneous. Instead, the trial court should have added the jury verdict to the costs and attorney's fees incurred before the offer of judgment to make its determination of the "judgment finally obtained". Using that formula, the correct calculation of the "judgment finally obtained" in the instant case would be the pre-offer of judgment costs of $757.10 plus the pre-offer of judgment attorney's fees of $21,810 plus the jury verdict of $18,100 for a total of $40,667.10, which is less favorable than the $50,000 offer of judgment. *See* N.C.G.S. § 1A-1, Rule 68.

Accordingly, we reverse the judgment of the Superior Court, Orange County and remand this case to that court for entry of judgment consistent with this opinion.

Reversed and remanded.

Judges HORTON and EDMUNDS concur.

STATE OF NORTH CAROLINA v. DEBBIE OXENTINE MITCHELL

No. COA98-1555

(Filed 16 November 1999)

1. Evidence— hearsay—directive statement

The trial court did not err in a prosecution for providing drugs to an inmate by admitting testimony that defendant's boyfriend, an inmate, said "hurry" or "leave" to her as she was departing. Directives are not hearsay when they are simply

offered to prove that the directive was made, not to prove the truth of any matter asserted.

2. Evidence— relevance—guilt of third party

The trial court did not err in a prosecution for providing drugs to an inmate by excluding cross-examination questions by defendant which defendant contends would have shown that the marijuana could have come from someone else. Defendant's proffered cross-examination only sought to raise the inference that some third party might have smuggled the marijuana and did not point to any specific person.

3. Drugs— supplying drugs to inmate—sufficiency of evidence

The trial court did not err by refusing to dismiss for insufficient evidence a charge of providing drugs to an inmate where defendant visited her boyfriend, an inmate at the Alexander County jail; they spoke in a cubicle, separated by a glass window; following their conversation, defendant was seen rising from a squatting position and her boyfriend was seen picking something up near the jail door; there was a separation between the door and the floor; the boyfriend told defendant to hurry and to leave when a jailer and a deputy questioned him; and a marijuana cigarette was found in defendant's hand.

Appeal by defendant from judgment entered 5 August 1998 by Judge James C. Davis in Alexander County Superior Court. Heard in the Court of Appeals 6 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General James C. Holloway, for the State.

L. Dale Graham for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 4 August 1998 session of Alexander County Superior Court for providing drugs to an inmate at a local confinement facility on 4 May 1997, in violation of N.C. Gen. Stat. § 14-258.1(a). The jury returned a verdict of guilty on 4 August 1998, and defendant now appeals.

At trial, the State's evidence tended to show that defendant visited her boyfriend, Bobby Hightower ("Hightower"), at the Alexander County jail on Sunday afternoon, 4 May 1997, where Hightower

was then an inmate. They proceeded to speak in a cubicle for ten minutes, separated only by a glass window. Following their conversation, defendant was observed rising up from a squatting position and Hightower was then seen bending over and picking something up near the main jail door. At that time, there was approximately an inch or an inch-and-a-half separation between the jail door and the floor. When the jailer on duty and a deputy sheriff immediately questioned Hightower as to what was in his hand, he told defendant to "hurry" or "leave." The jailer and deputy sheriff discovered in Hightower's hand a marijuana cigarette, around which was wrapped twelve dollars.

[1] In her first assignment of error, defendant argues that the jailer's and deputy sheriff's testimony that Hightower said "hurry" or "leave" to defendant as she was departing constitutes inadmissible hearsay. We disagree. In their respective briefs, the parties focus on whether such statements fall within the excited utterance exception to hearsay. *See* N.C.R. Evid. 803(2). We need not address those arguments as these statements are not even hearsay in the first place.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). The Official Commentary to Rule 801, however, points out that "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." N.C.R. Evid. 801, Official Commentary. Directives, such as those here, are not hearsay because they are simply offered to prove that the directive was made, not to prove the truth of any matter asserted therein. *Cf. United States v. Gibson*, 675 F.2d 825, 834 (6th Cir.) ("Indeed, a suggestion or an order is not subject to verification at all because such utterances do not assert facts."), *cert. denied*, 459 U.S. 972, 74 L. Ed. 2d 285 (1982).

On this point, *State v. Hood*, 294 N.C. 30, 239 S.E.2d 802 (1978), is instructive. In *Hood*, the following testimony was objected to as hearsay:

> Well, the way it was I suppose to [sic] he said I supposed to set upon the bank . . . .
>
> [Objection; overruled]
>
> I suppose to set upon the bank and shoot through the windshield, back windshield.

Id. at 40, 239 S.E.2d at 808. In addressing the defendant's contention that this testimony amounted to hearsay, our Supreme Court stated:

> The witness's response that he 'was suppose to set upon the bank [etc.] . . .' indicates that defendant directed the witness to do certain things. Such a response is not hearsay in that it is offered only to show that the statement was made, and not to show the truth of matters asserted in the statement. The probative force of such testimony, *i.e.*, that the statement was made, depends on the credibility of the witness himself, and not on the credibility of some person other than the witness producing such testimony.

Id. at 40-41, 239 S.E.2d at 808. Here, as in *Hood*, the significance of the statement "hurry" or "leave" was in the fact that the statement was made, not in the truth of any matters asserted therein. Accordingly, defendant's first assignment of error is overruled.

[2] Next, defendant contests the trial court's exclusion of certain questioning purportedly relevant to defendant's case. "[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). With this standard of review in mind, we turn to defendant's proffered line of questioning.

Specifically, defendant sought to cross-examine the deputy sheriff as to four things: (1) inmates serving DWI sentences being in the jail that weekend; (2) other occasions in which prisoners brought in contraband themselves; (3) the general procedure for visitors bringing in clothing or personal items to inmates; and (4) "trustees" (i.e. trusted inmates) being allowed in the lobby area of the jail. Defendant argues that such cross-examination would have shown the marijuana here could have come from someone other than defendant. We conclude that such cross-examination was properly excluded by the trial court as being irrelevant.

"Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it

does more than create an inference or conjecture in this regard. *It must point directly to the guilt of the other party.*" *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279 (1987) (emphasis added). Here, defendant's proffered cross-examination only sought to raise the inference that some third party might have smuggled in the marijuana—it did not point to any *specific* person. Thus, defendant's argument is rejected. *See also State v. Brewer*, 325 N.C. 550, 562, 386 S.E.2d 569, 575 (1989) (holding defendant's proffered evidence to be irrelevant because "it fail[ed] to point to a specific other person as the perpetrator of the crime with which defendant is charged"), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990).

[3] Finally, defendant contests the trial court's failure to dismiss the charges against her for insufficient evidence. "In ruling upon defendant['s] motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). There must be substantial evidence of defendant's guilt as to each element of the crime charged. *Id.* Here, defendant was charged with providing drugs to an inmate at a local confinement facility. To withstand a motion to dismiss for that offense, the State had to prove three elements: (1) Hightower was an inmate at a local confinement facility; (2) while Hightower was an inmate, defendant gave him a controlled substance; and (3) defendant acted knowingly and intentionally. *See* N.C. Gen. Stat. 14-258.1(a) (1993); N.C.P.I., Crim. 233.80. The State's evidence, as summarized earlier, satisfied each of these three elements. Thus, defendant's final argument is without merit.

No error.

Judges JOHN and McGEE concur.

DILLON R. ALEXANDER, BY GUARDIAN AD LITEM, AND BRIAN ALEXANDER AND WIFE, CHERYL ALEXANDER, PLAINTIFFS v. ROBERT QUATTLEBAUM AND HABITAT PROPERTIES OF NC, INC., D/B/A HABITAT REALTY, DEFENDANTS

No. COA99-2

(Filed 16 November 1999)

1. Premises Liability— licensees—standard of care—retroactivity

The trial court erred in a negligence action arising from a fall through a door by applying a willful and wanton standard of care for licensees and granting a 12(b)(6) dismissal. *Nelson v. Freeland*, 349 N.C. 614, changed the standard to a duty of reasonable care, and that decision is applicable here retroactively because this case falls within the third category of retroactive application listed in *State v. Rivens*, 299 N.C. 385, 389.

2. Appeal and Error— retroactivity—application—categories of cases

When changes in the law are made retroactive, these changes apply to five categories of cases: (1) The parties and facts of the case in which the new rule is announced; (2) Cases in which the factual event, trial, and appeal are all at an end but in which a collateral attack is brought; (3) Cases pending on appeal when the decision is announced; (4) Cases awaiting trial; and (5) Cases initiated in the future but arising from earlier occurrences.

Appeal by plaintiffs from order granting a 12(b)(6) motion entered 27 August 1998 by Judge Ronald K. Payne in Henderson County Superior Court. Heard in the Court of Appeals 22 September 1999.

Jackson & Jackson, by Phillip T. Jackson, for plaintiff-appellants.

Cloninger, Barbour & Arcuri, P.A., by John C. Cloninger, for defendant-appellees.

LEWIS, Judge.

[1],[2] Plaintiff filed this negligence action on 9 April 1998 for injuries arising when he fell through the screen door of his grandmother's mobile home. Specifically, plaintiff alleged that defendants Robert Quattlebaum, owner of the mobile home, and Habitat Properties of N.C., Inc., manager of the property, were negligent in

that they failed to make repairs to the screen door, even after plaintiff complained that the door frequently fell off its track. In addition, plaintiff alleged that there was no landing or stairway from the screen door to the ground below. Plaintiff has stipulated that he was a licensee for purposes of his claim. Defendants moved to dismiss this action for failure to state a claim upon which relief could be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court granted the dismissal, and plaintiff now appeals.

A defendant's motion for a 12(b)(6) dismissal should be granted where it "appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970). For the purposes of a 12(b)(6) motion to dismiss, the court "must treat the allegations of the complaint as true." *Hickman v. McKoin*, 337 N.C. 460, 462, 446 S.E.2d 80, 82 (1994). The trial court concluded that plaintiff's complaint failed to allege that defendants acted willfully or wantonly toward him. In doing so, the trial court relied on the former case law relating to premises liability, since modified by our Supreme Court in *Nelson v. Freeland*, 349 N.C. 614, 507 S.E.2d 882 (1998).

Formerly, North Carolina law defined the duty owed by landlords according to whether the person on their land was a licensee, invitee, or trespasser. The law defined a licensee as a person who was on the owner's land by permission but whose presence confers benefit to the licensee only. *Andrews v. Taylor*, 34 N.C. App. 706, 709, 239 S.E.2d 630, 632 (1977). The duty owed by the owner to a licensee was to refrain from injuring him willfully or through wanton negligence or by doing any act which increases the hazard to the licensee while he was on the premises. *Id.* at 709, 239 S.E.2d at 632. The law defined an invitee as a person who was on the land with the owner's permission, where there was a mutual benefit by that presence enjoyed by that person and the landowner. *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 561, 467 S.E.2d 58, 63 (1996). A landowner owed the invitee a duty of reasonable care to keep the property safe and to warn of hidden dangers. *Pulley v. Rex Hospital*, 326 N.C. 701, 705, 392 S.E.2d 380, 383 (1990). Finally, a trespasser was defined as one who was on the land without the owner's permission and only raised the duty for the landowner to refrain from willfully and wantonly causing injury. *Starr v. Clapp*, 40 N.C. App. 142, 143, 252 S.E.2d 220, 221, *aff'd per curiam*, 298 N.C. 275, 258 S.E.2d 348 (1979).

Plaintiff stipulated here that he was a licensee. Thus, under the former law, in order to survive a 12(b)(6) motion to dismiss, plaintiff would have to allege specific acts of negligence that would tend to show willful conduct or wanton negligence. *Roberts v. Memorial Park*, 281 N.C. 48, 56, 187 S.E.2d 721, 725 (1972).

On 31 December 1998, the North Carolina Supreme Court changed this system in *Nelson v. Freeland*, 349 N.C. 614, 507 S.E.2d 882 (1998). The court announced that the duty owed to licensees is no longer that of refraining from willful or wanton negligence, but rather a duty of reasonable care. *Id.* at 631, 507 S.E.2d at 892. Thus, the court erased the distinction between the duty owed to licensees and invitees. Though the trial court's dismissal of plaintiff's claim here was granted prior to this change in law, the *Nelson* court explicitly stated that the change was to be retroactive. *Id.* at 633, 507 S.E.2d at 893. When changes in the law are made retroactive, these changes apply to five categories of cases:

> (1) The parties and facts of the case in which the new rule is announced; (2) Cases in which the factual event, trial, and appeal are all at an end but in which a collateral attack is brought; (3) Cases pending on appeal when the decision is announced; (4) Cases awaiting trial; and (5) Cases initiated in the future but arising from earlier occurrences.

State v. Rivens, 299 N.C. 385, 389, 261 S.E.2d 867, 870 (1980), *cited in MacDonald v. University of North Carolina*, 299 N.C. 457, 462, 263, S.E.2d 578, 581 (1980). Having filed the notice of appeal here on 25 September 1998, this case falls within the third application of retroactivity. Thus, the new standard announced in *Nelson* applies here.

Because the court below granted the 12(b)(6) motion to dismiss based on a willful and wanton standard for licensees, and since the appropriate standard is now one of reasonable care, we vacate the decision below and remand for further proceedings consistent with the new law as described in *Nelson v. Freeland*.

Vacated and remanded.

Judges JOHN and McGEE concur.

TINA JONES SITTON, PLAINTIFF v. RHONDA GENEANE COLE, DEFENDANT

No. COA98-1453

(Filed 16 November 1999)

1. **Evidence— medical record—probative value outweighed by prejudice**

The trial court properly exercised its discretion in an automobile accident case where plaintiff testified that she had never experienced any problems with her thoracic spine, defendant sought to introduce a prior medical record which referred to thoracic pain, and the court excluded the record under Rule 403. The record was remote in time, plaintiff's physician at that time could not specify who had made the vague notation, and the physician did not have personal knowledge of the statement.

2. **Evidence— impeachment—vehicle to introduce inadmissible record**

The trial court did not err in an automobile accident case by excluding a physician's testimony relating to an excluded medical record. The doctor testified that he had no personal knowledge and was relying solely on the record; impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.

Appeal by defendant from judgment entered 11 March 1998 by Judge James L. Baker, Jr. in Swain County Superior Court. Heard in the Court of Appeals 14 September 1999.

Melrose, Seago & Lay, P.A., by Mark R. Melrose, for plaintiff-appellee.

Frank J. Contrivo, P.A., by Frank J. Contrivo, for defendant-appellant.

LEWIS, Judge.

This case arises from an automobile accident that occurred between plaintiff and defendant on 13 June 1995 in Swain County, North Carolina. On 16 January 1997 plaintiff filed this action alleging defendant operated her vehicle negligently and asking to recover compensatory damages, attorney's fees and costs. Defendant

answered denying liability and damages. The jury awarded plaintiff damages in the amount of $8,000.

At trial plaintiff testified she suffered injury to her neck, shoulder and thoracic spine as a result of the accident on 13 June 1995, and that prior to the accident she had never experienced any problems with her neck, shoulder or thoracic spine. Defendant sought to introduce a 1988 medical record of plaintiff from Swain Medical Center, where plaintiff received prior routine medical treatment. The trial court excluded the medical record and any testimony relating to the excluded medical record.

[1] Defendant first argues the trial court's determination that the probative value of plaintiff's medical record was outweighed by its danger of prejudice under Rule 403 was error. We note that defendant does not address Rule 403 on appeal, but instead asserts that the medical record is admissible as a properly authenticated business record under Rule 803(6). Qualification of the medical record under a hearsay exception does not itself justify admitting it into evidence, as the evidence must also be found to be more probative than prejudicial. N.C.R. Evid. 403; *State v. Hayes*, 130 N.C. App. 154, 175, 502 S.E.2d 853, 868 (1998). Whether or not evidence should be excluded pursuant to Rule 403 is a matter within the discretion of the trial court. *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d. 198, 203 (1998). The trial court's ruling will be reversed only upon a showing that it was arbitrary to the extent it could not be the result of a reasoned decision, and therefore, an abuse of discretion. *Id.* at 727, 509 S.E.2d at 203.

The plaintiff's medical record in this case is dated 27 June 1988, ten years before the trial. A note in the record states plaintiff complained of "longstanding mid-thoracic pain" and "paraspinal muscle pain." Dr. Paul Sale, plaintiff's treating physician on 27 June 1988, testified he could not identify the signature on plaintiff's medical record, did not know whether the signature belonged to a physician, and did not know who wrote the note. Dr. Sale could not determine if the note referred to an injury, medical illness or a symptom. Furthermore, Dr. Sale had no personal knowledge of the statement in the medical record. Because the medical record was remote in time and Dr. Sale could not specify who made this vague notation regarding plaintiff's condition, its probative value was substantially outweighed by its danger of prejudice and the trial court properly exercised its discretion in excluding the evidence under Rule 403.

[2] Defendant next argues the trial court erred in excluding the oral testimony of Dr. Sale relating to the excluded medical record. Defendant attempted to admit Dr. Sale's oral testimony to impeach plaintiff's testimony that she had never had any prior pain or problems with her neck, back or shoulder. It is clear, however, that " 'impeachment by prior inconsistent statement may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible.' " *State v. Hunt* 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989) (quoting *United States v. Morlang*, 531 F. 2d 183, 190 (4th Cir. 1975)). Dr. Sale testified he had no personal knowledge of plaintiff's back or muscular problems. He was relying solely on the medical record. Since plaintiff's medical record itself was properly excluded, admission of such oral testimony from Dr. Sale would have served as a mere vehicle to get before the jury evidence not otherwise admissible. Thus, the trial court properly excluded Dr. Sale's oral testimony regarding the medical record.

Appellant fails to offer argument in her brief supporting the remaining assignments of error. They are deemed abandoned under Appellate Rule 28(b)(5).

Affirmed.

Judges MARTIN and HUNTER concur.

PHYLLIS DARBY, PLAINTIFF-APPELLANT v. HOYTE CLYDE DARBY, DEFENDANT-APPELLEE

No. COA98-1517

(Filed 16 November 1999)

Process and Service— acceptance of service—action by wife against husband—acceptance by wife

N.C.G.S. § 1A-1, Rule 4(j)(1)(a) does not allow a wife who sues her husband to accept service of process for her husband when they live in the same house.

Appeal by plaintiff-appellant from judgment entered 21 September 1998 by Judge Loto G. Caviness in Cleveland County Superior Court. Heard in the Court of Appeals 16 September 1999.

Deaton & Biggers, P.L.L.C., by Lydia A. Hoza, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen Smith, for defendant-appellee.

WYNN, Judge.

The facts of this appeal are quite simple. The plaintiff-wife having been injured in an automobile driven by her husband, brought an action against him one day before the running of the three-year statute of limitations. The county sheriff served the complaint at the residence of the husband which was also the residence of the wife. For some reason, not apparent to us, the plaintiff-wife accepted service of her own complaint on behalf of her defendant-husband.

Having been informed by answer of the insurer for the defendant-husband that this was not an acceptable service, the plaintiff's attorney resorted to a substituted form of service by sending to the defendant-husband a certified copy of the complaint by registered mail. To complete what appears to be a bar exam type hypothetical, the plaintiff-wife accepted and signed the return receipt on the certified mail for her defendant-husband.

The obvious issue that flows from this factual fiasco is: Does North Carolina's service of process statute permit a wife who sues her husband to accept service of process for her husband when she lives in the same house as he does? We answer: No.

Under our statute, the manner of service of process may be by "leaving copies thereof at the defendant's dwelling or usual place of abode with some person of suitable age and discretion then residing therein." *See* N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a) (1990). While the plaintiff wife in this case meets each of those criteria, we must afford our legislature the courtesy of understanding that there is an obvious exception to that rule—a plaintiff cannot accept service of her own complaint.

While our legislature strives to write our laws in plain language, it cannot be expected to address every possible scenario that may be presented by the literal application of its words. Rather, the courts in reading our statutes must import common sense to the meaning of the legislature's words to avoid an absurdity. *See Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (stating that "where a literal interpretation of

the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded"). Thus, we hold that the statute does not allow a plaintiff to accept—on the behalf of the defendant—service of her own complaint.

Affirmed.

Judges JOHN and EDMUNDS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 NOVEMBER 1999

CITY OF WILSON EMPLOYEES CREDIT UNION v. CUMIS INS. SOC'Y No. 98-1556	Wilson (98CVD575)	Reversed and Remanded
COLONIAL OIL INDUS. v. WILLIAMS OIL CO. No. 98-1545	Chatham (98CVS32)	Affirmed
COUCH v. LOCKLEAR No. 98-1409	Durham (96CVS03026)	Affirmed
HALFORD v. WRIGHT No. 98-1606	Rutherford (96CVS633)	Affirmed
HARMON v. FOOD LION STORE #748 No. 98-1546	Ind. Comm. (336923)	Affirmed
IN RE FAUSNET No. 98-1136	Wilkes (98J25)	Affirmed
LOVE GRADING CO. v. BD. OF ADJUST. OF MECKLENBURG COUNTY No. 98-1558	Mecklenburg (96CVS14494)	Affirmed
MOHORN v. MOHORN No. 98-1452	Guilford (90CVD2136)	Affirmed
STATE v. EDGEWORTH No. 98-1210	Mecklenburg (94CRS66532) (94CRS66534)	No Error
STATE v. JONES No. 98-1070	Surry (97CRS10426)	No Error
STATE v. WHITTINGTON No. 98-1397	Watauga (97CRS2751) (97CRS2867)	Trial: No Error. Sentencing: Remand for resentencing.
STULL v. STULL No. 98-1456	Lenoir (96CVD17)	Affirmed
WARE v. MARTIN No. 98-1348	Wake (96CVD903)	Affirmed
WAVERLY BELMAN SHOPPING CENTER v. WALTERS No. 98-1319	Wake (97CVS3634)	Reversed and Remanded

FILED 16 NOVEMBER 1999

BRANCH v. BRENTWOOD FOOD & BEVERAGE, INC. No. 98-1618	Franklin (97CVS832)	Affirmed
CB COMMERCIAL REAL ESTATE GRP. v. BAYNE No. 98-1525	Mecklenburg (97CVS1297)	Affirmed
FITZHUGH v. FAULKNER No. 99-550	Halifax (98CVS376)	Reversed and Remanded
HARKINS v. HARKINS No. 98-1480	Henderson (98CVS758)	Affirmed
HORTON v. CSSI No. 99-160	Ind. Comm. (705100)	Affirmed
HYDE v. CHESNEY GLEN HOMEOWNERS ASS'N No. 99-152	Wake (95CVD6617)	Vacated & Remanded
IN RE CAULDER No. 99-234	Scotland (97J94)	Dismissed
IN RE ROGERS No. 99-577	Yadkin (94J64) (94J65) (94J66) (94J67)	Affirmed
KENNEDY v. CUMMINGS No. 99-416	Guilford (98CVS5607)	Dismissed
POPE v. OFFERMAN No. 98-1104	Harnett (97CVS01443)	Reversed and Remanded
POWELL v. N.C.D.O.C. ENTERS. No. 98-1572	McDowell (98CVS226)	Reversed and Remanded
SPENCE v. GARDNER No. 99-146	Dare (96CVS423)	Affirmed in part, Reversed in part
STATE v. ALLRED No. 99-600	Guilford (98CRS29154) (98CRS29155)	No Error
STATE v. ATKINSON No. 98-1519	Lenoir (96CRS5782)	No Error
STATE v. BARRETT No. 99-353	Moore (97CRS3876) (97CRS3879)	No Error

STATE v. CASSELL No. 99-333	Rowan (96CRS6590) (96CRS6591)	No Error
STATE v. CRAIG No. 99-612	Rowan (98CRS11990) (98CRS12074)	No Error
STATE v. DELGADO No. 99-468	Surry (98J131B)	Affirmed
STATE v. FAIRLEY No. 99-406	Durham (97CRS5688) (97CRS5689) (97CRS3836) (97CRS3837) (97CRS6199)	Dismissed
STATE v. FARMER No. 99-226	Mecklenburg (97CRS139346)	No Error
STATE v. GAITHER No. 99-63	Guilford (98CRS053561)	No Error
STATE v. HAKES No. 99-199	Guilford (98CRS23559) (98CRS23560) (98CRS23561) (98CRS23562) (98CRS23563) (98CRS23564) (98CRS23565) (98CRS23566) (98CRS23567) (98CRS23568) (98CRS23569) (98CRS23570) (98CRS23571) (98CRS23572) (98CRS23573) (98CRS23574) (98CRS23575) (98CRS23576) (98CRS23577) (95CRS58556) (95CRS20637)	Reversed and remanded for rehearing
STATE v. HERNANDEZ No. 99-666	Cabarrus (98CRS4799) (98CRS4800) (98CRS4942) (98CRS4943) (98CRS4944)	No Error

	(98CRS4945) (98CRS4946) (98CRS4947) (98CRS4948) (98CRS4949) (98CRS4950)	
STATE v. HUNTER No. 98-1342	Mecklenburg (92CRS62872) (92CRS62873)	No Error
STATE v. JACOBY No. 99-482	Watauga (97CRS4353)	No Error
STATE v. KIRBY No. 99-426	New Hanover (97CRS18553) (97CRS18554)	No Error
STATE v. LACEWELL No. 99-515	Bladen (98CRS8604)	Affirmed
STATE v. LAMBERT No. 98-1222	Pasquotank (96CRS5357)	No Error in trial. Judgment vacated in part and Remanded for resentencing consistent with this opinion
STATE v. McFARLANE No. 99-301	Mecklenburg (97CRS32984)	No Error
STATE v. PARKER No. 99-114	Durham (98CRS33177) (98CRS33178) (98CRS33179) (98CRS33180) (98CRS33181)	Remanded
STATE v. SHEPARD No. 99-531	Lenoir (98CRS2359)	No Error
STATE v. TODD No. 99-87	Robeson (94CRS20282)	No Error
STATE v. WHITE No. 99-643	Gaston (96CRS16473) (97CRS8279)	No Error
STATE v. WILLIAMS No. 98-1577	New Hanover (98CRS2649) (98CRS2650) (98CRS2651) (98CRS2652)	No Error

TRIANGLE BANK v. EATMON No. 98-1428	Nash (98CVS459)	Affirmed
WHEDBEE v. GODWIN No. 98-1248	Bertie (94CVS430)	Affirmed
YARBOROUGH v. TRUESDALE No. 98-1597	Wake (97CVS7694)	Affirmed

BRANNOCK v. BRANNOCK

[135 N.C. App. 635 (1999)]

SHERYL W. BRANNOCK, PLAINTIFF v. TOMMY D. BRANNOCK, DEFENDANT

No. COA98-1179

(Filed 7 December 1999)

1. Appeal and Error— preservation of issues—voluntary dismissal

Defendant's failure to appeal did not preclude consideration of assignments of error and arguments addressed to the voluntary dismissal of a claim. While an involuntary dismissal under Rule 41(b) constitutes a discretionary action of the trial court and a party who fails to appeal such dismissal is bound thereby, a Rule 41(a)(1) dismissal emanates from a party's election to dismiss a claim and is not based upon an order or discretionary ruling of the court. It appears that any attempt by defendant to appeal plaintiff's Rule 41(a)(1) dismissal would have been ineffective because, under N.C.R. App. P. 3(a), appeal may be taken only from a judgment or order of a superior or district court.

2. Trials; Divorce— alimony—voluntary dismissal—statutory amendment—new action

Summary judgment should not have been granted in favor of plaintiff and should have been granted for defendant where defendant instituted a divorce action, plaintiff responded with a counterclaim seeking alimony pursuant to N.C.G.S. § 50-16.1 (since repealed), defendant asserted as an affirmative defense that plaintiff had engaged in an adulterous relationship, the parties were divorced with the judgment providing that matters pertaining to alimony were retained for a later date, plaintiff filed a voluntary dismissal without prejudice under Rule 41(a), plaintiff filed a new complaint seeking alimony under the new N.C.G.S. § 50-16.1A(3)a, defendant stipulated that he had committed illicit sexual behavior under that statute and plaintiff admitted that she had not "remained celibate" from the separation to the divorce, and the trial court granted summary judgment for plaintiff. Under the prior statute, proof that a dependent spouse (plaintiff, here) had committed adultery anytime prior to entry of divorce provided the supporting spouse (defendant, here) an absolute defense against alimony notwithstanding similar conduct by the supporting spouse, while the new statute focuses solely upon misconduct prior to separation. Considering the invalidation of a statutory absolute defense for alimony which defendant enjoyed

> as a vested right at the time plaintiff voluntarily dismissed her first claim for alimony and the subjection of defendant to new liability which did not previously exist, it cannot be said that the second claim constituted a new action on the same claim earlier dismissed, particularly upon viewing the entire history of the litigation between the parties. While the procedural remedy of alimony previously existed, the substantive rights of the parties are now different and the second claim constituted a new and distinct claim for alimony which is barred.

Appeal by defendant from summary judgment entered 25 June 1998 by Judge A. Moses Massey in Surry County District Court. Heard in the Court of Appeals 12 May 1999.

Schoch and Woodruff, L.L.P., by Carolyn J. Woodruff, for plaintiff-appellee.

Bell, Davis and Pitt, P.A., by Robin J. Stinson, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's 25 June 1998, *nunc pro tunc* 23 April 1998, grant of summary judgment in favor of plaintiff. Defendant contends the trial court erred by allowing plaintiff to pursue a new alimony claim (Claim # 2) under N.C.G.S. § 50-16.1A *et seq.* (1995) following her voluntary dismissal of a pending alimony claim (Claim #1) asserted under N.C.G.S. § 50-16.1 *et seq.* (*repealed by* 1995 N.C. Sess. Laws ch. 319, § 1, effective October 1, 1995). We reverse the trial court.

Pertinent undisputed facts and relevant procedural history include the following: Plaintiff and defendant were married 24 May 1976 and separated 14 July 1994. Defendant instituted a divorce action 17 July 1995, and plaintiff responded 14 August 1995 with an answer and counterclaim seeking alimony pursuant to G.S. § 50-16.1 *et seq.* (repealed). Defendant's 25 August 1995 Reply asserted as an affirmative defense that plaintiff had

> engaged in an adulterous relationship . . . [and that] N.C.G.S. § 50-16.6 specifically does not allow alimony to be paid when the issue of adultery is found against the spouse seeking alimony.

Defendant also filed and served upon plaintiff a request for admissions, eliciting therein acknowledgment by plaintiff that she

had "engaged in a sexual relationship since the date of separation from [defendant] with a person other than [defendant]." Plaintiff failed to respond thereto and the parties do not dispute that defendant's request was deemed admitted by operation of N.C.G.S. § 1A-1, Rule 36 (1990).

Plaintiff and defendant were divorced 11 April 1996, the judgment providing that matters pertaining to alimony were "retained by the Court for hearing at a later date." On 21 March 1997, plaintiff filed a notice of voluntary dismissal without prejudice, *see* N.C.G.S. § 1A-1, Rule 41(a) (1990) (Rule 41(a)), voluntarily dismissing Claim #1.

On 2 April 1997, plaintiff filed a complaint asserting Claim # 2 and alleging in pertinent part as follows:

> 5. At the time the judgment of absolute divorce was entered . . . Plaintiff had pending a counterclaim for alimony. . . .
>
> . . . .
>
> 7. Pursuant to Rule 41 . . . [and] *Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994), Plaintiff is entitled to file a new action based upon the same claims as originally asserted in her counterclaim for alimony [Claim #1] . . . within one year of the voluntary dismissal without prejudice of her counterclaim.
>
> . . . .
>
> 13. The Plaintiff is automatically entitled to an award of alimony by virtue of the Defendant's participating in an act of illicit sexual behavior as defined in N.C.G.S. § 50-16.1A(3)a, during the marriage and prior to the date of separation. The Plaintiff did not participate in an act of illicit sexual behavior as defined in N.C.G.S. § 50-16.1A(3)a, during the marriage and prior to the date of separation.

Defendant's 11 July 1997 answer and motion to dismiss pleaded, *inter alia*, plaintiff's adultery prior to divorce as a bar to "[p]laintiff's demand for alimony herein."

On 26 August 1997, defendant filed a stipulation, "for the purposes of Plaintiff's claim for alimony" in Claim # 2, conceding he had committed illicit sexual behavior under N.C.G.S. § 50-16.3A(a) (1995). The referenced statute provides:

> (a) . . . If the court finds that the dependent spouse participated in an act of illicit sexual behavior [including adultery] . . . during

> the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in [adultery] . . . during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse.

G.S. § 50-16.3A(a).

Following a 10 December 1997 trial court order to compel, plaintiff filed a response to admissions. Plaintiff admitted therein that she had "engaged in sexual relationships with a person other than" defendant and that she had "not remained celibate from the date of separation until [the] date of divorce."

Plaintiff moved for summary judgment 17 March 1998 as to the issue of her entitlement to alimony under G.S. § 50-16.3A(a). She argued there remained no issue of material fact in view of defendant's uncontested status as supporting spouse, his stipulated participation in illicit sexual behavior as defined in the new statute during the marriage and prior to separation, and the absence of plaintiff's misconduct, again as provided in the new law, prior to separation. The trial court agreed and allowed plaintiff's motion 25 June 1998. Defendant appeals.

[1] We note preliminarily the record contains no indication that defendant interjected notice of appeal upon plaintiff's voluntary dismissal under Rule 41(a) of Claim # 1. This Court has held that an involuntary dismissal under N.C.G.S. § 1A-l, Rule 41(b) (1990) (Rule 41(b)), constitutes a discretionary action of the trial court and a party who fails to appeal such dismissal is bound thereby. *Jones v. Summers*, 117 N.C. App. 415, 418-19, 450 S.E.2d 920, 922-23 (1994), *disc. review denied*, 340 N.C. 112, 456 S.E.2d 315 (1995). However, a Rule 41(a)(1) dismissal emanates from a party's election to dismiss a claim and, unlike dismissal pursuant to Rule 41(b), is not based upon an order or discretionary ruling of the court. *See* G.S. § 1A-1, Rule 41(a)(1) ("action or any claim . . . may be dismissed by the plaintiff *without order of court* . . . by filing a notice of dismissal at any time before the plaintiff rests his case") (emphasis added); *Ward v. Taylor*, 68 N.C. App. 74, 78, 314 S.E.2d 814, 819, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 157 (1984) (Rule 41(a)(1) "does not require court action, other than ministerial record-keeping functions, to effect a dismissal"); *Carter v. Clowers*, 102 N.C. App. 247, 250-51, 401 S.E.2d 662, 664 (1991) (a party "is free to abandon an alleged or potential claim against another party at any time" and "*no action of the court*

is necessary" to give Rule 41(a)(1) notice of dismissal its full effect) (emphasis in original); and *Kohn v. Mug-A-Bug*, 94 N.C. App. 594, 596, 380 S.E.2d 548, 550 (1989), *overruled on other grounds*, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992) (plaintiffs possessed "unqualified right" to take Rule 41(a)(1) dismissal where case in pretrial stage and defendants had sought no affirmative relief).

It thus appears any attempt by defendant to appeal plaintiff's Rule 41(a)(1) dismissal of Claim # 1 would have been ineffective. *See* N.C.R. App. P. 3(a) (appeal may be taken only "from *a judgment or order of a superior or district court* rendered in a civil action") (emphasis added). Accordingly, defendant's failure to appeal does not preclude our consideration herein of the assignments of error and arguments addressed to dismissal of Claim # 1. *See also Wells v. Wells*, 132 N.C. App. 401, 406, 512 S.E.2d 468, 470-71, *disc. review denied*, 350 N.C. 599, — S.E.2d — (1999) (plaintiff's assignments of error and arguments in appellate brief preserved right to appeal interlocutory order notwithstanding plaintiff's failure to reference order in formal notice of appeal).

[2] We turn therefore to defendant's argument that Claim # 2 failed to qualify as "a new action based on the same claim" under Rule 41(a)(1) so as to permit filing of Claim # 2 within one year of plaintiff's dismissal of Claim # 1. G.S. § 1A-1, Rule 41(a)(1). According to defendant, G.S. § 50-16.1A *et seq.* created a claim of alimony distinct from that set out in repealed G.S. § 50-16.1 *et seq.* Defendant points to significant substantive differences affecting, *inter alia*, entitlement to alimony. We conclude defendant's argument is well founded.

Rule 41(a) provides:

> If an action commenced within the time prescribed therefor, 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 . . . .

G.S. § 1A-1, Rule 41(a)(1).

Our courts have required the "strictest factual identity between the original" claim, *Goodson v. Lehmon*, 225 N.C. 514, 518, 35 S.E.2d 623, 625 (1945) (construing N.C.G.S. § 1-25, a predecessor of Rule 41(a)(1)); *see Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 355, 198 S.E.2d 741, 743 (1973) (provisions of Rule 41 follow G.S. § 1-25 without change), and the "new" action, which must be based upon the "same claim," G.S. § 1A-1, Rule 41(a)(1), as the original

action. Further, both claims must be "substantially the same, involving the same parties, the same cause of action, and the same right." *Cherokee Ins. Co. v. R/I, Inc.*, 97 N.C. App. 295, 297, 388 S.E.2d 239, 240, *disc. review denied*, 326 N.C. 594, 393 S.E.2d 875 (1990) (citations omitted). If the actions are "fundamentally different," *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733, *disc. review denied*, 314 N.C. 670, 336 S.E.2d 402 (1985), or not "based on the same claim[s]," G.S. § 1A-1, Rule 41(a)(1), the new action is not considered a "continuation of the [original] action," *Goodson*, 225 N.C. at 518, 35 S.E.2d at 625, and Rule 41(a) may not be invoked.

Notwithstanding, it appears a party may voluntarily dismiss a pending alimony claim following entry of a divorce judgment and thereafter file within one year under Rule 41(a) an action based upon the earlier alimony claim. *Stegall v. Stegall*, 336 N.C. 473, 479, 444 S.E.2d 177, 181 (1994) ("if alimony . . . claim[] [is] properly asserted . . . and [is] not voluntarily dismissed pursuant to Rule 41(a)(1) until after judgment of absolute divorce is entered, a new action based on th[at] claim[] may be filed within the one-year period"); *cf. Lafferty v. Lafferty*, 125 N.C. App. 611, 613, 481 S.E.2d 401, 402, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 549 (1997) (citations omitted) (plaintiff may not voluntarily dismiss claim under Rule 41(a) without consent of defendant where latter has set up claim against plaintiff arising out of same transactions alleged by plaintiff). While plaintiff relies on *Stegall* as establishing that "dismissal of her first claim after the entry of Judgment of Divorce and the subsequent refiling of the action was procedurally proper," she concedes the case does not address the operation of Rule 41(a)(1) when new legislation intervenes between dismissal and subsequent refiling.

Pertinent to the case *sub judice* and effective 1 October 1995, G.S. § 50-16.1A *et seq.* repealed the existing alimony statute, G.S. § 50-16.1 *et seq.*, and became applicable to civil actions filed on or after said date, specifically excluding pending litigation or motions in the cause seeking to modify orders or judgments already in effect on that date. G.S. § 50-16.1A (Act of June 21, 1995, ch. 319, § 12, 1995 N.C. Sess. Laws 641, 649) (provisions "shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995").

We begin with the observation that plaintiff's reference to *Stegall* may not be beneficial to her position before this Court. *Stegall* in effect held that an alimony claim pending at the time of a divorce

judgment and subsequently voluntarily dismissed may be refiled within the one year period permitted by Rule 41(a)(1). *Stegall*, 336 N.C. at 479, 444 S.E.2d at 181. By citing *Stegall*, plaintiff thus posits that Claim # 1, later dismissed 21 March 1997 and, according to plaintiff, refiled as Claim # 2 on 2 April 1997, was pending 1 October 1995. However, G.S. § 50-16.1A *et seq.*, upon which plaintiff expressly based Claim # 2, provides the section is inapplicable to litigation pending upon the statutory effective date of 1 October 1995.

If, therefore, as plaintiff argues to this Court, Claim # 2 is "based on the same claim," G.S. § 1A-1, Rule 41(a)(1), advanced in Claim # 1, it would then appear that Claim # 2 was "pending" 1 October 1995 and the provisions of G.S. § 50-16.1A *et seq.* would not be applicable. *See McFetters v. McFetters*, 219 N.C. 731, 734, 14 S.E.2d 833, 835 (1941) ("[a]n action is deemed to be pending from the time it is commenced until its final determination"); *see also* Black's Law Dictionary 1021 (5th ed. 1979) ("an action or suit is 'pending' from its inception until the rendition of final judgment; [action b]egun, but not yet completed"), and The American Heritage College Dictionary 1010 (3d ed. 1997) ("pending" defined as "[n]ot yet decided or settled; awaiting conclusion or confirmation"). On the other hand, if Claim # 2 is found not to be "based on the same claim" advanced in Claim # 1, then Claim # 2 must fail as a "new" claim for alimony initiated subsequent to the parties' divorce. *See* N.C.G.S. § 50-11(c)(1995) (divorce "shall not affect the rights of either spouse with respect to any action for alimony . . . pending at the time the judgment for divorce is granted"). While plaintiff's appeal would thus be unavailing under either theory, we conclude Claim # 2 did not constitute "a new action based on the same claim." G.S. § 1A-l, Rule 41(a)(1).

The new statute has been described as effecting a "wholesale revision," Sally B. Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C.L. Rev. 2018 (1998); *see id.* at n.1 ("definitions of a dependent spouse and a supporting spouse . . . are virtually the only portions of the new alimony act . . . that have remained in their original form"), in North Carolina alimony law, "basically replac[ing]," *id.* at 2029, prior law with new "principles, concepts and directives that are inconsistent with previous case law," *id.* at 2031, and laying a "foundation for the development of many fundamental principles thus far unknown" to our State's domestic law, *id.* at 2021. In short, the new alimony statute created: 1) postseparation support, a new category of support replacing *alimony pendente lite*, 2) less restrictive dependency require-

ments, 3) greater flexibility in determining the amount and duration of alimony, including a marked departure from a standard of living assessment, and, most significantly 4) less emphasis on fault. *See id.* at 2022.

For example, North Carolina courts previously were required to conduct a completely fault-based assessment to determine entitlement to alimony, whereas under the new statute fault merely constitutes a factor to be considered in resolving support eligibility and amount. *See id.* at 2031-32. Prior law entitled a dependent spouse to alimony upon proof the supporting spouse had committed one of ten fault grounds set forth under G.S. § 50-16.2 (repealed), including adultery. G.S. § 50-16.2(1) (repealed); *see Adams v. Adams*, 92 N.C. App. 274, 278-79, 374 S.E.2d 450, 452-53 (1988) (adultery by supporting spouse after separation date, but prior to divorce, grounds for alimony; no distinction between pre-separation and post-separation adultery under G.S. § 50-16.2(1)). However, regardless of such proof, a dependent spouse was barred from an award of alimony if "adultery [wa]s pleaded in bar of demand . . . and the issue of adultery [wa]s found against the spouse seeking alimony." G.S. § 50-16.6(a) (repealed). Accordingly, proof a dependent spouse had committed adultery anytime prior to entry of divorce provided the supporting spouse an absolute defense against an alimony claim, notwithstanding similar misconduct by the supporting spouse. *See id.*

By contrast, the new alimony statute has replaced the concept of adultery with a broader category denominated "illicit sexual behavior," G.S. § 50-16.1A(3)(a), encompassing, by way of example, adultery committed "during the marriage and prior to or on the date of separation," G.S. § 50-16.1A(3). In focusing solely upon misconduct prior to separation, the new law substantively changed previous concern with acts occurring anytime before divorce.

In addition, the new statute entirely eliminated the absolute defense provided in G.S. § 50-16.6(a) (repealed). On the issue of adultery, G.S. § 50-16.3A(a) states:

> If the court finds that the dependent spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, then the court shall order that alimony be

> paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior . . . then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances.

G.S. § 50-16.3A(a). The foregoing "affirmative mandate that a proven adulterous supporting spouse be ordered to make alimony payments is completely new to North Carolina law." S. Sharp, 76 N.C.L. Rev. at 2058. Also "completely new," *id.*, is the provision deferring to the trial court's discretion the decision of whether to award alimony in the instance where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior." G.S. § 16.3A(a).

In the case *sub judice*, defendant, the supporting spouse, raised the absolute defense under G.S. § 50-16.6(a) (repealed), of plaintiff's postseparation adultery in his reply to Claim #1. However, plaintiff maintains this preexisting absolute defense is not available to defendant under Claim # 2 filed pursuant to G.S. § 50-16.3A. In addition, according to plaintiff, defendant may properly be subjected to liability under statutory provisions not enacted at the time Claim # 1 was filed.

The issue, therefore, is whether the "new action based on the same claim" language of Rule 41(a)(1) will permit plaintiff's prosecution of Claim # 2, filed within one year of her dismissal of Claim # 1. We conclude the trial court erroneously resolved this issue in favor of plaintiff.

The leading North Carolina case addressing retroactive statutory application, *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970), contains instructive language. *Smith* involved a wrongful death action instituted 3 July 1969 on behalf of an intestate killed 16 March 1968. *Id.* at 331, 172 S.E.2d at 490. Revisions to the North Carolina wrongful death statute became effective 14 April 1969 as to claims filed on or after that date, but not to pending actions. *Id.* at 332, 172 S.E.2d at 491. Prior to amendment, the statute allowed recovery for "the loss of a human life [based upon] the present value of the net pecuniary worth of the deceased based upon his life expectancy." *Id.* at 331, 172 S.E.2d at 490. However, the new statute provided for numerous additional elements of damages, including hospitalization and funeral expenses, pain and suffering of the decedent, and punitive damages. *Id.* at 332, 172 S.E.2d at 491.

Although the decedent's death occurred prior to 14 April 1969, no action based upon the death was pending on that date. *Id.* at 333, 172 S.E.2d at 491. Our Supreme Court held the new statute "created a new cause of action" for wrongful death that "did not exist on [the date decedent] . . . was killed," *id.* at 334, 172 S.E.2d at 492, because, "[a]lthough the procedural remedy [action for wrongful death] . . . [wa]s the same, the substantive rights of the parties [we]re different," *id.* at 333, 172 S.E.2d at 492.

The Court reviewed "general principles" involved in determining whether a statute should be construed to apply prospectively or retroactively:

> "Ordinarily, an intention to give a statute a retroactive operation will not be inferred . . . . It is especially true that the statute or amendment will be regarded as operating prospectively only, where . . . the effect of giving it a retroactive operation would be to . . . destroy a vested right, or create a new liability in connection with a past transaction, [or] invalidate a defense which was good when the statute was passed . . . ." "A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already passed . . . ."

Id. at 337-38, 172 S.E.2d at 494-95 (citations omitted). *See also Minty v. Board of State Auditors*, 58 N.W.2d 106, 111 (Mich. 1953) (citation omitted) (action accruing prior to, but filed after, repeal of statute is governed by repealed statute, because "the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated").

Numerous subsequent cases have cited and relied upon the holding in *Smith*. In *White v. American Motors Sales Corp.*, 550 F. Supp. 1287 (W.D. Va. 1982), *aff'd*, 714 F.2d 135 (4th Cir. 1983), for example, North Carolina's "Products Liability" statute, which abolished the defense of lack of privity, was held not to apply retroactively to accidents occurring prior to its effective date, regardless of whether an action was pending on its effective date or filed thereafter. Relying on *Smith*, the *White* Court observed retrospective application would "create liability for the defendant where none existed at the time of the accident" by virtue of the elimination of an existing defense. *Id.* at 1293; *see* 73 Am. Jur. 2d *Statutes* § 350 (1974) (cases arising before

passage of new law are not governed by new law where unexpected liability would be imposed); *see also United Roasters, Inc. v. Colgate-Palmolive* Co., 485 F. Supp. 1049, 1057 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir. 1981), *cert. denied*, 454 U.S. 1054, 70 L. Ed. 2d 590 (1981) ("[u]nder the general principles laid down by *Smith v. Mercer*, it is clear that 1977 amendments to [statute relied upon in plaintiff's 1976 action] constituted a substantive revision intended to expand . . . potential liability" that did not exist prior to the amendments, and thus amendments would not apply to plaintiff's claim), and *Lewis v. Pennsylvania R. Co.*, 69 A. 821, 823 (Pa. 1908) ("to impose a liability for a past occurrence where none existed at the time, or, what is the same thing, take away a legal defense available at the time" would exceed constitutional limitations; "law can be repealed by the lawgiver, but the rights which have been acquired under it, while it was in force, do not thereby cease").

Further, in *Gardner v. Gardner*, 48 N.C. App. 38, 269 S.E.2d 630 (1980), this Court relied upon *Smith* in holding that a statutory amendment not specifying whether it was applicable to pending litigation would not operate to allow striking of defendant wife's recriminatory defenses in a divorce action filed prior to the date of amendment. *Id.* at 45, 269 S.E.2d at 634. In so ruling, we noted:

> [t]he general rule of construction is that an amendment which invalidates a preexisting statutory defense will, in the absence of a clear legislative intention otherwise, be given prospective effect only.

Id.

Notably, we further observed that defendant wife would not have been entitled to assert recriminatory defenses had plaintiff instituted divorce proceedings following enactment of the statutory amendment, but because the divorce complaint had initially been filed prior to amendment, "reference to the entire history of litigation between the parties," *id.* at 46, 269 S.E.2d at 634, was required.

In the case *sub judice*, defendant pled an absolute defense to Claim #1 pursuant to G.S. § 50-16.6(a) (repealed), then in effect. By virtue of her failure to respond to defendant's request for admissions, plaintiff had affirmatively established the existence of a factual basis for defendant's absolute defense. Thereafter, in Claim # 2, plaintiff sought relief under G.S. § 50-16.1A *et seq.*, which abolished defendant's previously established absolute adultery defense, shifted the

focus from pre-divorce misconduct to pre-separation misconduct, and subjected defendant to automatic liability for his admitted misconduct prior to separation.

To conclude, considering the resultant "invalidat[ion]" of a statutory absolute defense defendant enjoyed as a "vested right," *Smith*, 276 N.C. at 337, 172 S.E.2d at 494; *see also Hughes Air. v. United States ex rel. Schumer*, 520 U.S. 939, 950, 138 L. Ed. 2d 135, 146 (1997) ("it is simply not the case that . . . the elimination of a prior defense . . . does not 'create a new cause of action' or 'change the substance of the extant cause of action' "), at the time plaintiff voluntarily dismissed Claim # 1, and the subjection of defendant to "new liability," *Smith*, 276 N.C. at 337, 172 S.E.2d at 494, which did not previously exist, we cannot say, particularly upon viewing the "entire history of litigation between the parties," *Gardner*, 48 N.C. App. at 46, 269 S.E.2d at 634, noted above, that Claim # 2 constituted "a new action based on the same claim," G.S. § 1A-1, Rule 41(a)(1), earlier voluntarily dismissed by plaintiff. While the "procedural remedy" of an alimony claim previously existed, "the substantive rights of the parties are different." *Smith*, 276 N.C. at 333, 172 S.E.2d at 492; *see also Lindh v. Murphy*, 521 U.S. 320, 327, 138 L. Ed. 2d 481, 489 (1997), *cert. denied*, 522 U.S. 1069, 139 L. Ed. 2d 676 (1998) (amendment to federal statute governing entitlement of state prisoners to habeas corpus relief "goes beyond 'mere' procedure to affect substantive entitlement to relief" and therefore not applicable to proceeding pending at time amendment enacted).

Therefore, based upon the foregoing, we hold Claim # 1 and Claim # 2 are neither "substantially the same" nor "involv[e] . . . the same right," *Cherokee Ins. Co.*, 97 N.C. App. at 297, 388 S.E.2d at 240, but rather are "fundamentally different," *Stanford*, 76 N.C. App. at 289, 332 S.E.2d at 733. Accordingly, plaintiff's filing of Claim # 2 pursuant to G.S. § 50-16.1A *et seq.* did not implicate for purposes of Rule 41(a)(1) the one year period within which Claim # 1 asserted under G.S. § 50-16.1 *et seq.* might have been refiled. *See* G.S. § 1A-1, Rule 41(a)(1). Rather, Claim # 2 constituted a new and distinct claim for alimony which was filed subsequent to the parties' divorce and is thereby barred. *See* G.S. § 50-11(c). The trial court's grant of summary judgment in favor of plaintiff thus must be reversed and this matter remanded for entry of summary judgment in favor of defendant. *See* N.C.G.S. § 1A-1, Rule 56(c) (1990) (when appropriate, summary judgment "may be rendered against the moving party"), and *Greenway v. Insurance Co.*, 35 N.C. App. 308, 314, 241 S.E.2d 339, 343 (1978) ("G.S.

§ 1A-1, Rule 56(c) does not require that a party move for summary judgment in order to be entitled to it").

Notwithstanding, plaintiff points to *Harwood v. Harrelson Ford, Inc.*, 78 N.C. App. 445, 337 S.E.2d 158 (1985), as requiring a contrary result. Plaintiff's reliance upon *Harwood* is misplaced.

In *Harwood*, this Court approved an award of prejudgment interest to three plaintiffs in actions originally filed 13 August 1980, voluntarily dismissed without prejudice 29 April 1982, and reinstituted 26 August 1982 pursuant to Rule 41(a)(1). *Id.* at 446, 337 S.E.2d at 159. On 5 May 1981, N.C.G.S. § 24-5 was amended so as to allow recovery of prejudgment interest upon claims such as those of the three *Harwood* plaintiffs; the provision became effective upon ratification 5 May 1981, but was not applicable to pending litigation. *Id.* at 447-48, 337 S.E.2d at 160.

In ruling in favor of the three plaintiffs, this Court emphasized that

> [t]he Legislature's purpose in amending G.S. 24-5 was to provide an incentive to insurance companies to expeditiously litigate actions they are involved in.

Id. at 450, 337 S.E.2d at 161-62. Moreover, we continued,

> when plaintiffs filed their complaint, insurance companies were aware of the legislature's expressed intent to encourage prompt resolution of lawsuits. Yet, over three years have passed since the three plaintiffs filed their lawsuit and their judgment is yet to be satisfied. We conclude that with respect to [these three] plaintiffs . . . the [trial court's award of prejudgment interest] is consistent with the legislature's intent as expressed in G.S. 24-5.

Id.

Therefore, even assuming *arguendo* the amendment to G.S. § 24-5 allowing recovery of prejudgment interest created a new substantive right somehow similar to that we have held to have been effected by the "wholesale revision," S. Sharp, 76 N.C.L. Rev. at 2018, of North Carolina alimony law, it is apparent the ruling in *Harwood* was instead primarily a pointed rebuke to the defendants' apparent disregard of the legislatively enunciated public policy "to cure past delays in litigation," *Harwood*, 78 N.C. App. at 450, 337 S.E.2d at 161; *see Webb v. Port Commission*, 205 N.C. 663, 677-78, 172 S.E. 377, 384

(1934) (Clarkson, J., concurring) ("purpose and spirit of an act must be considered in its construction and its obvious intent ascertained and respected"). Indeed, as noted above, we specifically cited with disapproval the delay of "over three years" in satisfaction of the three plaintiffs' judgments. *Harwood*, 78 N.C. App. at 450, 337 S.E.2d at 162.

In the foregoing context, it is interesting to particularize the chronological "history of litigation between the parties," *Gardner*, 48 N.C. App. at 46, 269 S.E.2d at 634, *sub judice*. The statutory revisions discussed herein were passed by the General Assembly 21 June 1995, ch. 319, 1995 N.C. Sess. Laws 641, effective 1 October 1995 except as to pending litigation and motions seeking to modify orders and judgments in effect on the date. *See* G.S. § 50-16.1A *et seq.* Defendant filed his divorce action 17 July 1995 and plaintiff initiated her alimony claim under G.S. § 50-16.1 *et seq.* (repealed) on 14 August 1995, almost two months following passage of the new law and but six weeks prior to the effective date thereof. The parties were divorced 11 April 1996. However, it was not until almost one year later and nearly two years following passage of the new law that plaintiff voluntarily dismissed her alimony claim under the repealed statute on 21 March 1997 and filed her action based upon the new statute approximately two weeks later on 2 April 1997. The thrust of the holding in *Harwood* thus runs counter to plaintiff's situation herein.

Based upon the foregoing, the trial court's grant of summary judgment in favor of plaintiff is reversed and this case remanded for entry of summary judgment in favor of defendant.

Reversed and remanded with instructions.

Judges TIMMONS-GOODSON and HUNTER concur.

STATE OF NORTH CAROLINA v. LINDA MOONEY SMITH

No. COA98-1623

(Filed 7 December 1999)

1. Jury— selection—death penalty—rehabilitation

The trial court did not abuse its discretion in a capital murder prosecution by refusing to allow defendant to rehabilitate jurors excused for cause based on their views of the death penalty where they had made their opposition clear. Absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit defendant to ask about the same matter. Moreover, the defendant here was convicted of second-degree murder.

2. Evidence— cross-examination—door opened

The trial court did not err in a murder prosecution where defendant contended that the court had permitted speculative testimony, but all of the evidence was either within the personal knowledge of the witness or was permitted due to defendant having opened the door on cross-examination.

3. Evidence— leading questions—directing witness's attention

The trial court did not abuse its discretion in a murder prosecution by allowing the district attorney to ask leading questions where the case was long and complicated and the questions either were "bridges" or summaries of testimony or were directing the attention of the witness to earlier statements.

4. Evidence— cross-examination—questions proper

The trial court did not err in a murder prosecution by not allowing defendant to ask certain questions on cross-examination where the questions had already been answered, were irrelevant, were confusing or argumentative, lacked sufficient basis, or incorrectly summarized the witness's testimony.

5. Evidence— hearsay—not offered to prove the truth of the matter asserted

There was no error in a murder prosecution where most of the statements objected to by defendant as hearsay explained subsequent conduct or corroborated prior testimony and so were not offered to prove the truth of the matter asserted. Additionally, the trial court gave a limiting instruction.

6. Evidence— regular course of business—officer's dispatch time

There was no error in a murder prosecution where defendant objected to an officer's testimony that the time on his dispatch computer was accurate. Although the State did not quite lay a proper foundation, the error was harmless; furthermore, defendant offered the same information during the officer's cross-examination.

7. Evidence— admission of party opponent—admissible

The trial court did not err in a murder prosecution by admitting defendant's statement to police, which contained remarks defendant attributed to the victim. Defendant's statement was an admission of a party opponent and the remarks by the victim were not spoken or offered to prove the truth of the matter asserted.

8. Evidence— time line—accuracy

There was no prejudice in a murder prosecution where defendant argued that a time line used by the prosecution was inaccurate but the facts listed on the time line were verified by each witness as that witness testified and defendant failed to show that "inaccuracies" were in any way prejudicial. Small changes in the way a phrase was written as compared to the way the witness spoke the phrase did not alter the substance.

9. Evidence— inculpatory statement—newspaper publication—no prejudice

There was no prejudice in a murder prosecution where the court held a voir dire concerning a statement by defendant to an aunt that she had heard that this was a mercy killing, the court decided to allow the statement, and a local newspaper published the details of the hearing before the statement was admitted. Assuming that the statement was inculpatory, there was no basis to think that the jury became aware of its publication in the local newspaper and it was subsequently admitted into evidence.

10. Discovery— sanctions—witnesses recalled—no abuse of discretion

There was no abuse of discretion in a murder prosecution where the State did not divulge a statement by defendant before the trial; the court noted that defendant was in possession of the statement for at least four days prior to its introduction; and,

rather than granting a mistrial, the court ordered all witnesses who had testified to be recalled for further examination. There was no showing that the late revelation upset defendant's trial strategy or that she was otherwise prejudiced.

11. Evidence— photographs—murder victim

The trial court did not abuse its discretion in a murder prosecution by admitting two photographs of the victim's tongue after it had been removed from her head and sliced in half. The photographs were relevant to the cause of death and the probative value outweighed any prejudicial effect.

12. Criminal Law— prosecutor's closing argument—defendant's appearance and demeanor

The trial court did not err in a murder prosecution by allowing the prosecutor to argue in closing that defendant had big hands, was left-handed, was strong, and failed to react with tears for her murdered grandmother. All of the prosecutor's remarks were related to matters observable in the courtroom and, despite defendant's contention, calling attention to defendant's demeanor and appearance did not infringe upon her right not to testify because they were not directed at her failure to take the stand.

Appeal by defendant from judgment entered 17 December 1997 by Judge Thomas W. Seay, Jr. in Superior Court, Rowan County. Heard in the Court of Appeals 21 October 1999.

Michael F. Easley, Attorney General, by Joan Herre Erwin, Assistant Attorney General, for the State.

Davis Law Firm, by James A. Davis, for the defendant.

WYNN, Judge.

Before her death, Ina Mooney, the 81-year old grandmother of defendant Linda Mooney Smith, resided at the Brian Center Nursing Home. She suffered from Alzheimer's Disease and many other medical conditions including incontinence for which she wore adult diapers. To prevent wandering, the Brian Center staff strapped her into bed each night with a "roll belt," a device which tied around her abdomen and to the sides of the bed.

On 11 February 1997, Ms. Smith visited her grandmother at the Brian Center. But Mrs. Mooney did not recognize her, prompting Ms. Smith to yell at her. And when Ms. Smith tried to take her grand-

mother back to her room, Mrs. Mooney resisted until a nurse came to their assistance. Ms. Smith again yelled at her grandmother for cooperating with the staff but not with her.

Later while Ms. Smith fed her grandmother, staff members overheard her say "Shut your damn mouth. I want you to eat this. Eat this pudding or I'll shove it down your damn throat." The conversation stopped when the two employees entered Mrs. Mooney's room. Later, another employee heard Ms. Smith tell her grandmother to "Open your damn mouth and eat this damn food," and then saw Ms. Smith grab Mrs. Mooney by the collar and jerk her back and forth in her wheelchair. Ms. Smith left the Brian Center at about 5:30 pm and returned at about 8:30 pm.

Around this time, the staff dressed Mrs. Mooney for bed in a nightgown and an adult diaper called a "promise pad." Since Mrs. Mooney would not stand up straight while the staff dressed her, the connecting tape on the promise pad was askew. The staff then put Mrs. Mooney into bed and attached the roll belt, which was clean from a recent wash. There were no bruises on her face. After the nurses left, Ms. Smith stayed with her grandmother, sitting in the geri-chair next to the bed.

At around 11:15 pm, Nurse Akon Eyo went into Mrs. Mooney's room where she found her alive and awake. Ms. Smith was still in the geri-chair. The nurse left to attend to another patient.

Around midnight, staff member Alice Henderson went to Mrs. Mooney's room to change the promise pad but Ms. Smith told her that she had already changed the promise pad because Mrs. Mooney had a bowel movement. The room was dark and the bed curtain was closed. Ms. Henderson could not see Mrs. Mooney clearly—she could only see that Mrs. Mooney's head was not on the pillow, but was propped up against the headboard.

Ms. Smith left the room at about 12:05 am. On her way out, she told some other Brian Center employees that Mrs. Mooney was awake, talking, and laughing. A few minutes later, an alarm went off, signaling that someone had opened an outside door. Ms. Smith appeared and said that she had propped the door open while she had gone out to smoke and move her car. She also stated that she had seen four teenagers looking into the windows of the Brian Center. The Center called the police, but they found no trespassers. In the meantime, Ms. Smith returned to her grandmother's room.

Almost immediately, Ms. Smith came out of the room, covering her face with her hands and shaking. The staff members hurried in the room and found Mrs. Mooney dead. Her hair was messed up, her face was bruised, and blood came out of her ears and pooled under her eyes. The pillow was propped behind Mrs. Mooney's head, and her blood was smeared on the roll belt, which was loose on the side of the bed near where Ms. Smith had been sitting. The promise pad was still in place, and the nurses noted that its tape was askew, indicating that it was the same pad they had put on Mrs. Mooney themselves—not a new clean pad. In fact, no soiled pads were found in the room, despite Ms. Smith's claim that she had changed a dirty pad.

An autopsy revealed that Mrs. Mooney had died from asphyxiation. The bruising on her face was petechia—burst blood vessels—which create spots which are generally associated with asphyxiation deaths. Several areas on Mrs. Mooney's nose, right cheek, and chin did not have petechia—a phenomenon consistent with pressure being applied at those points. Her tongue and the area behind her ear were bruised. The bruising to the tongue was consistent with an object being crammed into Mrs. Mooney's mouth to stop the airway. The pathologist ruled out death by natural means, and opined that the victim was suffocated, choked and strangled, and one of those means or their combination resulted in her death.

Within days of Mrs. Mooney's death, Ms. Smith stated to her aunt that, "I heard that it was a mercy killing, but there is no mercy to it because I don't believe in God. They say grandma's happy now, but I know that's not true because they will put her in the ground and the worms will eat her."

Ms. Smith was charged and tried for capital murder. A jury found her guilty of second degree murder and the court sentenced her to a term of not less than 189 months nor more than 236 months. She timely filed this appeal.

I.

[1] Ms. Smith first contends that the trial court erred by denying her motion to rehabilitate jurors excused for cause based on their views of the death penalty. We disagree.

As a general matter, a trial judge may not automatically deny the defendant's request for an opportunity to rehabilitate jurors. *See State v. Brogden*, 334 N.C. 39, 430 S.E. 905 (1993). However, "where the record shows the challenge is supported by the prospective juror's

answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter." *State v. Gibbs*, 335 N.C. 1, 35, 436 S.E.2d 321, 340 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994).

After reviewing the record, we find that every prospective juror who was dismissed had made their opposition to the death penalty clear. The trial judge did not abuse his discretion by not allowing Ms. Smith to rehabilitate prospective jurors.

In any case, any error as to this point is harmless since Ms. Smith was convicted of second degree murder and therefore did not face the death penalty. Issues concerning "death qualification" go only to sentencing when the penalty is death. *See State v. Robinson*, 327 N.C. 346, 359, 395 S.E.2d 402, 409 (1990). Furthermore, both the United States Supreme Court and the Supreme Court of North Carolina have rejected the assertion that death qualification results in an unfair trial or a partial jury. *See State v. Wingard*, 317 N.C. 590, 346 S.E.2d 639 (1986); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980); *Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137 (1986).

II.

[2] Ms. Smith next argues that the trial court erred by permitting various witnesses to offer a variety of speculative testimony. We disagree.

A witness must testify to matters within his personal knowledge. N.C.R. Evid. 602 (1992). However, when a defendant "opens the door" on cross-examination by asking certain questions, testimony that might otherwise be inadmissible is allowed. *See State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

In this case, all of the evidence challenged by the defendant was either within the personal knowledge of the witness or was permitted due to Ms. Smith having opened the door to the subject on cross-examination.

For instance, Ms. Smith complains about testimony given by Lisa Hodge on re-direct examination concerning chart notations made by Nurse Durette. However, Ms. Smith herself first asked Ms. Hodge about the notations, opening the door for the prosecutor's follow-up questions.

Ms. Smith also objects to Alice Henderson's testimony in which she guessed the thoughts of Mary Onwuroh when she said "I can't believe that is a family member." Ms. Onwuroh had already testified as to this incident. Ms. Henderson's speculation about the comment merely confirmed what Ms. Onwuroh had stated—that she was surprised to hear a family member speaking in harsh tones to a patient.

Finally, Ms. Smith complains that Nurse Durette was allowed to testify that she was not sure, but she thought that Nurse Eyo said to her that Mrs. Mooney was awake at 11:00 pm. This evidence simply corroborated Ms. Eyo's earlier testimony, and in fact, the trial judge gave instructions to the jury that it was to be used *only* to corroborate Ms. Eyo's testimony. Under these circumstances, Nurse Durette's uncertainty would only have served to dilute the corroborative effect and therefore help the defendant.

III.

[3] Ms. Smith next argues that the trial court erred in allowing the district attorney to ask leading questions to multiple witnesses. We disagree.

Leading questions should not be used on direct examination of a witness except as necessary to develop his testimony. N.C.R. Evid. 611(c) (1992). A leading question is one which, by its form or substance, suggests the answer. While leading questions ordinarily should not be allowed, the trial court has discretion to permit some leading questions, and we will reverse a ruling on the admissibility of a leading question only upon a showing of abuse of discretion. *See State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986).

In this case, there is no showing that the trial judge abused his discretion. The record shows that the questions that Ms. Smith objected to during trial were not so much "leading" as they were "bridges" or summaries of testimony. In general, the questions did not suggest a particular answer. The few questions that bordered on suggestion did so only to direct the attention of the witness to earlier statements. In any case, the responses went beyond a mere agreement with the question asked, but instead gave a reasoned explanation. As Ms. Smith recognizes, this case was long and complicated. Several witnesses testified to a variety of topics. Allowing the prosecutor to direct the witness's attention to a certain topic through the use of leading questions was not an abuse of discretion.

IV.

[4] Ms. Smith next argues that the trial court erred by not allowing her to ask nine different witnesses a variety of questions on cross-examination. We disagree.

Ms. Smith's arguments on this point are numerous; but, since we find no error in the trial court's rulings, we dismiss her claims with a blanket recitation as to why her proposed questions were improper. In most instances, her questions had either already been answered by the witness or were irrelevant to the issues before the jury. In other instances, the questions were confusing and/or argumentative. A few questions lacked sufficient basis. In one instance, the defense attorney incorrectly summarized the witness' testimony. Even taken all together, the exclusion of all of these questions did little to stymie Ms. Smith's ability to cross-examine witnesses.

V.

[5] Ms. Smith next presents a list of evidentiary rulings with which she disagreed. She generally asserts that most of these rulings violated the hearsay rule. She also argues that some demonstrative evidence was inaccurate. We disagree with all of her assertions.

An out-of-court statement offered in evidence to prove the truth of the matter asserted is not admissible. N.C.R. Evid. 801(c) (1992). Statements offered for other purposes are not hearsay. *See, e.g., State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990) (statement offered to show basis for subsequent conduct is not hearsay); *State v. Gilbert*, 96 N.C. App. 363, 385 S.E.2d 825 (1989) (statement offered to corroborate testimony is not hearsay).

Ms. Smith objects to a number of statements offered by witnesses during the State's direct examination. However, nearly all of these statements explained subsequent conduct or corroborated prior testimony—they were not offered to prove the truth of the matter asserted. Therefore, the statements were all admissible. In addition, the trial court specifically limited the evidence by instructing the jury that the statements were not being offered to prove the matter asserted, but only to show the basis for the subsequent conduct or corroboration.

[6] Ms. Smith also objects to a police officer's testimony that the time on his dispatch computer was accurate. The officer testified as

to routine matters normally conducted in the regular course of his business. Although the State did not quite lay a proper foundation to show that the computer times were indeed accurate, this error was harmless and does not require reversal. Furthermore, Ms. Smith corrected this error by offering the same information during the officer's cross-examination.

[7] Ms. Smith also complains of the introduction of her statement to the police which contained remarks she attributed to Mrs. Mooney. Her statement to the police was an admission of a party opponent, and therefore admissible under N.C.R. Evid. 801(d) (1992). The remarks made by Mrs. Mooney were not hearsay in that they were not spoken or offered to prove the truth of the matter asserted.

[8] Finally, Ms. Smith argues that the timeline used throughout the trial by the prosecutor inaccurately reflected the evidence and created a danger of unfair prejudice. However, she fails to show that the "inaccuracies" in the timeline were in any way prejudicial. Furthermore, the listed facts in the timeline were verified by each witness as that witness testified. Small changes in the way a phrase was written as compared to the way the witness spoke the phrase did not alter the substance of the evidence offered.

The trial court properly admitted all of the evidence.

VI.

[9] Ms. Smith's next argument encompasses three separate complaints as to the trial court's treatment of a statement made by her to her aunt on the telephone. We hold that none of these matters requires reversal.

Ms. Smith first challenges the admission of her statement: "I heard it was a mercy killing, but there is no mercy to it because I don't believe in God. They say grandma's happy now, but I know that's not true because they will put her in the ground and the worms will eat her." Although Ms. Smith believes that this was the most damaging piece of evidence against her, and even refers to it as a "confession," we cannot say that it is any more inculpatory than any other evidence offered. In fact, arguably, the statement could be viewed as exculpatory.

Nonetheless, Ms. Smith argues that the trial court erred by denying her motion to have the jurors questioned concerning whether they had read about the statement in the local newspaper. After a *voir*

dire hearing, the court decided to allow the statement into evidence. After the hearing, but before the statement was admitted, a local newspaper published the details of the hearing on the front page. The trial court denied Ms. Smith's motion to inquire if any jurors had read or heard about the publication. We hold that the trial court did not err.

When there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. *See State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986). However, other than the fact that the statement was in the paper, there is no basis to think that the jury had become aware of it. *See State v. Langford*, 319 N.C. 332, 336, 354 S.E.2d 518, 521 (1987); *Barts*, 316 N.C at 683, 343 S.E.2d at 839. Throughout the trial, consistent with the requirements of N.C. Gen. Stat. § 15A-1236(4) (1997), the judge repeatedly warned the jurors to avoid reading, watching, or listening to accounts of the trial. Absent a clearer suspicion that the jury was aware of the publication, the trial court did not err in refusing to question the jury about it. In fact, questioning the jury about whether they read the article may have done nothing more than alert them to a statement of which they were previously unaware. In any case, since the statement was thereafter admitted into evidence, there was no prejudice to Ms. Smith even if the jury *had* read the newspaper publication. *See Langford*, 319 N.C. at 336, 354 S.E.2d at 521.

[10] Ms. Smith next argues that the trial court erred by not declaring a mistrial due to an alleged discovery violation. N.C. Gen. Stat. § 15A-903(a)(2) (1997) requires a prosecutor to disclose to the defendant the substance of any relevant statements made by the defendant, in possession of the State, and the existence of which is known to the prosecutor.

In the case at bar, the prosecutor knew about the statement before the trial, but did not divulge it until after the trial was underway. Instead of granting a mistrial, the trial court ordered all witnesses who had already testified to be recalled for further examination.

A trial court is not required to impose sanctions for late discovery. Instead, it is a matter of discretion for the trial judge. N.C. Gen. Stat. § 15A-910 (1997); *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). Sanctions will not be reversed on appeal

absent a showing of abuse of discretion. *See State v. Gardner*, 311 N.C. 489, 506, 319 S.E.2d 591, 603 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

In the case at bar, the trial court allowed Ms. Smith to recall witnesses in light of the new evidence. The court noted that she had possession of the statement for at least four days prior to its introduction, and under those circumstances, it enacted a less drastic sanction than a mistrial or the exclusion of evidence. Furthermore, there is no showing that this late revelation upset her trial strategy or that she was otherwise prejudiced by the late discovery. In fact, Ms. Smith used the statement in her closing argument to her advantage. The trial court did not abuse its discretion in not declaring a mistrial.

VII.

[11] Ms. Smith next argues that the trial court erred by admitting two photographs of the grandmother's tongue after it had been removed from the head and sliced in half. Since these photographs were relevant to the cause of death, the trial court did not err in admitting them.

Determining the admissibility of a photograph is in the sound discretion of the trial court. *See Robinson*, 327 N.C. at 357, 395 S.E.2d at 408. The fact that a photograph is gruesome will not preclude its admission so long as it is used for illustrative purposes and so long as it is not so excessive or repetitive as to be aimed solely at unfairly prejudicing the jury. *See id.*, 327 N.C. at 356, 395 S.E.2d at 408.

In the case at bar, the probative value of the photographs of the tongue outweighed any prejudicial effect. The State used the photos to help prove that the grandmother had something crammed down her throat. The bruising on the tongue helped show that Mrs. Mooney's death was caused by violent means and also helped illustrate the testimony of the pathologist who had explained how she died. The trial judge reviewed the photos before admitting them to the jury. There was no abuse of discretion as to the photographs.

VIII.

[12] Ms. Smith next argues that the trial court erred by allowing the prosecutor to argue, in closing argument, that she had big hands, was left-handed, was strong, and failed to react with tears for her grandmother. We disagree.

The prosecutor has wide latitude in the scope of his closing argument. *See State v. Small*, 328 N.C. 175, 184, 400 S.E.2d 413, 418 (1991). He must remain consistent with the record, but otherwise, the arguments of counsel are largely within the control of the trial court's discretion. *See id.*, 328 N.C. at 185, 400 S.E.2d at 418. However, evidence includes not only what the jury hears from the stand, but what it observes in the courtroom. *See State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

In the case at bar, the prosecutor pointed out that Ms. Smith wrote with her left hand. He also told them that when they consider the circumstances of this case, they should consider the size of Ms. Smith's hands. He added, "She's 29 years old. She's young and she's strong." He elaborated no further on her strength, and given the context of his closing argument, the jury could reasonably have interpreted this to mean only that she was strong in relation to her 81-year-old grandmother. The prosecutor also drew attention to Ms. Smith's lack of reaction upon seeing the autopsy photographs. This too was a fact already observed by the jury—the prosecutor merely reminded them of her behavior. All of the prosecutor's remarks were related to matters observable in the courtroom, something which is appropriate for the jury to consider. *See Brown*, 320 N.C. at 199, 358 S.E.2d at 15.

Ms. Smith also argues that the prosecutor's remarks about her hands and strength, etc., drew a negative inference for the jury regarding her failure not to take the witness stand in violation of her right to remain silent. A review of the record shows no hint that the prosecutor improperly mentioned Ms. Smith's failure to take the stand, nor do the references to her appearance suggest that the prosecutor improperly referred to her refusal to take the stand. Calling attention to her demeanor and appearance did not infringe upon her right not to testify because they were not directed at her failure to take the stand. *See Brown*, 320 N.C. at 200, 358 S.E.2d at 16.

IX.

Ms. Smith lastly presents a catch-all type argument contending that the individual errors made during the course of the trial amount and rise to the level of reversible error when seen as a whole or on balance of this case. We disagree.

Having failed to point out any specific instance of error requiring reversal, Ms. Smith incorporates by reference, but does not spec-

ify, the numerous assignments of error included in the record. She urges this court to grant a new trial because the trial was full of errors so basic, so fundamental, and so lacking in fairness that justice was not done. *See State v. Potts*, 334 N.C. 575, 583, 433 S.E.2d 736, 740 (1993).

Aside from the fact that we will not review assignments of error that are not argued in the brief on appeal, Ms. Smith's last argument fails on its merits. We have found no instance of error in her case that is so basic, so fundamental, and so lacking in fairness that justice was not done.

No error.

Judges HORTON and EDMUNDS concur.

CRYSTAL GAIL WOLFE, ADMINISTRATRIX OF THE ESTATE OF RICHARD PHILLIP WOLFE, PLAINTIFF v. WILMINGTON SHIPYARD, INCORPORATED AND WILLIAM W. MURRELL, JR., DEFENDANTS

No. COA98-1516

(Filed 7 December 1999)

1. Jurisdiction— admiralty—injury on pier

An action arising from an injury and death at a shipyard was not subject to admiralty jurisdiction and therefore barred by the federal statute of limitations where the injury occurred while the victim was attaching a repaired rudder to a tugboat; the sling used to attach the 2,200-pound rudder to a crane broke; the rudder fell to the pier, bounced, and briefly trapped the decedent, who then fell from the pier into the water; the sling was not part of the tugboat's gear and was not attached to the tugboat when it broke; the crane was on the pier and not the tug; and the decedent was standing on the pier when injured. Neither the tug nor its appurtenances caused the injury.

2. Negligence— contributory—shipyard worker

A negligence action arising from the injury and death of a shipyard worker was not barred as a matter of law by contributory negligence where defendant argued that the decedent was dangerously close to a sling being used to move a rudder, but

there was evidence that he had no reason to know that he was too close and a jury could reasonably find that the risk of danger would not be apparent to a reasonably prudent person and that decedent exercised due care for his safety.

3. Employer and Employee— borrowed servant—shipyard worker

The trial court did not err in a negligence action arising from an injury and death in a shipyard by granting plaintiff's motion for a directed verdict on whether a crane operator (Giles) was a borrowed servant of Hanover Towing (decedent's employer). Defendant Wilmington Shipyard is presumed to have retained the right to control Giles because the record contains no evidence that decedent (Wolfe) exercised actual control over the manner of Giles' performance and does not contain substantial evidence that Wolfe had the right to exercise this control.

4. Evidence— deposition summaries—admitted as substantive evidence—limiting instruction not requested

There was no reversible error in a negligence action arising from a shipyard accident where the trial court admitted deposition summaries as substantive evidence. A safety expert testified that he relied upon the depositions in forming his opinion and the summaries were admissible under Rule 703 for the limited purpose of demonstrating the facts upon which the expert relied. Defendants could not assign error to the admission of the summaries as substantive evidence because they did not request a limiting instruction at trial.

5. Negligence— individual liability—injury in shipyard—shipyard president

Defendant Murrell was entitled to a directed verdict on the issue of personal liability in an action arising from an injury and death at a shipyard at which he was president where expert testimony that management is responsible for implementing shipyard safety in the shipyard industry was not sufficient to support the conclusion that Murrell was personally responsible for overseeing and monitoring safety at Wilmington Shipyard.

Appeal by defendants from judgment filed 4 June 1998 and from orders filed 4 June 1998 by Judge Carl L. Tilghman in New Hanover County Superior Court. Heard in the Court of Appeals 5 October 1999.

Ward and Smith, P.A., by John M. Martin and Ryal W. Tayloe, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Paul K. Sun, Jr., and Gary R. Govert; and Marshall, Williams & Gorham, L.L.P., by Ronald H. Woodruff, for defendant-appellants.

GREENE, Judge.

Wilmington Shipyard, Incorporated (Wilmington Shipyard) and William W. Murrell, Jr. (Murrell) (collectively, Defendants) appeal a judgment filed 4 June 1998 in favor of Crystal Gail Wolfe (Plaintiff), Administratrix of the Estate of Richard Phillip Wolfe, an order filed 4 June 1998 denying, in part, Defendants' motion for setoff, and an order filed 4 June 1998 denying Defendants' Rule 50 motion to set aside the verdict and Rule 59 motion for new trial.

Prior to trial, Defendants filed a motion to dismiss Plaintiff's claim on the ground it was subject to federal jurisdiction under the Admiralty Extension Act, 46 U.S.C. § 740 (1994), and was therefore barred by a three-year statute of limitations, 46 U.S.C. § 763(a) (1994). The trial court denied Defendant's motion.

The case then went to trial, and the evidence showed that in 1992, Wilmington Shipyard, a ship repair business, shared a location, office space, and staff with Hanover Towing, Inc. (Hanover), a marine towing and barge company. Murrell was president of both companies. Richard Phillip Wolfe (Wolfe) worked as a Port Engineer for Hanover, where he supervised all repair work. When Wolfe needed assistance with a repair job, he would sometimes ask Gerald Murrell, an employee at Wilmington Shipyard, to provide an assistant from Wilmington Shipyard.

Around May of 1992, Wolfe was assigned to repair the rudders of the *Cathy G*, a tugboat docked at Hanover's pier. On 9 April 1992, after the rudder had been repaired, William Edward Giles (Giles), an employee of Wilmington Shipyard, was asked by his supervisor to assist Wolfe in re-attaching the rudder to the *Cathy G*. Giles worked as a welder and crane operator, and his role on that day was to operate the crane that was used to lift the rudder from off the pier. At the same time, Wolfe was to act as the rigger, attaching a wire rope sling (the sling) to the rudder. The rudder weighed 2,200 pounds.

Giles testified Wolfe hooked the sling to the rudder and Giles used the crane to lift the rudder about six-to-eight feet off the pier: the same sling was used previously to remove the rudder from the *Cathy G.* Approximately thirty seconds later, while Wolfe was standing about seven feet away from Giles, the sling broke and the rudder fell to the pier. The rudder bounced onto the pier and "toppled over," trapping Wolfe between a 55-gallon drum and the rudder. Wolfe then fell into the water and, after being pulled from the water by a co-employee, died at the scene of the accident.

Giles stated regarding his job duties that when he worked with Wolfe, Wolfe would "walk [him] through things" and then the two would perform the job accordingly. He stated Wolfe was "more or less [his] boss man," but Giles was on the job to use his skill and knowledge as a crane operator. Giles also stated with regard to the operation of the crane that "it was [his] call," and if he thought a procedure was unsafe he would not perform the procedure. Giles testified he was at all times working for and paid by Wilmington Shipyard.

Plaintiff's evidence tended to show Giles and Wolfe did not receive safety training for inspecting and using the sling, and a proper inspection would have revealed the sling was damaged. Giles testified that on the day of the accident Wolfe used the only available path to the *Cathy G*, never walked under the rudder, did not put himself in a "dangerous position," and should have been "safe" where he was standing.

Donald L. Chisler, an expert in shipyard safety, testified the role of the rigger is to "attach the load to the hook of the crane and to help ensure personnel are free of the lift in the swing radius of the crane." He also stated a safe distance from a 2,200 pound rudder that had been hoisted twelve feet into the air would be between twenty and twenty-five feet.

Murrell testified there was no reason for Wolfe to be standing only seven feet from the rudder as it was being hoisted, and that he could have been standing fifty feet away or could have been standing on the *Cathy G* itself.

Following the 9 April 1992 accident, the federal Occupational Safety and Health Administration (OSHA) conducted an investigation of Wilmington Shipyard's work site, and Wilmington Shipyard was subsequently cited for sixty OSHA violations, including 39 "serious" violations.

Raymond Powell Boylston, Jr. (Boylston), a safety consultant and expert in workplace safety, testified regarding OSHA safety and health standards for the shipyard industry and the OSHA violations committed by Wilmington Shipyard. Boylston testified, based on a report prepared by an OSHA investigator who had investigated Wilmington Shipyard, that Wilmington Shipyard's training violated OSHA standards. Boylston stated the sling used by Wolfe and Giles did not have the proper number of clamps on it, which demonstrated Wolfe and Giles had not been properly trained to use the sling. He stated Wolfe was performing his job on the date of the accident in the same way he had in the past and, while he did "put him[self] in harm's way, . . . that's the normal way the job was set up, and that's what he was supposed to do."

Boylston testified Wilmington Shipyard had a safety handbook which referred to a safety committee. The safety committee was to coordinate safety activities and inspections and, in some cases, perform inspections. Wilmington Shipyard informed the Navy in a 7 September 1984 letter that it held monthly safety meetings. James Sykes, a crane operator supervisor at Wilmington Shipyard, however, testified he did not recall any safety committee meetings taking place and stated there were no safety meetings for general employees. Richard Miles, the "number three man" at Wilmington Shipyard, similarly testified he did not recall attending any safety committee meetings.

Boylston stated that according to shipyard safety standards, the management of a company, including the president, is responsible for implementing a shipyard safety and health program. He also testified that Murrell stated in his deposition he was "not involved in safety" at Wilmington Shipyard.

Boylston based his testimony, in part, on the depositions of James Sykes, Richard Miles, and Gerald Murrell, and summaries of statements from those depositions were admitted into evidence over Defendants' objection. Defendants did not, however, request a limiting instruction.

At the close of evidence, the trial court denied Defendants' motion for a directed verdict finding Plaintiff was contributorily negligent and Murrell was not personally negligent, and granted Plaintiff's motion for a directed verdict finding Giles was not a borrowed servant of Hanover.

The trial court submitted to the jury, in pertinent part, the issues of whether Wolfe's death was "caused by the negligence of . . . Wilmington Shipyard," whether Wolfe's death was "caused by the negligence of . . . Murrell," and whether Wolfe was contributorily negligent.

The jury found Wolfe's death was caused by the negligence of Wilmington Shipyard and Murrell, and that Wolfe had not, by his own negligence, contributed to his death.

The issues are whether: (I) Plaintiff's claim was subject to admiralty jurisdiction; (II) Plaintiff's claim was barred because Wolfe was contributorily negligent as a matter of law; (III) Defendants presented sufficient evidence to submit to the jury the issue of whether Giles was a borrowed servant of Hanover; (IV) deposition summaries upon which Boylston based his opinion were improperly admitted as substantive evidence under Rule 703; and (V) Plaintiff presented sufficient evidence to submit to the jury the issue of whether Murrell was individually liable.

I

[1] Defendants argue Plaintiff's claim was subject to admiralty jurisdiction and therefore barred by the federal statute of limitations.[1] We disagree.

The Admiralty Extension Act (the Act) extends federal admiralty jurisdiction to "all cases of damage or injury . . . caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. The Act applies when "a ship or its appurtenances . . . proximately cause[s] an injury on shore." *Pryor v. American President Lines*, 520 F.2d 974, 979 (4th Cir. 1975), *cert. denied*, 423 U.S. 1055, 46 L. Ed. 2d 644 (1976).

In this case, Wolfe was injured when the sling used to attach the rudder to the crane broke, causing the rudder to fall to the pier.

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1. In this case, Defendants contend Plaintiff's claim was barred by the three-year statute of limitations for claims brought under the Admiralty Extension Act, 46 U.S.C. § 763(a), and, although Plaintiff's claim would be tolled under state law, N.C.R. Civ. P. 41(a), state tolling provisions do not apply to claims brought under this Act.

Plaintiff, however, argues that even if its claim is subject to federal admiralty jurisdiction, state tolling provisions nevertheless apply and Plaintiff's claim was therefore timely filed.

Because we hold Plaintiff's claim is not subject to admiralty jurisdiction, we need not address the issue of whether state tolling provisions apply to claims brought under this Act.

The sling was not part of the *Cathy G*'s gear, and was not attached to the *Cathy G* when it broke. Further, the crane used to hoist the rudder was located on the pier and not on the *Cathy G*, and Wolfe was standing on the pier when injured. Because neither the *Cathy G* nor any of its appurtenances caused Wolfe's injury, this case is not subject to admiralty jurisdiction under the Act. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212-14, 30 L. Ed. 2d 383, 391-92 (1971) (claim not subject to admiralty jurisdiction under the Act when plaintiff was injured by a forklift used to load the ship, and the forklift was not "part of the ship's usual gear or . . . stored on board, . . . was in no way attached to the ship, . . . was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gangplank").

II

[2] Defendants argue Plaintiff's claim was barred as a matter of law by Wolfe's contributory negligence. We disagree.

"[A] plaintiff's right to recover in a personal injury action is barred upon a finding of contributory negligence," *Cobo v. Raba*, 347, N.C. 541, 545, 495 S.E.2d 362, 365 (1998), and a plaintiff is contributorily negligent when he fails to use due care to protect himself from risk of injury if the risk would have been apparent to " 'a prudent person exercising ordinary care for his own safety,' " *id.* at 546, 495 S.E.2d at 365 (quoting *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citations omitted)); *Dunbar v. City of Lumberton*, 105 N.C. App. 701, 703, 414 S.E.2d 387, 388 (1992) (citing *Rosser v. Smith*, 260 N.C. 647, 653, 133 S.E.2d 499, 503 (1963) (citations omitted)). Further, a plaintiff is contributorily negligent as a matter of law, thereby entitling a defendant to a directed verdict, when "the evidence taken in the light most favorable to [the] plaintiff establishes [his] negligence so clearly that no other reasonable inferences or conclusions may be drawn therefrom." *Dunbar*, 105 N.C. App. at 703, 414 S.E.2d at 388 (citing *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 90, 379 S.E.2d 677, 680 (1989) (citations omitted)).

In this case, Defendants argue Wolfe was contributorily negligent because he stood dangerously close to the sling. Although the record contains evidence a safe distance would have been twenty-to-twenty-five feet from the sling, and Wolfe was standing only seven feet from the sling, there is also evidence Wolfe did not know and had no reason to know that he was standing too close to the sling. The evidence shows, when viewed in the light most favorable to Plaintiff, Wolfe and

Giles never received any training regarding sling safety, including the proper place to stand when the sling was in use. Giles believed Wolfe never placed himself in a dangerous position on the day of the accident, and he testified Wolfe was standing in a safe place when the sling broke. Further, Wolfe used the only available route to reach the *Cathy G*, and the parties had previously used the same lift to move the same rudder without incident.

Because a jury could reasonably find, based on Plaintiff's evidence, that Wolfe exercised due care for his safety, and the risk of danger would not be apparent to a reasonably prudent person, the issue of contributory negligence was properly submitted to the jury.

III

[3] Defendants argue the trial court erred by finding as a matter of law Giles was not a borrowed servant of Hanover.[2] We disagree.

A servant furnished by its employer to another party becomes the borrowed servant of that party when it has the right to control the servant regarding " 'not only the work to be done *but also . . . the manner of performing it.*' " *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994) (quoting *Weaver v. Bennett*, 259 N.C. 16, 28, 129 S.E.2d 610, 618 (1963) (citations omitted)); *see also Hodge v. McGuire and Fingleton v. McGuire*, 235 N.C. 132, 136-37, 69 S.E.2d 227, 230 (1952) (" 'servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out to the servant the work to be done, . . . supervises the performance thereof, . . . or gives him directions as to the details of the work and the manner of doing it' " (quoting 57 C.J.S. *Master and Servant* § 566, at 287-88 (1948))). The most significant factor to consider when making this determination is whether the party actually exercises control over the servant, but other factors include:

> whether the lent servant is a specialist, which employer supplies the instrumentalities used to perform the work, the nature of those instrumentalities, the length of employment, the course of dealing between the parties, [and] whether the temporary

2. The issue of whether Giles was a borrowed servant of Hanover arises because the Longshore and Harbor Workers' Compensation Act, U.S.C. tit. 33, ch. 18 (1994), which provides compensation for employees injured "upon the navigable waters of the United States," 33 U.S.C. § 903(a), provides the exclusive remedy for an employee injured by a co-employee when the injury is subject to the jurisdiction of this statute, 33 U.S.C. § 933(i).

> employer has the skill or knowledge to control the manner in which the work is performed . . . .

Harris, 335 N.C. at 387-88, 438 S.E.2d at 736. Further, "[a]bsent evidence to the contrary, the original employer is presumed to retain the right of control." *Id.* at 338, 438 S.E.2d at 736 (citations omitted).

In this case, when Wolfe needed assistance with a repair job he would ask Gerald Murrell, an employee of Wilmington Shipyard, to provide someone. Giles would then be instructed by his supervisor at Wilmington Shipyard to assist Wolfe. Although Giles referred to Wolfe as "boss man," Giles retained control over the operation of the crane while working with Wolfe. Wolfe would tell Giles the general plan for the work to be done, but Giles would decide whether a particular activity was safe and, if he had safety concerns, would decline to perform the activity. Giles was on the job to use his skill and knowledge as a crane operator, and was at all times paid by Wilmington Shipyard.

A moving party is entitled to a directed verdict against the party bearing the burden of proof when, viewing the evidence in the light most favorable to the party bearing the burden of proof, there is no substantial evidence to support that party's claim. *Cobb v. Reiter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992). " '[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). Because the record contains no evidence Wolfe exercised actual control over the manner of Giles' performance, and does not contain substantial evidence that Wolfe had the right to exercise this control, Wilmington Shipyard is presumed to have retained the right to control Giles and Plaintiff was entitled to a directed verdict finding Giles was not a borrowed servant of Hanover.[3]

IV

[4] Defendants argue deposition summaries admitted into evidence under Rule 703 were improperly admitted as substantive evidence. We disagree.

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3. The ownership of the instrumentality is one factor to consider when determining whether the operator of the instrumentality is a borrowed servant. *See Harris*, 335 N.C. at 388, 438 S.E.2d at 736. Defendants contend Hanover owned the crane used by Giles to assist Wolfe, but the record contains conflicting evidence regarding ownership of the crane. Even assuming Hanover did own the crane; however, ownership of the crane alone is insufficient evidence in this case to show Wolfe exercised control or had the right to exercise control over Giles' manner of work.

An expert may rely upon facts or data not otherwise admissible into evidence if they are the type "reasonably relied upon by experts in the particular field in forming opinions or inferences." N.C.G.S. § 8C, Rule 703 (1992). These facts or data, however, are admissible for the limited purpose of showing the basis for the expert's opinion, and not as substantive evidence. *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988).

In this case, Boylston testified he relied upon the depositions of James Sykes, Richard Miles, and Gerald Murrell when forming his expert opinion, and Plaintiff sought to admit into evidence, over the objection of Defendants, summaries of those depositions. Although these summaries were not admissible as substantive evidence, they were admissible under Rule 703 for the limited purpose of demonstrating to the jury facts Boylston relied upon when forming his opinion. Defendants' objection was therefore properly overruled. Further, as Defendants did not request a limiting instruction at trial, they cannot assign error to the admission of these summaries as substantive evidence. *Id.* (defendant not entitled to assign error to trial court's failure to provide limiting instruction for evidence admissible under Rule 703 when defendant objected to admission of evidence at trial but did not request limiting instruction).

V

[5] Defendants argue the issue of Murrell's individual liability should not have been submitted to the jury because the record contains no evidence of Murrell's personal liability.

While as a general rule an officer of a corporation is not liable for the torts of the corporation " 'merely by virtue of his office,' " *Records v. Tape Corp.*, 19 N.C. App. 207, 215, 198 S.E.2d 452, 457 (quoting 19 C.J.S. *Corporations* § 845, at 271 (1940)), *cert. denied*, 284 N.C. 255, 200 S.E.2d 653 (1973), an officer of a corporation "can be held personally liable for torts in which he actively participates[,]" even though "committed when acting officially," *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) (citation omitted).

In this case, Boylston testified that in the shipyard industry, the management of a company is responsible for implementing a shipyard safety and health program and demonstrating a commitment to safety. Boylston further stated the management includes the president of the company. Plaintiff did not present evidence, however, that

in this case Murrell was personally responsible for implementing or monitoring the company's safety program. Further, Murrell stated in his deposition he was not personally involved in any safety aspect of the business at Wilmington Shipyard.

A defendant is entitled to a directed verdict when, viewing the evidence in the light most favorable to the plaintiff, there is no substantial evidence to support the plaintiff's claim. *Cobb*, 105 N.C. App. at 220-21, 412 S.E.2d at 111. " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 220, 412 S.E.2d at 111 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted)). Because Boylston's testimony regarding general safety standards in the shipyard industry are not sufficient to support the conclusion that Murrell was personally responsible for overseeing and monitoring safety at Wilmington Shipyard, Murrell was entitled to a directed verdict on the issue of his personal liability. Accordingly, the trial court erred in denying this motion.

Defendants also assign error to the trial court's instruction to the jury that violation of an OSHA regulation is negligence per se, the admission of OSHA citations into evidence, and expert testimony regarding Wilmington Shipyard's violation of OSHA regulations; however, we do not address these arguments because they were not properly raised in the trial court. N.C.R. App. P. 10(b)(1) (appellants must make timely objection at trial to preserve question for appellate review); N.C.R. App. P. 10(b)(2) (appellants must raise objection to jury charge at trial).

In summary, there is no error in the judgment for Plaintiff against Wilmington Shipyard and the judgment against Murrell is reversed.

Reversed in part.

Judges WALKER and HUNTER concur.

GEORGE T. WRENN, PLAINTIFF v. MARIA PARHAM HOSPITAL,INC., DEFENDANT

No. COA99-12

(Filed 7 December 1999)

1 Appeal and Error— law of the case—appellate decision—vicarious liability of hospital—voluntary dismissal of doctor—new legal issue—second summary judgment motion

The trial court did not err in a negligence case by considering and granting defendant hospital's "new" motion for summary judgment filed after the Court of Appeals' prior unpublished opinion concerning defendant's vicarious liability for its alleged agent, Dr. Byrd, because: (1) the entry of a voluntary dismissal with prejudice as to Dr. Byrd materially changes the factual setting and raises an entirely new legal issue as to the effect of that voluntary dismissal on the liability of defendant; (2) the Court of Appeals did not address the effect of the voluntary dismissal in its unpublished decision of 16 June 1998, meaning that decision did not become the "law of the case" on the issue now before the Court; and (3) defendant's "new" motion for summary judgment was based on an event, the filing of a voluntary dismissal, which occurred after the trial court granted defendant's first motion for summary judgment.

2. Civil Procedure— second voluntary dismissal—dismissal with prejudice—adjudications on the merits

The trial court did not err in concluding plaintiff is barred from proceeding against defendant-alleged employer on the theory of respondeat superior after plaintiff dismissed his negligence claim against the alleged employee with prejudice and without payment because: (1) it was the second dismissal of plaintiff's claims against the alleged employee, and therefore, operated as an adjudication on the merits under N.C.G.S. § 1A-1, Rule 41; and (2) the voluntary dismissal itself specifically stated that it was with prejudice, which also operated as a disposition on the merits precluding subsequent litigation.

Appeal by plaintiff from judgment entered 16 October 1998 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 23 September 1999.

On 4 September 1989, Carolyn Wrenn took her husband, George T. Wrenn (plaintiff), to the emergency room of Maria Parham Hospital

(the hospital), located in Vance County. Maria Parham Hospital, Inc. (defendant), a non-profit corporation, owned and operated the hospital. Dr. Jesse Byrd (Dr. Byrd), an emergency room physician, examined and treated plaintiff. Coastal Emergency Services, Inc. (Coastal), provided Dr. Byrd and other emergency room physicians to the hospital pursuant to a contract between Coastal and defendant. A sign posted outside the emergency room at the time plaintiff was admitted stated, "the emergency physician on duty [is] not an employee or agent of Maria Parham." Dr. Byrd diagnosed plaintiff's condition as gastroenteritis and released him. Later that same evening, plaintiff's condition worsened and he went into septic shock. His wife brought him back to the emergency room of the hospital. Plaintiff was flown to Duke University Hospital due to the seriousness of his condition. Ultimately, plaintiff lost the distal half of each of his feet, and one of his fingers.

On 8 January 1992, plaintiff and his wife, Carolyn (collectively, the Wrenns), filed an action against defendant, Dr. Byrd, and against Coastal. The Wrenns contended, as they have done throughout this litigation, that Dr. Byrd misdiagnosed plaintiff husband's condition and released him from the Maria Parham emergency room in an unstable condition. The Wrenns contended that the defendant was liable under theories of *respondeat superior* (a master's vicarious liability for the acts of a servant), nursing negligence, and corporate negligence. Defendant moved for summary judgment, but the trial court denied the motion on 29 October 1993. The Wrenns amended their complaint on 5 April 1994 to allege only a claim for vicarious liability against defendant, and to allege negligence claims against Dr. Byrd and Coastal. On 7 June 1994, the Wrenns voluntarily dismissed without prejudice "all claims" against defendant Maria Parham Hospital, Inc., but reserved their claims against the other defendants. On 14 October 1994, the trial court granted summary judgment against Carolyn Wrenn on her claim for negligent infliction of emotional distress and she appealed to this Court. Plaintiff then voluntarily dismissed without prejudice his claims against Coastal and Dr. Byrd. This Court reversed the entry of summary judgment on Carolyn Wrenn's claim for negligent infliction of emotional distress and remanded her case for trial. *Wrenn v. Byrd*, 120 N.C. App. 761, 464 S.E.2d 89 (1995), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

On 6 June 1995, plaintiff then refiled his complaint against the defendant, Dr. Byrd, and Coastal. Plaintiff alleged that Dr. Byrd was

negligent, and that defendant was liable on theories of vicarious liability, nursing negligence and corporate negligence. Plaintiff's action, and that of his wife, were again set for trial in June 1997. Prior to that trial, however, Carolyn Wrenn dismissed her claim against the Hospital. The Wrenns settled their claim against Coastal pursuant to a settlement agreement. The settlement agreement with Coastal contained the following provisions:

> 2. Coastal shall pay to George T. Wrenn the sum of Eighty Thousand and No/100 Dollars ($80,000.00) and to Carolyn M. Wrenn the sum of Seventy Thousand and No/100 Dollars ($70,000.00). Within two (2) working days of the receipt of the final payment, to be paid as follows: (1) $70,000.00 on or before April 25, 1997, to Carolyn M. Wrenn and $5,000.00 to George T. Wrenn; and (2) $75,000.00 to George T. Wrenn on or before May 27, 1997, Mr. and Mrs. Wrenn shall cause to be filed a Voluntary Dismissal With Prejudice of the Lawsuit as to all Defendants except Maria Parham Hospital, Inc.
>
> 3. Subject to the provisions of paragraph 4 [regarding payment], Mr. and Mrs. Wrenn hereby release and forever discharge Coastal, its employees, partners, agents, representatives, independent contractors, officers, directors, trustees, attorneys, and all other persons, firms or corporations connected with any of them from any and all claims . . . .
>
> 3.1 Notwithstanding any provision of this Settlement Agreement and Release in Full, George T. Wrenn [plaintiff] specifically does not hereby release Maria Parham Hospital, Inc. He specifically reserves and retains all rights to assert and pursue any and all claims he may have against Maria Parham Hospital, Inc.

On 27 May 1997, the Wrenns filed a joint voluntary dismissal with prejudice as to Coastal, and a joint voluntary dismissal with prejudice "without payment" as to Dr. Byrd. The following language was handwritten on each voluntary dismissal immediately above the date and signature of counsel for plaintiff:

> Plaintiffs expressly reserve all claims against Maria Parham Hospital, Inc.

On 1 May 1997, defendant filed a motion for summary judgment. It is not clear from the record on appeal when the trial court heard the motion, but the trial court signed an order granting the motion for

summary judgment on 23 May 1997. The order was then filed on 28 May 1997 in the office of the Clerk of Superior Court of Durham County.

On 13 June 1997, plaintiff appealed from the grant of summary judgment against him. Plaintiff included in the record on appeal the 27 May 1997 voluntary dismissal of his claims against Dr. Byrd. On 16 June 1998, this Court filed an unpublished opinion (COA97-1043) in which we held that summary judgment was improvidently granted on plaintiff's vicarious liability claim because there was a genuine issue of material fact as to whether Dr. Byrd was an employee of the hospital or an independent contractor. We also held that summary judgment was properly granted on plaintiff's vicarious liability claim based on the non-delegable duty doctrine, and held that plaintiff's nursing negligence and corporate negligence claims were barred by the statute of limitations.

Following our decision of 16 June 1998, defendant filed a "new" motion for summary judgment, arguing that plaintiff's voluntary dismissal with prejudice of his claims against Dr. Byrd extinguished the vicarious liability of the defendant, Dr. Byrd's alleged master. The trial court allowed the new motion for summary judgment, and dismissed plaintiff's claim with prejudice. Plaintiff appealed.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein; and Bentley & Associates, P.A., by Charles A. Bentley, Jr., for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Beth R. Fleishman for defendant appellee.

HORTON, Judge.

Plaintiff argues that (I) the prior unpublished opinion of this Court dated 16 June 1998 was *res judicata* as to his vicarious liability claim against defendant hospital, and that (II) the dismissal of his claims against Dr. Byrd with prejudice and without payment was, in effect, a release given in good faith pursuant to the Uniform Contribution Among Tort-Feasors Act, so that defendant was not discharged from liability. We disagree with both contentions and affirm the judgment of the trial court.

I.

[1] Plaintiff argues that this Court's unpublished decision of 16 June 1998 established his right to a trial on the issue of defendant's vicari-

ous liability for the negligent acts of its alleged agent, Dr. Byrd; that the decision became the law of the case, and prevented the trial court from considering the "new" motion for summary judgment. We have carefully considered plaintiff's argument, but cannot agree. When this case was before us on plaintiff's prior appeal, we framed the issue as follows:

> The question here is whether there is a genuine issue of material fact that Dr. Byrd was subject to regulation, interference or control by defendant hospital with respect to the manner or method of performing his duties as an emergency room physician. Plaintiff argues that there was some evidence that Dr. Byrd was acting as an agent of defendant hospital at the time he treated and discharged plaintiff and summary judgment was inappropriate. After careful review, we agree.
>
> . . . .
>
> Given that there is evidence of several factors that support the contention that Dr. Byrd was an employee rather than an independent contractor, we hold that summary judgment was inappropriately granted. We therefore reverse the judgment of the trial court and remand for a new trial.

Both defendant and Dr. Byrd have contended throughout the course of this litigation that Dr. Byrd was an independent contractor, not an employee of Maria Parham Hospital. This Court found that there were several factors which supported the plaintiff's contention that Dr. Byrd was an employee of Maria Parham, and remanded the case for trial on that issue. We did not discuss in the opinion, nor did the parties argue in their briefs, the question of the effect of plaintiff's voluntary dismissal of his claims against Dr. Byrd with prejudice and "without payment." Plaintiff strenuously contends, however, that because he included the 27 May 1997 voluntary dismissal with prejudice of his claims against Dr. Byrd in the record on appeal, the issue of its effect was properly before this Court and could have been asserted by the defendant. Plaintiff reasons that since defendant could have raised the issue of the voluntary dismissal's effect during his prior appeal, our prior decision has *res judicata* implications, and bars the trial court from considering and granting the motion for summary judgment now before us.

Although plaintiff included the voluntary dismissal document in the prior record on appeal, we note that the voluntary dismissal of

Dr. Byrd with prejudice was entered on 27 May 1997, *after* the trial court had made its decision on the "new" motion for summary judgment, and four days *after* the trial court signed the order granting summary judgment. Plaintiff agrees that the order granting summary judgment was signed by the trial court on 23 May 1997, but contends the order was not "entered" pursuant to Rule 58 of the Rules of Civil Procedure until 28 May 1997, when it was filed in the office of the clerk of superior court. Although the date the order granting summary judgment was "entered" is important for some purposes, the 27 May 1997 voluntary dismissal with prejudice was simply not before the trial court when the trial court signed its order granting defendant's motion for summary judgment.

Plaintiff relies on numerous appellate decisions which stand for the proposition that, since he included the voluntary dismissal with prejudice of Dr. Byrd in the record filed in connection with his prior appeal, the issue *could have been raised* before this Court. Therefore, he argues, this Court's unpublished decision of 16 June 1998 is necessarily *res judicata* as to all issues which could have been raised. We disagree.

The decisions plaintiff cites do not support his position. Instead, the decisions deal with the commonly occurring situation where a litigant seeks to pursue a previously denied motion on a new legal theory, even though there has been no change in the underlying facts of the case. For example, plaintiff relies on *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E.2d 554 (1939). In *Gibbs*, the plaintiffs attacked a transfer of certain land on Jack's Creek in Yancey County on the grounds that the grantor lacked the mental capacity to make the transfer to the defendants. A jury ruled against the plaintiffs, and our Supreme Court affirmed the entry of judgment against the plaintiffs. *Higgins v. Higgins*, 212 N.C. 219, 193 S.E. 159 (1937). The plaintiffs then sought to bring a second action against the same defendants, alleging that the grantor was under the undue influence of the defendants when he deeded the land on Jack's Creek. There had been no change in the underlying facts or parties, and our Supreme Court held that the plaintiffs' argument of undue influence "could have been asserted and relied upon in the former action." *Gibbs*, 215 N.C. at 205, 1 S.E.2d at 558.

Plaintiff also relies on the decision of this Court in *Board of Education v. Construction Corp.*, 64 N.C. App. 158, 306 S.E.2d 557 (1983), *disc. review denied*, 310 N.C. 152, 311 S.E.2d 290 (1984).

Defendant Juno Construction Corporation was the general contractor and defendant Statesville Roofing & Heating Company was the subcontractor in connection with the installation of a roof on a Burke County high school. Leaks developed in the roof, and Burke County Board of Education (the Board) sued both defendants for breach of contract. The Board also sued defendant Statesville Roofing & Heating Company (Statesville Roofing) for breach of contract for failure to maintain the roof. Prior to trial, the trial court denied Statesville Roofing's motion to amend its pleadings to allege that the roof maintenance contract was unenforceable. The jury found that both defendants had breached their contracts, but found that the roof design furnished to defendants by plaintiff was defective, and awarded no damages. On appeal to this Court, we upheld the decision of the trial court as to Juno, but found Statesville Roofing liable on the roof maintenance contract. We also upheld the ruling of the trial court denying Statesville Roofing's motion to amend its pleadings, and remanded the case to the trial court for determination of damages. *Bd. of Education v. Construction Corp.*, 50 N.C. App. 238, 273 S.E.2d 504 (1981). On remand, defendant Statesville Roofing renewed its motion to amend, advancing a new theory, a public policy argument, in support of the motion to amend its pleadings. On a second appeal, we held that the motions were identical, the underlying facts had not changed, and the previous appellate decision became the "law of the case."

> Where a question before an appellate court *has previously been answered* on an earlier appeal in the same case, the answer to the question given in the former appeal becomes "the law of the case" for purposes of later appeals.

Construction Corp., 64 N.C. App. at 160, 306 S.E.2d at 559 (emphasis added).

In the case before us, however, the entry of a voluntary dismissal with prejudice as to Dr. Byrd materially changes the factual setting and raises an entirely new legal issue as to the effect of that voluntary dismissal on the liability of defendant. We did not answer that question in our decision of 16 June 1998 and our decision did not become the "law of the case" on the issue which is now before us. The trial court properly considered defendant's "new" motion for summary judgment based on an event which occurred after the court granted the defendant's earlier motion for summary judgment. This assignment of error is overruled.

II.

[2] Plaintiff's second argument raises a more difficult question: may an injured plaintiff proceed against an alleged employer on the theory of *respondeat superior*, after having dismissed with prejudice and without payment plaintiff's negligence claim against the alleged employee? We conclude that plaintiff is barred from proceeding against defendant, the alleged employer of Dr. Byrd.

At common law, the release of the servant released the master as well. *Smith v. R.R.*, 151 N.C. 479, 66 S.E. 435 (1909). The master was not considered to be a joint tort-feasor with the servant because it did not " 'actively participate in the act which cause[d] the injury.' " *Id.* at 482, 66 S.E. at 436 (citation omitted). Since the liability of the master was merely vicarious, the release of the master's servant necessarily released the master from liability.

In 1967, our General Assembly enacted the Uniform Contribution Among Tort-Feasors Act (the Uniform Act), codified as N.C. Gen. Stat. §§ 1B-1 to 1B-6. The Uniform Act provides in pertinent part that:

> When a release or a covenant not to sue . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide[.]

N.C. Gen. Stat. § 1B-4 (1983).

Initially, it did not appear that the Uniform Act made any change in the established law of master and servant since the two were not considered to be joint tort-feasors. However, in *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 412 S.E.2d 666, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 73 (1992), our Supreme Court held that the term "tort-feasors" as used in the Uniform Act included vicariously liable masters. Thus, the *release* of a servant did not release a vicariously liable master, unless the terms of the release provided for release of the master. In *Yates*, the plaintiff was injured in an accident with a pizza deliveryman who was working for New South Pizza, Ltd., d/b/a Domino's Pizza. The plaintiff settled with the driver for $25,000.00, the amount of his insurance coverage, and executed a *covenant not to sue* the driver or the driver's insurer, but "expressly reserved all

rights to proceed against defendant . . . employer." *Id.* at 791, 412 S.E.2d at 667. In a divided opinion, our Supreme Court held that "*for purposes of this Act*, a 'tort-feasor' is one who is liable in tort." *Id.* at 794, 412 S.E.2d at 669 (emphasis in original).

In *Harris v. Miller*, 335 N.C. 379, 438 S.E.2d 731 (1994), the same question was before our Supreme Court. In *Harris*, the plaintiff brought a medical malpractice claim against a doctor, nurse, and hospital. The plaintiff then settled all claims with the nurse and hospital, and executed a *covenant not to sue* the nurse and hospital, but specifically reserved the right to pursue his claims against the doctor. The trial court then dismissed the vicarious liability claim against the doctor on the ground that there was insufficient evidence of a master-servant relationship between the doctor and the operating room nurse, and on the separate ground that the plaintiff's settlement with the nurse released the doctor. In accord with *Yates*, our Supreme Court held in *Harris* that "the release of a servant no longer operates to release a vicariously liable master, unless the terms of the release so provide." *Id.* at 398, 438 S.E.2d at 742. Thus both *Yates* and *Harris* hold that execution of a release or covenant not to sue the servant does not release the vicariously liable master.

In the present case, however, the litigation against the alleged servant, Dr. Byrd, was not terminated by a release or covenant not to sue, but was terminated by a voluntary dismissal with prejudice and without payment. Even if the voluntary dismissal had not recited that it was "with prejudice," it was the second dismissal of plaintiff's claims against Dr. Byrd and would have operated as an adjudication on the merits. "Such a dismissal is with prejudice, and it operates as a disposition on the merits and precludes subsequent litigation in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff." *Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 384, 465 S.E.2d 558, 559-60 (1996); *see Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974); N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990) ("a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state . . . an action based on or including the same claim[]").

In *Barnes*, decided after the enactment of the Uniform Act, the plaintiff contended that he was injured by the negligence of defendant McGee while McGee was acting as a servant of defendant YMCA. At trial, the trial court allowed the YMCA's motion for a directed ver-

dict, and dismissed with prejudice the action against McGee. On appeal, this Court held that a " '[d]ismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective *not only on the immediate parties but also on their privies.*' " *Barnes*, 21 N.C. App. at 289, 204 S.E.2d at 205 (quoting 9 Wright and Miller, Federal Practice and Procedure, § 2367, pp. 185-86) (emphasis in original). Thus, "[a] judgment on the merits in favor of the employee precludes any action against the employer where, as here, the employer's liability is purely derivative." *Id.*

This Court decided *Graham* following the Supreme Court decisions in *Yates* and *Harris*. In *Graham*, the female plaintiff sued Hardee's and its employee Rogers, based on sexual advances allegedly made by Rogers. The plaintiff dismissed her original complaint without prejudice, and then refiled her claim. Hardee's moved for summary judgment, following which the plaintiff again voluntarily dismissed her claim against Rogers. The trial court then granted Hardee's motion for summary judgment, and the plaintiff appealed. This Court held that "each of these claims [against Hardee's] as presented by plaintiff is dependant upon the alleged tortious conduct of Rogers. Since Rogers has been adjudicated not liable for the alleged conduct as a result of plaintiff's second voluntary dismissal of her claims against him, the remaining claims against Hardee's must also fail." *Graham*, 121 N.C. App. at 385, 465 S.E.2d at 560.

In the case before us, the dismissal against Dr. Byrd was a second dismissal of plaintiff's claims against him and therefore operated as an adjudication on the merits under the express language of Rule 41 of the Rules of Civil Procedure and our holding in *Barnes*. Furthermore, the voluntary dismissal itself specifically stated that it was with prejudice. Under the reasoning of our Court in *Graham*, the dismissal with prejudice as to Dr. Byrd operated as a disposition on the merits, and "precludes subsequent litigation [against defendant Maria Parham Hospital, Inc.] in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff." *Id.* at 384, 465 S.E.2d at 559-60. The trial court did not err in its grant of summary judgment in favor of defendant, and this assignment of error is overruled.

Affirmed.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. DONALD ALEXIS BOWERS

No. COA99-61

(Filed 7 December 1999)

1. Evidence— expert testimony—special knowledge and expertise—procedures forming basis of conclusions—not new scientific methods

The trial court did not err in a first-degree burglary case by admitting the expert testimony of three witnesses concerning the evidence gathered from the victim's panties because: (1) all three testified regarding their related study and experience that gave them special knowledge and expertise to qualify them as an expert witness; (2) all three thoroughly explained to the jury the procedures used in their analysis forming the basis of their conclusions; and (3) none of the scientific methods employed by the three experts were new methods where the reliability of the method was at issue.

2. Burglary and Unlawful Breaking or Entering— first-degree burglary—nighttime element—sufficiency of evidence

Viewing the evidence in the light most favorable to the State, the trial court did not err in a first-degree burglary case by concluding the State presented sufficient evidence of the burglary occurring at night because: (1) the victim testified her clock displayed 6:50 a.m. when the assailant entered her room and the room was still dark; and (2) with the proper adjustments of the National Climate Data Center's sunrise time in light of Daylight Savings Time, sunrise occurred at 7:33 a.m. on the day of the crime.

3. Burglary and Unlawful Breaking or Entering— first-degree burglary—instruction on breaking "or" entering—not prejudicial error

The trial court did not commit prejudicial error in a first-degree burglary case by instructing that defendant could be convicted of first-degree burglary if the jury found a "breaking or entering" rather than a "breaking and entering" because: (1) considering the jury charge as a whole, it was clear that the jury understood the conviction requires both a breaking and entering; and (2) defendant has failed to show that a different result would have been reached at trial absent this alleged error.

Appeal by defendant from judgment entered 12 March 1998 by Judge Claude S. Sitton in Superior Court, Buncombe County. Heard in the Court of Appeals 25 October 1999.

John T. Barrett for the defendant.

Michael F. Easley, Attorney General, by Bruce S. Ambrose, Assistant Attorney General, for the State.

WYNN, Judge.

On 12 March 1998, a jury found Donald Alexis Bowers guilty of first-degree burglary and statutory rape of a fourteen-year old girl. The trial court sentenced him to a consecutive sentence of 77 to 102 months for the first-degree burglary charge and 288 to 355 months for the statutory rape charge.

The State's evidence at trial showed that on 10 October 1996, a fourteen-year-old female, who resided with her mother in an apartment complex, awoke at approximately 6:30 a.m. to see her mother off for work. After her mother departed, she went back to sleep, but was awakened at 6:50 a.m. by creaking sounds from the stairs leading to her bedroom. Thereafter, a man entered her room, put his hands around her throat and told her, "[i]f you say another G-- d--- word I will kill you." He then pulled her pants down, put his penis into her vagina, ejaculated and left the apartment.

Following his departure, the female minor went to her mother's employment and informed her of the incident. The mother called the police who responded and took the female minor to a hospital. At the hospital, health care providers collected a sample of her hair, saliva, blood, swabs from her vagina and panties and the police recovered several dark hairs on the bedroom sheets.

Initially, the female minor identified an individual other than the defendant as her assailant, but scientific testing at the State Bureau of Investigation laboratory eliminated that person as a suspect.

Based on a lead, an investigating police officer interviewed the defendant. During the interview, the defendant consented to a request to provide samples of his hair, saliva, and blood.

Suzanne Barker, a forensic serologist at the State Bureau of Investigation laboratory analyzed stains found in the female minor's panties and identified the stains as spermatozoa. Also, Ms. Barker

prepared slides of the defendant's blood samples and transferred the slides to Michael Budzynski, a DNA analyst.

Mr. Budzynski examined the blood samples and determined that the defendant's DNA could not be ruled out as being the same DNA found in the victim's panties and sweat pants. According to Mr. Budzynski, the probability of finding the same DNA profile in another person is at least 1 in 5.5 billion.

Jim Gregory, a hair and fiber analyst with the State Bureau of Investigation laboratory, compared the head and pubic hair samples from the female minor, the defendant, and two other males with the dark hairs recovered from the female minor's panties and around her bed. Mr. Gregory concluded that the hair found in the female minor's panties was microscopically consistent with the defendant's hair. Mr. Gregory also concluded that the hair from the female minor's panties was microscopically inconsistent with the hair of the other two men sampled.

The State also tendered certified documents to the trial court from the National Climate Data Center to show that on the date of the crime, 10 October 1996, sunrise occurred at 6:33 a.m. This data, however, did not reflect the Daylight Savings Time which was in effect on the date of the crime. In this regard, the trial court took judicial notice that Daylight Savings Time was in effect on that particular day.

On appeal, the defendant contends that the trial court committed reversible error in: (I) admitting certain expert witness testimony, (II) denying his motion to dismiss the first-degree burglary charge, and (III) instructing the jury on the first-degree burglary charge.

I.

[1] The defendant first asserts on appeal that the trial court erred in admitting the expert testimony of Suzanne Barker, Jim Gregory, and Michael Budzynski because: (1) the foundations for the expert witnesses' testimony was insufficient and (2) the jury was asked to sacrifice its independence and accept the experts' conclusions on faith. We disagree.

The admissibility of expert witness testimony is governed by Rule 702 of the North Carolina Rules of Evidence.

> 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. Underwood*, 134 N.C. App. 533, 541, 518 S.E.2d 231, 238 (1999) (quoting *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973)). Usually, a determination of whether a witness is qualified as an expert is exclusively within the discretion of the trial court and will not be reversed absent a complete lack of evidence to support its ruling. *See id.*

In the instant case, all three witnesses testified regarding their related study and experience which gave them special knowledge and expertise to qualify them as an expert witness.

For instance, Ms. Barker testified that her professional background as a forensic serologist included: a Bachelor of Science degree in medical technology with a minor in biology and chemistry; an internship in medical technology; in-house training at the State Bureau of Investigation in forensic technology; and serving as an expert witness on three prior occasions.

Mr. Gregory testified that his professional background as a hair and fiber expert included: a Bachelor of Science Degree in Textile Chemistry; five years experience and training in hair and fiber identification and comparison as a State Bureau of Investigation agent; and serving as an expert witness on sixteen prior occasions.

Mr. Budzynski testified that his professional background as an expert in forensic DNA analysis included: a Bachelor of Science degree in biochemistry and zoology; postgraduate studies in molecular biology; attending numerous scientific meetings and workshops of the American Academy of Forensic Scientists and Southern Association of Forensic Science; two years in-house training at the State Bureau of Investigation laboratory; advanced DNA training at the Federal Bureau of Investigation laboratory in Quantico, Virginia; performing DNA analysis in over 200 cases; and serving as an expert in DNA analysis on approximately 35 prior occasions.

Furthermore, contrary to the defendant's assertions, all three expert witnesses thoroughly explained to the jury the procedures used in their analysis forming the basis of their conclusions.

Therefore, we find the trial court's determination that these witnesses possessed the requisite skills to testify as an expert to be supported by the evidence in the record. *See id.*

Moreover, we find meritless defendant's assertions that the jury was asked to sacrifice its independence and accept the experts' conclusions on faith. In arguing this point, the defendant challenges: (1) Suzanne Barker's testimony that the stains on the female minor's panties were spermatozoa; (2) Jim Gregory's testimony that one of the hairs collected from the female minor's panties was "found to be microscopically consistent with the pubic hair of [the] [defendant]"; and (3) Michael Budzynski's testimony that the DNA found in the female minor's panties and sweat pants matched the defendant's DNA and the probability of finding the same DNA profile in another person was at least 1 in 5.5 billion.

The defendant bases his argument on *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984) and *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).

In *Bullard*, the Supreme Court addressed the reliability of footprint identification and gave the legal concerns for determining whether a proffered method of proof is sufficiently reliable to be admissible at trial. *Bullard*, 312 N.C. at 129, 322 S.E.2d at 370.

Similarly, in *Pennington*, the Supreme Court examined the reliability of a DNA profile testing, which at the time was a relatively new scientific method of proof. *Pennington*, 327 N.C. at 89, 393 S.E.2d at 847.

In the case at bar, unlike *Bullard* and *Pennington*, none of the scientific methods employed by the three expert witnesses were new methods where the reliability of the method was at issue. Therefore, the present case is distinguishable from *Bullard* and *Pennington*. Hence, the defendant's reliance on those two cases is misplaced.

II.

[2] The defendant next argues that the State failed to present sufficient evidence for a rational jury to determine that he was guilty beyond a reasonable doubt of first-degree burglary. In particular, the defendant contends that there was insufficient evidence to support a finding that the crime occurred at night.

Our Court, in testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, must determine

whether there is substantial evidence of each essential element of the offense and substantial evidence that the defendant was the perpetrator of the offense. *See State v. Smith*, 307 N.C. 516, 518, 299 S.E.2d 431, 434 (1983). Substantial evidence is the amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *See State v. Ledford*, 315 N.C. 599, 607, 340 S.E.2d 309, 315 (1986).

"The elements of the crime of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) of another (6) which is actually occupied at the time of the offense (7) with the intent to commit a felony therein." *Id.* at 606, 340 S.E.2d at 314. Because the pertinent element at issue is the nighttime element, we limit our discussion to that particular element.

Our courts have held that to warrant a conviction for burglary in either the first or second degree the State must show, *inter alia*, that the crime charged occurred during the nighttime. *See State v. Cox*, 281 N.C. 131, 187 S.E.2d 785 (1972). Thus, "if the State fails to present substantial evidence that the crime charged occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed." *Smith*, 307 N.C. at 518, 299 S.E.2d at 434.

Since there is no statutory definition of "nighttime", our courts must adhere to the common law definition of "nighttime". *See Ledford*, 315 N.C. at 607, 340 S.E.2d at 315. This definition states that it is nighttime " 'when it is so dark that a man's face cannot be identified except by artificial light or moonlight.' " *Smith*, 307 N.C. at 519, 299 S.E.2d at 434 (quoting *State v. Lyszaj*, 314 N.C. 256, 266, 333 S.E.2d 288, 295 (1985)).

In the case *sub judice*, the female minor testified that just before the assailant entered her room, her clock displayed 6:50 a.m. Even though the female minor saw the assailant, she testified that her night light was on and yet the room was still dark.

Further, the State presented evidence of official records from the National Climate Data Center showing that on 10 October 1996, the day of the crime, sunrise occurred at 6:33 a.m., Eastern Standard Time. Although on that particular day Daylight Savings Time was in effect, the National Climate Data Center's sunrise time did not include adjustments for Daylight Savings Time. It follows that with the adjustments for Daylight Savings Time, sunrise occurred at 7:33 a.m. on the

day of the crime—approximately 43 minutes after the defendant entered the female minor's room.

Viewing this evidence in the light most favorable to the State, we find the evidence sufficient to establish the nighttime element necessary to sustain a conviction of first-degree burglary. *See State v. Bell*, 87 N.C. App. 626, 632, 362 S.E.2d 288, 291 (1987) (stating that "[i]n ruling upon a motion to dismiss in a criminal action, the trial court is required to consider the evidence in the light most favorable to the State, disregarding discrepancies and contradictions, and drawing all reasonable inferences in the State's favor").

Accordingly, the defendant's second assignment of error is without merit.

III.

[3] Finally, the defendant contends that the trial court's instructions on first-degree burglary—which included a statement that the defendant could be convicted of the crime if the jury found "a breaking or entering" rather than "a breaking and entering"—constituted prejudicial error. We disagree.

"It is well settled in this State that the court's charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, this Court will not sustain an exception on the grounds that the instruction might have been better." *Hanks v. Nationwide Mut. Fire Ins. Co.*, 47 N.C. App. 393, 404, 267 S.E.2d 409, 415 (1980).

In the instant case, the relevant instructions given by the trial court on first-degree burglary were:

> Now in the other cases wherein the defendant has been accused of first degree burglary, Members of the Jury, I charge that in that case he has been accused of first degree burglary, which is breaking and entering the occupied dwelling house or sleeping apartment of another without the tenant's consent in the nighttime with the intent to commit a felony, that is, statutory rape of a fourteen year old. . . .
>
> First, that there was a breaking or an entry by the defendant. I instruct you that the opening of a closed door may be a breaking. I further instruct you that the going into a building or a dwelling may be an entry.

Second—the second element is that the dwelling house was broken into and entered.

Third, that the breaking and entering was during the nighttime.

Fourth, that at the time of the breaking and entering the dwelling house was occupied. . . .

The fourth element is that at the time of the breaking and entering the dwelling house was occupied.

Fifth, that the tenant did not consent to the breaking and entering.

And sixth, that at the time of the breaking and entering the defendant intended to commit statutory rape.

So Members of the Jury, in regard to this charge, or this case, I instruct you and charge you that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant broke and entered the occupied dwelling house or sleeping apartment . . . .

If you don't find the defendant guilty of first degree burglary you must determine whether he's guilty of felonious breaking or entering. Felonious breaking or entering differs from burglary, first degree burglary, in that both a breaking and entering are not necessary. . . .

Considering the jury charge as a whole, we find that the trial court's instructions made clear to the jury that a first-degree burglary conviction requires both a breaking and entering.

Even assuming *arguendo* that the trial court's jury instructions constituted error, the defendant has failed to show that had the alleged error not been committed, a different result would have been reached at trial. *See State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 623-24 (1988) (stating that "[i]n order to show 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").

In the case at bar, there was competent evidence in the record from which the jury could have concluded that both a breaking and entering occurred. For instance, the female minor testified that she

heard her mother lock the door when she left for work. On cross-examination the female minor conceded that she was unsure whether the door was actually locked, but affirmed her testimony that she heard the door lock.

Moreover, while there was no evidence of forced entry, the mere act of opening the apartment door constituted a "breaking". *See State v. Eldridge*, 83 N.C. App. 312, 314, 349 S.E.2d 881, 883 (1986) (stating that "[a] breaking is defined as any act of force, however slight, used to make an entrance through any usual or unusual place of ingress, whether open, partly open, or closed").

In light of this substantive evidence, we cannot hold that the result would have been different had the trial court correctly stated "breaking and entering" in the first part of its instructions to the jury. Therefore, if any error resulted from the trial court's instructions, such error constituted harmless error.

Accordingly, the defendant's third assignment of error is denied.

In sum, we hold that the defendant received a fair trial free from prejudicial error.

No error.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. RAYMOND LEVI ROBERTS

No. COA98-1589

(Filed 7 December 1999)

1. Evidence— out-of-court identification—photographic lineup not unnecessarily suggestive

The trial court did not err in a felony breaking or entering case when it denied defendant's motion to suppress the out-of-court identification evidence because: (1) defendant has not made the photographic lineup part of the record on appeal; (2) the fact that defendant was the only one pictured with freckles does not render the photographic lineup impermissibly suggestive per se; (3) the trial court specifically found the investigating officer who compiled the photographic lineup did the best she

could in including individuals with similar features to those described by the victim; and (4) even if the photographic lineup was impermissibly suggestive, it was not so suggestive that there was a substantial likelihood of irreparable misidentification.

2. Evidence— in-court identification—not fruit of the poisonous tree

Since the Court of Appeals already concluded defendant's photographic lineup in a felony breaking or entering case was not impermissibly suggestive, it also follows that the trial court did not err when it denied his motion to suppress the in-court identification evidence as the fruit of the poisonous tree.

3. Criminal Law— prosecutorial delay of calendaring—one instance not egregious violation

The trial court did not err in failing to dismiss the charges against defendant in a felony breaking or entering case under N.C.G.S. § 15A-954(a)(4) based on the theory that the prosecutor delayed trying the case once after it had been calendared in order to locate missing witnesses and thereby gain a tactical advantage because an isolated allegation of prosecutorial delay does not rise to the level of repeated egregious violations.

4. Burglary and Unlawful Breaking or Entering— intent to commit felony—sufficiency of the evidence

The trial court did not err in a felony breaking or entering case for failing to grant defendant's motion to dismiss for insufficiency of the evidence as to defendant's intent to commit the felony because: (1) defendant has not offered any exculpatory evidence as to his intent, and intent may be inferred from the circumstances whether it is daytime or nighttime; and (2) even though defendant claims he made a statement to the victim that he was there to wash the windows, that evidence was excluded upon defendant's own hearsay objection, and evidence not introduced at trial cannot be considered.

5. Jury— selection—question about eyewitness identification—not improper stake-out

The prosecution did not impermissibly stake out jurors during jury selection in a felony breaking or entering case by asking if they had a per se problem with eyewitness identification because questions designed to measure prospective jurors' ability to follow the law are proper within the context of jury selection

voir dire since they tend to only secure impartial jurors and do not cause the jurors to commit to a future course of action.

6. Criminal Law— instruction on flight—some evidence of attempting to avoid apprehension

The trial court did not err in a felony breaking or entering case by instructing the jury on the issue of flight because there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged in order to avoid apprehension.

7. Sentencing— habitual felon—status—not substantive offense—notice of prosecution as recidivist

The trial court did not err in a felony breaking or entering case by sentencing defendant as an habitual felon even though the indictment did not specifically allege that defendant had committed a new felony while being an habitual felon because being an habitual felon is a status and not a substantive offense, and the only pleading requirement is that defendant be given notice he is being prosecuted for some substantive felony as a recidivist.

Appeal by defendant from judgment entered 16 October 1997 by Judge J. Milton Read, Jr., in Durham County Superior Court. Heard in the Court of Appeals 20 October 1999.

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

Daniel Shatz for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 13 October 1997 session of Durham County Superior Court for felony breaking and entering and for being an habitual felon. The jury returned a verdict on 16 October 1997, finding him guilty of felony breaking and entering and further finding him to be an habitual felon. Defendant now appeals.

At trial, the State's evidence tended to show that on Sunday morning, 7 July 1996, at about 7:00 a.m., LaToya Thorpe was awakened by a man climbing through her bedroom window. She observed him for about forty-five seconds and detected that he was unarmed. She then ran to get her grandmother and uncle, who were also living in the house. When her uncle returned to the bedroom, the intruder was

gone. When police inspected the area outside the window, they observed that a trash barrel had been moved directly underneath the window and that the window screen had been torn off. Ms. Thorpe described the man as a light or red-skinned African-American with a goatee and freckles around his nose and cheeks. After further investigation, the police began to suspect that defendant was the intruder. They prepared a photographic lineup that included defendant's picture and showed it to Ms. Thorpe. Without hesitation, she positively identified the intruder as defendant.

[1] Defendant first contests the trial court's denial of his motion to suppress the identification evidence. He maintains that both the out-of-court and in-court identifications of defendant were inherently flawed, in violation of his right to due process. Each will be analyzed in turn.

The standard for out-of-court identifications in this state is well-settled. "Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). Thus, in the context of photographic lineups, a positive identification must be suppressed only if the photographic lineup itself is both (1) "impermissibly suggestive" and (2) so suggestive that "irreparable misidentification" is likely. *State v. Pigott*, 320 N.C. 96, 99-100, 357 S.E.2d 631, 633-34 (1987). The failure of either requirement defeats defendant's due process claim.

Defendant argues the photographic lineup here was impermissibly suggestive because, of the six African-American men in the lineup, only two had a light complexion and only one (the defendant) had freckles. Inexplicably, however, defendant has not made the photographic lineup part of the record on appeal. So we have no way of determining whether the lineup was unnecessarily suggestive except by the bald assertions of the defendant. After a thorough review of the record, including both the pre-trial and trial transcripts, we conclude that defendant's contentions are without merit.

"The mere fact that defendant ha[s] specific identifying characteristics not shared by the other participants does not invalidate the lineup." *State v. Gaines*, 283 N.C. 33, 40, 194 S.E.2d 839, 844 (1973). Thus, the fact that defendant was the only one pictured with freckles does not render the photographic lineup impermissibly suggestive

per se. Furthermore, at the voir dire hearing on defendant's motion to suppress, the trial court specifically found that the investigating officer who compiled the photographic lineup did the best she could in including individuals with similar features to those described by Ms. Thorpe, but the police department's files simply included no pictures of African-American men with freckles. Defendant has not excepted to this finding, and it is thus conclusive on appeal. *State v. Fisher*, 321 N.C. 19, 24, 361 S.E.2d 551, 554 (1987). Accordingly, defendant's own unique physical appearance was what rendered him conspicuous in the lineup, not any suggestive police procedures. Defendant's unique physical appearance was "simply an existing fact," and the police's inability to include individuals in the lineup that shared defendant's unique physical appearance "cannot be attributed to the officers or regarded as the kind of rigged 'suggestiveness' in identification procedures [prohibited by due process]." *State v. Rogers*, 275 N.C. 411, 429, 168 S.E.2d 345, 356 (1969), *cert. denied*, 396 U.S. 1024, 24 L. Ed. 2d 518 (1970). We therefore conclude that this was not an impermissibly suggestive lineup.

Moreover, even if the photographic lineup was impermissibly suggestive, we conclude that it was not so suggestive that there was a "substantial likelihood of irreparable misidentification." *Harris*, 308 N.C. at 162, 301 S.E.2d at 94. In analyzing this part of the inquiry, our courts look at the totality of the circumstances, guided by five factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty demonstrated by the witness at the pre-trial identification; and (5) the time between the crime and the pre-trial identification. *Pigott*, 320 N.C. at 99-100, 357 S.E.2d at 634.

The circumstances here show there was not a substantial likelihood of irreparable misidentification. Ms. Thorpe had an opportunity to view the perpetrator for approximately forty-five seconds, her description to the police "matches to an absolute T" the appearance of the defendant (Motions Tr. at 69), she had no hesitancy in identifying defendant, and the photographic lineup was shown to her only nine days after the crime. Accordingly, the trial court did not err in denying defendant's motion to suppress the pre-trial identification.

[2] Defendant also contends that Ms. Thorpe's in-court identification of defendant should have been suppressed because it was tainted by the impermissibly suggestive photographic lineup. However, because

the lineup itself was not impermissibly suggestive (and thus not a "poisonous tree"), the in-court identification could not possibly be suppressed as the fruit of a poisonous tree. *See generally State v. Daughtry*, 340 N.C. 488, 507, 459 S.E.2d 747, 756 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *State v. Medlin*, 333 N.C. 280, 295, 426 S.E.2d 402, 409 (1993). We therefore reject his argument.

[3] Next, defendant argues that his charges should have been dismissed pursuant to N.C. Gen. Stat. § 15A-954(a)(4). That subsection permits dismissal when "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (1997). Here, defendant contends that the prosecution engaged in calendar abuse, thereby warranting dismissal. We disagree.

A motion to dismiss under section 15A-954(a)(4) is to be granted only sparingly. *State v. Joyner*, 295 N.C. 55, 59, 243 S.E.2d 367, 370 (1978). In his formal motion to the trial court, defendant's only argument was that the North Carolina statutes give the prosecution too much control over the calendaring process and case management, in violation of a defendant's constitutional rights. This facial constitutional challenge has already been rejected by our Supreme Court, and we need not readdress it here. *See Simeon v. Hardin*, 339 N.C. 358, 375-77, 451 S.E.2d 858, 869-71 (1994).

Only at the hearing on his motion to dismiss did defendant even suggest an as-applied challenge. Our Supreme Court permitted such a challenge in *Simeon*, where Simeon alleged the prosecution repeatedly delayed calendaring his case in order to keep him and other defendants in jail, had delayed trying him when it was likely he would be acquitted, and had pressured him to plead guilty. *Id.* at 378, 451 S.E.2d at 871-72. Defendant's only claim of abuse here is that the prosecution delayed trying his case once after it had been calendared in order to locate missing witnesses and thereby gain a tactical advantage. This one isolated allegation of prosecutorial delay does not rise to the level of the repeated, egregious violations in *Simeon*. Accordingly, defendant's motion to dismiss was properly denied.

[4] Defendant also contends the trial court should have granted his motion to dismiss for insufficient evidence. The standard for ruling on a motion to dismiss for lack of evidence is well-settled. The trial court must determine whether the State has offered substantial evi-

dence of defendant's guilt as to each element of the crime charged. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). In doing so, however, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *Id.* Felony breaking and entering involves (1) a breaking or entering (2) into a building (3) without consent (4) with an intent to commit a felony therein. N.C. Gen. Stat. § 14-54(a) (1993); N.C.P.I., Crim. 214.30. Here, defendant argues there was insufficient evidence to establish that he had any intent to commit a felony. We disagree.

The requisite intent for felony breaking and entering need not be directly proved it may be inferred from the circumstances. *State v. Myrick*, 306 N.C. 110, 115, 291 S.E.2d 577, 580 (1982). In fact, "[w]ithout other explanation for breaking into the building or a showing of the owner's consent," the requisite intent can be inferred. *Id.* Here, defendant's only explanation offered was a statement he purportedly made to Ms. Thorpe to the effect that he was there to wash the windows. However, that particular statement was never even before the jury, as it was excluded upon defendant's own hearsay objection. It goes without saying that, when viewing all evidence in favor of the State for purposes of a motion to dismiss, we cannot consider evidence not introduced at trial. Accordingly, because defendant has offered no exculpatory evidence as to his intent, that intent could properly be inferred under the circumstances here.

Defendant nonetheless asserts that this inference as to intent only applies at nighttime. He bases his argument on the following language from our Supreme Court regarding inferred intent:

> The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others *in the night time* [sic], when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also.

State v. McBryde, 97 N.C. 393, 396, 1 S.E. 925, 927 (1887) (emphasis added). We find defendant's argument unpersuasive. *McBryde* and most of the cases applying this so-called *McBryde* inference involved inferring intent in the context of a burglary charge. One of the elements of burglary is that the crime occur at nighttime. *State v. Dalton*, 122 N.C. App. 666, 669, 471 S.E.2d 657, 659 (1996). Thus, the *McBryde* court's reference to nighttime was more a reference to the

underlying burglary charge than a judicial pronouncement that the inference of intent only applies to crimes at night. In fact, this Court has previously applied the inference to breakings and enterings during the daytime. *See, e.g., State v. Costigan*, 51 N.C. App. 442, 445, 276 S.E.2d 467, 469 (1981). The trial court therefore properly rejected defendant's motion to dismiss based upon insufficient evidence.

[5] Next, defendant argues that the prosecution impermissibly staked out jurors during jury selection. Defendant points to the following *voir dire* questioning as being improper:

> Does anyone here have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the Judge instructs you as to the law. Per se unreliability of eyewitness identification.

It is certainly true that counsel may not pose hypothetical questions intended to elicit a prospective juror's decision in advance as to a particular set of facts or evidence. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). "[S]uch questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action." *Id.* It is equally true, however, that the right to an impartial jury contemplates inquiry by each side to ensure a prospective juror can follow the law. *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997). Accordingly, "[q]uestions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection *voir dire*." *Id.* Here, the prosecution was simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony that is, treat it no differently than circumstantial evidence. The prosecution's questions then "tended only to 'secure impartial jurors,' [and did] not caus[e] them to commit to a future course of action." *State v. McKoy*, 323 N.C. 1, 15, 372 S.E.2d 12, 19 (1988), *death penalty vacated*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

[6] Through another assignment of error, defendant argues that the trial court erred by instructing the jury on the issue of flight. We disagree. Jury instructions pertaining to the issue of flight are proper so long as there is "some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995). Mere evidence that defendant left the scene is not enough; there must be some

evidence suggesting defendant was avoiding apprehension. *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). The evidence here showed that Ms. Thorpe awoke to see defendant climbing through her window, that she exchanged some words with defendant, and then left the room to get her uncle and grandmother. When she returned, defendant was nowhere to be found. This evidence suggests defendant feared Ms. Thorpe would call the police and thus ran away to avoid possible apprehension. Accordingly, an instruction on flight was warranted.

[7] Finally, defendant argues he should not have been sentenced as an habitual felon because his habitual felon indictment was flawed. The indictment alleged that defendant was an habitual felon and then listed his three prior felony convictions; this permitted the State to indict him as an habitual felon. The indictment did not specifically allege that defendant had committed a new felony while being an habitual felon. This, defendant maintains, renders the indictment insufficient as a matter of law. We disagree.

In *State v. Cheek*, 339 N.C. 725, 453 S.E.2d 862 (1995), our Supreme Court held that the habitual felon indictment need not specifically list the new felony defendant allegedly committed. *Id.* at 728, 453 S.E.2d at 864. Defendant nonetheless maintains that *Cheek* still requires the indictment to allege that *some* new felony was committed. He correctly points out that "[b]eing an habitual felon is not a crime but is a status . . . . The status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). He then argues that, since criminal pleadings and indictments must contain every element necessary for conviction, N.C. Gen. Stat. § 15A-924(a)(5) (1997), the habitual felon indictment must make some reference to a new felony being committed in order to fulfill all the necessary elements of being an habitual felon.

Defendant, however, defeats his own argument. As he points out, being an habitual felon is not a substantive criminal offense, but is rather a status. Were it a substantive offense, then section 15A-925(a)(5)'s requirement that each element of the crime be pleaded would certainly apply. But because being an habitual felon is *not* a substantive offense, the only pleading requirement is that defendant be given notice "that he is being prosecuted for some substantive felony *as a recidivist*." *Allen*, 292 N.C. at 436, 233 S.E.2d at 588. Defendant's habitual felon indictment complied with that

notice requirement here. Defendant's final assignment of error is therefore overruled.

No error.

Judges JOHN and McGEE concur.

CITY OF DURHAM; COUNTY OF DURHAM, PLAINTIFFS-APPELLANTS v. JAMES M. HICKS, JR., AND WIFE, MRS. J.M. HICKS; ALL ASSIGNEES, HEIRS AT LAW AND DEVISEES OF JAMES M. HICKS, JR. AND MRS. J.M. HICKS, IF DECEASED, TOGETHER WITH ALL THEIR CREDITORS AND LIENHOLDERS REGARDLESS OF HOW OR THROUGH WHOM THEY CLAIM, AND ANY AND ALL PERSONS CLAIMING ANY INTEREST IN THE ESTATES OF JAMES M. HICKS, JR., AND MRS J.M. HICKS, IF DECEASED; GEORGE W. MILLER, JR., PUBLIC ADMINISTRATOR, CTA, DBA OF THE ESTATE OF LEILA PHILLIPS AND WILLIAM A. MARSH, JR., GUARDIAN AD LITEM FOR JAMES M. HICKS, JR., DEFENDANTS-APPELLEES

No. COA99-101

(Filed 7 December 1999)

1. **Estate Administration— pending estate administration—tax lien on estate property—precedence over payment of estate expenses**

The trial court erred by granting summary judgment in favor of the Public Administrator so he could continue to administer the estate and attempt to sell the pertinent property despite the County of Durham's attempt to foreclose on the property tax lien pursuant to N.C.G.S. § 105-379(a) because although N.C.G.S. § 28-19-6 and N.C.G.S. § 105-356(a)(1) do not reference each other and are conflicting over whether a tax lien takes precedence over all other claims against the estate, case law provides that tax liens against real property held in an open estate take precedence over the costs of administration.

2. **Taxation— enjoining collection and foreclosure of taxes—statutory prohibition—property in pending estate administration**

The trial court violated the statutory prohibition of N.C.G.S. § 105-379(a) against enjoining the collection and foreclosure of taxes when it denied the County of Durham's right to foreclose on

a tax lien even though the property was in the midst of a pending estate administration because N.C.G.S. § 105-374(k) requires the County in its foreclosure proceeding to be obligated to raise enough funds to satisfy the tax debt, while N.C.G.S. § 28A-19-6 provides that the Public Administrator is not obligated to pay the back taxes if the sale of the property does not generate enough funds.

3. Estate Administration— pending estate administration— foreclosure sale—administrator's advance of additional funds

Even though N.C.G.S. § 105-374 only requires the County of Durham to raise enough money from the foreclosure sale of the pertinent property to cover the taxes and the property is still in the midst of a pending estate administration, the Public Administrator is only required to use funds from the estate itself under N.C.G.S. § 105-383 and N.C.G.S. § 28A-12-5 in advancing the costs of the estate and his decision to advance funds beyond the amount that is available in an estate upon the reliance that real property will be sold to cover those costs is an unprotected risk.

4. Estate Administration— payment of claims—funds not available

In a foreclosure proceeding, the Public Administrator is not required to raise enough funds to pay all of the claims against the property because even though N.C.G.S. § 28A-19-6 governs the order in which claims against the estate must be paid, nowhere does it dictate that all claims must be paid in full regardless of whether funds exist to do so.

Appeal by plaintiffs from judgment entered 28 October 1998 by Judge Craig B. Brown in District Court, Durham County. Heard in the Court of Appeals 21 October 1999.

Kimberly Martin Grantham, Assistant County Attorney, for plaintiffs-appellants.

Haywood, Denny & Miller, L.L.P., by Thomas H. Moore, for defendant-appellee George Miller, Jr., and Marsh and Marsh, by William A. Marsh, Jr., as Guardian-Ad-Litem for defendant-appellee James M. Hicks, Jr.

WYNN, Judge.

N.C. Gen. Stat. § 28A-19-6 (1984) dictates that the costs of an estate administration must be paid before all other claims. In this case, however, the City and County of Durham argue that their tax liens against real property held in an open estate take precedence to the costs of administration. We agree and therefore hold that the trial court erred in preventing the foreclosure proceeding to collect the tax liens against real property held in an open estate.

Leila Phillips died in 1975 leaving by will two adjacent properties on Teel Street in Durham County to her grandson, James M. Hicks, Jr., then a minor. At the time of her death, no property taxes were due on the parcels.

In 1981, the Durham County Clerk of Court appointed Attorney George W. Miller, Jr., to act as the Public Administrator for the Phillips estate which consisted of the two Teel Street lots (one of which contained a dilapidated house), and about $100.00 in a bank account. The whereabouts of James M. Hicks, Jr., was, and still is, unknown, so the court appointed William A. Marsh, Jr., as guardian ad litem to represent his interests in the estate.

During the administration of the estate, the County of Durham ordered that the house on the Teel Street properties be demolished. Although it was not statutorily required to do so, the Public Administrator's law firm advanced the costs of the razing. The Public Administrator has since tried to sell the properties, but the properties are economically unattractive and have not yet sold. In the meantime, taxes on these properties have not been paid because the estate is otherwise insolvent. As of 26 October 1998, the back taxes and interest on the two lots totaled $1,606.22.[1]

Through October 1998, the Public Administrator advanced through his law firm $2,584.00 to administer the Phillips estate. This included the cost of demolishing the house, appraising the properties, filing annual accounts with the Durham County Clerk of Court, and paying various other expenses. In addition, the estate generated nearly $10,000 in legal expenses, mostly related to the Public Administrator's efforts to sell the properties.

1. An estate administrator must pay taxes due on property under his control, but, like the costs of the razing of the house in this case, he is only required to use funds from the estate itself. N.C. Gen. Stat. §§ 105-383 (1997), 28A-12-5 (1984).

In 1992, the City and County of Durham initiated proceedings to foreclose its tax lien on the Teel Street properties. (The County apparently was unaware that the Public Administrator was still administering the estate since he was not initially named as a defendant, but was later added in an amended complaint.) The County sought to recover the back taxes and interest, to appoint a commissioner to sell the Teel Street properties, and to first apply the proceeds from the sale to pay the back taxes and interest.

In their representative capacities, the Public Administrator and the Guardian Ad Litem answered, asking the Court to stay the foreclosure proceedings, and noting that a special proceeding had been instituted by the Public Administrator to sell the Teel Street properties and that this sale would likely generate sufficient funds to pay the costs of the estate administration and the back taxes.

The City and County of Durham took no steps to proceed with this action until ordered to do so by District Court Judge Craig B. Brown in September 1998. After a hearing, Judge Brown denied the City and County's motion for summary judgment and instead granted summary judgment in favor of the Public Administrator so he could continue to administer the estate and attempt to sell the property. This appeal by the City and County followed.[2]

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[1] The County of Durham argues that it has the authority to foreclose a property tax lien even if the property is in the midst of a pending estate administration. It also contends that the trial court violated the statutory prohibition against enjoining the collection and foreclosure of taxes when it denied the County's right to foreclose. We agree with both of the County's arguments.

Chapter 105 of the North Carolina General Statutes governs tax assessments and collections. N.C. Gen. Stat. § 105-355 (1997) provides that a tax liability on a piece of property creates a tax lien against that property. N.C. Gen. Stat. § 105-356(a)(1) (1997) provides that a tax lien is superior to all other claims against the property: "the lien of taxes . . . shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes."

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2. The arguments set forth by the County of Durham apply equally to the City of Durham, so for the sake of brevity we will refer to the plaintiffs jointly as "the County."

Chapter 28A of the North Carolina General Statutes governs the administration of a decedent's estate. N.C. Gen. Stat. § 28A-19-6 (1984) dictates the order of payment of claims against any estate being administered in North Carolina. The statute provides, in pertinent part, that

> After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order: . . .
>
> Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

The purpose of the ranking system is to provide orderly administration of estates, with proper safeguards and definite rules to benefit all creditors. *See Farmville Oil & Fertilizer Co. v. Bourne*, 205 N.C. 337, 339, 171 S.E.2d 368, 369 (1933).

Under § 28A-19-6, the County of Durham is a fourth class creditor and should be paid after the costs and expenses of the Phillips estate administration are paid. However, § 105-356 dictates that a tax lien takes precedence over all other claims against the estate. These two conflicting statutes do not reference each other.

The defendants argue that to break the deadlock, we should rely on the ranking system in § 28A-19-6, which requires that administrative costs be paid before local taxes. But a similar reliance could be placed on the plain language of § 105-356, which gives precedence to all tax liens. Although the plain language of these statutes present an inherent inconsistency, our case law provides guidance for resolving the conflict.

In *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946), Justice Barnhill writing for our Supreme Court considered a case in which the debts of an estate were greater than the personalty left behind. In that case, the estate's administrator needed to sell some of the real estate to pay all of the estate's debts in full. The Court held that an estate's personalty is primarily liable for paying the estate's debts, and the real estate is only secondarily liable. Furthermore, the Court held that the statute which dictated the order in which debts were to be paid related exclusively to the application of personal property, and not the realty. Moreover, when real estate is sold by an administrator to pay debts, the proceeds of the sale remain realty until all liens against the real estate are discharged. Only the residue, if any, con-

verts to personal property which may be used to satisfy other claims against the estate.

The rationale of *Moore* is applicable to the case at bar in that it establishes the order by which claims against an estate must be paid when the sale of real estate is necessary to pay the debts. If real property must be sold to satisfy the debts of an estate, such as in the case at bar, all liens against that property, such as a tax lien, must be satisfied first. Only then can the remainder be used to satisfy other claims, such as the costs of the estate administration.

In an even earlier pronouncement from our Supreme Court in *Guilford County v. Estates Administration*, 213 N.C. 763, 197 S.E. 535 (1938), Justice Winborne wrote that the right of an administrator to sell an estate's realty to pay the debts of an estate did not prevent the holder of a tax sale certificate from foreclosing in a civil action during the pendency of the administration of the estate. In *Estates Admin.*, the taxes in question which took precedence to other claims against the estate accrued *before* the death of the decedent. Logically, that rule of precedence applies equally to tax liens that arise *after* the death of the decedent.

In any event, Justice Winborne's rationale in *Estates Administration* that the holder of a tax sale certificate does not lose the right to foreclose the property just because that property is in the midst of an estate administration applies to the case at bar. Our current law treats a tax sale certificate and an original tax lien identically, and allows the holder of either to institute a foreclosure action. N.C. Gen. Stat. § 105-374 (1997). Under our extension of the holding of *Estates Administration*, we must allow the County of Durham to proceed with its tax foreclosure despite the fact that the Public Administrator is still administering the estate.

[2] Finally, we are supported in our holding by N.C. Gen. Stat. § 105-379(a) (1997) which provides that:

> No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose.

And our courts have consistently allowed local governments to collect taxes due to them unless the tax was somehow illegal or invalid. *See, e.g., Sherrod v. Dawson*, 154 N.C. 525, 70 S.E. 739 (1911); *Onslow*

County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), *rev'd on other grounds*, 346 N.C. 265, 485 S.E.2d 618 (1997).

In the case before us, the trial court's decision effectively denied the County its right to foreclose on the tax lien, a violation of § 105-379(a). The defendants do not contend that the taxes in question were illegal or invalid, thereby invoking the exception to the rule. Rather, the defendants argue that the Public Administrator is also a government official, so the trial court's ruling did not enjoin the collection of the taxes, but merely dictated who would sell the property.

We note, however, that the Public Administrator is not *obligated* to pay the taxes if the sale of the property does not generate enough funds. N.C. Gen. Stat. § 28A-19-6. Only the County in its foreclosure proceeding will be obligated to raise enough funds to satisfy the tax debt. N.C. Gen. Stat. § 105-374(k). Although the Public Administrator *may* raise enough funds to pay the back taxes, he may in fact not be able to do so. To allow him to proceed with a private sale would, in effect, enjoin the County from collecting the taxes since such a sale may not raise sufficient funds to pay the taxes. Only the County has the ability and the obligation to cover the tax debt.

[3] The Public Administrator's final argument is that if the tax lien takes precedence over the payment of the estate expenses, a harsh and absurd result will arise—direct out-of-pocket losses to himself for the advancements made by his law firm in the administration of the Phillips estate. The Public Administrator points out that N.C. Gen. Stat. § 105-374 only requires that the County raise enough money from the sale of the properties to cover the taxes.

We recognize the possibility of an inequity in the event the property does not yield more than the value of the tax lien. Yet, in advancing the costs of the estate, the Public Administrator did so without statutory authority or obligation. Under N.C. Gen. Stat. §§ 105-383 and 28A-12-5, the Public Administrator is only required to use funds from the estate itself. To advance funds beyond that amount that is available in an estate upon the reliance that real property will be sold to cover those costs is an unprotected risk.

Moreover, while N.C. Gen. Stat. § 105-374(k) requires that a seller in a tax foreclosure sale raise at least enough money to pay *all* of the taxes owing on the property, subsection (k) limits what may be sold to "the sale of real property *or as much as may be necessary for the*

satisfaction of all of the [debt]" (emphasis added). A sale by the County will not necessarily encompass the entire property, leaving the remainder to continue in the estate administration.

In addition, N.C. Gen. Stat. § 105-374(q) establishes the order in which the proceeds from a tax foreclosure sale must be applied. Generally, proceeds are first applied to the costs of the sale, then to any taxes and special benefit assessments. Finally, subsection (q)(6) provides, "any balance then remaining shall be paid in accordance with any directions given by the court . . . ." Under this subsection, the remainder of the tax foreclosure sale could be paid to the Phillips estate.

[4] The Public Administrator further argues that *he*, unlike the County, would be required to raise enough funds to pay *all* of the claims against the property. But it is unclear how he arrived at this conclusion.

N.C. Gen. Stat. § 28A-19-6 governs the order in which claims against an estate must be paid nowhere does it dictate that all claims must be paid in full, regardless of whether funds exist to do so. In fact, our Supreme Court has addressed the issue of how a payment-order statute, such as the one in the case at bar, should be applied.

> [T]he debts of a decedent must be paid, if he leave anything with which to pay them, and if his estate is not sufficient to pay his debts in full, then they are to paid in classes, with those of the last class, if and when reached, sharing ratably in what is left.

Rigsbee v. Brogden, 209 N.C. 510, 512, 184 S.E. 24, 25 (1936). Clearly, when an estate cannot pay all of its debts, those debts can and will remain unpaid. The Public Administrator, therefore, is no more obligated to raise enough money to satisfy *all* of the claims against the property than the County.

Since the trial court improperly prevented the County of Durham from proceeding with its tax lien foreclosure, the decision of the trial court is,

Reversed.

Judges HORTON and EDMUNDS concur.

MARK D. MYERS, PLAINTIFF/APPELLANT v. TOWN OF PLYMOUTH, DEFENDANT/APPELLEE

No. COA99-79

(Filed 7 December 1999)

1. Cities and Towns— town manager employment contract—at will employee—severance package—town retains right to fire manager at its pleasure

A town manager's employment contract requiring a lump sum payment for a severance package did not violate the statutory "at will" employment mandate under N.C.G.S. § 160A-147 since the statute mandates only that the town retains the right to fire its manager "at its pleasure," and the pertinent contract explicitly gave the Town of Plymouth that right at any time for any reason.

2. Cities and Towns— town manager employment contract—at will employee—severance package—not ultra vires

A town manager's employment contract requiring a lump sum payment for a severance package was not ultra vires since: (1) N.C.G.S. § 160A-4 gives municipalities supplementary powers to carry out their enumerated powers; (2) the town's relationships with its five previous managers reveals the contract in question was a legitimate way for the town council to employ a town manager while providing the manager with the financial security to accept the employment; (3) the town did not violate or improperly interpret a clearly articulated statute; and (4) the town may still present evidence at trial that the town manager did not live up to the terms of the severance provision under his contract if he engaged in felonious criminal conduct or failed to cure his performance after the town gave him notice of deficiency.

3. Cities and Towns— town manager employment contract—lack of pre-audit certificate—no obligation incurred during fiscal year

The trial court did not err in finding a town manager's employment contract was valid despite its lack of a pre-audit certificate required by N.C.G.S. § 159-28(a) because: (1) the town did not incur an obligation to pay the severance package during the fiscal year in which the contract was authorized; and (2) the mere possibility of an expense in the first year does not invalidate the contract when the first year never in fact resulted in an obligation.

Appeal by plaintiff from judgment entered 29 October 1998 by Judge W. Russell Duke, Jr. in Superior Court, Washington County. Heard in the Court of Appeals 21 October 1999.

The Brough Law Firm, by Michael B. Brough, for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Patricia L. Holland and Gregory W. Brown, and Rodman, Holscher, Francisco & Peck, by David C. Francisco, for defendant.

WYNN, Judge.

Under N.C. Gen. Stat. § 160A-147 (1998 Cum. Supp.), municipalities may only hire their town managers in an "at will" capacity. In this case, a fired town manager contends that a provision for severance pay under his employment contract did not negate the "at will" nature of his employment. Since we find an agreement providing severance pay to a town manager does not prohibit the town from terminating the town manager "at will," we conclude that the severance pay provision is valid and enforceable.

N.C. Gen. Stat. § 159-28(a) (1994) requires that a town pre-audit any financial obligation that will come due in the year the town incurs the obligation. The Town in this case argues that its employment contract with the town's manager is invalid because the contract lacks a pre-audit certificate. Because we find that the obligation incurred by the Town did not result in a financial obligation in the year in which the contract was signed, we uphold the trial court's finding that the lack of a pre-audit certificate did not invalidate the Town's employment contract with its town manager.

In December 1996, the Town of Plymouth through its town council offered Mark D. Myers the position of town manager at a salary of $50,000 per year. Mr. Myers accepted the job and began work on 2 January 1997. At that time, Mr. Myers did not have a written employment contract with the Town but he wanted to obtain one before moving his family and establishing a long-term residence in Plymouth. He worried about his job's stability because of the Town's recent history regarding its managers. (From 1991 to 1996, Plymouth employed five different people to serve as town manager or interim town manager. One of the fired managers sued the Town, eventually settling the action for $60,000.)

At the town council's regular monthly meeting of 10 March 1997, Mr. Myers presented a proposed written employment contract. The

town council instructed him to meet with the town attorney and present a revised contract. At the next meeting on 14 April 1997, the town council voted 4-2 to enter into the employment contract and severance agreement.

Under the terms of the contract, Mr. Myers agreed to work for the Town of Plymouth for four years. He reserved the right to terminate his employment upon 30 days' notice. The Town of Plymouth also reserved the right to terminate Mr. Myers' employment after 30 days' notice and to relieve him of his duties at any time. Furthermore, the contract provided Mr. Myers with a severance package to be paid upon his termination by the Town for any reason except felonious criminal conduct or a failure of performance which he failed to cure after appropriate notice. The severance package provided for a lump-sum payment of (1) the monetary equivalent of his accrued vacation and leave time, (2) any unreimbursed expenses, and (3) his regular salary and benefits for the duration of the contract period.

Relying on the contract and its severance provisions, Mr. Myers moved his family to Plymouth and entered into a 27-month housing lease.

On 12 December 1997, a new town council was seated. One seat was filled by appointment, replacing a council member who resigned. After the appointment, only one council member who had voted in favor of Mr. Myers' employment contract remained on the council. Mr. Myers' relationship with the new council deteriorated, and on 13 April 1998, the council voted to dismiss him from his position as town manager, effective immediately. However, the council refused to pay to him any of the compensation required by the severance package.

In response, Mr. Myers brought this action against the Town of Plymouth seeking first, a declaratory judgment that the contract was valid and enforceable and second, that the Town of Plymouth had breached the contract. After considering the pleadings, affidavits and arguments of counsel, the trial court found that the contract was valid despite its lack of a pre-audit certificate required by N.C. Gen. Stat. § 159-28(a). However, the trial court found that the severance agreement violated N.C. Gen. Stat. § 160A-147 which dictates that town managers must serve at the pleasure of the town, and therefore, the contract was not valid. From the grant of summary judgment in favor of the Town of Plymouth, Mr. Myers appealed.

I.

[1] Mr. Myers argues that the Town of Plymouth had the authority to enter into the employment contract and that the severance agreement did not violate the statutory "at will" employment mandate. We agree.

Under N.C. Gen. Stat. § 160A-147, our Legislature limited the hiring of town managers to serve "at the pleasure" of municipalities.

> In cities whose charters provide for the council-manager form of government, the council shall appoint a city manager to serve *at its pleasure.*

N.C. Gen. Stat. § 160A-147. (Emphasis added.) We, like the 4th Circuit U.S. Court of Appeals in *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997), *cert. denied*, —— U.S. ——, 139 L. Ed. 2d 869 (1998), hold that when an employee serves "at the pleasure" of an employer, an "at will" relationship exists.

The Town of Plymouth argues that the employment contract went far beyond an "at will" relationship and is therefore invalid under N.C. Gen. Stat. § 160A-147. However, the statute mandates only that the town retains the right to fire its manager "at its pleasure."

In the case at bar, the contract in question explicitly gave the Town of Plymouth the right to fire Mr. Myers at any time for any reason. The contract did not prevent the Town from exercising its power, as is evidenced by the fact that it fired Mr. Myers.

At most, the severance package may have deterred the Town from exercising its right to fire Mr. Myers since the lump-sum payment may have acted as a disincentive to firing. But that disincentive did not prohibit the Town from terminating Mr. Meyers "at its pleasure." It follows that Plymouth's severance agreement did not violate the "at will" mandate under N.C. Gen. Stat. § 160A-147.

[2] Notwithstanding our finding that the Town's employment contract did not violate N.C. Gen. Stat. § 160A-147, the Town of Plymouth strenuously argues that the execution of the employment contract was *ultra vires*—beyond the power given to the Town by the Legislature—and is therefore unenforceable.[1] We disagree.

1. Although Mr. Myers does not assert that the Town of Plymouth is estopped from arguing that the employment contract was *ultra vires*, we believe it is prudent to note this aspect of this case. Our Supreme Court has repeatedly held that a municipality cannot be estopped from defending a contract action on the basis of *ultra vires*,

Municipalities may only exercise that power given to them by the Legislature. Acts or agreements which are beyond the powers of a municipality are invalid and unenforceable. *See Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994). However, the Legislature gives municipalities broad discretion in executing those powers explicitly conferred.

The policy underlying N.C. Gen. Stat. § 160A-4 (1994) provides that municipalities should have adequate authority to execute the powers, duties, privileges and immunities conferred upon them by law.

> To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect . . . .

N.C. Gen. Stat. § 160A-4. By law, municipalities have the power to enter into contracts (N.C. Gen. Stat. § 160A-11 (1994)), to hire city managers (N.C. Gen. Stat. § 160A-147), and to establish employees' compensation (N.C. Gen. Stat. § 160A-162 (1994)).

Since N.C. Gen. Stat. § 160A-4 gives municipalities supplementary powers to carry out their enumerated powers, we find that the contract in this case was not *ultra vires*. The contract in this case employed a town manager, setting forth the particulars of his compensation. Each aspect of the contract in question was explicitly allowed by the Legislature. Moreover, given the history of the Town of Plymouth's relationships with its five previous managers, the contract in question was a legitimate way for the Town of Plymouth to employ a town manager while providing the manager with the financial security to accept the employment.

The Town of Plymouth relies on *Bowers*, *supra*, in its argument that Mr. Myers' employment contract was *ultra vires*. However, the facts of that case are distinguishable from the case at bar.

In *Bowers*, our Supreme Court addressed the question of whether contracts entered into by a town based on the town's interpretation

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despite the fact that the town may have already benefitted from the contract. *See, e.g., Bowers v. City of High Point*, 339 N.C. 413, 424, 451 S.E.2d 284, 292 (1994); *Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950); *Jenkins v. Henderson*, 214 N.C. 244, 248, 199 S.E. 37, 40 (1938); *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 276-77, 416 S.E.2d 411, 415 (1992).

of a statute were *ultra vires*. The statute in question provided specific guidelines to determine separation allowances for retiring police officers. The City of High Point took it upon itself to define the separation allowances contrary to the plain language of the statute. The statute in that case was clear on its face, and the City exceeded its powers by enforcing it in a way contrary to its plain meaning.

In the case at bar, we have already determined that Plymouth did not violate or improperly interpret a clearly articulated statute. Therefore, the Town's reliance on *Bowers* to show that Mr. Myers' contract was *ultra vires* is unpersuasive.

We note in passing that the parties do not address the constitutionality of the subject contract. In *Lette v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995), our Supreme Court found a county's severance pay expenditure invalid under Article I, Section 32 of the North Carolina Constitution which states:

> No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

In *dicta*, the Supreme Court appears not to have placed an outright ban on severance payments; instead, the Court limited its holding to the facts of that case by noting that the retiring manager did not have a written contract with the county calling for such a payment, but was instead receiving a gift.

> The wisdom of prohibiting such additional compensation for a public servant official upon his voluntary resignation, *absent a contract stating otherwise*, is grounded in the interest of good government and founded on sound reasons of public policy.

Id. at 123, 462 S.E.2d at 480 (Emphasis added). Thus while it appears that our Supreme Court left open the possibility that a written contract which required a severance payment *could* be enforceable, despite the language of Art. I, § 32, the parties did not present that issue to us and we will therefore refrain from further addressing that question in this opinion.

We further note that the severance package in this case does not create an automatic right to payment for Mr. Myers. The contract provides that if the town manager engaged in felonious criminal conduct or failed to cure his performance after notice of deficiency by the

Town, then the Town of Plymouth was not obligated to pay the severance package. Thus, the Town of Plymouth may still present evidence at trial to show that Mr. Myers did not live up to the terms of the severance provision under his contract.

II.

[3] The Town of Plymouth also argues that the trial court erred when it found that the employment contract was valid despite its lack of a pre-audit certificate required by N.C. Gen. Stat. § 159-28(a). We disagree.

N.C. Gen. Stat. § 159-28(a) reads, in pertinent part,

> (a) Incurring Obligations.—No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year . . . . If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection . . . .

Furthermore, an "obligation incurred in violation of this subsection is invalid and may not be enforced. The finance officer shall establish procedures to assure compliance with this subsection." N.C. Gen. Stat. § 159-28(a). The purpose of the pre-audit certificate is to ensure that a town has enough funds in its budget to pay its financial obligations.

The language of the statute makes the pre-audit certificate a *requirement* when a town will have to satisfy an obligation in the fiscal year in which a contract is formed. Our case law supports the position that a contract for payment that has not been pre-audited is invalid and unenforceable. *See L & S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622, 471 S.E.2d 118, 121 (1996); *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 276, 416 S.E.2d 411, 415 (1992); *Cincinnati Thermal Spray Inc. v. Pender County*, 101 N.C. App. 405, 408, 399 S.E.2d 758, 759 (1991).

However, § 159-28(a) provides no guidance as to whether a pre-audit certificate is required for obligations that will come due in future years. Neither this nor any other section requires that a town's financial officer pre-audit a long-term contract each year the contract is in effect.[2] Therefore, a contract that is signed in one year but results in a financial obligation in a later year will not violate § 159-28(a).

In the case at bar, the Town of Plymouth did not incur an obligation to pay the severance package during the fiscal year in which the contract was authorized. The fiscal year in question ended only two months after the Town and Mr. Myers signed the contract. Presumably, neither Mr. Myers nor the Town of Plymouth thought that Mr. Myers would be fired within a mere two months after the contract was signed, and indeed he was not fired within that time. We recognize that the improbability of termination did not mean that termination was *impossible* during that two-month period. However, we will not invalidate the contract due to its lack of a pre-audit certificate when the mere *possibility* of an expense in the first year never in fact resulted in an obligation.

In conclusion, summary judgment is proper when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c) (1990). Since Mr. Myers' employment contract was valid and enforceable, the trial court erred in granting summary judgment in favor of the Town of Plymouth.

Reversed in part; affirmed in part.

Judges HORTON and EDMUNDS concur.

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2. We note the existence of N.C. Gen. Stat. § 159-13 (1994), which governs "contingency appropriations"—i.e., obligations that may or may not come due during a fiscal year. Although the statute requires that such a contingency be treated as a financial obligation in the year in which it is approved, the statute does not offer guidance as to whether a long-term contingency appropriation requires a pre-audit certificate should it come due in a future year. In any case, the parties in their briefs did not address § 159-13, so we withhold comment on its application to the case at bar.

JOHN THOMAS MEEHAN, PLAINTIFF v. DOROTHY ANN CABLE AND K. REID BERGLUND, TRUSTEE, DEFENDANTS

No. COA99-121

(Filed 7 December 1999)

1. **Mortgages— waiver of right to accelerate—acceptance of late payments—failure to assert intent to require prompt payment**

The trial court did not err in a foreclosure proceeding by concluding defendants were not entitled to a directed verdict on the issue of waiver because plaintiff presented substantial evidence that defendants repeatedly accepted late payments for the pertinent real property without asserting their intent to hold plaintiff to the terms of the note or to require prompt payment according to the terms of the note for future payments.

2. **Appeal and Error— preservation of issues—motion for new trial—specific basis required**

Since defendants' motion for a new trial under Rule 59(a) in a foreclosure proceeding case did not state any specific basis for granting a new trial as required by N.C.G.S. § 1A-1, Rule 7(b)(1), the issue was not properly before the Court of Appeals.

Appeal by defendants from judgment filed 19 June 1998 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 26 October 1999.

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

Creighton W. Sossomon for defendant-appellants.

GREENE, Judge.

Dorothy Ann Cable (Cable) and K. Reid Berglund, Trustee (collectively, Defendants) appeal a jury verdict and judgment in favor of John Thomas Meehan (Plaintiff) and the trial court's denial of Defendants' motion for a new trial and motion for judgment notwithstanding the verdict.

In August 1985, Plaintiff entered into an agreement to purchase from Cable real property located on Cullasaja Drive, Highlands, North Carolina (the property). Plaintiff signed a promissory note (the note),

secured by a deed of trust for the property, in the amount of $71,500.00 plus interest at the rate of 10% per annum. The note specified payments would be made in annual installments of $9,654.66, and payments would be applied first to any accrued interest and then to any outstanding principal balance.

The note contained an acceleration clause, which stated:

> In the event of default in payment of any installment of principal or interest hereof or default under the terms of any instrument securing this note, and if the default is not made good within fifteen (15) days, the holder may, without notice, declare the remainder of the debt at once due and payable. Failure to exercise this option shall not constitute a waiver of the right to exercise the same at any other time.

In 1993, Defendants brought a foreclosure action against Plaintiff, which was heard before the Clerk of the Superior Court of Macon County. The Clerk entered an order permitting foreclosure, which was affirmed by the Superior Court in a trial de novo as provided by N.C. Gen. Stat. § 45-21.16(d1), and by this Court in *In re Foreclosure of Meehan*, 118 N.C. App. 337, 455 S.E.2d 498 (1995) (unpublished).

Plaintiff filed a separate action against Defendants pursuant to N.C. Gen. Stat. § 45-21.34 seeking, in pertinent part, an accounting of the amount due under the note and an injunction restraining Defendants from proceeding with foreclosure until final judgment in this action. Plaintiff alleged Defendants could not accelerate the debt owed by Plaintiff under the equitable defenses of waiver, estoppel, novation, and tender of payment.

On 26 August 1996, Plaintiff submitted $88,700.00 to the Clerk of Court, and on 24 September 1996, the trial court ordered a stay of the foreclosure sale. The trial court further ordered the Clerk of Court to hold a hearing to determine "the rights of the parties, including the amount due, if any." On appeal, however, this Court, in *Meehan v. Cable*, 127 N.C. App. 336, 489 S.E.2d 440 (1997), reversed in part the order of the trial court and remanded this case to the trial court for determination of Plaintiff's equitable defenses to the foreclosure action under N.C. Gen. Stat. § 45-21.34.

At trial, Plaintiff testified that although payments were due under the note in August of each year, he made the first payment in July of 1986 because Cable asked him to make the payment early. He also tes-

tified that over the years Cable had periodically asked him to make payments and he had complied, but he did not know whether these payments were made prior to their due date.

Plaintiff's records indicate he made payments as follows: $14,350.00 by 30 August 1985; $3,000.00 by 30 August 1986, with payments totaling $8,362.77 in 1986; $500.00 by 30 August 1987, with payments totaling $11,141.61 in 1987; $500.00 by 30 August 1988, with payments totaling $7,000.00 in 1988; $4,000.00 by 20 August 1989, with payments totaling $12,507.32 in 1989; $1,154.66 by 30 August 1990, with payments totaling $5,554.66 in 1990; $4,900.00 by 30 August 1991, with payments totaling $6,100.00 in 1991; $1,800.00 by 30 August 1992, with payment totaling $4,550.00 in 1992; and $2,800.00 in 1993. Plaintiff made approximately seventy-two payments to Cable.

Plaintiff stated that in addition to cash payments, he made payments on the note in forms other than cash, including providing Cable with horse feed. He did not, however, keep records of those payments, and could not testify regarding their amount.

In 1993 Plaintiff discussed the amount due under the note with Kent Satterfield (Satterfield), a certified public accountant who handled Cable's business affairs. At some point, Plaintiff asked Satterfield for an accounting of the payments made and amount due under the note. Plaintiff stated Satterfield told him the amount Cable claimed was due, but that he did not believe the amount was correct because the amount of interest was improperly calculated. He also stated he did not know whether he was in default on the note at that time because Cable would not provide him with an accounting.

Ladonna Keener (Keener), a certified public accountant, testified Plaintiff asked her to calculate the amount due under the note, including interest calculated on an annual basis. Plaintiff provided Keener with "lists of instructions on beginning balance, payment amounts, [and] dates of payments." Keener determined based on this information that the balance due as of 30 August 1996 was $86,147.98, and the amount due as of 28 May 1998 was $101,817.34. Keener did not run an amortization on the note to determine what method of interest was used to calculate the amount of the note.

Karen Meehan, Plaintiff's wife, testified she kept records of payments due under the note and, as of 19 December 1989, Plaintiff had made all payments due at that time. She stated that as of August of 1989, the balance due under the note was $59,875.87.

At the close of Plaintiff's evidence, Defendants made a motion for directed verdict on the issues of novation, estoppel, waiver, tender of payment, and an account stated. The trial court granted this motion with regard to account stated, but denied the motion with regard to novation, estoppel, and waiver. The record does not indicate the trial court's ruling on Defendants' motion for directed verdict on the issue of tender of payment.

Satterfield then testified for Defendants, based on the payment schedule of the note, that the interest due under the note was to be compounded on a monthly rather than annual basis. He stated the balance due under the note as of 27 April 1998 was $104,960.46, and Plaintiff had not been current with payments since 27 August 1991.

Cable testified she asked Plaintiff for the first payment due under the note in July of 1986, but subsequently did not ask for any payments until they were due under the note. She stated she kept a record of when checks were received, but "there were one or two checks that [she] did not put down." Cable never told Plaintiff it was acceptable to make partial payments, and Plaintiff never asked her for an accounting of how much money he owed her under the note. She also testified Plaintiff occasionally supplied her with feed for her horses, but the "slips" that accompanied the deliveries did not contain a value for the feed and generally did not contain a date.

At the close of evidence, Defendants renewed their motion for directed verdict made at the close of Plaintiff's evidence, and the trial court denied the motion.

The trial court submitted to the jury the issue of what amount Plaintiff owed Cable under the note, and whether the equitable defenses of estoppel, waiver, or novation precluded Defendants from commencing foreclosure proceedings against Plaintiff.

The jury found Plaintiff was indebted to Defendants under the note for $88,900.00, and found the equitable defenses of estoppel, waiver, and novation precluded Defendants from commencing foreclosure proceedings against Plaintiff.

After the trial court entered judgment on the jury verdict, Defendants moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. Defendants' motion for a new trial stated Defendants were entitled to a new trial under Rule 59(a)(5) (manifest

disregard of jury instructions), Rule 59(a)(7) (insufficiency of evidence or verdict contrary to law), and Rule 59(a)(8) (error in law by trial court). The motion, however, did not state how any of these rules applied to the facts of this case.

The trial court denied Defendants' motion for new trial. The record does not contain the trial court's ruling on Defendants' motion for judgment notwithstanding the verdict.

The issues are whether: (I) the record contains substantial evidence of the equitable defense of waiver, and (II) Defendants' motion for new trial contained grounds for relief.

I

[1] Defendants argue they were entitled to a directed verdict on the issues of waiver, novation, and estoppel because Plaintiff presented no evidence of these equitable defenses.[1]

A defendant is entitled to a directed verdict when, viewing the evidence in the light most favorable to the plaintiff, there is no substantial evidence to support the plaintiff's claim. *Cobb v. Reitter*, 105 N.C. App. 218, 220-21, 412 S.E.2d 110, 111 (1992). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 220, 412 S.E.2d at 111 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted)).

Defendants first contend the record contains no evidence of waiver. "A noteholder who repeatedly accepts late installments will be held to have waived the right to accelerate the debt on that ground unless the payor is first notified that prompt payment will be required in the future." *Barker v. Agee*, 93 N.C. App. 537, 541, 378 S.E.2d 566, 569 (1989) (citing *Driftwood Manor Investors v. City Federal Savings & Loan*, 63 N.C. App. 459, 305 S.E.2d 204 (1983)), *reversed in part on other grounds*, 326 N.C. 470, 389 S.E.2d 803 (1990). A noteholder, however, does not waive its right to accelerate the debt by "isolated instances of acceptance of late payments." *Id.* (noteholder

1. Defendants also argue in their brief to this Court that they were entitled to a directed verdict on the issue of tender of payment; however, although the record contained Defendants' request for a directed verdict on the issue of tender of payment, the record does not indicate how the trial court ruled on that motion. Moreover, the issue of tender of payment was not submitted to the jury. This issue is therefore not properly before this court, N.C.R. App. P. 10(b)(1), and we consequently do not address it.

did not waive right to accelerate debt by acceptance of two late payments). Moreover, a noteholder does not waive its right to accelerate the debt by accepting late payments so long as the noteholder "makes clear to the debtor its intent to continue to hold the debtor to the terms of the agreement." *Nationsbank of North Carolina v. Baines*, 116 N.C. App. 263, 270, 447 S.E.2d 812, 816 (1994).

In this case, the record indicates Plaintiff's annual payment of $9,654.66 was due in August of each year. Plaintiff's schedule of payments, however, shows that, other than in the first year, Plaintiff did not make his payments according to the payment schedule provided for in the note. Rather, viewing the evidence in the light most favorable to Plaintiff, the record establishes a pattern of approximately seventy-two payments made at various times for various amounts. Plaintiff, for example, paid only $3,000.00 of his 1986 payment prior to the due date, $500.00 of his 1987 payment prior to the due date, $500.00 of his 1988 payment prior to the due date, and $4,000.00 of his 1989 payment prior to the due date.

The evidence further shows that, upon acceptance of these payments, Defendants did not assert their intent to continue to hold Plaintiff to the terms of the note or require prompt payment according to the terms of the note for future payments.

Defendants argue a noteholder does not waive its right to accelerate a debt by accepting *partial* late payments under the note. The rules of *Driftwood* and *Barker*, however, do not distinguish between a noteholder accepting late payments for the full amount due and a noteholder accepting late payments for the partial amount due. Rather, waiver is based on the "consistent course of conduct" of the noteholder in accepting late payments. *Barker*, 93 N.C. App. at 541, 378 S.E.2d at 569.

Because Plaintiff presented substantial evidence Defendants repeatedly accepted late payments, the jury could find Defendants waived their right to accelerate Plaintiff's debt with regard to payments due in the past, and waived their right to accelerate the debt based on future delinquent payments without first notifying Plaintiff that prompt payment would be expected in the future. Defendants, therefore, were not entitled to a directed verdict on the issue of waiver.[2]

2. Defendants also assign error to the trial court's denial of their motion for judgment notwithstanding the verdict. The record does not contain the trial court's ruling on Defendants' motion for judgment notwithstanding the verdict; therefore, that issue

Because we hold the trial court properly submitted to the jury the issue of waiver, and the jury found Defendants waived their right to commence foreclosure proceedings, we do not address Defendants' additional assignments of error pertaining to Plaintiff's equitable claims of estoppel and novation.

II

[2] Defendants contend the trial court erred by denying their motion for new trial under Rule 59(a) because the jury's finding that Plaintiff owed $88,900.00 under the note was not supported by the evidence.

In this case, Defendants' motion for new trial stated Defendants were entitled to a new trial under Rule 59(a)(5), Rule 59(a)(7), and Rule 59(a)(8). The motion did not, however, state any specific basis for granting a new trial. *See* N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (1990) (motion must contain grounds for relief); *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 ("mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1)"), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997). Because Defendants' motion does not meet the requirements of Rule 7(b)(1), this issue is not properly before this Court, N.C.R. App. P. 10(b)(1) (party assigning error to motion must have presented motion to trial court), and we therefore do not address it.

No error.

Judges WALKER and TIMMONS-GOODSON concur.

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is not properly before this Court. N.C.R. App. P. 10(b)(1) (party assigning error to motion must obtain ruling on motion). Nevertheless, because we hold Defendants were not entitled to a directed verdict, Defendants would not be entitled to a judgment notwithstanding the verdict. *Dickinson v. Pake*, 284 N.C. 576, 584-85, 201 S.E.2d 897, 903 (1974) (motion for judgment notwithstanding the verdict is renewal of motion for directed verdict).

STATE OF NORTH CAROLINA v. STEWART VANCE CODY

No. COA99-50

(Filed 7 December 1999)

1. **Criminal Law— denial of continuance—time to subpoena witness—reason for delay—prejudice**

In an assault with a deadly weapon inflicting serious injury case, defendant was not deprived of his constitutional right to present witnesses to confront the evidence against him by the trial court's denial of defendant's motion for continuance to subpoena a witness who was not located until one day prior to the trial date because defense counsel's unsworn statement, that he believed the witness would testify that defendant was not involved in the victim's assault and did not participate until the altercation, failed to provide detailed proof regarding a reason for delay and how defendant would be materially prejudiced by the witness's absence.

2. **Assault— deadly weapon inflicting serious injury—sufficiency of evidence**

Viewing the evidence in the light most favorable to the State, the trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury at the close of defendant's case-in-chief because the State presented evidence that: (1) the victim saw defendant participate in the fight and while the victim did not identify which participants struck him with which instruments, he was hit with both a gun and a log;(2) another witness saw defendant kick the victim a few times and hit the victim with a branch or a log; and (3) the victim suffered two hematomas near his brain and received fifteen stitches after being hit in the head with a log while lying on the ground, revealing a jury could find the log was a deadly weapon based on the severity of the victim's injuries and the manner in which the log was used.

3. **Assault— deadly weapon inflicting serious injury—instruction on acting in concert—sufficiency of evidence**

The trial court did not err in an assault with a deadly weapon inflicting serious injury trial by submitting the acting in concert theory under North Carolina Pattern Jury Instruction 202.10 because the State presented evidence that defendant was at the

scene of the crime, defendant and two other men planned to assault the victim if he had a gun, and the three men did assault the victim after discovering he had a gun.

Appeal by defendant from judgment dated 4 June 1998 by Judge James E. Lanning in Buncombe County Superior Court. Heard in the Court of Appeals 26 October 1999.

Attorney General Michael F. Easley, by Associate Attorney General Christopher W. Brooks, for the State.

Thomas R. Young, for defendant-appellant.

GREENE, Judge.

Stewart Vance Cody (Defendant) appeals from a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury.

On the morning Defendant's trial was scheduled to begin, Defendant made and the trial court denied an oral motion for continuance on the ground Defendant had located an additional witness, Christopher Cassell (Cassell), on the previous evening. Cassell lived in Maryland, and Defendant did not know whether he would voluntarily testify, but he could be subpoenaed to testify. Defendant believed if Cassell did testify, he would state Defendant "wasn't involved, basically" in the assault with which he had been charged, and Defendant "did not participate until the altercation."

The State presented evidence that on 22 September 1997, Joshua Chambliss (Chambliss), while at his home, spoke to Brandy Teague (Teague), his ex-girlfriend, over the telephone. Teague and Chambliss began to argue, and Chambliss could hear several male voices in the background at Teague's home. Chambliss and the parties at Teague's home began threatening one another, and Chambliss stated: "If you all come over to my house, you will end up leaving in body bags." Teague then hung up the phone.

Chambliss testified that approximately twenty or thirty minutes later, Joseph Ingle, II (Ingle), a friend of Teague, began beating on his front door, and when Chambliss opened the door Ingle struck him. The two began to struggle, and Chambliss pulled an unloaded BB gun (the gun) from his belt and hit Ingle with the gun. The gun then slipped out of Chambliss's hand, and Chambliss and Ingle began fighting on the ground.

After the fighting began, Defendant and Cassell ran toward where Chambliss and Ingle were struggling on the ground, and attacked Chambliss. One of the men struck Chambliss in the head several times with the gun, and Chambliss was also struck in the head with a log. Defendant, Ingle, and Cassell then ran away, and Chambliss telephoned for an ambulance. He was taken to the hospital, where he received fifteen stitches in his head and treatment for a broken finger and two hematomas near his brain.

Ingle testified that on the day of the incident he drove Defendant, Cassell, Teague, and Christina Pearce (Pearce) to Chambliss's house. Ingle went to the door and began to fight with Chambliss, and Cassell later joined in the fight and struck Chambliss on the head with the gun. Ingle and Cassell then began kicking Chambliss, and Cassell struck him on the head with a log. Ingle testified he did not see Defendant strike Chambliss.

Jana Osada, an investigator with the district attorney's office, testified Ingle met with her and other members of the district attorney's staff prior to Defendant's trial date. Ingle stated in the meeting that during the 22 September 1997 incident, Defendant kicked Chambliss all over his body, including his head. Defendant then picked up a log and, after telling Chambliss to remove his hands from his face, "swung the log down [onto] his face." Pearce testified that while riding to Chambliss's house on the date of the incident, the parties riding in the car decided they would fight Chambliss if he had a gun, and if he did not have a gun they would just speak with him. After the parties arrived at Chambliss's house, Pearce saw Chambliss had a gun and screamed "gun." The parties fought, and Pearce saw Defendant kick Chambliss a few times and hit him with "a branch or a log."

At the close of the State's case-in-chief, Defendant requested dismissal, in pertinent part, of the charge of assault with a deadly weapon inflicting serious injury, and the trial court denied this motion.

Defendant then proceeded to present evidence. Teague testified for Defendant the parties did not plan to fight with Chambliss when they drove to his house, but planned only to speak to him. After they arrived, Teague saw Chambliss had a gun and screamed "gun." She stated Defendant did not participate in the fight with Chambliss, and she did not see anyone with a stick during the fight.

At the close of Defendant's case-in-chief, Defendant made a second motion for dismissal of the assault with a deadly weapon

inflicting serious injury charge, and the trial court again denied the motion.

Over Defendant's objection, the trial court charged the jury, in pertinent part, on the doctrine of acting in concert under North Carolina Pattern Jury Instruction 202.10, as follows:

> For a person to be guilty of a crime, it is not necessary that he, himself, do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit a crime, each of them, if actually constructively present, is not only guilty of that crime of assault if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit the assault. So I charge you that if you find, from the evidence beyond a reasonable doubt, that on or about the date alleged that [Defendant], acting either by himself or acting together with others, did intentionally assault the victim with a stick or log, and that such stick or log was a deadly weapon, thereby inflicting serious injury upon the victim, it would be your duty to return a verdict of guilty of assault with a deadly weapon inflicting serious injury. However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of assault with a deadly weapon inflicting serious injury.

The issues are whether: (I) Defendant was entitled to a continuance to subpoena a witness who was not located until one day prior to the trial date; (II) the State presented substantial evidence of the charge of assault with a deadly weapon inflicting serious injury; and (III) North Carolina Pattern Jury Instruction 202.10, acting in concert, was erroneously submitted to the jury.

I

[1] Defendant argues the denial of his motion for continuance deprived him of his constitutional right to present witnesses to confront the evidence against him. We disagree.

When a motion for continuance raises a constitutional issue, the trial court's ruling is a question of law and is fully reviewable on appeal. *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citing *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977)). Further, a motion for continuance made on the ground Defendant needs to secure a witness at trial raises a constitutional issue because

a defendant has a constitutional right to present witnesses to confront the witnesses and testimony against him. U.S. Const. amend. VI; N.C. Const. art. I, § 23; *see State v. Davis*, 61 N.C. App. 522, 525, 300 S.E.2d 861, 863 (1983) (citations omitted). If an appellate court determines denial of such a motion was erroneous, the denial is prejudicial error unless the State demonstrates beyond a reasonable doubt the error was harmless. N.C.G.S. § 15A-1443(b) (1997).

In this case, Defendant's motion for continuance raises a constitutional issue and is therefore reviewable by this Court as a question of law. A motion for continuance must be supported by "detailed proof" which "fully establishe[s]" the reasons for the delay, and a party is entitled to a continuance only upon a showing of material prejudice if its motion is denied. *State v. Jones*, 342 N.C. 523, 531-32, 467 S.E.2d 12, 17-18 (1996) (citations omitted). The "detailed proof" may be in the form of an unsworn statement by the movant's attorney or an affidavit by the attorney which establishes the reason for delay and how the movant will be prejudiced if its motion is denied. While it is the better practice to support a motion for continuance with an affidavit, *State v. Gibson*, 229 N.C. 497, 501, 50 S.E.2d 520, 523 (1948) ("it is desirable that an application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance"), an affidavit is not required, *see Jones*, 342 N.C. at 531, 467 S.E.2d at 17 (citations omitted) (motion for continuance *should* be supported by affidavit).

In this case, Defendant made an oral motion requesting a continuance on the day of the trial because he had not discovered the location of Cassell until the previous day. Defendant's motion was not supported by an affidavit, and Defendant did not provide any detailed information regarding the significance of Cassell's testimony; rather, Defendant's counsel, in an unsworn statement, merely stated he believed Cassell would testify Defendant "wasn't involved, basically" in Chambliss's assault and "did not participate until the altercation." This unsworn statement failed to provide detailed proof regarding how Defendant would be materially prejudiced by Cassell's absence. Indeed, the statement Defendant did not participate in Chambliss's assault "until the altercation" appears to support the State's contention Defendant participated in the assault. Because the unsworn statement of Defendant's counsel was insufficient to provide detailed proof of a reason for delay, the trial court did not err by denying Defendant's motion for a continuance. It follows Defendant was not deprived of his constitutional right to present witnesses to confront the evidence against him.

II

[2] Defendant contends the trial court erred by denying his motion, made at the close of Defendant's case-in-chief, for dismissal of the charge of assault with a deadly weapon inflicting serious injury.[1] We disagree.

A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is "substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime." *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988) (citations omitted). "Substantial evidence 'must be existing and real,' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981) (citations omitted)).

In this case, Defendant was charged with assault with a deadly weapon inflicting serious injury, and the State bore the burden of proving: (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; and (4) not resulting in death. N.C.G.S. § 14-32(b) (1993); *see State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990).

Defendant first contends the State did not present substantial evidence Defendant assaulted Chambliss. The State, however, presented evidence Chambliss saw Defendant participate in the fight and, while he did not identify which participants struck him with which instruments, he was hit with both a gun and a log. In addition, Pearce testified she witnessed Defendant kick Chambliss "a few times" and hit Chambliss with "a branch or a log." Viewing this evidence in the light most favorable to the State, a reasonable mind could find Defendant not only participated in Chambliss's beating, but also struck Chambliss with a log. The State therefore presented substantial evidence Defendant assaulted Chambliss.

Defendant also contends the State did not present substantial evidence Defendant used a deadly weapon during the assault. An instrument is a deadly weapon if it is "likely to produce death or great bodily harm under the circumstances of its use," and when the question

1. Defendant also argues in his brief to this Court that the trial court erred by denying Defendant's motion for dismissal of the assault with a deadly weapon inflicting serious injury charge at the close of the State's case-in-chief. Defendant, however, waived his right to appellate review of this issue when he presented evidence, N.C.R. App. P. 10(b)(3), and this issue is consequently not before this Court.

of whether an instrument might be deadly or produce great bodily harm turns on its manner of use, the determination is a question of fact for a jury. *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978).

In this case, the State presented evidence that while Chambliss was lying on the ground, Defendant, Ingle, and Cassell struck Chambliss, and Defendant hit him on his head with a log. Chambliss suffered two hematomas near his brain as a result of the incident, and received fifteen stitches. Based on the severity of Chambliss's injuries and the manner in which the log was used, a jury could find the log was a deadly weapon. *See State v. Randolph*, 228 N.C. 228, 231, 45 S.E.2d 132, 135 (1947) (citing *State v. West*, 51 N.C. (6 Jones) 595 (1859)) (actual effects of using weapon may be considered when determining whether character of weapon was deadly). This issue was therefore properly submitted to the jury.

III

[3] Defendant argues the trial court erred by submitting to the jury North Carolina Pattern Jury Instruction 202.10, acting in concert, because the State failed to establish the existence of a common purpose to commit the crime of assault. We disagree.

An instruction on the doctrine of acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and "acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Robinson*, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986).

In this case, the State presented evidence Defendant was at the scene of the crime. Further, Pearce testified Defendant, Cassell, and Ingle decided they would fight Chambliss if he had a gun. After Defendant arrived at Chambliss's house, Chambliss struck Ingle with a gun and the two began to fight. Further, Pearce and Teague saw Chambliss had a gun and began to scream "gun." Defendant and Cassell then attacked Chambliss.

Because the State's evidence tends to show Defendant, Cassell, and Ingle planned to assault Chambliss if he possessed a gun, and the State presented evidence Defendant, Cassell, and Ingle did assault Chambliss after discovering he had a gun, the trial court did not err by submitting to the jury an instruction on the doctrine of acting in concert.

No error.

Judges WALKER and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. TIMOTHY EARL BLACKWELL

No. COA98-1284

(Filed 7 December 1999)

1. **Criminal Law— plea agreement—spirit of agreement violated—charge used derivatively**

The trial court's order concerning a drunk driving case is vacated and remanded because although the State did not directly use the felonious impaired driving charge as the underlying felony to prove murder, the State violated the spirit of its plea agreement with defendant when it used the charge derivatively to prove the four assault with a deadly weapon inflicting serious injury charges that were then used as the underlying felonies themselves, since defendant reasonably interpreted the agreement to mean the State promised not to use the felonious impaired driving charge in any way to prove felony murder.

2. **Criminal Law— breach of plea agreement—specific performance or rescission—factors to consider**

Since the State violated the spirit of its plea agreement with defendant in a drunk driving case, the trial court's order is vacated and remanded to determine whether specific performance or rescission is the appropriate remedy in light of the five factors, including: (1) who broke the bargain; (2) whether the violation was deliberate or inadvertent; (3) whether circumstances have changed between entry of the plea and the present time; (4) whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate; and (5) the particular wishes of defendant.

Judge WALKER dissents.

Appeal by defendant from judgment entered 17 April 1998 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 25 August 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III and Assistant Attorney General Jonathan P. Babb, for the State.

Robert Brown, Jr. and Shannon A. Tucker for defendant-appellant.

LEWIS, Judge.

This case stems from a drunk driving accident that occurred on 27 February 1997, in which a four-year-old girl was killed. Defendant was indicted on 3 March 1997 for murder, four counts of assault with a deadly weapon inflicting serious injury, felonious impaired driving, driving with his license revoked, driving left of center, possession of drug paraphernalia, and possession of an open container. As part of a plea bargain, defendant subsequently pled guilty to all charges except murder and the assaults. The trial court accepted his plea and entered prayer for judgment continued until the remaining charges were adjudicated. The defendant was then tried at the 16 March 1998 Session of the Durham County Superior Court for the murder and assaults. On 16 April 1998, the jury returned a verdict finding defendant guilty of three counts of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury, and first degree murder under the felony murder rule. Defendant now appeals.

[1] Defendant first contends that the State violated its plea agreement with him. To fully understand defendant's argument, we must briefly summarize how the State proceeded against defendant for felony murder. Defendant was charged with five felonies that could have formed the underlying felony for first degree murder: four counts of assault with a deadly weapon inflicting serious injury and one count of felonious impaired driving. Defendant entered into a plea agreement purporting to limit the underlying felonies the State could use at trial. Specifically, in return for defendant's guilty pleas to felonious impaired driving and the misdemeanors, the State bargained not to "use the charge of felonious impaired driving as a theory of first degree murder under the felony murder rule." (1 Tr. at 12).

The State then proceeded at trial using the four assaults as the underlying felonies for first degree murder. For the driver of an automobile to be convicted of assault with a deadly weapon, the State must show either (1) his specific intent to inflict injury or (2) his culpable negligence. *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955); *see also State v. Curie*, 19 N.C. App. 17, 20, 198 S.E.2d 28, 30

(1973) (stating that specific intent is not a required element for assault under section 14-32(b)). The State attempted to show culpable negligence. But to do so, it introduced into evidence defendant's guilty plea as to the felonious impaired driving and then argued to the jury that felonious impaired driving is culpable negligence as a matter of law. *See State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985) (holding that driving while impaired is culpable negligence as a matter of law). In sum then, the State did not use the felonious impaired driving directly as the underlying felony, but did use it derivatively to prove the assaults, which were then used as the underlying felonies themselves. Defendant contends this derivative use violated his plea agreement. We agree.

Even though a plea agreement arises in the context of a criminal proceeding, it remains in essence a contract. *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). However, it is markedly different from an ordinary commercial contract. By pleading guilty, a defendant waives many constitutional rights, not the least of which is his right to a jury trial. *State v. Pait*, 81 N.C. App. 286, 289, 343 S.E.2d 573, 576 (1986). "No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). As such, due process mandates strict adherence to any plea agreement. *Rodriguez*, 111 N.C. App. at 145, 431 S.E.2d at 790. Moreover, this strict adherence "require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). While the plea agreement here may not have been ambiguous, it was imprecise in light of what the State intended to argue at trial.

The State promised not to use the felonious impaired driving charge "as a theory of first degree murder" for its prosecution of defendant under felony murder. The defendant quite reasonably interpreted this to mean that the State promised not to use the felonious impaired driving in any way, shape, or form—directly or derivatively—to prove felony murder. The State suggests that defendant should have bargained for this interpretation. But defendant should not be forced to anticipate loopholes that the State might create in its own promises. Using defendant's guilty plea to felonious impaired driving to prove the underlying felony of assault is no less a violation of the plea agreement than if the State had just gone ahead

and introduced evidence of the felonious impaired driving. Here, the State used defendant's plea as the same proof. Thus, even if the State did not violate the express terms of the plea agreement, it did violate the *spirit* of that agreement. *Cf. State v. Sodders*, 633 P.2d 432, 438 (Ariz. Ct. App. 1981) ("A breach of a plea agreement occurs not only when the prosecution breaks its promise, but also when the spirit of the inducement is breached."); *Van Buskirk v. State*, 720 P.2d 1215, 1216 (Nev. 1986) ("The violation of the terms or 'the spirit' of the plea bargain requires reversal."). We therefore hold that the State violated defendant's plea agreement.

[2] We must next consider the remedy for this violation. At this point, it is necessary to distinguish between the various cases on appeal. Case number 97 CRS 6391 involves the felonious impaired driving and various misdemeanor charges. It is in this case that defendant tendered his plea of guilty to those charges. Case numbers 97 CRS 6390 and 97 CRS 6421 involve the felony murder and assault charges, respectively, for which defendant was found guilty. We first deal with 97 CRS 6391, the case in which the plea arrangement was entered.

"[W]hen a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he is entitled to relief." *Motor Co. v. Board of Alcoholic Control*, 35 N.C. App. 536, 538, 241 S.E.2d 727, 729 (1978). Typically, relief is either specific performance of the plea agreement or withdrawal of the plea itself (i.e. rescission). *Santobello v. New York*, 404 U.S. 257, 263, 30 L. Ed. 2d 427, 433 (1971). While this Court has in the past determined the particular remedy, *see, e.g., State v. Isom*, 119 N.C. App. 225, 458 S.E.2d 420 (1995) (ordering rescission); *State v. Rodriguez*, 111 N.C. App. 141, 431 S.E.2d 788 (1993) (ordering specific performance), the trial court is usually in the best position to determine which remedy is appropriate under the circumstances. *Santobello*, 404 U.S. at 263, 30 L. Ed. 2d at 433. Though we do not doubt the trial court's ability to choose the appropriate remedy, we feel the nature of this case and the peculiar plea arrangement here warrant further guidance for the trial court. In that light, we find the following language from the California Supreme Court instructive in helping the trial court make its determination:

> Factors to be considered include who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the

> [present time], and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate.

People v. Mancheno, 654 P.2d 211, 214 (Cal. 1982). To these, we would also add a fifth factor: the particular wishes of the defendant. *See Santobello*, 404 U.S. at 267, 30 L. Ed. 2d at 436 (Douglas, J., concurring) ("In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State."). We therefore remand case number 97 CRS 6391 to the trial court to determine whether specific performance or rescission is the appropriate remedy.

We now turn to the disposition of case numbers 97 CRS 6390 and 97 CRS 6421, dealing with felony murder and the assaults. Whichever remedy the trial court deems appropriate in case number 97 CRS 6391, the effect is necessarily the same as to these cases: defendant is entitled to a new trial. This is so because the violated plea agreement in 97 CRS 6391 was not only introduced as substantive evidence at defendant's trial, but became the backbone of the State's theory of prosecution. Thus, its violation amounted to prejudicial error, entitling defendant to a new trial.

In sum, then, if the trial court grants defendant specific performance of the plea agreement, defendant is still deemed guilty of felonious impaired driving and the misdemeanors, but the State must prosecute defendant again for felony murder and the assaults according to the terms and the spirit of the plea agreement. If the trial court grants defendant rescission, then the defendant is not only entitled to a new trial for felony murder and the assaults, but is also entitled to enter pleas of not guilty or otherwise as to felonious impaired driving and the misdemeanors.

In light of our holding as to the violation of the plea agreement, we need not address defendant's remaining assignments of error.

The defendant's record is despicable and his alleged acts here, monstrous. Bad facts should not make worse law and, above all, the State should not perpetrate the wrong. Judges, prosecutors, and attorneys should be held to higher standards of accountability and fairness.

Vacated and remanded.

Judge HUNTER concurs.

Judge WALKER dissents.

Judge WALKER dissents.

I respectfully dissent from the majority opinion which grants the defendant a new trial in case numbers 97 CRS 6390 and 97 CRS 6421, dealing with felony murder and felony assault.

The majority concludes that the State violated the plea agreement in 97 CRS 6391, which was introduced at defendant's trial, by allowing the State to use felonious impaired driving to prove felony assault, resulting in prejudicial error. I disagree.

Independent of the plea agreement and the charge of felonious impaired driving, the record contains overwhelming evidence, properly admitted, which showed that on this occasion the defendant was operating his vehicle in a reckless manner and drove his vehicle across the center line, striking the victim's vehicle. While operating his vehicle, the defendant was under the influence of alcohol, heroin and cocaine. Thus, the evidence would enable the jury to find the defendant guilty of operating his vehicle in a culpably negligent manner, thereby committing felony assault used to prove felony murder. I conclude there was no prejudicial error in the defendant's trial.

STATE OF NORTH CAROLINA v. WALTER LINEMANN

No. COA98-1515

(Filed 7 December 1999)

Courts— district court convictions—correction of clerical errors—appeal to superior court—untimeliness

In a case involving defendant's purported appeal to the superior court of his convictions in the district court for attempted simple assault, simple assault, and communicating threats, the superior court's order is vacated and remanded because the superior court did not have jurisdiction in this case and should have dismissed defendant's appeal since: (1) the district court's origi-

nal judgment was entered on 22 September 1997; (2) defendant appealed the conviction on 2 October 1997, meeting the ten-day requirement under N.C.G.S. § 7A-290, but withdrew his appeal on 3 October 1997; (3) the district court's correction of clerical errors in the judgment on 10 March 1998 did not constitute a new judgment; and (4) defendant's purported appeal of 10 March 1998 pursuant to N.C.G.S. § 7A-290 was not timely since it was not made within ten days of the judgment on 22 September 1997.

Appeal by defendant from order entered 12 May 1998 by Judge Robert Farmer in Wake County Superior Court. Heard in the Court of Appeals 5 October 1999.

Attorney General Michael F. Easley, by Associate Attorney General Christopher W. Brooks, for the State.

Kelly & Kelly, by George E. Kelly, III, for defendant-appellant.

HUNTER, Judge.

Walter Linemann ("defendant") appeals the order of the superior court wherein it granted the State's motion for appropriate relief. We vacate on the basis that the superior court did not have jurisdiction.

First, we note that defendant does not have a right to appeal from the order of the superior court to this Court. Article 91 of the North Carolina General Statutes, entitled "Appeal to Appellate Division," indicates when a defendant in a criminal action may appeal to the appellate division. It provides that "[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422." N.C. Gen. Stat. § 15A-1444(f) (1997). While N.C. Gen. Stat. § 15A-1422 (1997) indicates that a defendant, in certain instances, may appeal the denial of his own motion for appropriate relief, it gives no indication that a defendant may appeal the granting of the State's motion for appropriate relief as is the case here. Defendant's purported appeal to this Court is therefore subject to dismissal. However, we elect to treat his attempt to appeal as a petition for writ of certiorari and grant that petition.

Briefly, the facts relevant to this appeal indicate that defendant was found guilty in Wake County District Court on 22 September 1997 for attempted simple assault, simple assault and communicating threats. On that same day, District Court Judge James R. Fullwood consolidated the sentences for these convictions to a term of 45 days,

which was suspended and defendant was placed on supervised probation for 12 months. On the sentencing form, each of the convictions was listed as a "Class 1" offense, defendant's race was listed as "W," and under "special conditions," the judge had required defendant to "report to probation officer when released from active sentence in 97CR 33161 [an unrelated charge] which is on appeal." Defendant entered a notice of appeal from these convictions to the Wake County Superior Court for a trial *de novo* on 2 October 1997, but withdrew said notice on 3 October 1997.

On or about 9 December 1997, defendant filed a motion for appropriate relief with the Wake County District Court pursuant to N.C. Gen. Stat. § 15A-1415(b) and N.C. Gen. Stat. § 15A-1419(b). In his motion, defendant alleged certain errors in the judgment, that the judgment was in violation of his North Carolina and United States Constitutional rights, and that he did not waive his right to a jury trial. Defendant's hearing on his motion was heard on 10 March 1998 and that same day Judge Fullwood corrected the errors cited by defendant by amending the judgment as follows: (1) labeling the defendant's race as "H" instead of "W"; (2) labeling the attempted simple assault conviction as a Class 3 misdemeanor instead of a Class 1 misdemeanor; (3) labeling the simple assault conviction as a Class 2 misdemeanor instead of a Class 1 misdemeanor; and (4) striking the language that read "report to probation officer when released from active sentence in 97CR 33161 which is on appeal" because defendant had subsequently been found not guilty in superior court of that unrelated charge. Judge Fullwood did not grant any other portion of defendant's motion. Defendant filed a notice of appeal of his conviction to Wake County Superior Court on that same date. His case was calendered for superior court on 27 April 1998. The record is unclear as to whether the superior court considered his appeal on that date.

On or about 30 April 1998, the State filed a "Motion For Appropriate Relief" in Wake County Superior Court wherein it requested that the superior court dismiss defendant's appeal and remand his case to the district court for lack of jurisdiction based on an untimely appeal, or reverse the district court's allowance of defendant's motion for appropriate relief. Superior Court Judge Robert Farmer ruled on the State's motion on 12 May 1998 and concluded that "[t]he district court judge did not have the authority, in granting the motion for appropriate relief, to set aside the original judgment and enter a new judgment without a new trial in district

court." Judge Farmer ordered that the district court's order of 10 March 1998, allowing defendant's motion for appropriate relief, be overturned. Defendant appeals.

Defendant contends that the superior court erred in allowing the State's motion for appropriate relief because it lacked authority to do so under N.C. Gen. Stat. § 15A-1416. This statute states:

> (a) After the verdict but not more than 10 days after entry of judgment, the State by motion may seek appropriate relief for any error which it may assert upon appeal.
>
> (b) At any time after verdict the State may make a motion for appropriate relief for:
>
> (1) The imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted.
>
> (2) The initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment; and Article 84, Fines, with regard to the modification of sentences. The procedural provisions of those Articles are controlling.

N.C. Gen. Stat. § 15A-1416 (1997). Defendant argues that the State did not meet the ten-day deadline enunciated in § 15A-1416(a); therefore, the superior court lacked jurisdiction. The State agrees that it did not make the motion within the required ten-day period, but argues that the superior court lacked jurisdiction because defendant had no right to appeal the "amended judgment" of 10 March 1998. Therefore, the State contends, although captioned "Motion For Appropriate Relief," its motion should have been treated as a motion to dismiss because the State asked for this relief in the motion. We find the State's argument persuasive.

The record reveals that a new verdict or judgment was not rendered on 10 March 1998. As the superior court found, the district court only corrected clerical errors in the 22 September 1997 judgment on 10 March 1998, marking them "amended." Although defendant brought these misstatements to the court's attention in his motion for appropriate relief, the court's action did not change the substance of defendant's judgment and sentence. The court did not grant defendant a new trial or modify his sentence pursuant to Article 89 of

the North Carolina General Statutes, entitled "Motion for Appropriate Relief and Other Post-Trial Relief." The court here merely made the statements in the judgment and sentencing sheet "speak the truth." "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth." *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956). When the trial court has corrected a clerical error in a judgment and commitment form, which had erroneously listed the class of the crime, the defendant is not entitled to a new sentencing hearing. *State v. Hammond*, 307 N.C. 662, 669, 300 S.E.2d 361, 365 (1983). Such action by the court in the present case related *nunc pro tunc* to the original judgment of 22 September 1997. *See State v. Cannon*, 244 N.C. at 406, 94 S.E.2d at 344 ("[i]t follows that the record in this case, as amended stands as if it had never been defective, or as if the entries had been made at the proper term"). Thus, the correction of a clerical error in a judgment does not constitute a new conviction or judgment.

According to defendant's purported appeal of 10 March 1998, he was appealing his "conviction" for a trial *de novo*. Defendant in no way indicated in the appeal filed on 10 March 1998 with the superior court, and does not contend in the present appeal to this Court, that he was attempting on 10 March 1998 to appeal the partial denial of his motion for appropriate relief. Therefore, we do not address whether such appeal would be proper in the superior court. Accordingly, we focus our inquiry on whether or not the superior court had jurisdiction over defendant's purported appeal of his conviction.

We note that "[a] defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A-1431(b) (1997). "Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment." N.C. Gen. Stat. § 7A-290 (1995). "For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (1997). Defendant in the present case was adjudged guilty and judgment entered on 22 September 1997. He appealed that conviction on 2 October 1997, meeting the ten-day requirement under N.C. Gen. Stat. § 7A-290. However, defendant withdrew his appeal on 3 October 1997. We have held that the district court's correction of clerical errors in the judgment on 10 March 1998 did not constitute a new judgment. Thus, defendant's

purported appeal of 10 March 1998 pursuant to N.C. Gen. Stat. § 7A-290 was not timely as it was not made within 10 days of 22 September 1997.

N.C. Gen. Stat. § 7A-271, entitled "Jurisdiction of superior court," states: "(b) Appeals by the State or the defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance[] . . . ." N.C. Gen. Stat. § 7A-271(b) (1995). Therefore, the superior court only gains jurisdiction over misdemeanors tried in district court when the defendant properly appeals. If a petitioner fails to perfect his appeal by giving timely notice of appeal from the lower court as required by statute, the superior court is without jurisdiction to review the ruling. *Mechanic Construction v. Haywood*, 56 N.C. App. 464, 465, 289 S.E.2d 134, 134 (1982) *(citing Spaulding Division of Questors Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501, *cert. denied*, 300 N.C. 375, 267 S.E.2d 678 (1980)). Because defendant in the present case did not meet the ten-day requirement of N.C. Gen. Stat. § 7A-290, he did not properly perfect his appeal. Therefore, the superior court lacked jurisdiction in the present case for a trial *de novo*.

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 for want of jurisdiction. *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Because the superior court did not have jurisdiction in defendant's case, it should have dismissed defendant's appeal upon the State's motion. Accordingly, we vacate the order of superior court and remand this case to the superior court for entry of an order dismissing defendant's appeal.

Vacated and remanded.

Judges GREENE and WALKER concur.

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

No. COA98-1622

(Filed 7 December 1999)

Insurance— automobile—UIM coverage—two separate policies

In a declaratory judgment action seeking a determination of whether plaintiffs had purchased one or two underinsured motorist policies from unnamed defendant GEICO, the trial court's grant of summary judgment in favor of GEICO is reversed and remanded for entry of judgment declaring that GEICO had issued two separate policies to plaintiffs because: (1) GEICO's internal processing system would not allow more than three vehicles to be included in one policy endorsement declaration, and plaintiffs had four cars requiring a second policy endorsement declaration to provide insurance coverage for their fourth vehicle; (2) the policy endorsement declaration sheets attached to the policies reveal two different policy numbers; (3) plaintiffs received a separate billing for the two policies and those billings show a different renewal date for each policy number; (4) GEICO's own rules and regulations provide the insured is to receive the multi-car discount, even though all the vehicles cannot be included in one policy; and (5) the policy's language that the fourth car has been added to the policy, which shows some evidence of a single policy, is not dispositive because any ambiguity is construed against GEICO since it drafted the documents in question.

Appeal by plaintiffs from order and judgment filed 21 September 1998 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 19 October 1999.

Elliot, Pishko, Gelbin & Morgan, by Robert M. Elliot, for plaintiff-appellants.

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

Michael R. Greeson, Jr. for unnamed Integon/T.R. Jones.

Ken Rotenstreich for unnamed Nationwide.

GREENE, Judge.

Aline Joan Iodice (Ms. Iodice), James V. Iodice, and Mary J. Iodice (Mrs. Iodice) (collectively, Plaintiffs) appeal the trial court's entry of an order granting summary judgment for unnamed defendant, Government Employees Insurance Company (GEICO). Plaintiffs had requested a declaratory judgment on the issue of whether they had purchased one or two underinsured motorist (UIM) policies from GEICO.

The pertinent evidence reveals that on 4 September 1996, Ms. Iodice was the front seat passenger in a vehicle involved in a collision with the named defendant, Thomas Richard Jones (Jones). Ms. Iodice was a passenger in a Mazda MX3 (Penney vehicle) driven by Fiona Penney.

Plaintiffs filed this civil action against Jones on 24 January 1997. Jones was covered by a primary insurance policy issued by Integon Insurance Company. Integon settled on behalf of Jones, distributing its policy limits to Plaintiffs and other victims of the collision.

There were two UIM carriers providing additional coverage for this collision. GEICO was the UIM carrier covering Plaintiffs' vehicles, and Nationwide Insurance Company was the UIM carrier covering the Penney vehicle. In June 1998, just prior to the trial of this action, each of the UIM carriers entered into a settlement agreement. Pursuant to this agreement, Plaintiffs filed a motion for declaratory judgment to determine how many policies were provided by GEICO to Plaintiffs on 16 June 1998. In support of Plaintiffs' motion for declaratory judgment, Plaintiffs submitted an affidavit from Mrs. Iodice and documents related to the alleged policies to the trial court on 14 September 1998. Mrs. Iodice's affidavit provided, in relevant part:

> 3. At the time of the collision, our family was covered by insurance which we had purchased from GEICO Insurance Company. We had maintained coverage with GEICO for a number of years. Up until 1996 we had a single policy, policy number 367-90-75, which covered all of our family vehicles. . . .
>
> 4. In 1995 we purchased our fourth family vehicle, a 1988 Merkur Scorpio. Upon purchasing the vehicle, I called the GEICO Policyholder Service at 1-800-841-3000. I spoke with the customer representative from GEICO, and informed her that we would need to add another vehicle to our automobile insurance policy.

The representative informed me that the maximum number of vehicles which GEICO could maintain on a single policy was three, and that in order to cover our fourth vehicle, GEICO would need to issue a second policy. The representative then asked me to specify the coverage which I wished to purchase for the fourth vehicle, and I provided the information.

5. In 1996, a second policy was issued by GEICO to cover the fourth vehicle. The policy was issued under policy number 367-90-75-1. . . .

6. Since the issuance of policy number 367-90-75-1, we have received separate bills and statements with respect to the two policies.[1] The bills reflect different policy numbers, different issuance dates, different premiums and separate charges for payment by installment.

7. I have . . . received [documents] from GEICO concerning policy number 367-90-75 . . . [and] documents . . . from GEICO concerning policy number 367-90-75-1 . . . .

8. A comparison of these documents shows the following:

(a) That each policy shows a separate number and separate billing dates;

(b) That we have been billed separately for each policy;

(c) That each policy includes a separate installment charge, meaning that we were charged the same amount—$3.00—for paying each policy in installments, regardless of how many cars were covered by each policy.

9. Based on the above documentation, at all times, GEICO and our family treated the two policies as separate and independent policies.

10. We have paid all premiums reflected on these two policies as required to maintain coverage for all of our family vehicles.

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1. The record shows Mrs. Iodice received separate bills for policy number 367-90-75 and policy number 367-90-75-1. For the September 1996 to March 1997 period, the "Aug-27-Policy Renewal" on number 367-90-75 reveals a premium of $1,185.32. For the September 1996 to March 1997 period, the "Aug-26-Policy Renewal" on number 367-90-75-1 reveals a premium of $252.78.

> 11. I have just received the renewal documents concerning each policy. As always, they were sent in separate envelopes and came at different times. Each has a separate billing statement requesting separate payments. I will pay, as always, with separate checks, specifying the policy number of each.

"Policy number 367-90-75," as shown on a "Policy Endorsement Declaration" noted that it insured a 94 Dodge, an 88 Isuzu, and an 87 Chrysler. "Policy number 367-90-75-1," as shown on a "Policy Endorsement Declaration" noted that it insured an 88 Merkur. The "Policy Endorsement Declaration" issued for policy number 367-90-75-1 contained the following language: "The 88 Merkur has been added to your policy." Each "Policy Endorsement Declaration" noted that the policy provided $100,000.00 combined uninsured/underinsured motorists coverage, with a separate premium paid for this coverage on each policy. The "Policy Endorsement Declarations" also noted the policy period, the named insured, the amount of all coverages, and the type of coverages. The record does not reveal whether policies of insurance were delivered to Plaintiffs. GEICO did, however, admit in affidavits filed with the trial court that it "issued" to Plaintiffs a "policy contract number[ed] 367-90-75" and a "policy contract number[ed] 367-90-75-1." Copies of those separate polices were attached to the affidavits.

GEICO submitted the affidavit of Ms. Alice Hinkle, underwriting manager for GEICO. That affidavit provided in pertinent part:

> [Policy number] 367-90-75-1 is an extension of basic policy number 367-90-75-0 and is not a separate policy. The extension number is denoted by a -1, because our internal processing system will not allow more than three vehicles to be listed under one declaration sheet. Extension 367-90-75-1 does receive the multi-car discount and the premiums are calculated using the same rating elements. The basic and extension numbers listed above have the same effective and expiration dates, and all renewal paperwork is mailed on the same date.

During discovery and in response to one of Plaintiffs' request for production of documents relating to "all policies, regulations, rules and all other documents concerning charges and discounts for coverage, specifically including any multi-vehicle discount; billing; installment payments; and other documents reflecting GEICO's billing practices," GEICO provided Plaintiffs with a document entitled "Personal Auto Manual" which states, in relevant part:

D. Single and Multi-Car Risks

The applicable Multi-Car Rating Factor shall apply if two or more four-wheel private passenger autos owned by an individual or owned jointly by two or more individuals residing in the same household are insured in the same policy.

Exception

If a company's procedure does not permit insuring all vehicles in the same policy, the applicable Multi-Car Rating Factor shall apply only if the company insures two or more four-wheel private passenger autos owned by an individual or owned jointly by two or more individuals resident in the same household. (emphasis added).

In granting GEICO's motion for summary judgment, the trial court declared that "as of the date of the automobile accident in which [P]laintiff Aline Joan Iodice was injured, GEICO had issued only one policy of underinsured motorist insurance to [P]laintiffs."

The dispositive issue is whether policy numbers 367-90-75 and 367-90-75-1 constitute one policy or two policies.[2]

GEICO argues there was only one policy of insurance issued to Mrs. Iodice, and it included three vehicles. This policy was subsequently "modified" or "extended" to provide coverage for the 88 Merkur. The evidence, however, simply does not support this argument. GEICO's "internal processing system" would not allow more than three vehicles to be included in one "Policy Endorsement Declaration." Thus, a second "Policy Endorsement Declaration" was required and issued to provide insurance coverage for the fourth vehicle. The record is unclear as to whether the "internal processing system" prohibited the insuring of more than three vehicles in one *policy* of insurance. There is information contained in the record, submitted by GEICO in response to Plaintiffs' interrogatories, suggesting GEICO may have a procedure that "does not permit insuring [more than

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2. This issue is important because an insured party is only permitted to stack *interpolicy* underinsured motorist coverages for non-fleet private passenger type vehicles. *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 258, 468 S.E.2d 584, 586, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 17 (1996); N.C.G.S. § 20-279.21(b)(4) (Supp. 1998). An insured may not stack underinsured motorist coverages pertaining to separate vehicles insured under a single policy of insurance. *Honeycutt v. Walker*, 119 N.C. App. 220, 224, 458 S.E.2d 23, 26, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 236 (1995); N.C.G.S. § 20-279.21(b)(4).

three] vehicles in the same policy." In any event, GEICO submitted affidavits, in response to Plaintiffs' request for the production of documents, plainly stating that separate policies of insurance were "issued" to Mrs. Iodice and included copies of those policies as attachments to those affidavits. Although the policies themselves do not contain any policy numbers, the "Policy Endorsement Declaration" sheets attached to the policies reveal the different policy numbers, *i.e.*, 367-90-75-1 and 367-90-75. Furthermore, Mrs. Iodice received a separate billing for the number 367-90-75 and the number 367-90-75-1 premium charges, and those billings show a different renewal date for each policy number. GEICO, therefore, cannot now deny that two separate policies were issued to Mrs. Iodice.

It is not material that the 88 Merkur, insured in policy number 367-90-75-1, received the multi-car discount. GEICO relies on this discount to support its argument that there is but one policy. GEICO's own rules and regulations, however, provide the insured is to receive the multi-car discount even though all the vehicles cannot be included in one policy.

We acknowledge the language contained in the 367-90-75-1 "Policy Endorsement Declaration," stating that "[t]he 88 Merkur has been added to your policy," is some evidence of a single policy of insurance. This language, however, in the context of all the materials submitted in this case, is not dispositive of whether there is a single policy. At best, this language reveals nothing more than an ambiguity with respect to the question of whether there is one policy or two policies. As GEICO drafted the documents in question, any ambiguity created by their language must be resolved against them and in favor of the insured. *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990).

The summary judgment entered for GEICO, therefore, must be reversed and this matter remanded for the entry of judgment declaring that as of the date of the automobile accident in which Plaintiff Aline Joan Iodice was injured, GEICO had issued two separate policies of underinsured motorist insurance to Plaintiffs.

Reversed and remanded.

Judges WALKER and HUNTER concur.

MIKE CLAYTON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHELLE CLAYTON HALL (DECEASED), PLAINTIFF v. DENNIS HAL BURNETT, KENNETH HENDERSON TRUCKING COMPANY, INC., KENNETH HENDERSON, CHARLES WOODROW NELSON D/B/A NELSON TRUCK BROKERS, AND CHIP LEE HALL, DEFENDANTS

No. COA98-1633

(Filed 7 December 1999)

1. **Wrongful Death— proper plaintiff—substantive right—lex loci**

The trial court did not err in applying Georgia law in a wrongful death action where decedent and defendant Hall got married in North Carolina and were thereafter involved in an automobile accident in Georgia while driving to catch a plane for their honeymoon, because: (1) matters affecting the substantive rights of the parties are determined by the lex loci, or where the wrong occurred; (2) the determination of who is the proper party to sue in a wrongful death action is governed by substantive law; and (3) the limited public policy exception to the lex loci principle is not warranted.

2. **Wrongful Death— proper plaintiff—Georgia law—personal representative—funeral, medical, and other necessary expenses**

The trial court erred in entering summary judgment in favor of defendants in a wrongful death action arising out of an automobile accident occurring in Georgia by concluding plaintiff was the wrong party to institute a wrongful death action because Georgia law provides that the personal representative of the deceased is entitled to recover for the funeral, medical, and other necessary expenses under Ga. Code Ann. § 51-4-5(b), and plaintiff-personal representative specifically sought funeral expenses.

3. **Wrongful Death— proper plaintiff—failure of husband to sue—Georgia law—equity—suit by personal representative**

The trial court erred in entering summary judgment in favor of defendants in a wrongful death action arising out of an automobile accident occurring in Georgia by concluding plaintiff was the wrong party to institute a wrongful death action because even though Georgia's wrongful death statutory scheme provides that defendant Hall as decedent's surviving spouse is the only party entitled to bring this cause of action for wrongful death, Georgia has a separate jurisdictional scheme in equity under Ga. Code

Ann. § 23-4-20 allowing plaintiff-personal representative to pursue this claim under Ga. Code Ann. § 51-4-5(a) since: (1) plaintiff waited the full two-year statute of limitations period before filing his claim to see whether Hall would exercise his legal right to bring the claim himself; (2) Hall manifested no intent to bring the claim himself; and (3) decedent's beneficiaries and next of kin are left remediless unless plaintiff is permitted to maintain this cause of action.

Appeal by plaintiff from judgment entered 24 September 1998 by Judge Dennis J. Winner in Jackson County Superior Court. Heard in the Court of Appeals 22 September 1999.

Melrose, Seago & Lay, P.A., by Randal Seago, for plaintiff-appellant.

Roberts & Stevens, P.A., by Wyatt S. Stevens and Frank P. Graham, for defendant-appellees Dennis Hal Burnett, Kenneth Henderson Trucking Company, Inc., and Kenneth Henderson.

Sean P. Devereux for defendant-appellee Charles Woodrow Nelson d/b/a Nelson Truck Brokers.

Cloninger, Barbour & Arcuri, P.A., by Frederick S. Barbour and Alan D. McInnes, for defendant-appellee Chip Lee Hall.

LEWIS, Judge.

This case arises out of an automobile accident that occurred in Habersham County, Georgia. On 2 July 1995, Michelle Clayton Hall and defendant Chip Lee Hall were married in North Carolina. Following their wedding, they started to Atlanta to catch a plane for their honeymoon. On the way, their car collided with a tractor-trailer driven by defendant Dennis Hal Burnett. Michelle Clayton Hall died instantly. Plaintiff Mike Clayton, the father of Michelle Clayton Hall, filed this wrongful death action on behalf of her estate on 27 June 1997, alleging negligence by Chip Lee Hall, who was driving their car, and by defendant Burnett and his employers. The trial court entered summary judgment in favor of the defendants, concluding that, under Georgia law, plaintiff was the wrong party to institute a wrongful death action. Plaintiff appeals. We reverse.

[1] At the outset, we must ascertain whether Georgia law or North Carolina law applies to the instant action. The conflict of laws provisions of this state are well-settled. Matters affecting the substantive

rights of the parties are determined by the *lex loci*, or where the wrong occurred; matters affecting the remedial or procedural rights of the parties are determined by the *lex fori*, or where the claim is filed. *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). Plaintiff contends that the determination of who is a proper party to sue is merely a procedural right, such that North Carolina law governs. We disagree.

The common law rule has been summarized as follows:

> The matter of who is the proper plaintiff in a wrongful death action brought in one jurisdiction for a death resulting from a wrong committed in another has been said to be governed by the law of the jurisdiction in which the wrong occurred, under the theory that such matter is a part of the substantive law, rather than merely a matter of procedure.

22A Am. Jur. 2d *Death* § 413 (1988). Though we have found no North Carolina case law directly addressing the propriety of the common law rule, we have found one case that has implicitly accepted it. In *Evans v. Morrow*, 234 N.C. 600, 68 S.E.2d 258 (1951), an automobile collided with a tractor-trailer in South Carolina, resulting in the death of the driver of the automobile. *Id.* at 602, 68 S.E.2d at 260. The driver of the tractor-trailer instituted a negligence action in North Carolina against the automobile driver's father, individually, under the family purpose doctrine. *Id.* The automobile driver's father subsequently qualified as administrator of his deceased son's estate, whereupon he filed a negligence suit against the driver of the tractor-trailer in South Carolina. *Id.* The driver of the tractor-trailer then sought to enjoin the father from proceeding in South Carolina, contending that North Carolina's courts acquired prior jurisdiction over him in his representative capacity when the driver of the tractor-trailer commenced the negligence action in North Carolina. In rejecting this argument, our Supreme Court made the following statement relevant to the issue before this Court today:

> All matters of substantive law relating to the wrongful death action are governed by the law of South Carolina, where the fatal accident occurred. Under that law, nobody can sue to enforce a cause of action for death by wrongful act except the executor or administrator of the decedent.

Id. at 605-06, 68 S.E.2d at 262 (citations omitted). Thus, the *Evans* court implicitly treated the matter of who may institute a wrongful death action as a substantive matter to be governed by the *lex loci*.

We now explicitly hold that this issue is one of substantive law such that the *lex loci* controls, and that is Georgia.

Notwithstanding the general rule, our courts have adopted a limited exception to the *lex loci* principle. Specifically, our courts apply North Carolina law if the law of the other state offends North Carolina public policy. *See, e.g., Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983) (choosing to apply North Carolina's worker's compensation laws after concluding that Virginia's worker's compensation system was contrary to North Carolina public policy). But "a mere difference as to the person entitled to maintain a given cause of action . . . is [in]sufficient or [in]adequate dissimilarity to work a denial of the usual principles of comity prevailing among the states of the Union." *Rodwell v. Coach Co.*, 205 N.C. 292, 295, 171 S.E. 100, 102 (1933). Accordingly, application of the public policy exception to the *lex loci* principle is not warranted here. As such, because the accident occurred in Georgia, its laws control who is entitled to bring forth this wrongful death suit. We now turn to Georgia's substantive law.

[2] Georgia has a very specific wrongful death statutory procedure. We begin by separating the types of damages sought by plaintiff. Under Georgia's law, "[w]hen death of a human being results from a crime or from criminal or other negligence, the *personal representative* of the deceased person shall be entitled to recover for the *funeral*, medical, and other necessary expenses resulting from the injury and death of the deceased person." Ga. Code Ann. § 51-4-5(b) (Supp. 1999) (emphasis added). Plaintiff, as Michelle Clayton Hall's personal representative, has specifically sought funeral expenses and is thus statutorily entitled to pursue them. *See, e.g., Hosley v. Davidson*, 439 S.E.2d 742 (Ga. Ct. App. 1993) (denying personal representative's claims for wrongful death as being the inappropriate party, but granting his claims for funeral expenses).

[3] Plaintiff has also sought damages for wrongful death. Under Georgia law, the party who is entitled to seek wrongful death damages is quite limited:

> The *surviving spouse* or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent . . . .

Ga. Code Ann. § 51-4-2(a) (Supp. 1999) (emphasis added). This statutory provision is to be construed strictly. *Walden v. John D. Archbold*

Mem'l Hosp., 398 S.E.2d 271, 273 (Ga. Ct. App. 1990). Thus, pursuant to the plain language of the statute, defendant Chip Lee Hall, as the surviving spouse, is the only party entitled to pursue a claim for wrongful death.

Plaintiff nonetheless cites section 51-4-5(a) to suggest that the personal representative may institute a wrongful death claim here. That provision states:

> When there is no person entitled to bring an action for the wrongful death of a decedent under Code Section 51-4-2 . . . , the administrator or executor of the decedent may bring an action . . . .

Ga. Code Ann. § 51-4-5(a) (Supp. 1999). Plaintiff asserts that, because the surviving spouse is allegedly negligent here, he is not "entitled" to bring a wrongful death action. This assertion is not supported by Georgia's case law. *See, e.g., Matthews v. Douberley*, 428 S.E.2d 588 (Ga. Ct. App. 1993) (allowing allegedly negligent surviving spouse to institute a wrongful death action). While it is certainly true that Chip Lee Hall could not be both the plaintiff and defendant in this suit, *see Jones v. Jones*, 376 S.E.2d 674, 675 n.2 (Ga. 1989), that does not mean he is not "entitled" to bring the cause of action in the first place. Section 51-4-2(a) vests him with the right to bring the wrongful death action. His own potential negligence does not divest him of this right. Thus, pursuant to Georgia's wrongful death statutory scheme, Chip Lee Hall, as Michelle Clayton Hall's surviving spouse, is the only party entitled to bring this cause of action for wrongful death.

Our inquiry does not end there, however, as Georgia has a separate jurisdictional scheme in equity. "Any person who may not bring an action at law may complain in equity and every person who is remediless elsewhere may claim the protection and assistance of equity to enforce any right recognized by the law." Ga. Code Ann. § 23-4-20 (1982). As we have already concluded, plaintiff here, as Michelle Clayton Hall's personal representative, may not bring this wrongful death action at law. The legal right was that of Chip Lee Hall, the surviving spouse. We nonetheless conclude that plaintiff can pursue this claim in equity. Georgia courts have on at least two occasions circumvented section 51-4-2(a)'s limiting language and allowed others to maintain wrongful death suits under the cloak of equity jurisdiction. In *Brown v. Liberty Oil & Refining Corp.*, 403 S.E.2d 806 (Ga. 1991), the Georgia Supreme Court invoked equity to allow a decedent's children to institute a wrongful death claim because the

surviving spouse had abandoned the children, could not be located, and likely would not pursue such a claim in the first place. Following this lead, the Georgia Court of Appeals, in *Emory University v. Dorsey*, 429 S.E.2d 307 (Ga. Ct. App. 1993), again permitted a decedent's child to pursue a wrongful death claim because the surviving spouse had left the state and apparently had no intention of bringing forth the cause of action himself.

Defendants point out that both of these cases involved the ability of a decedent's *children* to bring a wrongful death claim, rather than a decedent's personal representative. However, we do not feel these cases stand for the proposition that equity jurisdiction may *only* be invoked if the decedent leaves surviving children. Rather, they focus on the specific factual circumstances warranting the application of equity jurisdiction. We feel the specific factual circumstances here justify using equity to allow plaintiff to proceed with his wrongful death claim. Plaintiff waited the full two-year statute of limitations period before filing his claim to see whether Chip Lee Hall would exercise his legal right to bring the claim himself; Chip Lee Hall manifested no intent to bring the claim himself; and, most importantly, Michelle Clayton Hall's beneficiaries and next of kin are left remediless unless plaintiff is permitted to maintain this cause of action.

In summary, we hold that Georgia law applies to this case because the issue of who may institute a wrongful death claim is a substantive matter to be governed by the *lex loci* principle. We further hold that, pursuant to Georgia law, plaintiff is entitled to pursue his claim for funeral expenses. And finally, we hold that equity enables plaintiff to proceed with his claim for wrongful death as well.

Because of our holding, we need not address plaintiff's remaining assignments of error.

Reversed and remanded.

Judges JOHN and McGEE concur.

MCGINNIS POINT OWNERS ASSOCIATION, INC., AND THE BOARD OF DIRECTORS OF MCGINNIS POINT OWNERS ASSOCIATION, INC., PLAINTIFFS V. BARNEY G. JOYNER, AND WIFE PHYLLIS M. JOYNER, DEFENDANTS

No. COA98-1486

(Filed 7 December 1999)

1. Deeds— assessment covenants—definiteness

The trial court did not err in granting summary judgment in favor of plaintiffs, who sought to recover annual assessments plus interest from defendant-property owners, because the Ocean Declaration covenant: (1) establishes a sufficient standard for ascertaining defendants' liability for assessments; (2) describes the property to be maintained with particularity; and (3) provides sufficient guidance as to which properties and facilities are required to be maintained with assessment funds.

2. Deeds— assessment covenants—enforcement—attorney fees—written notice—fifteen percent limitation

In a case where an Owners' Association sought to recover annual assessments plus interest from defendant-property owners pursuant to their Ocean Declaration covenants, the trial court's order awarding attorney fees to plaintiffs under N.C.G.S. § 6-21.2 is vacated and remanded for further findings on the issue of whether plaintiffs have provided written notice to defendants stating that defendants have five days from the mailing of such notice to pay the assessments without incurring attorney fees, and if notice was provided, the original award of attorney fees must be limited to fifteen percent of the outstanding assessment balance under N.C.G.S. § 6-21.2(2).

Appeal by defendants from order entered 11 August 1998 by Judge James E. Ragan, III in Carteret County Superior Court. Heard in the Court of Appeals 14 September 1999.

Kirkman, Whitford & Brady, P.A., by Carolyn B. Brady, for plaintiff-appellees.

Temple & Petersen, by G. Henry Temple, Jr., for defendant-appellants.

LEWIS, Judge.

Plaintiffs, McGinnis Point Owners Association, Inc. ("Owners' Association") and its Board of Directors, are charged with main-

taining and administering the real properties of McGinnis Point, administering and enforcing applicable covenants and restrictions, and collecting and disbursing all relevant assessments. Two tracts of land approximately one mile apart comprise McGinnis Point. The first tract ("McGinnis Point Subdivision") is a ten-acre, ninety-unit development located on Bogue Sound. The second tract, ("McGinnis Point-Ocean") includes seven lots located on the Atlantic Ocean. McGinnis Point Subdivision is composed of single-family detached homes, a swimming pool, two tennis courts and a boat ramp. McGinnis Point-Ocean is composed of single-family detached homes and an ocean front beach access area with a parking lot, walkway and deck, called McGinnis Point Ocean Park ("ocean park").

Defendants here are the record owners of Lot 4 in McGinnis Point-Ocean pursuant to a General Warranty Deed recorded 15 May 1992 in the Carteret County Registry. The deed in the conveyance states that it is made subject to that Declaration of Covenants, Restrictions and Easements for McGinnis Point-Ocean ("Ocean Declaration"), recorded in the Carteret County Registry 8 June 1987. The Ocean Declaration references the Declaration of Covenants, Restrictions, and Easements for McGinnis Point Subdivision ("Subdivision Declaration"), which was recorded in the Carteret County Registry several years prior to the Ocean Declaration.

The portion of the Ocean Declaration which is pertinent to this appeal is set forth as follows:

> Article 11. McGinnis Point Amenities
>
> The owner of each lot within McGinnis Point-Ocean shall be deemed an associate member of the McGinnis Point Owner's Association, Inc. Each such associate member shall be entitled to use the McGinnis Point swimming pool, the McGinnis Point tennis courts, and the McGinnis Point ocean park, and no other McGinnis Point amenity or common area, except as may be required to allow ingress and egress to those amenities for which utilization is permitted herein. No such associate member shall be a voting member of the McGinnis Point Owner's Association, Inc. To assist in bearing the maintenance cost associated with the use of such facilities, each lot shall pay an annual assessment to the McGinnis Point Owner's Association, Inc., in an amount equal to 25% of the annual dues payable by the owner of a Currituck unit within McGinnis Point, as such dues level may be established from time to time, plus $100.00 per year. All such assessments

> shall be payable in advance. Failure to pay said dues shall be treated as failure to pay an assessment under the Declaration of Covenants for McGinnis Point recorded in Deed Book 491, Page 52, Carteret County Registry, and the Association shall have the right to enforce said assessment by all means allowed by law, or allowed by said covenants. The use of such master common properties shall be subject to the rules and regulations adopted by the Association from time to time, and applicable to all members and associate members of the Association.

Plaintiffs assessed defendant-property owners pursuant to the Ocean Declaration for the years 1994, 1995, 1996, 1997 and 1998. Plaintiffs' complaint alleged defendant-property owners failed and refused to pay annual assessments from 1994 through 1998, requested payment of such assessments with twelve percent (12%) interest in accordance with the Owners' Association Bylaws as well as reasonable attorneys' fees. Defendants counterclaimed asking to recover damages from plaintiffs for improvements to the surrounding properties if it were determined that defendants were liable for assessments.

On 11 August 1998, the trial court granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment. The court ordered defendants to pay the amounts owing under their respective assessments with interest, totaling $3508.87, and reasonable attorneys' fees in the amount of $5876.49. Defendants appeal from this Order.

[1] Defendants first argue the trial court acted improperly in granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment under Rule 56. The test to be applied by the trial court in ruling on a motion for summary judgment was whether the pleadings, depositions, answers to interrogatories, admissions of file or affidavits established a genuine issue as to any material fact. N.C.R. Civ. P. 56(c); *Tuberculosis Assoc. v. Tuberculosis Assoc.*, 15 N.C. App. 492, 494, 190 S.E.2d 264, 265 (1972). If no such issue exists, the trial court must then determine whether the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c); *Van Poole v. Messer*, 19 N.C. App. 70, 71, 198 S.E.2d 106, 107 (1973).

Defendants assert that Article 11 of the Ocean Declaration is insufficient to require the McGinnis Point-Ocean property owners to pay assessments. Specifically, defendants contend that Article 11 does not satisfy the standards relevant to covenants imposing affirmative obligations that this Court applied in *Homeowners'*

Association v. Parker and Homeowners' Association v. Laing, 62 N.C. App. 367, 303 S.E.2d 336, *disc. review denied* 309 N.C. 320, 307 S.E.2d 170 (1983) and clarified in *Allen v. Sea Gate Assn.*, 119 N.C. App. 761, 460 S.E.2d 197 (1995). Further, defendants attempt to distinguish the covenant provisions which we held enforceable in *Homeowners'* from those in this case in order to establish that the terms of Article 11 fail for vagueness, rendering it unenforceable. We disagree.

Covenants which impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are executed in " 'clear and unambiguous language' " that is " 'sufficiently definite' " to guide the courts in their application. *Allen*, 119 N.C. at 764, 460 S.E.2d at 199 (quoting *Beech Mountain Property Owner's Assoc. v. Seifart*, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980)). There must be " 'some ascertainable standard' " by which a court " 'can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant.' " *Id.* In *Allen*, we clarified the inquiry relevant to the imposition of assessment obligations. There, we held that assessment provisions "(1) must contain a 'sufficient standard by which to measure . . . liability for assessments,' . . . (2) 'must identify with particularity the property to be maintained,' and (3) 'must provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain.' " *Id.* (quoting *Homeowners' Association*, 62 N.C. App. at 376, 303 S.E.2d at 341). Accordingly, we must determine whether the test in *Allen* as applied to the assessment provisions here supports the trial court's grant of summary judgment in favor of plaintiffs.

We first consider whether the Ocean Declaration sets forth a sufficient standard by which to measure defendant-property owners' liability for assessments. Article 11 of the Ocean Declaration requires the owner of each lot to pay "an amount equal to 25% of the annual dues payable by the owner of a Currituck unit within McGinnis Point, as such dues level may be established from time to time, plus $100.00 per year." The dues payable by the owner of a Currituck Unit are contained in the Subdivision Declaration, which Article 11 makes applicable by providing that a "[f]ailure to pay said dues shall be treated as failure to pay an assessment under the [Subdivision Declaration]." The assessment provisions in the Ocean Declaration sufficiently specify the standard by which to measure liability in light of that held sufficient in *Homeowners' Association*, to wit: "[S]uch assessment or

charge shall be in an amount to be fixed from year to year by the Company, which may establish different rates from year to year as it may deem necessary . . . ." 62 N.C. App. at 371, 303 S.E.2d at 338. We find that the Ocean Declaration establishes a sufficient standard for ascertaining defendant-property owners' liability for assessments.

We find that Article 11 describes the property to be maintained with particularity. Article 11 of the Ocean Declaration establishes each homeowner's right to use and obligation to bear the maintenance costs of the "McGinnis Point swimming pool, the McGinnis Point tennis courts, and the McGinnis Point ocean park." Because McGinnis Point only contains one of each of these facilities, we can discern no construction of Article 11 which would support any conclusion other than that of the trial court.

We also find that Article 11 of the Ocean Declaration provides sufficient guidance as to which properties and facilities are required to be maintained with assessment funds. Defendants were made aware by the terms of Article 11 that assessment funds would be used for maintenance costs associated with the use of the particularly described facilities. There are no after-acquired properties or facilities other than those specified in the Ocean Declaration requiring maintenance with assessment funds. Consequently, we find the covenants sufficient to guide the trial court in its determination.

Our careful review of the record on appeal and consideration of the arguments advanced by defendants fail to persuade us that there is any genuine issue of material fact as to the application and enforceability of the assessment provisions against defendants. We therefore find the trial court properly entered summary judgment in favor of plaintiffs on the issue of assessment provisions. In affirming the grant of plaintiffs' summary judgment motion, we necessarily conclude that defendants' motion for summary judgment was properly denied.

[2] Defendants also argue that the trial court's award of reasonable attorneys' fees in excess of fifteen percent (15%) of the balance owing was improper under N.C. Gen. Stat. § 6-21.2. The Bylaws in this case, recorded as part of the Subdivision Declaration, allow for the collection of reasonable attorneys' fees incident to the collection of assessments. As a general rule, a party cannot recover attorneys' fees "unless such a recovery is expressly authorized by statute." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). In accordance with this rule, N.C. Gen. Stat. § 6-21.2

authorizes an award of attorneys' fees pursuant to the provisions of a covenant when certain requirements have been fulfilled. *Four Seasons Homeowners Assoc., Inc. v. Sellers*, 72 N.C. App. 189, 191-92, 323 S.E. 2d 735, 737-38 (1984). Plaintiffs must have complied with section 6-21.2 to be entitled to an award of attorneys' fees.

Our first consideration on the award of attorneys' fees is the explicit notice requirement in section 6-21.2(5). Specifically, plaintiffs must have provided written notice to defendants stating that defendants had five days from the mailing of such notice to pay the assessments without incurring attorneys' fees. *Blanton v. Sisk*, 70 N.C. App. 70, 74-75, 318 S.E.2d 560, 564 (1984). Defendants argue plaintiffs failed to fulfill this notice requirement, making the trial court's award of attorneys' fees improper. Nothing in the record indicates that plaintiffs did or did not provide defendants written notice in accord with section 6-21.2(5), nor is there a finding either way. Absent a finding of notice, the trial court was not authorized to award attorneys' fees under section 6-21.2. We therefore vacate the trial court's award of attorneys' fees and remand to the trial court for findings on the issue of notice.

If it is determined on remand that defendants were provided with requisite notice, the court must reconsider its award of reasonable attorneys' fees pursuant to the Bylaws. When reasonable attorneys' fees are authorized without specifying a certain percentage, the provision shall be construed to mean fifteen percent (15%) of the balance outstanding on the assessments. N.C. Gen. Stat. § 6-21.2(2). The trial court's $5876.49 award far exceeded this fifteen percent (15%) limitation. Accordingly, if the trial court on remand determines plaintiffs provided notice under section 6-21.2(5), the original award of attorneys' fees must be limited to fifteen percent (15%) of the outstanding assessment balance under section 6-21.2(2).

We also note that the North Carolina Planned Community Act, enacted in February 1999, allows a court to award reasonable attorneys' fees exceeding fifteen percent (15%) in a case such as this. N.C. Gen. Stat. § 47F-1-101 (1999). Section 47F-3-120 allows the prevailing party in an action to enforce a Declaration of Covenants to recover reasonable attorneys' fees if the Declaration of Covenants permits such recovery, unlike section 6-21.2(2), where a specific percent must be stated to override the fifteen percent (15%) limitation. But Chapter 47F only applies to planned communities created prior to February 1999 if their Declaration of Covenants is amended to indicate that this statute applies. N.C. Gen. Stat. § 47F-1-102(d) (1999). No such amend-

ment was made here, so plaintiffs' only statutory basis for attorneys' fees is through section 6-21.2.

The order of the trial court granting summary judgment to plaintiffs is affirmed. The order awarding attorneys' fees to plaintiffs is vacated and remanded.

Affirmed in part, vacated in part and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

SANDRA K. COLLINS AND HUGH COLLINS, PLAINTIFFS v. DARRYL ROGER TALLEY, DENNIS OVERHOLT, INDIVIDUALLY, MICHAEL OVERHOLT, INDIVIDUALLY, AND DENNIS OVERHOLT AND MICHAEL OVERHOLT D/B/A JONES AUTO PARTS, DEFENDANTS

No. COA99-115

(Filed 7 December 1999)

Appeal and Error— appealability—interlocutory order—no substantial right affected

Even though the record does not indicate how the trial court arrived at the amount of plaintiffs' attachment bond, plaintiffs cannot immediately appeal from the trial court's interlocutory order modifying the bond because it does not affect a substantial right since: (1) the validity of the order is not determined until after a final judgment is entered in the case; and (2) the trial court is not required to make findings of fact under N.C.G.S. § 1A-1, Rule 52(a) in an order modifying a bond unless a party requests findings of fact.

Appeal by plaintiff from order entered 18 December 1998 by Judge Forrest A. Ferrell in Macon County Superior Court. Heard in the Court of Appeals 25 October 1999.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones, for plaintiff-appellants.

Clark Law Firm, P.A., by Justin D. Robertson, for defendant-appellees.

HUNTER, Judge.

Sandra K. Collins and Hugh Collins ("plaintiffs") appeal from the order wherein the superior court modified their attachment bond. We dismiss on the grounds that this appeal is interlocutory.

Plaintiffs filed the present action on 15 October 1998 alleging, in pertinent part, that they are creditors of R & S Auto Parts, and that defendants Dennis and Michael Overholt purchased all of the assets of R & S Auto Parts without proper notice to plaintiffs as required by the North Carolina Bulk Sales Act. In conjunction with the filing of their complaint, plaintiffs filed an "Affidavit in Attachment Proceeding" seeking to have the contents of the auto parts store attached on the basis that defendants are not North Carolina residents. They requested defendants' bond to be set at $75,000.00. Plaintiffs filed with their affidavit the $200.00 bond required by the clerk of court, and an order of attachment was issued.

Defendants filed a motion to increase plaintiffs' bond and following a hearing before the clerk of court, defendants' attachment bond was fixed at $75,000.00 and plaintiffs' attachment bond was raised to $50,000.00. Plaintiffs filed a notice of appeal to the superior court and after a hearing on the matter, the court entered an order requiring plaintiffs to post bond in the amount of $10,000.00.

Plaintiffs contend that the clerk of court and superior court committed reversible error in ordering a modification of the attachment bond on the grounds that there was no evidence before the court upon which to base a modification. Plaintiffs ask this Court to reverse the order of the trial court and remand in order for it to receive evidence on this issue.

First, we note that an order is interlocutory if it does not determine the issues in an action, but instead merely directs some further proceeding preliminary to the final decree. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). Therefore, the order appealed in the present case is interlocutory. Generally, there is no right to appeal from an interlocutory order, *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950); however, it may be appealed if either of two circumstances exist:

> First, an interlocutory order can be immediately appealed 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. N.C.R. Civ. P. 54(b). Second, an interlocutory order can be imme-

> diately appealed under N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1995) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review."

Bartlett v. Jacobs, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted).

No claim has been determined in the present case. Therefore, Rule 54 is inapplicable and plaintiffs can only appeal the order if they have been deprived of a substantial right pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(d)(1). This Court has stated that to be immediately appealable on the foregoing basis, a party has the burden of showing that: (1) the judgment affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to him if not corrected before appeal from final judgment. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Plaintiffs in the present case have not indicated why the increase and/or modification of their bond affects their substantial rights. In a similar case, *Stancil v. Stancil*, 94 N.C. App. 760, 381 S.E.2d 720 (1989), the plaintiff, a fifty percent (50%) shareholder in a corporation, had brought suit to dissolve the corporation. The trial court required the defendant, as a fifty percent (50%) shareholder of a close corporation, to post a $150,000.00 bond in order to preserve the status quo and defendant appealed. This Court held that the substantial rights of the defendant were not affected and the order was a nonappealable interlocutory order, stating:

> The amount of the bond each [party] was ordered to post reasonably approximates the value of BSRI assets allegedly in his possession, and, should the opposing sibling be unsuccessful in obtaining judgment in his favor, the bond will be cancelled. Under these circumstances, "no substantial right . . . can possibly be affected to the slightest extent if the validity of the order is not determined until after a final judgment is entered in the case."

Id. at 764, 381 S.E.2d at 722-23. In the present case, the record does not indicate how the court arrived at the amount of the bond the plaintiff was ordered to pay. However, this fact does not demonstrate

that plaintiff's substantial rights may be adversely affected if the present appeal is not considered.

Our Supreme Court, in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976), noted the proper procedure for perfecting an appeal of a judgment concerning the vacation or modification of a bond:

> "In this and like cases, it is the province of the Judge in the Court below to hear the evidence, usually produced before him in the form of affidavits, find the facts and apply the law arising thereupon. If a party should complain that the Court erred in so applying the law, then he should assign error and ask the Court to state its findings of the material facts in the record, so that he might have the benefit of his exceptions, on appeal to this Court. In that case, it would be error if the Court should fail or refuse to so state its findings of fact, and the law arising upon the same.
>
> "Such practice affords the complaining party reasonable opportunity to have errors of law, arising in the disposition of incidental and ancillary matters in the action, corrected by this Court, while, in very many cases, it lessens the labor of the Court below, expedites proceedings in the action and saves costs."

Id. at 143, 225 S.E.2d at 812 (citation omitted) (*citing Millhiser v. Balsey*, 106 N.C. 433, 435, 11 S.E. 314, 315 (1890)). *Oestreicher* does not indicate that modification of a bond affects a substantial right. In that case, the trial court had granted the defendant summary judgment on two of the three causes of action in the suit but did not certify there was no just reason for delay as required by Rule 54. While this Court had dismissed plaintiff's appeal as interlocutory, *Oestreicher v. Stores*, 27 N.C. App. 330, 219 S.E.2d 303 (1975), our Supreme Court reversed, observing that "plaintiff had a substantial right to have all three causes tried at the same time by the same judge and jury." *Id.* at 130, 225 S.E.2d at 805. As for the bond issue, the Court held: "Since plaintiff failed to request findings of fact to justify the modification of defendant's bond, it is presumed that the trial judge found facts sufficient to support his order, and this is not reviewable on appeal. . . . Error must be shown by the party alleging it." *Id.* at 143, 225 S.E.2d at 812.

The reasoning in *Oestreicher* that the court is not required to make findings of fact in an order modifying a bond correlates with N.C.R. Civ. P. 52(a) concerning provisional remedies, which states in

pertinent part: "findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party." N.C.R. Civ. P. 52(a)(2). Our review does not indicate that any statute requires the judge to make findings of fact in a case such as the one at bar. Plaintiffs mistakenly assert that N.C. Gen. Stat. § 1-440.36 (1996) and N.C. Gen. Stat. § 1-440.37 (1996) are applicable to the present case. These statutes concern dissolution of and modification of the order of attachment, respectively. N.C. Gen. Stat. § 1-440.40(a), entitled "Defendant's objection to bond or surety" states:

> At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

N.C. Gen. Stat. § 1-440.40(a) (1996). Under this statute, the trial court is not required to make findings of fact in order to modify plaintiff's bond on the motion of the defendant, as is the case here.

Based on the foregoing authority, we conclude that unless a party requests findings of fact, the trial court is not required to make them when it modifies plaintiff's bond on defendant's motion. Lack of findings in the present order does not demonstrate that plaintiffs' substantial rights have been affected, as we presume the trial court found facts sufficient to support its order. *Oestreicher*, 290 N.C. 118, 225 S.E.2d 797.

"Piecemeal adjudication and unnecessary delay in proceedings . . . serve to delay and frustrate the effective administration of justice." *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983) (citation omitted). Plaintiffs have not asserted nor shown that they will lose any rights if the order appealed from is not reviewed before final judgment. We therefore hold that plaintiffs' substantial rights are not affected, thus they have no right to appeal the interlocutory order of the trial court. It is the court's duty to dismiss an appeal *sua sponte* when no right of appeal exists. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980). Accordingly, the present appeal is dismissed.

Dismissed.

Chief Judge EAGLES and Judge JOHN concur.

ALLEN R. TEW, P.A., PLAINTIFF v. WILLIAM BROWN, DEFENDANT

No. COA99-179

(Filed 7 December 1999)

1. Attorneys— reasonableness of legal fees—fixed fee contract—prior to commencement of representation—burden on client

Even though plaintiff-lawyer did not prove the reasonable value of his services, the trial court did not err in granting summary judgment in favor of plaintiff-lawyer with respect to the reasonableness of his legal fees because when an attorney and a client enter into a fixed fee contract prior to commencement of representation, no confidential relationship exists between the parties, the presumption of undue influence against the attorney does not apply, and defendant-client has the burden of proving the unreasonableness of the fee.

2. Civil Procedure— grant of summary judgment—failure to rule on motion to amend answer—harmless error because unverified

While it was error for the trial court to grant summary judgment in favor of plaintiff-lawyer in a case concerning the reasonableness of his legal fees without first ruling on defendant's motion to amend his pleadings under Rule 15(a), this error was harmless because the amended pleadings are unverified and the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.

Appeal by defendant from order filed 29 October 1998 by Judge Albert A. Corbett, Jr., in Johnston County District Court. Heard in the Court of Appeals 26 October 1999.

Tew & Atchison, P.A., by Allen R. Tew and Alexander R. Atchison, for plaintiff-appellee.

David S. Crump for defendant-appellant.

GREENE, Judge.

William Brown (Defendant) appeals an order granting summary judgment in favor of Allen R. Tew, P.A. (Plaintiff).

Plaintiff, a law firm, represented Defendant in an incompetency and guardianship action involving Virginia O. Brown (Brown), Defendant's mother. Other relatives of Defendant contested the action. Plaintiff's verified pleadings allege Defendant and Plaintiff entered into a fee contract whereby Defendant would pay Plaintiff $150.00 per hour for attorney time and $75.00 an hour for staff time, plus costs, for representation in the competency and guardianship action. Defendant also agreed to pay a non-refundable retainer of $3,000.00, and Plaintiff would bill Defendant for any amount due that exceeded the retainer amount.

On 12 November 1997, Plaintiff mailed Defendant a bill for $8,901.69. On 5 December 1997, the superior court awarded Plaintiff a $2,000.00 attorney's fee for his representation of Defendant in the competency proceedings pursuant to N.C. Gen. Stat. § 35A-1116, which allows the clerk of court, in his discretion, to award attorney's fees in a competency action. The clerk of court ordered Brown to pay this fee. On 18 December 1997, Plaintiff filed suit against Defendant in the district court, seeking recovery of its $8,901.69 attorney's fee. Brown's estate then paid the $2,000.00 fee awarded by the clerk of court and Defendant made payments totaling $3,000.00, leaving a balance of $3,901.69.

Plaintiff included in its pleadings a statement providing the daily balance of Defendant's account and chargeable time slips stating the time spent and work done on Defendant's case.

Defendant filed a verified answer to Plaintiff's complaint on 3 March 1998, denying any indebtedness to Plaintiff. On 7 August 1998, Defendant filed a motion for leave to amend his answer, and the motion included an unverified amended answer. The unverified amended answer asserted as an affirmative defense that Plaintiff's fee was "excessive and unreasonable." On 17 August 1998, Plaintiff filed a motion for summary judgment.

On 22 October 1998, Defendant filed an affidavit, stating in pertinent part: Plaintiff "spent an unreasonable amount of time on numerous tasks" during the representation and billed Defendant "1-2 hours for reading an e[]mail" and five hours for discussing the case with Defendant when Plaintiff "never spent over one session of one hour in length discussing the case with [Defendant]"; Plaintiff's fees were "excessive"; and Defendant "pre-paid" Plaintiff $3,000.00 as an "initial retainer."

On 26 October 1998, the trial court granted Plaintiff's motion for summary judgment, and awarded Plaintiff $3,901.69. The trial court did not rule on Defendant's motion for leave to amend his answer.

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[1] The dispositive issue is whether Defendant, in his affidavit, raised genuine issues of material fact with respect to the reasonableness of Plaintiff's legal fee.

Defendant argues Plaintiff had the burden to prove in this attorney fee collection case that its fee was reasonable and, because Plaintiff presented no evidence on this issue, the trial court erred in granting summary judgment for Plaintiff.

When an attorney enters into a contract for a fixed fee[1] with a client *after* the attorney's representation of the client has commenced, the attorney bears the burden of proving, in an action to recover fees under the contract, that the fees were "fair and reasonable."[2] *Stern v. Hyman*, 182 N.C. 422, 424, 109 S.E. 79, 80 (1921) (citations omitted), *overruled on other grounds*, *Rock v. Ballou*, 286 N.C. 99, 209 S.E.2d 476 (1974); *see Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985) (attorney had burden of proving reasonableness of fee when contract was, presumably, entered into after commencement of representation). This is so because there is a presumption of undue influence when an attorney enters into a fee contract with a client during representation. 7A C.J.S. *Attorney & Client* § 346, at 682 (1980).

When an attorney and client enter into a fixed fee contract *prior to* commencement of representation, no confidential relationship exists between the parties and this "rule of presumption [of undue influence] against the attorney" does not apply.[3] *Higgins v. Beaty*,

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1. A fixed fee can include either a set hourly rate or a set total fee.

2. Matters properly considered in determining whether the fees are reasonable include: (1) complexity of case; (2) amount involved; (3) responsibility of attorney; (4) time spent on case either in or out of the office; (5) years of experience of attorney; (6) previous experience attorney has in these types of matters; (7) trial time; (8) result of litigation; (9) benefits received by client; and (10) expenses incurred by attorney. 2 Robert L. Rossi, *Attorneys' Fees* § 13:13, at 311-12 (2nd ed. 1995). It is not necessary that other attorneys offer testimony that the fee is reasonable. *Rock v. Ballou*, 286 N.C. 99, 105, 209 S.E.2d 476, 479 (1974). "Neither is it a prerequisite to [a reasonableness finding] that the attorney introduce in[to] evidence a detailed, itemized statement of the time spent by him in rendering the service." *Id.*

3. The attorney, attempting to collect his fee due pursuant to a contract, has the burden of showing when the contract was made, *i.e.*, either before or during the representation.

242 N.C. 479, 481-02, 88 S.E.2d 80, 82-83 (1955), *declined to follow on other grounds*, *O'Brien v. Plumides*, 79 N.C. App. 159, 339 S.E.2d 54, *cert. dismissed*, 318 N.C. 409, 348 S.E.2d 805 (1986). The attorney, therefore, is not required to prove "the reasonable value of his services" in an action to recover fees under the contract, 7A C.J.S. *Attorney & Client* § 345, at 679, as the fee is presumed to be reasonable, *id.* § 346, at 681. The burden is on the defendant client to allege, in the form of an affirmative defense, and to prove the unreasonableness of the fee. 7A C.J.S. *Attorney & Client* § 346, at 681; *see Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974) (defendant has burden of proving affirmative defense).

If the fee contract involves a contingent fee, whether made during the existence of the attorney-client relationship or prior to its inception, a somewhat different test applies. The attorney must show that the contract was " 'made in good faith, . . . without undue influence of any sort or degree[] and [that] the compensation . . . [is] absolutely just and fair.' " *Rock*, 286 N.C. at 104, 209 S.E.2d at 479 (quoting *Casket Co. v. Wheeler*, 182 N.C. 459, 467, 109 S.E. 378, 383 (1921)).

This case involves an attorney fee contract for a fixed sum which was entered into prior to any attorney-client relationship. There arises a presumption, therefore, that the fee charged was reasonable, and Defendant had the burden of showing at this summary judgment hearing that genuine issues of fact exist as to the reasonableness of the fee. Defendant's affidavit raises no genuine issue on this point. His statements that the fee was "excessive" and that Plaintiff "spent an unreasonable amount of time on numerous tasks" are nothing more than conclusions and do not raise an issue of fact. *Ward v. Durham Life Ins. Co.*, 90 N.C. App. 286, 289, 368 S.E.2d 391, 393 (1988) (trial court may not consider portions of affidavit stating affiant's legal conclusions) (citation omitted), *aff'd*, 325 N.C. 202, 381 S.E.2d 698 (1989). In any event, Defendant does not plead in his answer the affirmative defense of the unreasonableness of the fee and is barred from raising the issue. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984) (citation omitted) (failure to plead affirmative defense constitutes a waiver of defense).

[2] Defendant did raise as an affirmative defense that Plaintiff's fee was "excessive and unreasonable" in his unverified amended answer, and the trial court did not rule on Defendant's motion for leave to amend his answer prior to granting summary judgment in favor of Plaintiff. While it is error for the trial court to grant a motion for sum-

mary judgment without first ruling on a party's motion to amend its pleadings under Rule 15(a), *Carolina Builders v. Gelder & Associates*, 56 N.C. App. 638, 640, 289 S.E.2d 628, 629 (1982), this error is harmless when the amended pleadings are unverified because the trial court may not consider an unverified pleading when ruling on a motion for summary judgment. *Coble Cranes & Equipment Co. v. B&W Utilities, Inc.*, 111 N.C. App. 910, 913, 433 S.E.2d 464, 466 (1993) (citing *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971)).

Defendant raises other issues on appeal to support his argument that summary judgment was not proper. We have carefully reviewed each of those arguments and reject them. Accordingly, the trial court's order for summary judgment is affirmed.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

PAULINE W. KEISTLER; PAULINE W. KEISTLER, AS ADMINISTRATRIX OF THE ESTATE OF JACK MUREAL KEISTLER, SR.; AND PAULINE W. KEISTLER; JACK MUREAL KEISTLER, JR.; JILL K. GREGG; JOEY L. KEISTLER; AND JUNE K. GIBSON, THE HEIRS AT LAW OF JACK MUREAL KEISTLER, SR., PLAINTIFFS-APPELLEES v. W.H. KEISTLER, JR. AND DOROTHY R. KEISTLER, DEFENDANTS-APPELLANTS

No. COA99-93

(Filed 7 December 1999)

Trusts— resulting trust—summary judgment improper—parol evidence allowed

In a case involving whether a resulting trust may be imposed in favor of one owner who has paid the consideration for the property against a non-paying joint owner, the trial court erred in granting summary judgment in favor of plaintiffs because there were genuine issues of material fact regarding plaintiffs' ownership interest in the five parcels of property and the parol evidence rule does not bar extrinsic evidence for the purpose of establishing a resulting trust on one co-tenant in favor of another co-tenant.

Appeal by defendants from judgment entered 20 November 1998 by Judge James E. Lanning in Superior Court, Mecklenburg County. Heard in the Court of Appeals 21 October 1999.

Perry, Patrick, Farmer & Michaux, P.A., by John H. Carmichael, for plaintiffs-appellees.

Larry D. Tucker and Caudle & Spears, P.A., by Harold C. Spears, for defendants-appellants.

WYNN, Judge.

A resulting trust may arise when one furnishes the consideration to pay for property, but title is taken in the name of another. The defendants in this case argue that a resulting trust may be imposed in favor of one owner who has paid the consideration for the property against a non-paying joint owner. Because we agree that a resulting trust may be created between co-owners, we reverse the trial court's grant of summary judgment in favor of the plaintiffs.

The parties in this case dispute the ownership of five parcels of real property located in Mecklenburg County, North Carolina. One parcel is titled in the names of W. H. Keistler, Jr. and his brother J. M. Keistler, now deceased. The other four parcels are titled in the names of W. H. Keistler, Jr. and his wife Dorothy R. Keistler, and J. M. Keistler and his wife Pauline W. Keistler. The deeds are silent as to what interests or shares were granted to the separate grantees.

The plaintiffs in this action are J. M. Keistler's heirs at law—his widow, Pauline W. Keistler, and children, Jack Mureal Keistler, Jr., Jill K. Gregg, Joey L. Keistler, and June K. Gibson. After the death of J. M. Keistler, the plaintiffs brought an action against the defendants W. H. Keistler and his wife Dorothy R. Keistler, seeking an accounting for rents and profits from the five properties. The plaintiffs also sought a declaratory judgment concerning their ownership interests in the parcels.

In their answer and counterclaim, the defendants asserted that because they had paid the entire purchase price of the five properties, they had a purchase-money resulting trust as to the plaintiffs' interest in the five properties. The defendants argued that they purchased the properties for their benefit only and intended for the decedent and plaintiff Pauline W. Keistler to acquire legal title only. The defendants asked that the trial court order the plaintiffs to convey their legal title to the properties to them.

The trial court granted summary judgment to the plaintiffs—affirming their one-half undivided interest in the properties—and dismissed the defendants' resulting trust claim. The trial court found that the deeds of conveyance were absolute and unambiguous on their face and concluded that any extrinsic evidence was barred by the parol evidence rule. The defendants brought this appeal.

The defendants argue that the trial court erred in granting summary judgment for the plaintiffs because there were genuine issues of material fact regarding the plaintiffs' ownership interest in the five parcels of property. They contend that the parol evidence rule does not bar extrinsic evidence for the purpose of establishing a resulting trust in their favor. We agree.

The parol evidence rule provides that when parties have formally and explicitly expressed their contract in writing, that contract shall not be contradicted or changed by contemporaneous oral agreements. *See Gaylord v. Gaylord*, 150 N.C. 222, 230, 63 S.E. 1028, 1032 (1909). However, the parol evidence rule does not bar evidence proving the existence of a resulting trust. *See Thompson v. Davis*, 223 N.C. 792, 794, 28 S.E.2d 556, 558 (1944). This is because evidence introduced to establish such a trust is not offered to contradict, alter or explain the written instrument. *See id.* at 795, 28 S.E.2d at 558 (Holding that the "deed has its full force and effect in passing the absolute title at law, and is not altered, added to, or explained by the trust, which is an incident attached to it, in equity, as affecting the conscience of the party who holds the legal title.")

A resulting trust arises where one person furnishes the consideration to pay for land, but the title is taken in the name of another. In such a case, a trust is created in favor of the party who furnished the consideration. *See Cline v. Cline*, 297 N.C. 336, 344, 255 S.E.2d 399, 404-05 (1979). When the facts of a case support the establishment of a resulting trust, the parol evidence rule has no application and extrinsic evidence is admissible. A resulting trust must be proven by clear, strong, and convincing evidence. *See Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954). This finding is a matter solely within the province of a jury. *See id.*

One exception to the general rule that parol evidence may be admitted to prove the existence of a resulting trust is that as a matter of law, parol evidence may not be admitted to prove the existence of a resulting trust in favor of a deed's grantor. *See, e.g., Gaylord v. Gaylord, supra*; *Guy v. Guy*, 104 N.C. App. 753, 411 S.E.2d 403 (1991);

Tomlinson v. Brewer, 18 N.C. App. 696, 197 S.E.2d 901 (1973). However, the issue presented in this case is whether a resulting trust can be imposed on one cotenant in favor of another cotenant.

In the resulting trust case of *Guy v. Guy*, *supra*, this Court explicitly stated: "Parties to an integrated document cannot introduce either oral or written evidence which contradicts the writing." *Id.* at 756, 411 S.E.2d at 405. In that case, as in others, we did not allow a grantor to impose a resulting trust on a grantee. We held that a resulting trust may only arise where there is a grantor, a grantee, and a beneficiary who is not a party to the document. Of the three, only the non-party beneficiary may introduce evidence about a resulting trust because the others would breach the parol evidence rule if they were to do so.

This Court's holding in *Guy* supports the position that the defendants in this case—parties to the disputed deed—may not impose a resulting trust on the other parties to the deed. But we are bound to follow *Bowen v. Darden*, *supra*, where our Supreme Court allowed a jury to determine whether a resulting trust existed in a joint-ownership situation.

In *Bowen*, Mrs. Fannie V. Bowen paid the entire purchase price for residential property located in Greenville, North Carolina. She contended that she was "disappointed when she later learned" that the deed was written to convey a life interest to her with the remainder interest to her daughter Hildred B. Darden. *Id.* at 15, 84 S.E.2d at 293. Although both Mrs. Bowen and her daughter were parties to the deed, our Supreme Court held that "a trust resulted in favor of Mrs. Bowen." *Id.* at 17, 84 S.E.2d at 294.

The plaintiffs in this case argue that *Bowen* differs from the case at bar because the people seeking to establish the resulting trust—Mrs. Bowen's nine other children—were not parties to the deed. But the nine plaintiffs in that case were the heirs of their deceased mother, Mrs. Bowen. Under the rationale of our Supreme Court in *Bowen*, the resulting trust favored Mrs. Bowen as the party who had furnished the consideration, not her children. The children—including Hildred B. Darden—only benefitted from that declaration because the property was then transferred to Mrs. Bowen's estate and they were her heirs.[1]

1. We recognize that the facts of the Bowen case appear to indicate the existence of a constructive trust (which is based on a breach of fiduciary duty or fraud) rather than a resulting trust. However, our Supreme Court in *Bowen*, after discussing the dif-

In the present case, the defendants paid all of the purchase price for the properties, and the titles were taken jointly in the names of both plaintiffs and defendants. The defendants argue that they never intended for the plaintiffs to acquire beneficial interests in the properties, but legal title only. Following *Bowen*, the defendants set forth facts sufficient to constitute a resulting trust and that evidence on which they rely to establish the trust is sufficient to carry the case to a jury.[2]

Summary judgment is properly granted when there is no genuine issue as to any material fact and one party is entitled to a judgment as a matter of law. N.C.R. Civ. P. 56(c) (1990). Since we hold that a resulting trust can be established in favor of a joint owner, a question of fact remains that must be decided by a jury. The trial court erred in granting summary judgment for the plaintiffs. The decision of the trial court is,

Reversed.

Judges HORTON and EDMUNDS concur.

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ferences between a constructive or resulting trust, expressly found that "plaintiffs alleged sufficient facts to constitute a resulting trust . . . ." *Bowen*, 241 N.C. at 14, 84 S.E.2d at 292.

2. It is interesting to note that *Bowen's* pronouncement that a resulting trust may be imposed by one owner on another owner is supported by the position of the Restatement (Second) of Trusts §§ 440 and 441.

> Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in §§ 441, 442 and 444.

Restatement (Second) of Trusts § 440 (1957).

> A resulting trust does not arise where a transfer of property is made to one person and the purchase price is paid by another, if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise.

Restatement (Second) of Trusts § 441 (1957).

Comment (e) to this section provides that when one person pays for the property but takes title jointly with another, a presumption arises that the payer intended to make a gift to the other person. This presumption is rebuttable.

Since the parties do not address this comparison, we decline to consider adopting the Restatement position in this opinion. (For cases in which we have adopted provisions from various Restatements, *see, e.g. Meachum v. Faw*, 112 N.C. App. 489, 436 S.E.2d 141 (1993); *Warzynski v. Empire Sys., Inc.*, 102 N.C. App. 222, 401 S.E.2d 801(1991); *Board of Transp. v. Charlotte Park and Recreation Comm'n*, 38 N.C. App. 708, 248 S.E.2d 909 (1978).)

MANN CONTRACTORS, INC. v. FLAIR WITH GOLDSMITH CONSULTANTS-II, INC.

No. COA98-1549

(Filed 7 December 1999)

1. Damages and Remedies— breach of contract

The trial court's decision must be remanded since it erred in a non-jury breach of contract trial by concluding plaintiff is entitled to recover damages of $36,000, based on the finding of fact that plaintiff had carried its burden of proof only as to the amount which it claimed was due by reason of changes mandated by the government officials of Guilford County, because the trial court failed to address the factual dispute with respect to the necessity or the cost of the required changes.

2. Appeal and Error— appealability—cross-assignment of error versus cross-appeal

In a non-jury breach of contract case, plaintiff improperly cross-assigned error to the trial court's findings that the written contract was not properly executed and that plaintiff failed to carry its burden of proof with respect to the amount of damages for changes other than those prescribed by government officials because neither of the cross-assignments would provide an alternative basis for upholding the $36,000 judgment as required by N.C. R. App. P. 10(d), and therefore, plaintiff should have cross-appealed from the judgment.

Appeal by defendant from judgment entered 7 August 1998 by Judge Charles Lamm in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 1999.

Harkey, Lambeth, Nystrom, Fiorella & Morrison, L.L.P, by Philip D. Lambeth, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., Richard B. Fennell, Paul P. Browne and John R. Buric, for defendant-appellant.

MARTIN, Judge.

Plaintiff Mann Contractors, Inc., brought this action to recover monies allegedly owed by reason of an alleged contract with defendant Flair with Goldsmith Consultants-II to construct improvements

upon property owned by defendant in Greensboro, N.C. In its amended complaint, plaintiff alleged that it had fully performed its obligations under the contract and that it was owed a balance of at least $80,000 for the work. Defendant answered, denying that it had entered into the contract, denying that plaintiff had performed the work required by the contract, and, alternatively, alleging that it had paid plaintiff in full for all of the work done by plaintiff. By counterclaim, defendant asserted that plaintiff had "wrongfully and negligently failed in the performance of" the renovations to defendant's property in a number of respects, resulting in damages to defendant exceeding $10,000.

Neither party having requested a jury trial, the case was heard by Judge Lamm sitting without a jury. After hearing the evidence, the trial court found facts as follows:

1. This Court has jurisdiction over the parties and the subject matter of this case, and the case is properly before the Court.

2. Although the written contract introduced by the Plaintiff has not been properly executed, it is the document under which the parties proceeded and to which by their conduct they have agreed to be bound.

3. The contract between the parties provided that the Plaintiff was to perform upfitting of the Defendant's gym facility in Greensboro, North Carolina for a contract price of $246,850.00, together with the cost, plus ten (10%) per cent [sic], of any change orders and overages.

4. The contract also provided that all unpaid balances would bear interest at the rate of 1 and 1/2% per month, or 18% per annum.

5. The Plaintiff presented evidence and contended that it was entitled to recover from the Defendant damages in the sum of $140,969.02, plus interest. The Defendant presented evidence and contended that the Plaintiff was entitled to recover nothing from the Defendant.

6. The Defendant has failed to pay all sums due the Plaintiff under the contract. However, the Plaintiff has failed to carry its burden of proof as to the amount of claimed change orders and overages except regarding those changes mandated by the governmental officials of Guilford County.

7. The Defendant failed to present evidence in support of its counterclaim against the Plaintiff.

Based upon those findings of fact, the trial court made the following conclusions of law:

1. The Defendant has breached its contract with the Plaintiff.

2. The Plaintiff is entitled to recover from the Defendant damages in the amount of $36,000.00, together with interest thereon at the rate of eighteen (18%) per cent [sic] per annum from July 14, 1998 until the date of this judgment, and at the legal rate thereafter.

3. The Defendant's counterclaim should be dismissed for lack of evidence in support thereof.

The trial court entered judgment in favor of plaintiff in the amount of $36,000, plus interest at 18% from 14 July 1998 until the date of the judgment, 6 August 1998, and at the legal rate thereafter, and dismissed defendant's counterclaim. Defendant gave notice of appeal.

On 20 October 1998, upon motion of plaintiff asserting a clerical error in the judgment, Judge Patti amended the judgment to provide that the principal amount of the judgment was to bear interest at 18% from 14 July 1994 until 6 August 1998, and then at the legal rate. Defendant also gave notice of appeal from that order.

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[1] On appeal, defendant asserts that the trial court's second conclusion of law is not supported by its findings of fact. When the parties waive a jury, the trial judge functions in the dual capacity of judge and jury. *Reid v. Johnston*, 241 N.C. 201, 85 S.E.2d 114 (1954). As such, the judge is required to find the facts on all issues raised by the pleadings, state separately its conclusions of law drawn from the facts found, and enter its judgment. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1); *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971). Rule 52(a)(1) does not require the trial court to recite all of the evidentiary facts; it is required only to find the ultimate facts, i.e., those specific material facts which are determinative of the questions involved in the action and from which an appellate court can determine whether the findings are supported by the evidence and, in turn, support the conclusions of law reached by the trial court. *Farmers Bank v. Brown Distributors, Inc.*, 307 N.C. 342, 298 S.E.2d 357 (1983).

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law.

Id. at 347, 298 S.E.2d at 360 (quoting *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980)). The trial court's findings have the force of a jury verdict if they are supported by competent evidence even though there may be evidence which would support findings to the contrary, *Williams v. Pilot Life Insurance Company*, 288 N.C. 338, 218 S.E.2d 368 (1975), but where there is conflicting evidence, the failure of the trial court to make specific findings upon which to base its conclusions is reversible error. The conclusions of law drawn by the trial court from its findings of fact are fully reviewable *de novo* by the appellate court. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980).

In this case, the facts found by the trial court do not support its conclusion that plaintiff is entitled to recover damages of $36,000. The trial court found that plaintiff had carried its burden of proof only as to the amount which it claimed was due by reason of "changes mandated by the government officials of Guilford County." The evidence was conflicting with respect to the cost of changes necessitated by the Guilford County inspectors' alleged enforcement of more stringent fire and building code requirements than had been anticipated by the contract; neither party contended for the figure which the trial court ultimately concluded plaintiff was entitled to recover. Yet the trial court's findings did not address the factual dispute with respect to either the necessity or the cost of those changes, rendering impossible appellate review of the reasoning process by which the trial court reached its conclusion as to the damages due plaintiff. Therefore, we must remand this case for a new trial on the issue of what amount, if any, plaintiff is entitled to recover from defendant for "changes mandated by the government officials of Guilford County."

[2] Plaintiff attempts to argue, by purported cross-assignments of error, that the trial court erred in its second finding of fact that the written contract was not properly executed, and in its sixth finding of fact that plaintiff had failed to carry its burden of proof with respect to the amount of damages it was entitled to recover for changes other than those prescribed by government officials. N.C.R. App. P. 10(d)

provides that "an appellee may cross-assign as error any action or omission of the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment . . . from which an appeal has been taken. Neither of the cross-assignments of error brought forward in plaintiff-appellee's brief, if sustained, would provide an alternative basis for upholding the $36,000 judgment in this case. In order to properly present the alleged errors for appellate review, plaintiff should have cross-appealed from the trial court's judgment. See *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E.2d 775 (1984).

We deem it unnecessary to address defendant's remaining assignments of error. The judgment awarding plaintiff damages in the amount of $36,000 is reversed and this case is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

ROWAN COUNTY DSS O/B/O MARY C. BROOKS, PLAINTIFF v. JOHN A. BROOKS, DEFENDANT

No. COA99-540

(Filed 7 December 1999)

1. Child Support, Custody, and Visitation— support modification—deviation from Child Support Guidelines

In a child support modification case, the trial court's order supporting a deviation from the Child Support Guidelines must be reversed and remanded for additional fact-finding because the order: (1) does not identify the presumptive amount of support due under the Guidelines; (2) does not analyze the reasonable needs of the two minor children, other than a finding that plaintiff-mother's child care costs for the minor child Kelly are reasonable; and (3) only concludes that the cause for the deviation is that the deviation is "reasonable and fair."

2. Child Support, Custody, and Visitation— support modification—income tax dependency exemption

In a child support modification case, the trial court did not err by ordering plaintiff-custodial parent to surrender her income tax dependency exemption to defendant-father because: (1) there is no case law from any jurisdiction disallowing a court-ordered waiver of a custodial spouse's dependency exemption because that order was entered in a child support proceeding; (2) sufficient findings of fact support the conclusion that plaintiff receives the earned income tax credit, has no tax liability, and therefore wastes the exemption for the minor child Kelly; and (3) there is no possible basis to determine that defendant's use of that exemption would conflict with the best interests of the child.

Appeal by plaintiff from the 19 February 1999 order of Judge Ted Blanton in Rowan County District Court. Heard in the Court of Appeals 15 November 1999.

Rosalee Hart-Morrison for plaintiff-appellant Rowan County Department of Social Services.

No brief filed for defendant-appellee.

MARTIN, Judge.

Plaintiff appeals from an order of the district court granting her motion to modify a child support order, granting defendant's motion to deviate from the North Carolina Child Support Guidelines, and directing that defendant receive the income tax dependency exemption for the parties' minor child, Kelly Brooks. We affirm in part, reverse in part and remand.

On 15 October 1997, plaintiff and defendant entered into a voluntary support agreement in which defendant agreed to pay $922 per month in child support for their three minor children, Kenneth, Christopher and Kelly. Plaintiff filed a motion to modify child support in Rowan County District Court on 9 November 1998. A hearing was held on the motion on 16 December 1998, but was not transcribed. At the hearing, defendant made a verbal motion to deviate from the North Carolina Child Support Guidelines.

On 19 February 1999, the district court entered an order granting plaintiff's motion to increase the child support amount, granting

defendant's motion to deviate from the Guidelines, and ordering that defendant be awarded the income tax dependency exemption for one of the minor children, Kelly. In its order, the court found changed circumstances in that the child Kenneth had attained majority and was no longer in school. The court made detailed findings as to plaintiff's and defendant's respective incomes and determined that plaintiff's child care costs for Kelly were reasonable. The order referenced three alternative worksheets prepared by the parties, which calculated defendant's support obligation under the Guidelines as either $853.43, $1,022.80, or $1,106.00.

Based on these findings, the court concluded it was "fair and reasonable" to deviate from the Guidelines. The order established defendant's new child support obligation as $1,000 per month to be paid in biweekly increments of $461.53.

Concerning the income tax exemption, the court found that plaintiff received an Earned Income Tax Credit and, therefore, had no income tax liability. The court further found that "based upon the plaintiff's income, the number of income tax exemptions in the home, and the plaintiff's entitlement to the Earned Income Credit, the plaintiff's exemptions for the minor child Kelly is wasted." It was therefore found "fair and reasonable" that the exemption for Kelly be surrendered to defendant.

Plaintiff raises two issues in her brief to this Court. First, she argues the district court made insufficient findings of fact to justify its deviation from the Guidelines. Second, she claims the district court lacked the authority and failed to find sufficient facts to order plaintiff to surrender her income tax dependency exemption to defendant.

[1] We review the district court's deviation from the amount of child support prescribed by the Guidelines for abuse of discretion. *Sain v. Sain*, 134 N.C. App. 460, 465, 517 S.E.2d 921, 926 (1999). To support a deviation, the district court must (1) determine the presumptive child support award under the Guidelines; (2) hold a hearing on the needs of the child and the relative abilities of the parents to meet those needs; (3) find by the greater weight of the evidence that the presumptive award "would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate[,]" N.C. Gen. Stat. § 50-13.4(c); and (4) enter written findings of fact that show the presumptive support amount, the reasonable needs of the

child, the relative abilities of the parents and that the presumptive amount is inadequate, excessive, or otherwise inappropriate or unjust. *Sain*, 135 N.C. App. at 466, 517 S.E.2d at 926. Our review of the order reveals the district court failed to make sufficient findings of fact to support a deviation from the Guidelines. The order does not identify the presumptive amount of support due under the Guidelines. In addition, there is no analysis of the reasonable needs of the two minor children, other than a finding that plaintiff's child care costs for Kelly are reasonable. *See State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998). Finally, the court's finding as to the cause for the deviation is limited to a conclusion that such a deviation is "reasonable and fair." We must therefore reverse this portion of the order and remand for additional fact-finding consistent with *Sain* and *Fisher*.

[2] Under federal tax law, the custodial parent is entitled to the support exemption for a child, even when the non-custodial parent provides more than half of the child's support. 26 U.S.C.A. § 152(e)(1) (West 1999). However, the custodial parent may waive the right to claim the exemption in favor of the non-custodial parent. 26 U.S.C.A. § 152(e)(2).

In *Cohen v. Cohen*, 100 N.C. App. 334, 347-48, 396 S.E.2d 344, 352 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 451 (1991), this Court upheld the trial court's order requiring the custodial parent to waive the right to claim the dependency exemption for income tax purposes. Plaintiff seeks to distinguish *Cohen* as a divorce proceeding involving the division of the marital property. Plaintiff notes that the *Cohen* court relied on case law from other jurisdictions which had treated the dependency exemption as part of the marital estate. She urges that a court sitting in a child support proceeding lacks the authority to dispose of portions of the marital estate.

Following *Cohen*, we hold that the district court acted within its authority in ordering the custodial parent to waive her dependency exemption in favor of the non-custodial parent. Plaintiff's attempt to distinguish *Cohen* from the instant case is unpersuasive. The *Cohen* court was reviewing a child support order and did not define the dependency exemption as marital property. Appellant has failed to point to a decision from any jurisdiction disallowing a court-ordered waiver of a custodial spouse's dependency exemption because that order was entered in a child support proceeding. Moreover, the case most heavily relied upon by plaintiff, *Hughes v. Hughes*, 35 Ohio St.

3d 165, 518 N.E.2d 1213, *cert. denied*, 488 U.S. 846, 102 L. Ed. 2d 97 (1988), was subsequently modified by the Ohio Supreme Court to remove the characterization of the exemption as "marital property" and to allow Ohio courts to treat the exemption as "analogous to or part of child support." *Singer v. Dickinson*, 63 Ohio St. 3d 408, 413, 588 N.E.2d 806, 810 (1992).

We also find that the district court made sufficient findings of fact to support the waiver. The court found that appellant receives the Earned Income Tax Credit, has "no income tax liability" and, therefore, "waste[s]" the exemption for the minor child Kelly. Appellant does not challenge the validity of the court's income tax analysis; rather she avers that the court was required to make findings as to the best interests of the child. We agree that in most cases an explicit finding as to the child's interests is warranted. However, since the district court found that plaintiff derives no monetary benefit from the tax exemption, we see no possible basis to determine that defendant's use of that exemption would conflict with the best interests of the child.

For the reasons discussed above, we affirm the portions of the district court's award granting plaintiff's motion for an increase in child support and ordering that defendant be entitled to the dependency exemption for the minor child Kelly. We reverse the grant of defendant's motion to deviate from the Guidelines and remand for further findings either from the evidence of record or after receipt of additional evidence.

Affirmed in part, reversed in part and remanded.

Judges WYNN and SMITH concur.

JOAN GORE MILLIGAN, INDIVIDUALLY AND FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF REVENUE; MURIEL K. OFFERMAN, IN HER CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE; RICHARD W. RIDDLE, IN HIS CAPACITY AS DIRECTOR OF THE CONTROLLED SUBSTANCE TAX DIVISION OF THE NORTH CAROLINA DEPARTMENT OF REVENUE; THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER; HARLAN E. BOYLES, IN HIS CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA99-14

(Filed 7 December 1999)

Drugs— drug tax—not criminal penalty—procedural safeguards not required

Plaintiff is not entitled to a refund of taxes she paid pursuant to N.C.G.S. § 105-113.111 for marijuana seized in her home by law enforcement officers because the drug tax is not a criminal penalty entitling defendant to the procedural safeguards of the Fifth and Sixth Amendments.

Appeal by plaintiff from judgment filed 23 October 1998 by Judge B. Craig Ellis in Wake County Superior Court. Heard in the Court of Appeals 19 October 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State.

Wyatt Early Harris & Wheeler, L.L.P., by Scott F. Wyatt, William E. Wheeler, and Stanley F. Hammer, for plaintiff-appellant.

GREENE, Judge.

Joan Gore Milligan (Plaintiff), individually and for the benefit and on behalf of those similarly situated, appeals from an Order entering a Rule 12(b)(6) dismissal of the complaint filed against the State of North Carolina; the North Carolina Department of Revenue (Department of Revenue); Muriel K. Offerman, in her capacity as Secretary of the Department of Revenue; Richard W. Riddle, in his capacity as Director of the Controlled Substance Tax Division of the Department of Revenue; the North Carolina Department of State Treasurer; and Harlan E. Boyles, in his capacity as Treasurer of the State of North Carolina (collectively, Defendants).

Plaintiff's complaint requests refunds of taxes paid pursuant to Article 2D, Chapter 105 of the North Carolina General Statutes. N.C.G.S. ch. 105, art. 2D (1995) (amended 1997 & Supp. 1998). These statutes were known as the "North Carolina Controlled Substance Tax" (Drug Tax).[1]

The allegations of the complaint reveal that on 8 December 1995, law enforcement officers seized marijuana from Plaintiff's home and arrested her for possession with intent to manufacture, sell, or deliver that same marijuana, as well as for maintaining both a place and a vehicle to keep controlled substances. On 23 September 1996, pursuant to N.C. Gen. Stat. § 105-113.111, the Department of Revenue assessed a tax liability of $12,252.95 against Plaintiff for taxes, penalties, and interest due on the approximately 2,227 grams of non-tax paid marijuana. Plaintiff paid the tax liability under protest and requested a refund pursuant to section 105-267. The refund was denied and Plaintiff filed her complaint contesting the validity of the tax. In the complaint it is alleged the Drug Tax is a "criminal penalty," "its enforcement must conform to the constitutional safeguards that accompany criminal proceedings," and Plaintiff was not provided any of these constitutional safeguards. It is also alleged that "Defendants have been the most aggressive of the states in enforcing [the] tax on illegal drugs."

The single issue is whether the Drug Tax is a criminal penalty.

Plaintiff argues that because the Drug Tax is a criminal penalty, its assessment and collection must comply with all the procedural safeguards required for criminal proceedings. It follows, Plaintiff contends, the statutes' failure to provide these safeguards requires a holding that the statutes are unconstitutional. We disagree.

A tax may be " 'so punitive either in purpose or effect' as to 'transfor[m] what [may have been] intended as a civil remedy into a criminal penalty.' " *Hudson v. United States*, 522 U.S. 93, 99, 139 L. Ed. 2d 450, 459 (1997) (citations omitted). If treated as a criminal penalty, "its enforcement must conform to the constitutional safeguards that accompany criminal proceedings." *Lynn v. West*, 134 F.3d 582, 593 (4th Cir. 1998), *cert. denied*, — U.S. —, 142 L. Ed. 2d 36 (1998). Thus, the taxpayer would be entitled to "all of the criminal-procedure guarantees of the Fifth and Sixth Amendments." *Id.*

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1. On 1 October 1997 the legislature substituted "Unauthorized Substances Taxes" for "Controlled Substance Tax" in the heading of Article 2D, Chapter 105.

This Court has held that the Drug Tax does not contain the "punitive characteristics" necessary to transform it into a criminal penalty. *State v. Ballenger*, 123 N.C. App. 179, 184, 472 S.E.2d 572, 575 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997); *see also State v. Adams*, 132 N.C. App. 819, 513 S.E.2d 588, *disc. review denied*, 350 N.C. 836, —— S.E.2d —— (1999); *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997).[2]

We acknowledge that our previous opinions on the Drug Tax were criminal proceedings whereas the present case is a civil proceeding. This distinction, however, is not material as the same issue is presented: whether the Drug Tax constitutes a criminal penalty. Because the Drug Tax does not constitute a criminal penalty, the Plaintiff was not entitled to the procedural safeguards required for criminal proceedings. Accordingly, the trial court correctly dismissed the complaint.[3]

Affirmed.

Judges WALKER and HUNTER concur.

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2. We are aware the Fourth Circuit has held the North Carolina Drug Tax to constitute a criminal penalty. *Lynn*, 134 F.3d at 592. We are not, however, bound by that decision. *Adams*, 132 N.C. App. at 820, 513 S.E.2d at 589; *see also State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

3. Plaintiff also argues the Drug Tax is unconstitutional "as applied." The single allegation in support of this claim is that the State has been "aggressive" in enforcing the tax on illegal drugs. This cannot support a claim that the statute is unconstitutional "as applied." This claim can be supported only upon a showing that the State has enforced the statute in some discriminatory or arbitrary manner. *See generally Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994); *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987); *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971). There are no allegations that the State has engaged in any discriminatory or arbitrary practices with Drug Tax enforcement.

PHYLLIS T. MATTHEWS, PLAINTIFF v. FOOD LION, INC., DEFENDANT

No. COA99-200

(Filed 7 December 1999)

1. **Damages and Remedies— slip and fall—instruction on permanency of injuries—sufficiency of evidence**

The trial court did not err in a slip and fall case by instructing the jury as to the permanency of plaintiff's injuries because there was sufficient evidence on both proximate cause and the permanent nature of the injuries from Dr. Ebken's testimony that: (1) plaintiff will continue to experience problems with her back for the rest of her life as a result of the fall at defendant-store; and (2) plaintiff might have experienced some permanent back pain even without the slip and fall due to her prior history of back problems, but that her fall at defendant-store will cause her additional or further back pain.

2. **Evidence— mortuary table—slip and fall—permanent injuries**

Because the Court of Appeals concluded the trial court did not err in a slip and fall case by concluding there was sufficient evidence to establish plaintiff's permanent injuries, the introduction of a mortuary table set out in N.C.G.S. § 8-46 was not error.

Appeal by defendant from judgment entered 19 August 1998 by Judge Orlando Hudson in Lee County Superior Court. Heard in the Court of Appeals 25 October 1999.

Staton, Perkinson, Doster, Post, Silverman, Adcock, & Boone, by Norman C. Post, Jr. and Michelle A. Cumming, for plaintiff-appellee.

Poyner & Spruill, L.L.P., by Eric P. Stevens, for defendant-appellant.

LEWIS, Judge.

This case arises from a slip-and-fall incident that occurred on 31 March 1997. While grocery shopping at one of defendant's stores, plaintiff slipped in a "puddle of liquid" and fell to the floor. She thereafter instituted a negligence action against defendant, claiming pain

and permanent injuries to her back, leg, and foot. From a jury verdict for plaintiff in the amount of $297,600, defendant appeals.

[1] Defendant first argues that the trial court erred by instructing the jury that it could award damages for permanent injury, future pain and suffering, and future medical expenses. In her complaint, plaintiff specifically sought damages for permanent injury. Defendant contends that the evidence did not warrant an instruction as to the permanency of plaintiff's injury. We disagree.

"[T]he trial court must instruct on a claim or defense if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense." *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994). With respect to the evidence sufficient to warrant an instruction as to permanency, our Supreme Court has made the following remarks:

> To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural.

Short v. Chapman, 261 N.C. 674, 682, 136 S.E.2d 40, 46-47 (1964). Thus, a permanency instruction is proper if there is sufficient evidence both as to (1) proximate cause and (2) the permanent nature of any injuries. There was sufficient evidence as to both requirements here.

As to the proximate cause requirement, plaintiff's expert, Dr. Ebken, testified as follows:

> Q: And do you have an opinion based on a reasonable degree of medical certainty as to whether or not Ms. Matthews' fall at Food Lion on March 31, 1997, approximately caused her herniated disk and result of surgery performed by Dr. Shupeck?
>
> A: I do and I think it did.

(Tr. at 288). As to the permanency requirement, Dr. Ebken went on to testify as follows:

Q: Do you have an opinion, Dr. Ebken, based on a reasonable degree of medical certainty, as to whether Ms. Matthews will continue to experience pain in her back, leg, and foot, or continue to experience problems with her back for the rest of her life as a result of injuries she sustained in her fall of March 31, 1997?

A: I do.

[Objection; overruled.]

Q: And what is that opinion, Dr. Ebken?

A: I do think it's more likely than not that she will.

(Tr. at 288-89). The fact that Dr. Ebken used the phrase "more likely than not" instead of "reasonably certain" is of no consequence. *See Pruitt v. Powers*, 128 N.C. App. 585, 589-90, 495 S.E.2d 743, 746, *disc. review denied*, 348 N.C. 284, 502 S.E.2d 848 (1998). Dr. Ebken's testimony then, when read in the light most favorable to plaintiff, did provide sufficient evidence to warrant an instruction as to permanent injury.

Defendant nonetheless points to Dr. Ebken's testimony on cross-examination regarding plaintiff's prior history of back problems unrelated to the slip-and-fall here. Defendant argues this testimony effectively nullified his testimony on direct regarding permanency and proximate cause. On cross-examination, Dr. Ebken testified:

Q: Would you agree with Dr. Shupeck that the weakening of Ms. Matthews' spine from her prior surgery contributed to the disk injury that she suffered?

A: Yes, I would.

Q: Would the weakening of Ms.—would Ms. Matthews' injury from the car accident in 1990 contribute to a history that would lead to the possibility of future back pain for Ms. Matthews?

A: I mean I think it could, probably more likely than not.

Q: More likely than not Ms. Matthews could suffer future back pain as a result of her injuries from 1990 or that would accelerate the possibility of her having future—

A: I think both; combination.

Q: So it would be true, more likely than not, that even if Ms. Matthews had not slipped and fallen at Food Lion in March of 1997, that at some point she would continue to suffer residual back pain as a result of degeneration that everyone experiences over time coupled with the particular problems that she has suffered?

A: I agree.

. . . .

Q: And that type of back pain—future back pain, permanent back pain would not be attributable to a fall at Food Lion?

A: Right.

(Tr. at 293-94). This testimony, when read in the light most favorable to plaintiff, however, did not nullify Dr. Ebken's direct testimony. Taken together, his testimony suggests that plaintiff might have experienced *some* permanent back pain even without the slip-and-fall, but that her fall will cause her *additional or further* back pain. This is to be distinguished from *Caison v. Cliff*, 38 N.C. App. 613, 248 S.E.2d 362 (1978), in which the expert on cross expressly *corrected* himself and stated, "If I answered it to a reasonable medical probability, I was in error. It could, or might be the cause or a contributing cause to the thrombophlebitis." *Id.* at 615, 248 S.E.2d at 363. This Court held that, because the expert corrected himself on cross, his testimony only raised a speculation as to causation. *Id.* at 616, 248 S.E.2d at 364. Here, however, Dr. Ebken neither corrected nor contradicted himself in his cross-examination. Accordingly, defendant's argument is without merit.

[2] Defendant next contests the introduction of the mortuary table set out in N.C. Gen. Stat. § 8-46. His argument, however, is conclusively resolved by our holding as to the first issue on permanency. Mortuary tables may be introduced to show life expectancy only if there is sufficient evidence to establish a permanent injury. *Mitchem v. Sims*, 55 N.C. App. 459, 462, 285 S.E.2d 839, 841 (1982). Because we have held that there was sufficient evidence here to establish plaintiff suffered permanent injuries, the introduction of the mortuary table was not error.

In its remaining assignments of error, defendant contests the introduction of certain testimony by Dr. Ebken. However, defendant

has not argued these assignments in its brief. Accordingly, they are deemed abandoned pursuant to N.C. Appellate Rule 28(b)(5).

No error.

Judges WYNN and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 DECEMBER 1999

A&V CO. OF THE TRIAD, INC. v. PARDUE No. 98-1617	Guilford (98CVS8111) (98CVS8112)	Affirmed
ADAMS v. SANDERS No. 99-35	Johnston (97CVS1637)	Affirmed
CARPENTER v. RYAN No. 99-692	Lincoln (97CVS360)	Reversed & Remanded
DENSON v. RICHMOND COUNTY No. 99-727	Richmond (97CVS146)	Appeal Dismissed
IN RE BETHEA No. 99-212	Buncombe (95J369)	Vacated and Remanded
IN RE LATHAM No. 99-341	Mecklenburg (96J139) (96J140) (96J141)	Affirmed
IN RE LONGWORTH No. 99-466	Surry (97J115B)	Affirmed
IN RE SMITH No. 99-909	Mecklenburg (99J16)	No Error
JONES v. BAXTER INT'L No. 99-105	Ind. Comm. (550113)	Affirmed
JONES v. JACKSON No. 99-17	Duplin (97CVS646)	Affirmed
MARTIN v. PYRANT No. 99-747	Lee (96CVD1105)	Appeal Dismissed
PUGH v. KOURY CORP. No. 98-1599	Guilford (97CVS2380)	Reversed and Remanded
RAY v. NOWELL No. 98-1174	Wake (97CVS04245)	Affirmed
REYNOLDS v. WALTERS No. 99-770	Wake (96CVD912)	Vacated and Remanded
SOOTS v. SOOTS No. 99-711	Brunswick (95CVD912)	Reversed in part and Remanded
STATE v. ALLEN No. 98-1588	Craven (96CRS4739)	No Error

STATE v. BENITEZ No. 99-669	Lenoir (98CRS5620)	No Error; Remanded for correction of clerical error.
STATE v. BOSTICK No. 99-509	Guilford (97CRS79386) (97CRS79388) (98CRS23518) (97CRS81446)	No Error
STATE v. BOYD No. 99-340	Guilford (98CRS51855) (98CRS51857) (98CRS57056) (98CRS23392)	No Error
STATE v. CORRAL No. 98-1604	Henderson (97CRS3592) (97CRS3596) (97CRS5145) (97CRS5146) (97CRS5147) (97CRS5148) (97CRS5153) (97CRS23073) (97CRS23074)	No error as to trial; Remanded for resentencing
STATE v. CRAWFORD No. 98-1641	Polk (96CRS1881) (96CRS1882)	No Error
STATE v. DAVIS No. 98-1364	Pitt (97CRS24218)	No Error
STATE v. FARMER No. 99-616	Wilson (98CRS9505)	No Error
STATE v. GALLMAN No. 99-697	Forsyth (98CRS21168) (98CRS32141)	No Error
STATE v. HAIRSTON No. 98-1569	Pender (97CRS3828) (97CRS3842) (97CRS3843) (97CRS3844)	No Error
STATE v. HOWELL No. 99-936	Alexander (97CRS1697) (97CRS1698) (97CRS1701) (97CRS1702) (97CRS4153) (97CRS4154) (97CRS4155)	No Error

STATE v. HUDSON No. 99-954	Beaufort (96CRS5932) (97CRS1491)	No Error
STATE v. HUDSON No. 99-45	Buncombe (96CRS68282)	No Error
STATE v. LACY No. 99-495	Martin (98CRS985)	No Error
STATE v. LASSITER No. 98-1574	Hertford (98CRS2266) (98CRS2267) (98CRS2268)	No Error
STATE v. LEE No. 99-752	Rutherford (97CRS5952)	No Error
STATE v. MILLINGTON No. 99-633	Sampson (97CRS8299) (97CRS8300) (97CRS8301)	No Error
STATE v. MONTGOMERY No. 98-1497	Mecklenburg (97CRS5420)	No Error
STATE v. NANCE No. 99-544	Mecklenburg (98CRS18879)	No Error
STATE v. OCHOA No. 98-1566	Onslow (97CRS9249)	Affirmed as to appeal, Remanded for trial
STATE v. PARKS No. 99-726	Wayne (98CRS1309)	No Error
STATE v. RHODES No. 99-460	Durham (97CRS15968)	No Error
STATE v. ROBINSON No. 99-753	Forsyth (98CRS18030)	No Error
STATE v. ROSEBORO No. 99-594	Forsyth (97CRS42330)	No Error
STATE v. STEPHENS No. 98-1295	Mecklenburg (97CRS35521) (97CRS35522)	No Error
STATE v. WADSWORTH No. 99-719	Henderson (98CRS3081)	Appeal Dismissed
STATE v. WALKER No. 99-735	Buncombe (97CRS65534) (98CRS1744) (98CRS2981) (98CRS2982)	No Error

STATE v. WILLIAMS No. 99-605	Montgomery (98CRS61) (98CRS62) (98CRS63)	New Trial
THOMAS v. MORRIS No. 99-16	Forsyth (98CVS2497)	Affirmed
TYSINGER v. BILLINGS FREIGHT SYS. No. 98-1512	Ind. Comm. (153695)	Affirmed
U.S. AUTOWASH CORP. v. CAROLINA PRIDE CARWASH, INC. No. 98-1236	Wake (98CVS867)	Affirmed

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TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

authority that defendant allegedly exceeded, the procedure defendant violated, or the errors of law committed; stated three errors in one assignment; and failed to provide clear and specific record or transcript references relating to each alleged error. N.C. R. App. P. 10(c). **Bowen v. N.C. Dep't of Health and Human Servs., 122.**

Law of the case—appellate decision—vicarious liability of hospital—voluntary dismissal of doctor—new legal issue—second summary judgment motion—The trial court did not err in a negligence case by considering and granting defendant hospital's "new" motion for summary judgment filed after the Court of Appeals' prior unpublished opinion concerning defendant's vicarious liability for its alleged agent, Dr. Byrd, because: (1) the entry of a voluntary dismissal with prejudice raises an entirely new legal issue; (2) the Court of Appeals did not address the effect of the voluntary dismissal in their unpublished decision, meaning that decision did not become the "law of the case" on the issue now before the Court; and (3) defendant's "new" motion for summary judgment was based on an event, the filing of a voluntary dismissal, which occurred after the trial court granted defendant's first motion for summary judgment. **Wrenn v. Maria Parham Hosp., Inc., 672.**

Mootness—amended statute—An appeal from a DWI vehicle seizure statute which has been amended was not mooted because a decision regarding the constitutionality of the statute also impacts other vehicle owners whose cars have been seized and because the underlying premise of the statute remains the same. **State v. Chisholm, 578.**

Mootness-election statutes—dual candidacies—Even though the 1998 election statutes N.C.G.S. §§ 163-323 and 163-106 have been rewritten to disallow superior court candidates from running for other offices during the same election and the same fact scenario will not be repeated, the Court of Appeals denied defendants' motion to dismiss plaintiff's appeal as moot because if the statutes in question were in violation of the North Carolina Constitution, then defendant-judges would be holding office unlawfully. **Comer v. Ammons, 531.**

Mootness—underlying negligence claim dismissed—Plaintiffs' appeal of a directed verdict in their wrongful death action was dismissed as moot where the trial court granted a directed verdict for defendants on most of plaintiffs' claims arising from the death of their stillborn child but left open the possibility of a recovery of damages for funeral expenses and nominal damages, keeping alive the underlying issue of negligence; plaintiffs voluntarily dismissed with prejudice all claims not previously dismissed; and plaintiffs then appealed the directed verdict. Claims for particular kinds of damage cannot exist without an underlying claim of negligence or fault and plaintiffs' voluntary dismissal with prejudice renders this appeal moot. Plaintiffs abandoned their appeal from the directed verdict by failing to argue it on appeal. **Bailey v. Gitt, 119.**

Preservation of issues—judgments and orders from which appeal taken—Plaintiffs' request for appellate review of orders entered prior to 24 June 1997 under N.C.G.S. § 1-278 was immediately defeated by their failure to object to the orders. Even construing plaintiffs' notice of appeal liberally, it does not give rise to any inference, reasonable or otherwise, of an intent to appeal orders issued other than the 24 June orders and judgments. **Gaunt v. Pittaway, 442.**

CHILD ABUSE AND NEGLECT—Continued

the removal of all other children from the home, the trial court has discretion in determining the weight to be given such evidence, and the environment in which the two juveniles live has been closely monitored by DSS. **In re Ellis, 338.**

Death of sibling—neglect—sufficiency of findings—In a child neglect action, findings of fact taken in their entirety were sufficient to support the conclusion that the child (Tamara) was neglected where the court found that the respondent parents intended to live in the home of the maternal grandparents where Tamara's sister, Katelynn, died; that her father had been convicted of causing the death of Katelynn; that although her mother had been advised that the death of Katelynn was by non-accidental means, she continued to support the claims of her husband (Tamara's father) that Katelynn's death was caused by being shaken as he ran with her to get help; that the parents were not cooperative with the social worker who was investigating the matter; that the respondent parents have neither expressed nor exhibited any concern for the future safety of Tamara in their home; and that the father extended most of the care for the juvenile during visits. The court carefully weighed and assessed the evidence and concluded that Tamara, then less than three months of age, would be at risk if allowed to reside with her parents in their home. **In re McLean, 387.**

Dispositional order—disassociation of mother from father—There was prejudicial error in a juvenile disposition order where the court made statements in open court (although not in the written order) about the mother's need to disassociate herself from the father where there were no findings that reasonable efforts to reunite the family would be futile, the statements made by the court could have left little doubt in the parties' minds that the separation of the parents was a pre-condition to the mother having a realistic chance to regain custody, and the integrity of the reasonable efforts process was further undermined by the statement of the trial court that it was only ordering reasonable efforts because it was required to do so. **In re McLean, 387.**

Dispositional order—oral comments by judge—disapproved—Statements by the trial court in a juvenile neglect action that referred to the family as ridiculous and that characterized the mother as abnormal were not approved even though they were made following the trial and the oral entry of adjudicatory and dispositional orders and there was no evidence of demonstrable prejudice during the trial. **In re McLean, 387.**

Retention of jurisdiction—The trial court erred in a juvenile neglect action by attempting to retain exclusive jurisdiction over future hearings. The legislature has not acted to grant authority to the trial court to retain jurisdiction in a domestic relations case, and, even if the court had had jurisdiction here, this portion of the dispositional order would have been vacated so that the appearance of neutrality could be preserved. **In re McLean, 387.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody sought by grandparent—constitutionally protected parental interest—In a case involving an attempt by a grandmother and her husband to gain custody of her daughter's minor child, the trial court did not err in granting defendant-daughter's motion to dismiss because: (1) plaintiff-grandmother does not allege conduct so egregious as to be inconsistent with defendant's parental

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

duties and responsibilities; (2) a higher standard of living is not relevant to the issue of defendant's constitutionally protected parental interest; and (3) plaintiffs' concerns as to defendant's decisions regarding the child's upbringing are squarely within parental rights and responsibilities. **Penland v. Harris, 359.**

Joint custody agreement—consent judgment—terms not followed—vacated and remanded—The trial court's order denying defendant-mother's motion to vacate the parties' joint custody agreement is reversed and remanded because although there is no legal requirement on the day the consent judgment is signed and entered by the trial court that the parties must acknowledge their continuing consent to the agreement or that the trial court must review the terms of the agreement with the parties, both actions were required in this case since the agreement specifically provided that both would occur. **Tevepaugh v. Tevepaugh, 489.**

Support—modification—college fund—findings not supported by evidence—In a case involving modification of child support, the trial court's findings of fact that defendant-father testified the parties agreed the excess payments would be invested in a college fund is not supported by the evidence. **Brinkley v. Brinkley, 608.**

Support—modification—deviation from Child Support Guidelines—In a child support modification case, the trial court's order supporting a deviation from the Child Support Guidelines must be reversed and remanded for additional fact-finding because the order: (1) does not identify the presumptive amount of support due under the Guidelines; (2) does not analyze the reasonable needs of the two minor children; and (3) only concludes that the cause for the deviation is that the deviation is "reasonable and fair." **Rowan County Dep't of Soc. Servs. v. Brooks, 776.**

Support—modification—improper credit—obligations owed between spouses—college fund—Although the trial court properly modified defendant-father's child support to $927.00 each month pursuant to the child support guidelines, it improperly gave him a credit for the amount he paid above his 1989 court-ordered child support obligation and for the amount plaintiff-mother owed defendant under the parties' equitable distribution judgment. **Brinkley v. Brinkley, 608.**

Support—modification—income tax dependency exemption—In a child support modification case, the trial court did not err by ordering plaintiff-custodial parent to surrender her income tax dependency exemption to defendant-father. **Rowan County Dep't of Soc. Servs. v. Brooks, 776.**

URESA—jurisdiction—cease and desist order—An order to cease and desist attempts to enforce a New York child support order and a contempt order for violating the cease and desist order, both of which arose from disputed paternity, were void for lack of subject matter jurisdiction where the trial court had also dismissed the URESA action. Full faith and credit must be accorded the New York order unless its enforcement is within the discretion of the New York courts, but the New York courts do not have discretion to annul or modify prior paternity orders. Moreover, the father argued none of the exceptions from *Pieper v. Pieper*, 108 N.C. App. 722. The case ended and jurisdiction terminated when the trial court dismissed the URESA action. **State of New York v. Paugh, 434.**

CRIMINAL LAW—Continued

there is no evidence defendant was hindered or deprived of his ability to defend one or more of the charges. **State v. Owens, 456.**

Jury request for evidence—trial court exercised discretion and did not abuse discretion—In a first-degree murder case, the trial court did not abuse its discretion or fail to exercise its discretion in its response to the jurors' request to review certain evidence. **State v. Perez, 543.**

Motion to join granted—no error—The trial court did not abuse its discretion in a second-degree murder case by allowing the State's motion to join the two defendants for trial. **State v. Lundy, 13.**

Plea agreement—spirit of agreement violated—charge used derivatively—The trial court's order concerning a drunk driving case is vacated and remanded because although the State did not directly use the felonious impaired driving charge as the underlying felony to prove murder, the State violated the spirit of its plea agreement with defendant when it used the charge derivatively. **State v. Blackwell, 729.**

Prosecutorial delay of calendaring—one instance not egregious violation—The trial court did not err in failing to dismiss the charges against defendant in a felony breaking or entering case under N.C.G.S. § 15A-954(a)(4) based on the theory that the prosecutor delayed trying the case once after it had been calendared because an isolated allegation of prosecutorial delay does not rise to the level of repeated egregious violations. **State v. Roberts, 690.**

Prosecutor's closing argument—defendant's appearance and demeanor—The trial court did not err in a murder prosecution by allowing the prosecutor to argue in closing that defendant had big hands, was left-handed, was strong, and failed to react with tears for her murdered grandmother. All of the prosecutor's remarks were related to matters observable in the courtroom and, despite defendant's contention, calling attention to defendant's demeanor and appearance did not infringe upon her right not to testify because they were not directed at her failure to take the stand. **State v. Smith, 649.**

Prosecutor's closing argument—four to five minute period of silence—The trial court did not err in failing to intervene ex mero motu in a first-degree murder case when the prosecutor observed a four to five minute period of silence during her closing argument. **State v. Perez, 543.**

Requested jury instructions denied—verbatim not required—jury could reasonably infer—The trial court did not err in a second-degree murder case by failing to give defendant Evans' requested jury instruction regarding "mere presence" as it relates to acting in concert because the trial court is not required to give the requested instruction verbatim and the jury could reasonably infer from the trial court's instructions that more than "mere presence" was necessary. **State v. Lundy, 13.**

DAMAGES AND REMEDIES

Automobile accident—motion to set aside the verdict—inadequate damages—jury determines if medical treatment is reasonably necessary—The trial court did not err in a negligence case arising out of an automobile accident by denying plaintiff's motion to set aside the verdict under N.C.G.S. § 1A-1, Rule

EMPLOYER AND EMPLOYEE—Continued

employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court erred in granting summary judgment for defendant Camp on the breach of duty of loyalty claim because there is a genuine issue of material fact as to whether Camp went beyond merely preparing to compete. **Dalton v. Camp, 32.**

Breach of duty of loyalty—summary judgment proper—merely preparing to compete—In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment for defendant Menius on the breach of duty of loyalty claim because her activities while employed by plaintiff were mere preparations to compete. **Dalton v. Camp, 32.**

Covenant not to compete—applicable to current distributor—A covenant not to compete was applicable to a current distributor even though the agreement contained language referring to the period after termination or resignation. Market America certainly intended to prohibit competition by those still working as distributors for the company. **Market America, Inc. v. Christman-Orth, 143.**

Covenant not to compete—independent distributor—A covenant not to compete was applicable to an independent distributor. **Market America, Inc. v. Christman-Orth, 143.**

Covenant not to compete—legitimate business purpose—A non-competition clause was valid where defendant argued that there was no legitimate business purpose for restricting distributors from participating in a business venture with a "similar matrix marketing system," but Market America's interest in protecting the integrity and viability of the business is legitimate. Moreover, the covenant expired six months from the date of termination or resignation. **Market America, Inc. v. Christman-Orth, 143.**

Inherently dangerous activity—concrete finishing work—general contractor's duty to subcontractor's employee—In a negligence case where a subcontractor's construction foreman was doing concrete finishing work when he sustained fatal head injuries as a result of walking backwards and falling from an opening in the second floor to the first floor, the trial court did not err in refusing to find as a matter of law that concrete finishing is not inherently dangerous. **Lane v. R.N. Rouse & Co., 494.**

Non-competition clause—valid—Market America's covenant not to compete was not unreasonable as a matter of law where it contained no fixed geographic restriction and it was likely that it was intended to reach the entire United States, but the covenant was operative for only six months and forbade participation only in those companies using a similar matrix marketing structure or handling similar products to that of Market America. **Market America, Inc v. Christman-Orth, 143.**

Wrongful discharge—employee's refusal to testify—no public policy violation—matters concerning job duties—The trial court did not err in granting defendant-employer's summary judgment motion on plaintiff-bookkeeper's claim that she was wrongfully discharged in violation of public policy for refusing to testify in defendant's dispute with a deceased patient's spouse over an unpaid account because an employer may reasonably expect that its employees will vol-

EMPLOYER AND EMPLOYEE—Continued

untarily appear on its behalf to testify about matters associated with their job duties. **Rush v. Living Centers-Southeast, Inc., 509.**

Wrongful discharge—employee's refusal to testify—no risk of perjured testimony—no public policy violation—The trial court did not err in granting defendant-employer's summary judgment motion on plaintiff-bookkeeper's claim that she was wrongfully discharged for refusing to testify in defendant's dispute with a deceased patient's spouse over an unpaid account, even in light of her contention that her participation might have caused her to perjure herself. **Rush v. Living Centers-Southeast, Inc., 509.**

Wrongful discharge—nurse's advice—against public policy—Taking the allegations of plaintiff-nurse's complaint alleging wrongful discharge from employment by defendant based on her advising a patient's family who solicited her opinion that they should consider changing physicians as true, the trial court erred in granting defendant's Rule 12(b)(6) motion to dismiss because plaintiff's termination was motivated by a reason or purpose that is against public policy. N.C.G.S. § 90-171.20(7). **Deerman v. Beverly California Corp., 1.**

ESTATE ADMINISTRATION

Payment of claims—funds not available—In a foreclosure proceeding, the Public Administrator is not required to raise enough funds to pay all of the claims against the property because even though N.C.G.S. § 28A-19-6 governs the order in which claims against the estate must be paid, nowhere does it dictate that all claims must be paid in full regardless of whether funds exist to do so. **City of Durham v. Hicks, 699.**

Pending estate administration—foreclosure sale—administrator's advance of additional funds—Even though N.C.G.S. § 105-374 only requires the County of Durham to raise enough money from the foreclosure sale of the pertinent property to cover the taxes and the property is still in the midst of a pending estate administration, the Public Administrator is only required to use funds from the estate itself under N.C.G.S. § 105-383 and N.C.G.S. § 28A-12-5 in advancing the costs of the estate and his decision to advance funds beyond the amount that is available in an estate upon the reliance that real property will be sold to cover those costs is an unprotected risk. **City of Durham v. Hicks, 699.**

Pending estate administration—tax lien on estate property—precedence over payment of estate expenses—The trial court erred by granting summary judgment in favor of the Public Administrator so he could continue to administer the estate and attempt to sell the pertinent property despite the County of Durham's attempt to foreclose on the property tax lien pursuant to N.C.G.S. § 105-379(a). **City of Durham v. Hicks, 699.**

EVIDENCE

Admission of party opponent—admissible—The trial court did not err in a murder prosecution by admitting defendant's statement to police, which contained remarks defendant attributed to the victim. Defendant's statement was an admission of a party opponent and the remarks by the victim were not spoken or offered to prove the truth of the matter asserted. **State v. Smith, 649.**

EVIDENCE—Continued

Expert testimony—special knowledge and expertise—procedures forming basis of conclusions—not new scientific methods—The trial court did not err in a first-degree burglary and statutory rape case by admitting the expert testimony of three witnesses concerning the evidence gathered from the victim's panties because: (1) all three testified regarding their related study and experience that gave them special knowledge and expertise to qualify them as an expert witness; (2) all three thoroughly explained to the jury the procedures used in their analysis forming the basis of their conclusions; and (3) none of the scientific methods employed by the three experts were new methods where the reliability of the method was at issue. **State v. Bowers, 682.**

Expert testimony—victim's credibility—The trial court did not err in a prosecution for first-degree statutory rape by allowing an expert witness to testify that the victim had been "guarded but straight forward" and "honest." The witness's opinion was that the victim suffered from post traumatic stress syndrome disorder and her testimony went to the reliability of her diagnosis, not to the victim's credibility. N.C.G.S. § 8C-1, Rule 702. **State v. Marine, 279.**

Failure to timely object—waiver—The failure of a statutory rape defendant to make a timely new objection waived his assignment of error where defendant initially objected when the witness began her answer by saying "Either . . .," the court allowed the testimony "If she knows," the witness gave her "Either . . ." answer, and defendant made no further objection, did not move to strike, and did not request an instruction. **State v. Marine, 279.**

Guilt of third party—relevance—The trial court did not err in a prosecution for providing drugs to an inmate by excluding cross-examination questions by defendant which defendant contends would have shown that the marijuana could have come from someone else. Defendant's proffered cross-examination only sought to raise the inference that some third party might have smuggled the marijuana and did not point to any specific person. **State v. Mitchell, 617.**

Hearsay—business records exception—descriptions in police report—first-hand knowledge—The trial court did not err in a four-car automobile collision case by admitting into evidence descriptions in the police report relating to vehicle #3 even though that vehicle fled the scene since the business records hearsay exception under Rule 803(6) expressly provides for the use of information of those having first-hand knowledge of the incident in question. **Nunnery v. Baucom, 556.**

Hearsay—corroboration of victim—The trial court in a first-degree statutory rape prosecution properly admitted a detective's testimony that another child had told him of defendant touching children in the park. The testimony was specifically offered to corroborate the testimony of the child, the jury was instructed to that effect, and the substance of the detective's testimony was generally consistent with the testimony of the child. **State v. Marine, 279.**

Hearsay—directive statement—The trial court did not err in a prosecution for providing drugs to an inmate by admitting testimony that defendant's boyfriend, an inmate, said "hurry" or "leave" to her as she was departing. Directives are not hearsay when they are simply offered to prove that the directive was made, not to prove the truth of any matter asserted. **State v. Mitchell, 617.**

EVIDENCE—Continued

Hearsay—harmless error—The admission of hearsay testimony in a caveat proceeding was harmless error where the propounder testified that hospital personnel had told him that one of the caveators had removed testator's power of attorney from the hospital without consent. The evidence merely indicated that the caveator was concerned about the medical care choices being made by propounder and caveators have not show that a different result would have occurred had the evidence been excluded. **In re Estate of Ferguson, 102.**

Hearsay—medical diagnosis or treatment exception—Hearsay statements may be admissible under N.C.G.S. § 8C-1, Rule 803(4) if those statements are made for the purpose of medical diagnosis or treatment. Factors properly considered to determine whether statements have been made for the purpose of medical diagnosis or treatment include whether the examination was requested by persons involved in the prosecution of the case, the proximity of the examination to the victim's initial diagnosis, whether the victim received a diagnosis or treatment as a result of the examination, and the proximity of the examination to the trial date. The key factor is whether the statements resulted in the child receiving medical treatment and/or diagnosis. **State v. Crumbley, 59.**

Hearsay—medical diagnosis or treatment exception—child sexual abuse victim—statements to social worker—The statements of a child sexual abuse victim to social workers were admissible as hearsay statements made for the purpose of medical diagnosis or treatment. **State v. Crumbley, 59.**

Hearsay—medical diagnosis or treatment exception—child sexual abuse victim—statements to social worker—Statements of a child sexual abuse victim to a social worker (Melendez) were admissible as hearsay statements made for the purpose of medical diagnosis and treatment where Melendez did not interview the victim at the request of anyone involved with the prosecution of defendant but as part of her duties as a social worker; the interview took place approximately twenty months prior to trial in close proximity to the child's initial diagnosis and treatment; and the child received medical diagnosis and treatment as a result of Melendez's interviews. **State v. Crumbley, 59.**

Hearsay—not offered to prove the truth of the matter asserted—There was no error in a murder prosecution where most of the statements objected to by defendant as hearsay explained subsequent conduct or corroborated prior testimony and so were not offered to prove the truth of the matter asserted. Additionally, the trial court gave a limiting instruction. **State v. Smith, 649.**

Hearsay—other testimony—*no prejudice*—Any error was harmless in a prosecution for first-degree rape where defendant contended that testimony tending to show that he was sexually promiscuous was double hearsay, but the jury heard ample other evidence suggesting his promiscuity. **State v. Marine, 279.**

Impeachment—State's own witnesses—prior inconsistent statements—The trial court did not err in an assault with a deadly weapon inflicting serious injury case by allowing the State to impeach its own witnesses with their prior inconsistent statements because the witnesses admitted giving the prior statements, and witnesses can be impeached concerning inconsistencies in their prior statements. **State v. Wilson, 504.**

Impeachment—vehicle to introduce inadmissible record—The trial court did not err in an automobile accident case by excluding a physician's testimony

EVIDENCE—Continued

relating to an excluded medical record. The doctor testified that he had no personal knowledge and was relying solely on the record; impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible. **Sitton v. Cole, 625.**

In-court identification—not fruit of the poisonous tree—Since the Court of Appeals already concluded defendant's photographic lineup in a felony breaking or entering case was not impermissibly suggestive, it also follows that the trial court did not err when it denied his motion to suppress the in-court identification evidence as the fruit of the poisonous tree. **State v. Roberts, 690.**

Inculpatory statement—newspaper publication—no prejudice—There was no prejudice in a murder prosecution where the court held a voir dire concerning a statement by defendant to an aunt that she had heard that this was a mercy killing, the court decided to allow the statement, and a local newspaper published the details of the hearing before the statement was admitted. **State v. Smith, 649.**

Leading questions—directing witness's attention—The trial court did not abuse its discretion in a murder prosecution by allowing the district attorney to ask leading questions where the case was long and complicated and the questions either were "bridges" or summaries of testimony or were directing the attention of the witness to earlier statements. **State v. Smith, 649.**

Letter stating killed before—threat to do it again—not predisposition to violence—relevancy—admission—intent to kill—The trial court did not err in a first-degree murder case by admitting into evidence portions of a letter which defendant wrote to his girlfriend from jail several months after the victim was killed, stating he would hunt her estranged husband down and really kill somebody since he did it once and it did not take too much to have one more under his belt, because the statements in defendant's letter were relevant to an admission with respect to the victim's death and also to show defendant's deliberate intent to kill. **State v. Perez, 543.**

Medical malpractice—plaintiff's medical records—alcohol abuse—The trial court did not err in a medical malpractice action by allowing evidence of plaintiff's medical records indicating a possibility of a history of alcohol abuse to explain defendants' consideration of alcohol withdrawal as a potential cause of her confusion or hallucinations after surgery. **Marley v. Graper, 423.**

Medical record—probative value outweighed by prejudice—The trial court properly exercised its discretion in an automobile accident case where plaintiff testified that she had never experienced any problems with her thoracic spine, defendant sought to introduce a prior medical record which referred to thoracic pain, and the court excluded the record under Rule 403. The record was remote in time, plaintiff's physician at that time could not specify who had made the vague notation, and the physician did not have personal knowledge of the statement. **Sitton v. Cole, 625.**

Mortuary table—slip and fall—permanent injuries—Because the Court of Appeals concluded the trial court did not err in a slip and fall case by concluding there was sufficient evidence to establish plaintiff's permanent injuries, the introduction of a mortuary table set out in N.C.G.S. § 8-46 was not error. **Matthews v. Food Lion, Inc., 784.**

EVIDENCE—Continued

Motion in limine—habitual impaired driving—driving while license revoked—operation of vehicle—The trial court did not err by allowing the State's motion in limine to prohibit the introduction of evidence by defendant that the vehicle he was alleged to have been operating was not operable in a case involving habitual impaired driving and driving while license revoked because the State's evidence was sufficient to show defendant operated the vehicle in the presence of a police officer. **State v. Clapp, 52.**

OSHA citations after accident—relevancy—negligence, gross negligence, punitive damages—In a negligence case where decedent-construction foreman was doing concrete finishing work when he sustained fatal head injuries as a result of walking backwards and falling from an opening in the second floor to the first floor, the trial court did not err in admitting evidence of OSHA citations against defendant-company after the accident. **Lane v. R.N. Rouse & Co., 494.**

Other offenses—murder—robbery with a firearm—The trial court did not err in a double murder case by allowing testimony of defendant's other crimes of robbery with a firearm pursuant to Rule 404(b) because the evidence was relevant for some purpose other than to show defendant's propensity to commit this type of crime, and the trial court concluded under the Rule 403 balancing test that the evidence was more probative than prejudicial. **State v. Leggett, 168.**

Other offenses—uncharged instances of sexual abuse—common plan or scheme—The trial court did not err in admitting the testimony of a fourth sister in a case involving defendant's numerous sex offenses against his girlfriend's three minor daughters because the evidence of uncharged instances of sexual abuse by defendant involving the fourth sister when she was a minor was relevant under Rule 404(b) to show a common plan or scheme. **State v. Owens, 456.**

Out-of-court identification—photographic lineup not unnecessarily suggestive—The trial court did not err in a felony breaking or entering case when it denied defendant's motion to suppress the out-of-court identification evidence because the photographic lineup was not impermissibly suggestive. **State v. Roberts, 690.**

Past recollection recorded—properly authenticated—statement within reasonable time—accurate when given—The trial court did not err in a double murder case when it allowed the past recorded recollection of a State's witness, defendant's cellmate, to be read to the jury because it was properly authenticated under N.C.G.S. § 8C-1, Rule 803(5). **State v. Leggett, 168.**

Photographs—murder victim—The trial court did not abuse its discretion in a murder prosecution by admitting two photographs of the victim's tongue after it had been removed from her head and sliced in half. The photographs were relevant to the cause of death and the probative value outweighed any prejudicial effect. **State v. Smith, 649.**

Police report and testimony relating to police report—waiver of objections—The trial court did not err in a four-car automobile collision case by admitting into evidence certain notations contained in the police report and the testimony of a sergeant relating to the report because: (1) defendants' objection at the time the report was introduced into evidence was limited; and (2) having once allowed the evidence to come in without objection, defendants waived their objections to the evidence. **Nunnery v. Baucom, 556.**

EVIDENCE—Continued

Prior bad act—first-degree rape—sexual assault—not sufficiently similar—only shows propensity—The trial court erred in a first-degree rape and non-felonious breaking or entering case by allowing evidence under Rule 404(b) of an alleged prior sexual assault because the facts of the two incidents are not sufficiently similar and the evidence only shows the propensity of defendant to commit sexual acts against young female children. **State v. White, 349.**

Prior sexual behavior of victim—child's sexual acts—The trial court did not err in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian by excluding testimony relating an instance of sexual behavior by the victim. **State v. Trogden, 85.**

Regular course of business—officer's dispatch time—There was no error in a murder prosecution where defendant objected to an officer's testimony that the time on his dispatch computer was accurate. Although the State did not quite lay a proper foundation, the error was harmless; furthermore, defendant offered the same information during the officer's cross-examination. **State v. Smith, 649.**

Sexual abuse of child—expert testimony—admissible—The trial court did not err in a prosecution for first-degree statutory rape, first-degree statutory sexual offense, and indecent liberties by admitting testimony from a pediatrician and the Director of the Child Sexual Abuse Team at Wake Medical Center that the victim had been sexually abused where the doctor based her opinions on her own exam of the victim, extensive personal experience examining children who have been sexually abused, knowledge of child sexual abuse studies, and a colleague's notes from an interview with the child. She did not base her opinions on speculation or conjecture, but on adequate data. N.C.G.S. § 8C-1, Rule 702. **State v. Crumbley, 59.**

Testimony in violation of motion in limine—curative instruction—no prejudice—There was no prejudicial error in a statutory rape prosecution where defendant contended that certain testimony violated his motion in limine prohibiting testimony concerning an investigation of him for use or distribution of controlled substances, but the trial court gave a curative instruction and the jury heard of defendant's suspected distribution of drugs from a defense witness. **State v. Marine, 279.**

Time line—accuracy—There was no prejudice in a murder prosecution where defendant argued that a time line used by the prosecution was inaccurate but the facts listed on the time line were verified by each witness as that witness testified and defendant failed to show that "inaccuracies" were in any way prejudicial. Small changes in the way a phrase was written as compared to the way the witness spoke the phrase did not alter the substance. **State v. Smith, 649.**

Value of church's property—video not allowed—irrelevancy to trial issues—In a case involving defendant-church's failure to repay its loan and plaintiff's attempt to gain possession of the church's real estate holdings securing the loan, the trial court did not abuse its discretion in refusing to allow video evidence that could have been used to establish the value of defendant-church's property in an attempt to establish a claim to construe the conveyance of the church property as an equitable mortgage because the trial court correctly considered the evidence in light of the issues presented at trial, and defendant did not previously attempt to advance the theory of equitable mortgage as a basis for

MEDICAL MALPRACTICE—Continued

Mr. Osburn's back surgery where the record failed to reflect evidence raising a material fact as to the existence of a causal relationship. **Osburn v. Danek Medical, Inc., 234.**

Violation of FDA regulations—no private cause of action—The trial court did not err by granting summary judgment for some of the defendants on plaintiffs' claims for violation of FDA requirements in an action arising from back surgery. *Medtronic v. Lohr*, 518 U.S. 470, involved the question of whether the federal statute pre-empted common-law state claims and did not give rise to an implied private state cause of action for violation of FDA regulations or requirements. **Osburn v. Danek Medical, Inc., 234.**

Witnesses—medical expert—standard of practice in similar communities—There was no error in a medical malpractice case from Greensboro where an expert did not testify that he was familiar with the standard of care for Greensboro, but the import of his testimony was that the defendant met the highest standard of care found anywhere in the United States. This testimony was sufficient to meet the requirements of N.C.G.S. § 90-21.12. **Marley v. Graper, 423.**

MORTGAGES

Anti-deficiency statute—not applicable—The anti-deficiency statute, N.C.G.S.§ 45-21.38, was not applicable to an erroneously canceled note because that statute applies only to purchase-money mortgages and the record here does not reflect that the loan was used to acquire defendants' real property. Moreover, that statute only applies where the purchase-money mortgagee is the seller. **G.E. Capital Mortgage Services, Inc. v. Neely, 187.**

Deed of trust—erroneously recorded cancellation—reinstated—The trial court did not err by reinstating a deed of trust where the deed of trust was erroneously canceled and a Notice of Satisfaction was filed with the register of deeds. No third party relied on the mistakenly recorded cancellation, defendants admitted that they had never paid off the underlying debt, and plaintiff realized its error and took steps to correct it in a timely fashion. The equities in the case warrant that the deed of trust be reinstated. **G.E. Capital Mortgage Services, Inc. v. Neely, 187.**

Erroneous cancellation of deed of trust—no issues of fact—There were no issues of fact in an action seeking a declaratory judgment that an erroneously canceled note and deed of trust was valid and enforceable where defendants argued that there was an issue as to whether the note was paid, given that it was marked "Paid and Satisfied," but defendants admitted that the note was never paid and that plaintiff had canceled the debt in error. Defendants also raised a factual issue as to whether plaintiff was a "holder" of the note, but plaintiff did not dispute that it did not have possession of the note after sending it to defendants. The only issues were the purely legal ones of the effect of the note being marked "Paid and Satisfied," and the effect of plaintiff's lack of possession on its ability to enforce the note. **G.E. Capital Mortgage Services, Inc. v. Neely, 187.**

Judgment notwithstanding the verdict—sufficient evidence to support jury verdict—asserting new theory on appeal improper—In a case involving defendant-church's failure to repay its loan and plaintiff's attempt to gain

MORTGAGES—Continued

possession of the church's real estate holdings securing the loan, the trial court did not err in denying defendant-church's motion for judgment notwithstanding the verdict because the record indicates: (1) the trial court correctly considered the evidence and found there was sufficient evidence to support the jury verdict; and (2) defendant is improperly asking the Court of Appeals to reconsider the evidence on the theory of equitable mortgage, which defendant at no time preceding or during the trial attempted to raise. **Tomika Inv., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc., 476.**

Power of sale—real property—equitable relief beyond scope of review—In an action for foreclosure under power of sale of plaintiffs' real property based on a loan taken out by plaintiff-wife's father purportedly signed by plaintiffs and the father without their knowledge, the trial court did not err in declining to address unnamed defendant Bank's argument for equitable relief because that action would have exceeded the trial court's permissible scope of review. N.C.G.S. § 45-21.16(d). **Espinosa v. Martin, 305.**

Power of sale—real property—no valid debt—no ratification—In an action for foreclosure under power of sale of plaintiffs' real property based on a loan taken out by plaintiff-wife's father purportedly signed by plaintiffs and the father, the trial court did not err in dismissing the foreclosure proceeding based on its determination that there was no valid debt owed by plaintiffs to the bank and plaintiffs did not ratify the loan. **Espinosa v. Martin, 305.**

Waiver of right to accelerate—acceptance of late payments—failure to assert intent to require prompt payment—The trial court did not err in a foreclosure proceeding by concluding defendants were not entitled to a directed verdict on the issue of waiver because plaintiff presented substantial evidence that defendants repeatedly accepted late payments for the pertinent real property without asserting their intent to hold plaintiff to the terms of the note or to require prompt payment according to the terms of the note for future payments. **Meehan v. Cable, 715.**

MOTOR VEHICLES

Automobile accident—judgment notwithstanding the verdict—credibility a jury issue—The trial court did not err in a negligence case arising out of an automobile accident by denying plaintiff's motions for judgment notwithstanding the verdict under N.C.G.S. § 1A-1, Rule 50 and for a new trial when defendants stipulated to the issue of negligence but not to the issues of proximate cause or damages because the jury weighs credibility and has the right to believe any part or none of the testimony concerning plaintiff's injuries, the reasonableness of her medical expenses, and the extent of her pain and suffering. **Blackmon v. Bumgardner, 125.**

Driving while impaired—prior out-of-state conviction—aggravating factor—substantially equivalent offense—In a case involving driving while under the influence of an impairing substance under N.C.G.S. § 20-139.1, the trial court did not err in determining that defendant's conviction in New York for the offense of driving while ability impaired was a prior conviction constituting an aggravating factor for purposes of sentencing. **State v. Parisi, 222.**

DWI vehicle seizure—due process—Due process was not violated when defendant's car was seized under DWI statutes; a long line of cases holds that

POLICE OFFICERS—Continued

favor of defendant police officers and the City in a wrongful death case of a bystander motorist killed in a collision at an intersection with another motorist involved in a police chase because N.C.G.S. § 20-145 exempts police officers from speed laws when engaged in the pursuit of a law violator and plaintiff did not demonstrate a genuine issue of material fact as to gross negligence. **Norris v. Zambito, 288.**

Police chase—motor vehicle collision—summary judgment proper—no gross negligence—prior knowledge suspect may flee—state of mind irrelevant—Even in light of the suspect's earlier threat to flee from the police, the trial court did not err in granting summary judgment in favor of defendant police officers and the City in a wrongful death case of a bystander motorist killed in a collision at an intersection with another motorist involved in a police chase since: (1) the officers were not required to guess the law violating motorist's state of mind in order to determine whether to pursue him; and (2) officers will not be held grossly negligent for attempting to apprehend a suspect merely because he indicates that he does not wish to be apprehended. **Norris v. Zambito, 288.**

PREMISES LIABILITY

Licensees—standard of care—retroactivity—The trial court erred in a negligence action arising from a fall through a door by applying a willful and wanton standard of care for licensees and granting a 12(b)(6) dismissal. *Nelson v. Freeland*, 349 N.C. 614, changed the standard to a duty of reasonable care, and that decision is applicable here retroactively because this case falls within the third category of retroactive application listed in *State v. Rivens*, 299 N.C. 385, 389. **Alexander v. Auattlebaum, 622.**

PROCESS AND SERVICE

Acceptance of service—action by wife against husband—acceptance by wife—N.C.G.S. § 1A-1, Rule 4(j)(1)(a) does not allow a wife who sues her husband to accept service of process for her husband when they live in the same house. **Darby v. Darby, 627.**

Motor vehicle collision—out-of-state parties—address from accident report sufficient—due diligence not required—In a case involving a motor vehicle collision in North Carolina with out-of-state parties, plaintiff's use of defendant's three-year-old address from the accident report in an effort to locate defendant was sufficient because N.C.G.S. § 1-105 does not have a due diligence requirement. **Coiner v. Cales, 343.**

Motor vehicle collision—out-of-state parties—service complete when returned to Commissioner of Motor Vehicles—In a case involving a motor vehicle collision in North Carolina with out-of-state parties, the trial court erred in allowing defendant's motion to dismiss under Rule 12(b)(5) for insufficient service because the service on defendant was complete under N.C.G.S. § 1-105(2) on the date the package was returned to the Commissioner of Motor Vehicles since defendant had moved and the forwarding order had expired. **Coiner v. Cales, 343.**

SCHOOLS AND EDUCATION—Continued

School board decision—effect on petitioner's character—Being dismissed from a job for making a racial comment, which the Board characterized as being "totally unacceptable for an employee in a school setting," affected petitioner's character within the meaning of N.C.G.S. § 115C-45(c). **Cooper v. Bd. of Educ. for Nash-Rocky Mount Schools, 200.**

School board decision—judicial review—Petitioner received judicial review of a school board decision where, after hearing arguments of counsel, reviewing the full record, and considering memoranda of law presented by the parties, the trial court granted the motion for summary judgment. **Cooper v. Bd. of Educ. for Nash-Rocky Mount Schools, 200.**

SEARCHES AND SEIZURES

Trafficking in cocaine—motion to suppress—evidence of consent conflicting—need specific finding of voluntary consent—The trial court's denial of defendant's motion to suppress all evidence that was obtained as a result of the police entering his hotel room in a trafficking in cocaine case must be remanded for further consideration and findings because the evidence as to defendant's consent was conflicting and the trial court did not include a specific finding as to whether defendant voluntarily consented to the search of the hotel room. **State v. Smith, 377.**

Warrantless search—unconstitutional—Crack cocaine and a crack pipe should have been excluded from a prosecution for possession of cocaine and paraphernalia, resisting an officer, and being an habitual felon where an officer interviewed defendant in an emergency room after defendant had been shot; a nurse began to remove defendant's clothing while the officer was speaking to defendant; wads of brown paper fell out of defendant's shoe or pant leg onto the gurney; and the officer picked up the wads of paper and unraveled them, finding the crack and the pipe. The record is bereft of any evidence that the officer recognized or even suspected that the brown paper wads contained contraband before he picked them up and unraveled them; while the wads of paper were suspicious and an officer of this experience would likely recognize such wads as containing contraband, the State cannot substitute speculation for evidence. **State v. Graves, 216.**

SENTENCING

Defendant's presence—alteration between oral rendering and written judgment—A sentence was vacated where defendant was present in open court when concurrent sentences were rendered in an oral judgment, but not when a written judgment was entered which provided that the sentences would run consecutively. This substantive change could only be made in defendant's presence, where he would have an opportunity to be heard. **State v. Crumbley, 59.**

Habitual driving while impaired—use of prior convictions—Sentences for impaired driving and habitual impaired driving were remanded where the trial court enhanced the impaired driving conviction through points for prior convictions and those same prior convictions were the basis for the habitual DWI charge. Although being an habitual felon is a status and driving while impaired is

SENTENCING—Continued

a substantive offense, that is a distinction without a difference. **State v. Gentry, 107.**

Habitual felon—status—not substantive offense—notice of prosecution as recidivist—The trial court did not err in a felony breaking or entering case by sentencing defendant as an habitual felon even though the indictment did not specifically allege that defendant had committed a new felony while being an habitual felon because the only pleading requirement is that defendant be given notice he is being prosecuted for some substantive felony as a recidivist. **State v. Roberts, 690.**

Non-vacated convictions—remand for resentencing—In a case where the double jeopardy clause constituted a bar to defendant's conviction for assault on a female, but not for the other convictions, the non-vacated convictions must be remanded for resentencing because it cannot be assumed that the trial court will reach the same sentencing result. **State v. Gilley, 519.**

Structured—plea agreement—aggravating range—necessary written findings—The trial court erred in sentencing defendant, who entered a plea of guilty for assault with a deadly weapon inflicting serious injury, in the aggravating range even though the plea agreement gave the trial court discretion in sentencing because N.C.G.S. § 15A-1340.16(b) and (c) requires the trial court to make the necessary written findings before deviating from the presumptive sentence of Structured Sentencing. **State v. Bright, 381.**

STATUTE OF LIMITATIONS

Dental malpractice—summary judgment—continuing course of treatment doctrine—The trial court erred in granting summary judgment in a negligence case in favor of defendant-dentist because there is a genuine issue of material fact concerning whether to apply the continuing course of treatment doctrine in order to toll the statute of limitations under N.C.G.S. § 1-15(c). **Rissolo v. Sloop, 194.**

Hospitals—continuing course of treatment—not applicable—The continuing course of treatment doctrine did not apply to extend the statute of limitations in a medical malpractice claim against a hospital based upon two discrete visits to an emergency room where plaintiff was not under the continuing care and observation of any hospital employee. **Trexler v. Pollack, 601.**

Medical malpractice—continuing course of treatment—prescription—The doctrine of continuing course of treatment is not extended to cover the time during which a patient consumes prescription medication, absent a showing of an ongoing relationship with the doctor and further treatment by the same doctor, or evidence that the medication itself was the cause of the patient's injury. **Trexler v. Pollack, 601.**

Statute of repose—real property improvements—substantial completion—last act or omission—Summary judgment was properly granted for defendant based upon the statute of repose in an action for breach of implied warranties of habitability and workmanlike construction arising from the construction and sale of a house where a certificate of compliance was issued for the house on 6 June 1991 and plaintiff brought her action on 23 October 1997. Under

WILLS—Continued

as a life tenant and at his death in ten equal per stirpes shares to the testatrix's ten children, a consideration of the will in light of the conditions and circumstances existing at the time the will was made reveals that the testatrix provided a remainderman share for plaintiff, even though he could not survive his own death, because plaintiff's issue, if any, would take just as the issue of any of the other nine children who predeceased plaintiff. **Canoy v. Canoy, 326.**

Nuncupative—summary judgment improper—The trial court erred in granting summary judgment in favor of the caveator in a proceeding involving the probate in solemn form and caveat of decedent's nuncupative will under N.C.G.S. § 31-3.5 because there are genuine issues of material fact: (1) whether decedent, at the time he dictated his desired disposition of his personal property, reasonably believed he was in the last stage of a chronic disease; and (2) whether he was indeed in the last stage of a chronic disease. **In re Will of Krantz, 354.**

WITNESSES

Automobile accident—expert witness—chiropractor—adequately instructed—The trial court did not err in a negligence case arising out of an automobile accident by refusing to instruct the jury that a chiropractor is an expert witness because the trial court adequately instructed the jury on the issue of expert testimony under N.C.G.S. § 90-157.2 and the trial court told the jury that the doctor was accepted as an expert in the field of chiropractic. **Blackmon v. Bumgardner, 125.**

Cross-examination—defendant conferring with attorney—no prosecutorial misconduct—There was no prejudicial error in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian in the State's cross-examination of defendant concerning whether defendant's family had gone over information with their lawyers. The State's cross-examination did not suggest that defendant improperly discussed the case with counsel or family members. **State v. Trogden, 85.**

Cross-examination—no prosecutorial misconduct—The State's cross-examination of defendant's father in a prosecution for indecent liberties, first-degree statutory sexual offense, and sexual activity by a custodian did not constitute prosecutorial misconduct where the prosecutor's statements did not rise to the levels of insult, degradation or pervasive badgering held to constitute prosecutorial misconduct in *State v. Sanderson*, 336 N.C. 1. **State v. Trogden, 85.**

Expert witness fees—appealability—failed to assign error—no subpoena—trial court's discretion—The trial court did not err in a negligence case arising out of an automobile accident by failing to award plaintiff expert witness fees because: (1) plaintiff failed to assign error to the trial court's denial of plaintiff's request for expert witness fees; (2) even if the error was properly assigned, there is no evidence to suggest plaintiff's expert witnesses appeared in court in response to a subpoena as required by N.C.G.S. § 7A-314; and (3) even if subpoenas were issued, the decision to award expert fees lies within the trial court's discretion. **Blackmon v. Bumgardner, 125.**

WORKERS' COMPENSATION

Attorney fees—correction officer—costs—The Industrial Commission did not abuse its discretion by awarding attorney's fees as part of the costs of appeal

WORKERS' COMPENSATION—Continued

to an injured correctional officer where the employer argued that the claim was under N.C.G.S. § 143-166.19 rather than Chapter 97. N.C.G.S. § 143-166.19 provides that the Commission shall hear the matter in accordance with its procedure for hearing claims under the Workers' Compensation Act. **Ruggery v. N.C. Dep't of Corrections, 270.**

Attorney fees—correction officer—salary continuation—The Industrial Commission did not improperly award attorney's fees for a "salary continuation" claim by a correctional officer. The claim was not properly characterized "salary continuation" when the employee's vacation and sick leave time accumulations were charged by the employer for time out from work due to the employee's injury related disability. The employer offered no justification for charging the employee's vacation and sick time for treatment of his compensable injury. **Ruggery v. N.C. Dep't of Corrections, 270.**

Attorney fees—unreasonable defense—The Industrial Commission did not err by awarding an attorney's fee of $500 under N.C.G.S. § 97-88.1 for defending a case without reasonable ground where, in light of the circumstances, the employee received the Commission's approval for medical treatment by physicians of the employee's choosing within a reasonable time and the failure to obtain authorization prior to receiving treatment from these doctors did not provide the employer with reasonable ground to defend. **Ruiggery v. N.C. Dep't of Corrections, 270.**

Death benefit—presumption that death the result of an accident—not rebutted—Defendants did not rebut the presumption that decedent's death was accidental where there was evidence that decedent committed suicide, but there was other competent evidence that he did not and the Commission chose to believe the latter. Issues of credibility are for the Commission. **Horton v. Powell Plumbing & Heating of N.C., Inc., 211.**

Disability—Form 21 presumption—not rebutted—Plaintiff's jobs as a substitute teacher and doorman lasted only a few weeks, were thus correctly found to be temporary by the Industrial Commission, and were not sufficient to rebut the presumption of disability created by a Form 21 agreement. **Davis v. Embree-Reed, Inc., 80.**

Disability—sufficiency of evidence—In a case where plaintiff-roofer was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in determining plaintiff has proven a disability under N.C.G.S. § 97-29 because plaintiff has sufficiently shown that his injury has prevented him from earning wages from defendant-employer Schuck or any other employer. **Rivera v. Trapp, 296.**

Injury arose out of and in the course of his employment—not a thrill-seeking employee—acted solely to accomplish job—employer authorized action—The Industrial Commission did not err in determining plaintiff-roofer's injuries arose out of and in the course of his employment when plaintiff was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house. **Rivera v. Trapp, 296.**

Injury in usual course of work—labor and delivery nurse—An Industrial Commission opinion and award denying compensation to a labor and delivery nurse was reversed where the nurse injured her shoulder while lifting the leg of

WORKERS' COMPENSATION—Continued

a heavy patient. There was a complete lack of evidence to support findings that plaintiff's injuries occurred while performing her usual employment duties in the usual way; the fact that her job responsibilities included assisting patients who received epidurals resulting in a total block was not dispositive. There was no evidence that plaintiff's regular work routine required lifting the legs of women weighing 263 pounds who had received epidurals resulting in total blocks. **Calderwood v. Charlotte-Mecklenburg Hosp. Auth., 112.**

Knowingly allowed employer to work without insurance—willfully neglected to bring employer into compliance—In a case where plaintiff-roofer was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in finding that defendant Trapp willfully neglected to bring defendant-employer Schuck into compliance with the requirements of N.C.G.S. § 97-93. **Rivera v. Trapp, 296.**

Maximum medical improvement—sufficiency of evidence—There was evidence to support the Industrial Commission's finding in a workers' compensation action that plaintiff had not reached maximum medical improvement where a doctor had expressed his opinion that a skin graft would be necessary for a complete healing of plaintiff's foot and had released plaintiff to work only with certain restrictions. **Davis v. Embree-Reed, Inc., 80.**

Pro se plaintiff—appeal required within fifteen days—self-representation not excusable neglect—waive own rules only if does not controvert statute—The Industrial Commission's opinion and award is reversed and remanded because it erred in considering pro se plaintiff's appeal of the deputy commissioner's opinion and award since plaintiff failed to file his appeal or motion for reconsideration within the fifteen-day period required by N.C.G.S. § 97-85 and he did not show excusable neglect under N.C.G.S. § 1A-1, Rule 60(b). **Moore v. City of Raleigh, 332.**

Temporary total disability—election of statute for recovery permissible—In a case where plaintiff-roofer was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in assigning plaintiff a rating of temporary total disability under N.C.G.S. § 97-29 instead of N.C.G.S. § 97-31(13). **Rivera v. Trapp, 296.**

Temporary total disability—evidence of diminished earning capacity—alien without immigration green card or social security card protected by Workers' Compensation Act—Even though defendant Trapp contends plaintiff-roofer lacks earning capacity since he did not have an immigration green card or a social security card in a case where plaintiff was injured as a result of falling from a forklift he rode in to move necessary materials to the third floor of a house, the Industrial Commission did not err in concluding plaintiff was temporarily totally disabled because plaintiff's injury diminished his earning capacity since: (1) N.C.G.S. § 97-2(2) makes clear that the General Assembly sought to protect every employee engaged in an employment, including aliens like plaintiff; and (2) plaintiff also presented evidence that prior to the injury, he did in fact have earning capacity as a roofer. **Rivera v. Trapp, 296.**

Witness credibility—province of Industrial Commission—The Industrial Commission did not err by deferring to plaintiff's accounts of his job location

WRONGFUL INTERFERENCE—Continued

tiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment in favor of defendant Menius on the tortious interference with prospective advantage claim because she did not act adversely to plaintiff's interests until after she left his employment. **Dalton v. Camp, 32.**

Tortious interference with prospective advantage—summary judgment proper—competitor—In a claim arising out of plaintiff-former employer's allegations of unfair competitive activity by defendants, employees and their new corporation, the trial court properly granted summary judgment in favor of defendant Millenium Communication Concepts on the tortious interference with prospective advantage claim because it was never more than a competitor to plaintiff and a competitor has the privilege to induce another party not to renew or enter into a contract with another as long as the competitor solicits legally and does not gain an unfair advantage at the other's expense. **Dalton v. Camp, 32.**

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina