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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. TERENCE LEVONNE GARNER

No. COA98-1215

(Filed 21 December 1999)

1. Indigent Defendants— funds for expert witness—eyewitness identification

The trial court did not abuse its discretion by denying defendant's motion for funds to employ an eyewitness identification expert where defendant failed to make the required threshold showing that he would be deprived of a fair trial without the expert assistance or that there was a reasonable likelihood that the expert assistance would materially assist him in the preparation of his case.

2. Indigent Defendants— funds for expert witness—ex parte hearing on motion

The trial court did not abuse its discretion by refusing defendant's request for an ex parte hearing on his motion for funds to employ an eyewitness identification expert. While access to the basic tools of an adequate defense is a core requirement of a fundamentally fair trial, the need for an ex parte hearing on a motion for expert assistance is not. And, while it has been held that the trial court is constitutionally required to grant indigent defendants an ex parte hearing to establish the need for a psychiatric expert, a request for an eyewitness identification expert does not require the constitutional protections afforded the request for a psychiatric expert.

3. Evidence— identification—eyewitness

The trial court did not err at a hearing on a motion for appropriate relief by denying defendant's motion to suppress identification testimony from the victims of a robbery and shooting. Under the totality of the circumstances, there was no substantial likelihood of irreparable misidentification and the identifications were not impermissibly suggestive.

4. Criminal Law— motion for appropriate relief—newly discovered evidence—confession

The trial court did not abuse its discretion by denying defendant's motion for appropriate relief with regard to the confession of a cousin of an accomplice. The trial court is in the best position to judge the credibility of a witness and found in this case that defendant had failed to prove that the cousin's statements to authorities were probably true.

5. Criminal Law— motion for appropriate relief—recanted testimony

The trial court did not abuse its discretion by denying a motion for appropriate relief based upon recanted testimony where there was not a reasonable possibility that a different result would have been reached in light of other testimony.

6. Criminal Law— prosecutorial misconduct—use of false testimony

The trial court did not abuse its discretion by denying defendant's motion for appropriate relief based upon the State's use of false testimony where it was implicit in the trial court's order that the testimony was probably not false except in regard to the witness having a cousin named Terence and defendant failed to establish that the witness otherwise perjured himself at trial.

7. Appeal and Error— motion for appropriate relief on appeal—newly discovered evidence

Defendant's motion for appropriate relief for newly discovered evidence in the Court of Appeals was denied where there was no reasonable possibility of a different result, the new evidence merely served to contradict, impeach or discredit other testimony, was not relevant, and there was no showing that it was not available at trial or at the hearing for the first motion for appropriate relief.

8. Appeal and Error— motion for appropriate relief on appeal—prosecutorial misconduct

Defendant's motion in the Court of Appeals for appropriate relief based upon prosecutorial misconduct was denied where it was based upon the same issue overruled in an assignment of error, and where the exculpatory evidence which allegedly should have been furnished to defendant was not of a nature to produce a different result, even if it was in the possession of the State.

Appeal by defendant from judgments entered 27 January 1998 and order entered 25 February 1998 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 23 August 1999.

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

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

WALKER, Judge.

Defendant was convicted of attempted first degree murder, first degree kidnapping, three counts of robbery with a dangerous weapon and two counts of second degree kidnapping. Defendant was sentenced to a minimum of 399 months and a maximum of 517 months in prison. Defendant filed a motion for appropriate relief in the trial court, which was denied. Defendant appeals both the convictions and the denial of the motion for appropriate relief.

The State's evidence tended to show the following: The Quality Finance Office in Johnston County near Goldsboro, North Carolina, was robbed at approximately 4:40 p.m. on 25 April 1997. Manager Charles Woodard, secretary Alice Wise, and a black customer named Bertha Miller were in the building at the time of the robbery. Two black males entered the office. The first black male, later identified as Kendrick Delon Henderson, wore a bandana over part of his face and was followed by a shorter black male with lighter skin, who was approximately five feet eight inches tall. The shorter black male's face was not covered during the robbery. Woodard identified the defendant as the shorter black male from a set of photographs furnished by law enforcement officers. At trial, Woodard and Wise both

identified the defendant as the shorter black male. Woodard and Wise testified they were face-to-face with the defendant for approximately twenty minutes. During this time, the defendant announced that a robbery was taking place and produced a revolver which he held to Woodard's head. He then forced the three victims into the back office, where Henderson bound the hands and feet of Wise and Miller with duct tape. The defendant demanded money from Woodard and Wise. Woodard gave the defendant money from the cash drawer, the safe, and from his pockets. The defendant asked for Wise's pocketbook, which was in the front office, and pulled her towards the front office. Wise was unable to move quickly because of her bound feet. Frustrated with Wise's slow pace, the defendant pushed Wise to the floor. As Wise was lying on the floor, face up, with her back against the wall, the defendant shot her in the chest. During this time, Wise was looking at the defendant. After the first shot, Wise raised her hands to protect her face. The defendant fired a second shot, which traveled through both of Wise's wrists and into her left eye. Wise testified that when the defendant shot her the second time, "I was looking directly in his face because I thought that was the last thing I was going to see." After being shot, Wise remained conscious until she was taken into the operating room for surgery. Wise permanently lost the use of her left eye.

Woodard's testimony corroborated Wise's version of the events of the robbery. Woodard testified that the two black males entered Quality Finance while Woodard, Wise, and Miller were all in the front office. The defendant held the revolver to Woodard's head and ordered all three victims to the back office where the hands and feet of Wise and Miller were bound by Henderson. The defendant took Woodard to the front office where Woodard showed the defendant the cash drawer. The defendant took the money from the cash drawer and escorted Woodard to the back office. During this time, Woodard was within three feet of the defendant as the revolver remained held to his head. After defendant demanded more money, Woodard gave defendant the money in the company safe located in the back office. Woodard then gave defendant the money in his pockets. Henderson bound Woodard's hands and legs with tape and took money from Miller's purse. The defendant then demanded money from Wise. When she indicated her purse was in the front office, defendant forced her to the front and out of the sight of Woodard. Woodard heard gun shots but did not see what happened in the front office. Woodard testified that the lighting in Quality Finance was very good.

Bertha Miller testified that during the robbery she was nervous, crying and shaking, and that Wise tried to calm her down. She did provide authorities with descriptions of the perpetrators but could not identify any of them from photographs, although she testified that she had previously known the defendant. After the robbery, Miller testified that through the window of Quality Finance she saw three individuals running to a car, but could not identify any of them. In other respects, her testimony corroborated that of Woodard and Wise.

After evidence was presented by the State and the defendant, Miller was recalled to the stand by the State. Miller testified that the person who bound her during the robbery had darker skin than the defendant but that person was not present in the courtroom.

Richard Keith Riddick testified for the State pursuant to a plea agreement arising out of his involvement in the robbery. Riddick stated that he waited in the car during the robbery and that Henderson and the defendant committed the robbery. Riddick testified that while he waited he heard three gun shots, after which Henderson first came running out to the car. The defendant ran out a few seconds later carrying a revolver and a bag containing money. On direct examination Riddick denied having a cousin named Terence.

The defendant testified and denied any involvement in the robbery and stated that he was playing softball near his home at the time of the robbery. Defendant offered the testimony of his grandmother, step-grandfather, and a family friend, all of whom confirmed his testimony.

Henderson testified for the defendant and admitted his presence at the scene of the robbery. Henderson was also charged and his fingerprints were identified on the duct tape left at the scene. Henderson stated that Riddick and Riddick's cousin, who was also named "Terence," went inside Quality Finance. Henderson testified that he was in the car and thought that Riddick and Riddick's cousin entered Quality Finance to obtain a loan. After a few minutes passed, Henderson entered the office. Henderson testified that upon discovering a robbery in progress, he returned to the car. Henderson stated that he did not know the defendant and that defendant was not involved in the robbery.

After defendant's conviction, Henderson reiterated to Detective Bobby Braswell, of the Wayne County Sheriff's Department, that defendant did not commit the robbery. Henderson told Detective

Braswell that Riddick's cousin, named Terence, was one of the perpetrators. Based on this information, Detective Braswell located Riddick's cousin, whose name was Terence DeLoach. Detective Braswell then questioned DeLoach and his girlfriend, Kim Robinson, regarding the Quality Finance robbery. Wayne County authorities told DeLoach that if he or Robinson were withholding information, the Department of Social Services would be contacted about Robinson and her small child and that she might be evicted from her apartment. DeLoach subsequently admitted he was involved in the robbery and that he shot Wise. Wayne County authorities transported DeLoach to Johnston County authorities for questioning and DeLoach again confessed to the crime. However, DeLoach's details of the events were inconsistent with the testimony of the three victims. When State Bureau of Investigation Agent Greg Tart pointed out to DeLoach numerous inconsistencies, DeLoach recanted and said, "Man, you-all got the right man. Garner did it. I made up the whole story when I told them down in Wayne County." DeLoach stated the reason for his original confession was the result of threats by the Wayne County officers to "get Kim [Robinson] evicted from her apartment and Social Services would take away her child."

Defendant filed a motion for appropriate relief in the trial court pursuant to N.C. Gen. Stat. § 15A-1415(c) based on newly discovered evidence and perjured testimony at his trial. In support of his motion, defendant called DeLoach and Riddick; however, both refused to testify based on their Fifth Amendment privilege. Defendant called Henderson who testified that DeLoach was the Quality Finance gunman. Defendant then called State Bureau of Investigation Agent Mike East who testified regarding an out-of-court statement made by Riddick one week after defendant's trial. Agent East testified that: Riddick admitted that he has a cousin named Terence; defendant, Henderson, DeLoach, and Riddick were all involved in the robbery; defendant shot Wise but DeLoach did not enter the Quality Finance building; Riddick then changed his statement and accused DeLoach of shooting Wise.

In response, the State offered Woodard and Wise, who again identified defendant as the gunman and both stated that they had never seen DeLoach before this hearing. Psychiatrist Nicole Wolfe examined DeLoach in preparation for the hearing and testified that his I.Q. was 76 and he was prone to impulsive behaviors that made him capable of admitting to something he did not do. Specifically, that it was possible that DeLoach would confess to a crime he did not com-

mit after being threatened that his girlfriend's child would be taken away if he did not confess to the crime.

After hearing testimony, receiving certain exhibits and hearing arguments of counsel over the course of three days, the trial court denied defendant's motion to dismiss the charges or for a new trial. In denying the motion for appropriate relief, the trial court made extensive findings and concluded the following: (1) that the defendant failed to prove by a preponderance of the evidence that he is entitled to a new trial under the provisions of North Carolina General Statute § 15A-1420(c)(5); and (2) that the defendant failed to prove by a preponderance of the evidence that had the false testimony of Riddick not been admitted, a different result would have been reached at the trial.

I.

[1] We first address the defendant's contention that the trial court erred in denying his motion for funds to appoint an eyewitness identification expert. Prior to trial, the defendant asked the trial court for funds to hire an eyewitness identification expert who could have testified that imperfections in memories are especially prevalent in situations of high stress.

The defendant moved for an *ex parte* hearing on his motion for funds to hire the expert. Instead, the trial court heard from the State and the defendant regarding this request and denied defendant's motion finding that "an identification expert is not essential to the defense."

To first establish a threshold showing of need for expert assistance, a defendant must prove that "(1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert assistance will materially assist him in the preparation of his case." *State v. Coffey*, 326 N.C. 268, 284, 389 S.E.2d 48, 58 (1990). In determining whether a defendant has made the requisite showing of a particularized need, the court "should consider all the facts and circumstances known to it at the time the motion for . . . assistance is made." *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986). The showing demanded is flexible and is to be resolved on a case-by-case basis and not by a bright-line rule. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). The "mere hope or suspicion of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement

that defendant demonstrate a threshold showing of specific necessity for expert assistance." *State v. Tucker*, 329 N.C. 709, 719-20, 407 S.E.2d 805, 811-12 (1991). Similarly, undeveloped assertions that the requested expert assistance would be beneficial or even essential to the preparing of an adequate defense are insufficient to satisfy this threshold requirement. *State v. Moseley*, 338 N.C. 1, 20-21, 449 S.E.2d 412, 425 (1994).

In *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), our Supreme Court upheld the trial court's denial of the defendant's motion for an eyewitness identification expert. Defendant's motion was based on the need to show the unreliability of witness identifications of the defendant. *Id.* at 348, 451 S.E.2d at 148. The Court rejected defendant's argument because of the strength of the identifications and because an expert would have only testified to matters within the common understanding of the jury. *Id.* The Court declined to address defendant's argument that an expert would also provide specialized knowledge outside the common understanding of the jury, since that argument had not been made to the trial court. *Id.* at 349, 451 S.E.2d at 149. The Court found that defendant's showing to the trial court failed to demonstrate a particularized need for an expert. *Id.*

On appeal, the defendant contends that under the circumstances of this case, distortions in memories are common when the identification of a defendant is at issue and that cross-racial identification is highly unreliable. Defendant asserts that this meets the threshold showing required of him. However, our review of the record establishes that the defendant has failed to make the threshold showing as required by *Coffey*. Therefore, the trial court did not abuse its discretion in denying defendant's motion for funds to employ an eyewitness identification expert.

[2] Defendant also argues the trial court erred in failing to grant his request for an *ex parte* hearing on his motion. Defendant claims this denial required him to reveal his theory of defense to the State. Our Courts have allowed *ex parte* hearings regarding requests for funds to employ an expert in limited circumstances. In *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992), our Supreme Court considered whether a defendant's rights to due process, to effective assistance of counsel, and to reliable sentencing in a capital murder trial mandated that his motion for funds to employ a fingerprint expert be heard *ex parte*. The Supreme Court noted that the defendant's "right to obtain

[the expert] assistance [necessary to assist in preparing his defense] without losing the opportunity to prepare the defense in secret" was a strong reason for conducting an *ex parte* hearing. *Id.* at 449, 418 S.E.2d at 189 (*quoting Brooks v. State*, 259 Ga. 562, 565, 385 S.E.2d 81, 84 (1989)). The *Phipps* Court held the defendant was not entitled to an *ex parte* hearing nor was he entitled to funds to employ a fingerprint expert. The Court went on to state that "[w]hereas an indigent defendant's access to the 'basic tools of an adequate defense' is a core requirement of a fundamentally fair trial, the need for an *ex parte* hearing on a motion for expert assistance is not." *Id.* at 450, 418 S.E.2d at 190.

On the other hand, our Supreme Court in *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993) held that the trial court is constitutionally required to grant an indigent defendant an *ex parte* hearing to establish the need for a psychiatric expert. In holding that the defendant was entitled to an *ex parte* hearing, our Supreme Court stated:

> That the defendant in *Phipps* was requesting an *ex parte* hearing in order to apply for funds for a fingerprint expert distinguishes that case critically from the case now before us. The key difference between a hearing on the question of an indigent defendant's right to a fingerprint expert and one on the question of his right to a psychiatric expert is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature. [. . .] Moreover, because the area of psychiatric expertise differs importantly from that of fingerprint analysis, defendant's constitutional rights are far less likely to be jeopardized by the presence of the prosecutor when defendant attempts a threshold showing for a fingerprint expert than when he offers evidence to support his need for a psychiatrist.

Id. at 519, 428 S.E.2d at 180-81.

We find instructive the *Ballard* Court's distinction between the request for a psychiatric expert from the request for a fingerprint expert. For similar reasons, we find a request for an eyewitness identification expert does not require the constitutional protections afforded the request for a psychiatric expert. *See State v. White*, 340 N.C. 264, 277, 457 S.E.2d 841, 849 (1995) (holding that an indigent defendant's request for an investigator is not entitled to an *ex parte* hearing because an investigator is more analogous to a fingerprint expert than a psychiatric expert). The physical evidence, not the

defendant, is the "object of adversarial scrutiny" in a hearing for an eyewitness identification expert. An eyewitness identification expert is offered to undermine the reliability of the testimonial identification of the defendant, whereas the absence of a psychiatric expert puts at risk the availability of an insanity or diminished capacity defense strategy. Finding *Phipps* controlling, the decision to deny an *ex parte* hearing was within the trial court's discretion. *Phipps*, 331 N.C. at 449, 418 S.E.2d at 190. Since the defendant is unable to establish a threshold showing of a need for an expert, there was no prejudice in the trial court's denial of an *ex parte* hearing. *White*, 340 N.C. at 277, 457 S.E.2d at 849.

II.

[3] The defendant next assigns as error the trial court's denial of his motion to suppress the identification testimony of Woodard and Wise. Defendant argues that the pre-trial as well as the in-court identifications of both Woodard and Wise should have been suppressed because Woodard and Wise suffered mental and physical trauma during the robbery.

Specifically, defendant contends that Woodard's out-of-court identification is unreliable because there was no evidence that he was wearing glasses at the time of the crime. Woodard testified that he wore his glasses at the time he made the identification of the defendant in the photographic line-up. Defendant alleges the trial court failed to make findings regarding Woodard's ability to see clearly during the robbery. Defendant next argues that Wise's identification of the defendant at his bond hearing was unfairly suggestive because defendant was dressed in prison clothes and shackled. Defendant further contends that since both Woodard and Wise are white and the gunman was black, the cross-racial identification by these witnesses is unreliable.

The trial court conducted a *voir dire* hearing regarding the admissibility of Wise's identification. She testified to the following: (1) the defendant's face was not covered; (2) she was face-to-face with defendant when he pulled her to the front of the office to get her purse; (3) she was looking directly at the defendant when he shot her in the head; (4) her vision was good before the shooting; (5) there was adequate lighting in the office; (6) she was observing the defendant for the majority of the twenty minutes he was there; (7) she was calm throughout the robbery; and (8) she was "positive" that the defendant was the gunman.

Regarding her out-of-court identification of defendant at a bond hearing, Wise stated that she voluntarily attended the bond hearing where she saw five or six individuals in orange jumpsuits. In this group, she recognized two individuals: the defendant as the gunman and Henderson. Then she related this to the district attorney. Based on Wise's testimony, the trial court found her in-court identification was "unequivocal" and that her out-of-court identification was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. The trial court concluded that Wise's in-court identification was of independent origin and denied defendant's motion to suppress her identification of the defendant.

Woodard testified at trial that the defendant's face was uncovered during the robbery, he was within a foot of defendant's face for the majority of twenty minutes, and the lighting in Quality Finance was good. Woodard testified at the *voir dire* hearing that after viewing an array of photographs for approximately two minutes while wearing his glasses, he made an identification of the defendant. In court, Woodard also identified the defendant and stated there was absolutely no doubt that defendant was the gunman. Defendant did not question Woodard about his ability to see during the robbery. The trial court found Woodard's testimony to be "forthright and unequivocal," his recollection was "detailed" and that he was "in full control of his mental faculties throughout the ordeal." The trial court then denied defendant's motion to suppress Woodard's out-of-court and in-court identifications of defendant.

Identification evidence must be suppressed on due process grounds where the facts show that the pre-trial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification. *State v. Simpson*, 327 N.C. 178, 186, 393 S.E.2d 771, 776 (1990) (citations omitted). The test for determining the existence of irreparable misidentification includes several factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *State v. Breeze*, 130 N.C. App. 344, 350, 503 S.E.2d 141, 145-146, *disc. rev. denied*, 349 N.C. 532, 526 S.E.2d 471 (1998). In other words, a suggestive identification procedure has to be unreliable under a totality of the circumstances in order to be inadmissible. *Id.* Even when a pretrial procedure is found to be unreliable, in-court identification of

independent origin is admissible. *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978).

For the majority of twenty minutes, Wise was in the presence of the defendant and was face-to-face with him as he pulled her to the front office. Wise was calm throughout the robbery and was looking at defendant's face when he shot her. She identified the defendant while in attendance at his bond hearing and again identified defendant at trial.

Woodard was within three feet of the gunman for the majority of twenty minutes. Woodard testified he was in control of his emotions and clearly recalled the events of the robbery. When presented with a photographic line-up one week after the event, Woodard promptly identified the defendant. In court, Woodard again identified the defendant without hesitation.

Under a totality of the circumstances, there was no substantial likelihood of irreparable misidentification by either Woodard or Wise. The out-of-court and in-court identifications of Woodard and Wise were not impermissibly suggestive and the trial court did not err in their admission.

III.

[4] Defendant next contends that the trial court's denial of his motion for appropriate relief was error. Defendant argues that DeLoach's confession is newly discovered evidence and, together with Riddick's recanted testimony, a new trial is warranted pursuant to N.C. Gen. Stat. § 15A-1415(c).

At the motion for appropriate relief hearing, DeLoach took the stand and invoked his Fifth Amendment rights. Both Woodard and Wise were in court when DeLoach was on the stand. Both later testified that DeLoach was not the gunman who shot Wise.

At the conclusion of the hearing, the trial court made the following findings regarding DeLoach's confession:

(1) DeLoach was diagnosed by Dr. Nicole Wolfe with borderline intelligence, anti-social and impulsive disorders and described as a person who acts without thinking.

(2) The statement given the Wayne County Deputies by DeLoach was repeated later to Special Agent Tart of the North Carolina

State Bureau of Investigation who was an investigating officer and knew the details of the shooting of Alice Wise. When confronted with details that were not consistent with actual facts, DeLoach recanted. DeLoach gave his reason for his original statement as being the result of threats by the Wayne County officers, quote, "To get Kim evicted from her apartment and social services would take away her child," end quote, State's MAR-1, page seven. DeLoach stated in his recantation that Garner was in fact involved in the robbery and shooting at the finance company, State's MAR-1, page six.

(3) The inculpatory statements given the Wayne County Deputies and the Johnston County Deputies must be considered with the exculpatory statement given Special Agent Tart in determining whether the original statements are, quote, "probably true," end quote.

(4) The defendant has failed to prove by a preponderance of the evidence that the aforesaid statements given by DeLoach are probably true.

(5) The statements given by DeLoach do tend to contradict, impeach or discredit the testimony of the witnesses Wise, Woodard, Riddick and in the recantation, the defendant Garner.

To establish that DeLoach's confession constitutes newly discovered evidence that warrants a new trial, the defendant must show that: (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the newly discovered evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness, and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *State v. Britt*, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987). In an evidentiary hearing, defendant bears the burden of proving by a preponderance of the evidence every fact essential to support the motion. N.C. Gen. Stat. § 15A-1420(c)(5) (1997). If the findings are based upon competent evidence, those findings are binding on appeal, even if the evidence at the hearing is conflicting. *State v. Carter*, 66 N.C. App. 21, 25, 311 S.E.2d 5, 8 (1984).

The trial court is in the best position to judge the credibility of a witness. Here, the trial court found that the defendant failed to prove that DeLoach's statements given to the authorities were probably true. Based on competent evidence taken at the motion hearing, the findings by the trial court regarding DeLoach's confession are binding on appeal. *State v. Harding*, 110 N.C. App. 155, 165, 429 S.E.2d 416, 423 (1993). Adopting the findings of the trial court, we conclude the trial court did not abuse its discretion in denying defendant's motion with regard to DeLoach's confession.

[5] Defendant also argues that a new trial was justified based on Riddick recanting his trial testimony and that the trial court erred in finding only that Riddick's testimony was false in regard to his having a cousin named Terence. Like DeLoach, Riddick also invoked his Fifth Amendment rights and declined to testify. In its findings, the trial court noted that, at trial, the jury was instructed to closely examine Riddick's testimony since he had entered into a plea agreement with the State in exchange for his testimony. The trial court further found:

> (2) Riddick testified that he did not have a cousin named Terence. This was false testimony. Riddick was a material witness.
>
> (3) Considering all of the testimony implicating the defendant as the gunman and participation in the robbery there is lacking even a remote possibility that had Riddick testified truthfully concerning a cousin named Terence, a different result would have been reached at the trial. This testimony fails to meet the second criteria or requirement that there is a reasonable possibility that had the false testimony not been admitted, a different result would have been reached at trial.
>
> (4) The fact that Riddick lied about having a cousin named Terence did not have a direct and material bearing upon the defendant's guilt or innocence.

Riddick testified at trial that he did not have a cousin named Terence. Testimony by witnesses at the motion hearing established that Terence DeLoach is in fact Riddick's cousin. This formed the basis for the trial court's finding that Riddick gave false testimony when he denied having a cousin named Terence. The only suggestion that Riddick's testimony implicating the defendant was false was

Riddick's recantation, which served as his third version of the events of the robbery.

A new trial based upon recanted testimony may be granted if the trial court is "reasonably well satisfied that the testimony of a material witness was false, and there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at trial." *Britt*, 320 at 715, 360 S.E.2d at 665. Our Supreme Court has held:

> [t]here is a difference between recanted testimony and newly discovered evidence. Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial. Recanted testimony is testimony which has been repudiated by a party who gave it. Recanted testimony is not evidence which existed at the time of trial because the recanting witness would not have testified to it at trial. A motion for a new trial on the basis of recanted testimony is for the purpose of removing testimony from a jury. A motion for a new trial based on newly discovered evidence is for the purpose of putting new evidence before a jury.

State v. Nickerson, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987). With regard to recanted testimony, "[it] is exceedingly unreliable, and it is the duty of the trial court to deny the motion for new trial where it is not satisfied that such testimony is true, especially where the recantation involves a confession of perjury or where there is a repudiation of the recantation." *State v. Shelton*, 21 N.C. App. 662, 665, 205 S.E.2d 316, 318 (1974).

Riddick's post-conviction out-of-court statements contain conflicting versions of the Quality Finance robbery. Riddick initially stated that he, the defendant, Henderson, and DeLoach participated in the robbery and that defendant shot Wise. Riddick gave yet another version in which he stated defendant did not participate in the robbery and that DeLoach shot Wise.

The testimonies of Woodard and Wise at the hearing were consistent with their testimonies at trial and both again made a positive identification of the defendant as the gunman. In light of this eyewitness testimony implicating defendant as the gunman, the trial court concluded that even if Riddick's trial testimony were excluded, there was not a reasonable possibility that a different result would have been reached at trial.

[6] Defendant further argues that the State knew or should have known that Riddick would give false testimony and that the State's use of false testimony merits a new trial. Defendant gives two reasons why the State should have known Riddick would perjure himself: (1) Riddick was testifying pursuant to a plea agreement and (2) Riddick's pre-trial polygraph test indicated that his answers were deceptive. On the other hand, the State points out that Riddick testified at trial that the defendant was involved in the robbery and that he said in his initial statement to law enforcement after trial that defendant and DeLoach both were involved. Therefore, implicit in the trial court's order was that Riddick's testimony was not probably false except in regard to his having a cousin named Terence.

Defendant's contentions are without merit. The defendant has failed to establish that Riddick, in his out-of-court statements, perjured himself at trial, except to the extent that his testimony was false with regard to his having a cousin named Terence.

The trial court's findings are based upon competent evidence and therefore binding on appeal. *See Harding*, 110 N.C. App. at 165, 429 S.E.2d at 423 (stating that upon review of an order entered on a motion for appropriate relief, "the findings of fact are binding if they are supported by any competent evidence, and the trial court's ruling on the facts may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law"). The trial court applied the appropriate standard to a motion for appropriate relief and the conclusions based upon the findings were not an abuse of discretion. Our decision is in accord with case law concerning newly discovered evidence based upon confessions and recantations. *See State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991) (holding denial of motion for appropriate relief was proper where defendant could not show that third party's confession and recantation would constitute newly discovered evidence since confession was unreliable and included inconsistent details and recantation and continuing denial of involvement by third party meant there would be no new evidence at trial); *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985) (affirming denial of motion for appropriate relief where co-defendant's confession exonerating defendant was unreliable and unconvincing in light of co-defendant's recantation and lack of trustworthiness); *State v. Carter*, 66 N.C. App. 21, 311 S.E.2d 5 (1984) (affirming denial of motion for appropriate relief where third party's confessions to cell mates that he acted alone, thereby exonerating defendant, coupled with recantation did not constitute newly discovered evidence).

Defendant's motion for a new trial based on Riddick's recantation of his trial testimony was properly denied. The trial court did not err in denying defendant's motion for appropriate relief.

IV.

[7] On 12 July 1999, defendant filed with this Court a second motion for appropriate relief which was amended and re-filed on 4 October 1999. Defendant argues that additional newly discovered evidence since the first motion hearing merits a new trial and that prosecutorial misconduct tainted the conviction, also warranting a new trial. Pursuant to N.C. Gen. Stat. § 15A-1418(b):

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

N.C. Gen. Stat. § 15A-1418(b) (1997).

Ordinarily, issues regarding newly discovered evidence are heard in the trial court. However, since the record on appeal and defendant's affidavits attached to his second motion for appropriate relief are now before this Court, we elect, pursuant to N.C. Gen. Stat. § 15A-1418(b), to address the motion concurrently with defendant's appeal.

Defendant contends that affidavits given after the first motion hearing by Bertha Miller and Peter Benjamin Wright constitute newly discovered evidence. Miller was the third person present at Quality Finance when the robbery occurred and she testified at trial. While awaiting trial of defendant, Wright was a cell mate of Riddick in the Johnston County Jail.

Miller's affidavit, given 4 August 1998, in part provides the following:

> 8. I have known Terence Garner for many years. If he participated in the robbery, I would have been able to recognize him—even at a glance. I never pointed at Terence Garner in any of the line-ups and said that he was involved in the robbery.

> 9. Terence Garner was not inside the Quality Finance on the day of the robbery. I was too scared to look at the robber without the mask for any significant time because I feared for my life. However, I was able to glance at the robber without a mask a couple of times and I know that his face is not the same as Terence Garner.
>
> 10. Terence Garner was not the black male without the mask in the Quality Finance. I cannot, to my own knowledge, tell you who was outside of the Quality Finance. When I looked out of the window on the day of the robbery, I only saw the backs of three black males running.
>
> 11. I knew, from the time I was shown the first line-up, that Terence Garner was not inside the Quality Finance during the robbery. I did not come out and say so on the witness stand because I did not want Mr. Woodard and Ms. Wise to be mad at me.

After the defendant's trial had concluded, Detective Jason Barbour of the Johnston County Sheriff's Department showed Miller a photographic line-up regarding the Quality Finance robbery. Miller's affidavit states:

> 13. I viewed that line-up for a significant amount of time. I noticed that one of the faces, particularly the eyes, looked like one of the black males that I saw in the Quality Finance on the day of the robbery. After I pointed that face out and said there was "something about him," the detective told me that he was the person they picked up for the robbery, Terence DeLoach. The officers asked me if I was certain that I recognized that person. Eventually, I said that I could not be certain that he was one of the robbers.

On 5 February 1998, after Detective Barbour showed Miller a line-up, she was shown another photographic line-up by Investigative Assistant Scott Kendrick of the District Attorney's Office. With regard to that line-up, Miller's affidavit states:

> 14. At a later time, an African American officer picked me up at work in his black Cherokee. This officer took me to the police station. While I was there, he arranged four photographs for me to view. The photos were of the four men that they had arrested for the Quality Finance robbery (Garner, Riddick, DeLoach, Henderson). I looked at the photographs and told the officers that

> Terence Garner was not involved in the robbery of the Quality Finance. The officer asked me if I was sure, and I told him that I was sure that Terence Garner, the person that I saw in the picture, was not involved in the robbery.

As part of its response to the defendant's second motion for appropriate relief, the State submits Kendrick's affidavit to rebut Miller's claims which, in part, provides the following:

> 6. When we arrived at the District Attorney's office, I took [Miller] into the small conference room adjacent to [the District Attorney's] personal office. We were alone in the room. I showed her the four photographs of Garner, Henderson, Riddick and DeLoach. She stated that she recognized Garner, but did not know Henderson or Riddick, and when she looked at DeLoach's photograph, she said "there is something about his eyes." I asked her it [sic] she could recognize any of these four individuals as having been present during the robbery, and she replied that she could not.
>
> . . .
>
> 10. I was alone with Ms. Miller during the entire interview. Near the end of the interview, I asked her directly if Terence Garner was present during the robbery. She hesitated, and then replied, "I can't say." Ms. Miller never told me that Garner was not inside Quality Finance during the robbery or that he was not involved in the robbery.

The rule, as previously stated, requires a defendant to prove beyond a preponderance of the evidence that (1) the witness will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the newly discovered evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness, and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *Britt*, 320 N.C. at 712-13, 360 S.E.2d at 664.

Miller testified at trial that she was unable to identify either person inside Quality Finance during the robbery. Miller remains unable to positively identify any of the men involved in the robbery. Her affidavit does corroborate Henderson's trial testimony that defendant

was not involved in the robbery. However, the evidence at trial showed that during the robbery, Miller was nervous, crying and shaking, and Wise tried to calm her down. On the other hand, the trial court found that Woodard was in control of his emotions during the event and has a clear recall of the actions of the individuals who committed the robbery. Further, Wise was in control of her emotions until the moment she was shot and her ability to see, hear and know of the events about which she testified was uncontradicted.

Even conceding defendant's argument that Miller's affidavit constitutes newly discovered evidence to the extent she now states that the defendant was not present in the office when the robbery occurred, her evidence merely serves to impeach and contradict the identification testimony of Woodard and Wise and is not of "such a nature that a different result will probably be reached at a new trial" given the strength of the two eyewitness identifications. *See Britt*, 320 N.C. at 712-13, 360 S.E.2d at 664.

Further, assuming that Miller, by her affidavit, has recanted her trial testimony, we fail to see a reasonable possibility that the exclusion of Miller's testimony would effect a different result at trial. *See Britt*, 320 N.C. at 715, 360 S.E.2d at 665.

Defendant states three additional contentions for finding that newly discovered evidence exists such that a new trial is warranted. We discuss each in turn.

First, defendant argues that the affidavit of Wright constitutes newly discovered evidence. Wright's affidavit states that Riddick told him that he (Riddick) planned to commit perjury at defendant's trial in order to secure a favorable plea agreement. Wright also says that he and Riddick agreed not to tell anyone about Riddick's plan until after he was sentenced pursuant to his plea agreement. At his hearing, defendant subpoenaed Wright to testify regarding Riddick's plan to commit perjury. Wright refused to testify at the first motion hearing for the reason that Riddick had not yet been sentenced. Defendant asserts that Wright is now willing to testify as to his conversations with Riddick while they were cell mates. Defendant contends that "Wright was not legally available to testify either at trial or at the [motion] hearing."

Second, defendant contends there is newly discovered evidence in the affidavit of Wayne County Detective Jerry Best that relates to the post-conviction investigation by the Johnston County authorities.

Specifically, the affidavit describes the investigation procedure employed in locating and arresting the defendant. Further, Best's affidavit refers to the reaction of the district attorney upon hearing of DeLoach's confession, the decision by Johnston County authorities not to jointly interrogate DeLoach with Wayne County authorities, and Best's professional opinion concerning the length of time Woodard looked at the photographic line-up before identifying the defendant.

Third, defendant argues that he has obtained since the first motion hearing newly discovered evidence in the form of two affidavits from experts in eyewitness identification and forensic psychiatry who will testify on behalf of defendant. The testimony of these two witnesses would rebut the expert testimony of Nicole Wolfe regarding DeLoach's confession and recantation. At defendant's first motion hearing, defendant did not request funds to employ a forensic psychiatrist nor renew his request for funds to employ an identification expert.

The State contends that pursuant to N.C. Gen. Stat. § 15A-1419(a)(1), defendant is procedurally barred from raising these issues in his second motion. N.C. Gen. Stat. § 15A-1419(a)(1) states the following as a ground for the denial of a motion for appropriate relief:

> Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.

N.C. Gen. Stat. § 15A-1419(a)(1) (1997).

Defendant's first motion for appropriate relief was filed within 10 days of judgment and thus the grounds raised in the present motion are not procedurally barred. However, the defendant's three contentions of newly discovered evidence are still subject to the *Britt* requirements that (1) the witness will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the newly discovered evidence does not merely tend

to contradict, impeach or discredit the testimony of a former witness, and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *Britt*, 320 N.C. at 712-13, 360 S.E.2d at 664.

Wright's affidavit merely serves to contradict, impeach or discredit the testimony of Riddick, Woodard and Wise. Furthermore, Wright's affidavit establishes that defendant was aware prior to the first motion hearing that Wright knew of Riddick's plan to commit perjury. However, defendant did not ask the trial court to declare Wright unavailable and consider his affidavit instead.

With regard to the affidavit of Detective Best, we fail to see how the evidence proffered is material or relevant. Additionally, defendant makes no showing that this evidence was not available at trial or at the first motion hearing. Also, Detective Best was called by the defendant and testified at the first motion hearing. Finally, the evidence proffered by the Wright and Best affidavits when applied to the requirements of *Britt* is not of such a nature that a different result will probably be reached at a new trial.

Defendant fails to establish how the experts' opinions constitute newly discovered evidence. Additionally, defendant states in his motion that the testimony of one expert "would rebut the State's expert testimony" and that "the jury would likely (and properly) lose confidence in the accuracy of Ms. Wise and Mr. Woodard." As defendant argues, the testimony would tend to contradict, impeach and discredit the testimony of former witnesses. Again, applying the *Britt* requirements the defendant has failed to prove that this evidence warrants a new trial. Therefore, defendant's motion, with respect to his contentions based on newly discovered evidence, is denied.

[8] Defendant's second ground for relief is prosecutorial misconduct based on his claim that the State knew Riddick would give false testimony at trial and the State's withholding of exculpatory evidence given by Miller before the defendant's first motion hearing.

Defendant's argument that the State knew Riddick would give false testimony at trial is the same issue in an assignment of error in his appeal to this Court. For the reasons stated in overruling that assignment of error, the defendant's contentions are without merit.

Additionally, we note that the record on appeal reveals that at Riddick's sentencing hearing on 23 April 1998, Riddick related to the trial court yet another version of the events of the robbery.

Riddick stated under oath that he, the defendant, Henderson, and DeLoach were all involved in the robbery and that defendant was the gunman and DeLoach was the "look-out" outside Quality Finance. Further, he stated that his original trial testimony identifying the defendant as the gunman was truthful and he would be willing to testify again if asked.

Second, defendant argues that the information contained in Miller's affidavit is exculpatory evidence and should have been furnished to defendant before the first motion hearing.

At the first motion hearing, Detective Barbour testified for the State that after trial and after DeLoach's confession, he showed a photographic line-up separately to Woodard, Wise and Miller. Defendant did not question Detective Barbour about the line-up shown to Miller and did not call Miller to testify at the first motion hearing. Neither the defendant nor the State questioned Detective Barbour about whether Miller told Detective Barbour that defendant was present at the time of the robbery. Furthermore, Kendrick's affidavit regarding the photographic line-up he showed to Miller on 5 February 1998 states that she could not recognize any of the four individuals shown in the photographs as being present during the robbery.

In sum, we are unable to conclude that the State had "exculpatory evidence" in its possession. Further, again conceding defendant's argument that Miller's affidavit constitutes newly discovered evidence, based on the strength of the eyewitness identifications and the *Britt* requirements, the evidence is not of such a nature that a different result will probably be reached at a new trial. Defendant's second motion for appropriate relief is therefore denied.

We have carefully reviewed the remaining contentions in defendant's second motion for appropriate relief and find them to be without merit.

In conclusion, the defendant received a trial free of prejudicial error and the trial court did not err in denying his motion for appropriate relief. The defendant's second motion for appropriate relief filed in this Court is denied.

No error.

Chief Judge EAGLES and Judge McGEE concur.

BENNIE ARQUILLA AND WIFE JULIE ARQUILLA, HERBERT L. BAKER AND WIFE GRACE P. BAKER, DAVID M. BENNETT AND WIFE MELANIE H. BENNETT, RONALD BOST AND WIFE MARTHA BOST, ROBERT J. BRUNORY AND WIFE NAN W. BRUNORY, BOB BURGES AND WIFE SHARON BURGES, EUGENE K. CLARY AND WIFE SUE H. CLARY, RANDY L. COX AND WIFE MARY A. COX, PAUL DZIEZYC AND WIFE KATHERINE DZIEZYC, GORDON L. EDDY AND WIFE TERESA EDDY, RICHARD T. FONTENOT AND WIFE DONNALEE FONTENOT, ROBERT W. GARNER AND WIFE JULIE S. GARNER, SUZANNE R. GODRIDGE, GLENN R. HARRISON AND WIFE MARY J. HARRISON, DARLENE BARROW HARTMAN, CARROLL BRUCE HAWKINS AND WIFE KAREN HAWKINS, DENNIS D. HINZ AND WIFE DOROTHY C. HINZ, JERRY L. HOLDER AND WIFE BRENDA S. HOLDER, HONG BICH VAN LE AND WIFE CAM HONG THI DO LE, DOUGLAS H. JONES AND WIFE MELODY T. JONES, J. STEVEN LAND AND WIFE JAYNE H. LAND, CARL C. LYERLY, SR. AND WIFE MARGARET C. LYERLY, CLARA R. LAZARO, JOHN K. MILLER AND WIFE CAROL K. MILLER, WILLIAM MILLER AND WIFE KATHERINE MILLER, DOROTHY MISENHEIMER, ROBERT R. MOORE AND WIFE GAY P. MOORE, TIMOTHY L. NOONER AND WIFE CYNTHIA C. NOONER, JANET T. PARKER AND HUSBAND RICK PARKER, STEVE POTEAT AND WIFE DONNA POTEAT, JOHN R. PRING AND WIFE LAURA W. PRING, KENT RABON AND WIFE MARISA W. RABON, WARREN S. REYNOLDS AND WIFE RITA H. REYNOLDS, JOHN RUSS AND WIFE KIM RUSS, ALEX SCOTT, STEPHAN F. SHERRIFF AND WIFE NANCY S. SHERRIFF, FLOYD JOHN WALCHER AND WIFE JOE ELLEN DAVIS WALCHER, LINNE WALLACE AND HUSBAND CHARLIE JAMES WALLACE, JR., ANDREW E. WHITTED AND WIFE ANNETTE E. WHITTED, DANIEL H. WILLIFORD AND WIFE MELINDA S. WILLIFORD, JOHN W. WILLIAMS AND WIFE PATTY P. WILLIAMS, CARL RAY YATES AND WIFE DELLA FAYE YATES, JAMES D. CUSAK, JILL DUGGAN, SCOTT GASKILL AND WIFE KAREN GASKILL, JERRY MILEM AND WIFE SHIRLEY MILEM, ROBERT MORGAN AND WIFE ELIZABETH MORGAN, JOHN NOONAN AND WIFE LISA NOONAN, CHARLES R. REED AND WIFE GENEVIEVE B. REED, MARK RITCHIE AND WIFE JANE RITCHIE, DANNY THORNTON, JESSE C. EBERSOLE AND WIFE LISA M. EBERSOLE, WALLACE J. ELSTON, JR. AND WIFE ARLINE A. ELSTON, ALLEN R. AREY AND WIFE RUBY L. AREY, MARVIN A. BURNETT AND WIFE HAZEL H. BURNETT, YU CHIN CHOI AND WIFE HYUNG K. CHOI, JEFF DINSE, VIOLA H. DIXON, JOHN M. DURKEE AND WIFE JOYCE G. DURKEE, MARTHA S. FREEZE AND HUSBAND MICHAEL A. FREEZE, JOHEPH P. GREEN AND WIFE ANNA GREEN, LETTY KELLY, MOSES LANDRUM AND WIFE GEORGIA LANDRUM, DORIS D. MASTERS, WALTER GRADY MORRIS, BARBARA A. NANCE AND HUSBAND CLARENCE V. NANCE, OLD CAROLINA BRICK CO., JACK B. RICHARDSON AND WIFE MANIE G. RICHARDSON, RALPH SHATTERLY AND WIFE SHARON SHATTERLY, KENNETH W. SHEPLER AND WIFE NAOMI G. SHEPLER, RANSOM A. SHUPING AND WIFE PAULINE L. SHUPING, MICHAEL SOMMERS AND WIFE JOANNE SOMMERS, CHARLES F. VASCONCELLOS AND WIFE LAURIE VASCONCELLOS, ROBERT H. WADDELL AND WIFE ALICE WADDELL, LARRY DEAN WAGONER AND WIFE CAROLINE KIRKPATRICK WAGONER, C. WAYNE WHITMAN AND WIFE NANCY H. WHITMAN, BETTY B. HOYT, AND WIFE F. SYLVIA WISEMAN, PETITIONERS v. CITY OF SALISBURY, A NORTH CAROLINA MUNICIPAL CORPORATION, RESPONDENT

No. COA98-1398

(Filed 21 December 1999)

1. Cities and Towns— annexation—requirements—governmental purposes—subdivision test of urbanization

The trial court erred in an annexation case by finding that four tracts of land owned by Rowan County and located within Area 1 are in use for governmental purposes and meet the subdivision test of the urbanization requirements under N.C.G.S. § 160A-48(c)(3) because: (1) the listed uses do not establish that the tracts within Area 1 were being used for a common purpose; (2) past uses do not provide evidence that the tracts were supporting governmental uses at the time of annexation; (3) future plans are not relevant for classifying property; (4) the geographical location of the tracts within Area 1 near an airport runway is not evidence that the tracts are in governmental use; and (5) the proper inquiry is the actual use at the time of annexation.

2. Cities and Towns— annexation—requirements—use of topographic features

The trial court erred in an annexation case by finding that the boundaries of the pertinent annexation areas follow natural topographic features and streets wherever practical because petitioners met their burden to show that it would have been practical to use topographical features or streets as boundaries, and their burden was not to show that respondent did not have a practical reason to depart from natural features or streets in each instance that it did so.

3. Cities and Towns— annexation—requirements—use of topographic features

The trial court erroneously concluded in an annexation case that appellate courts have held that N.C.G.S. § 160A-48(e) is not mandatory because while that statute does not provide mandatory standards or requirements for annexation, the provision itself is mandatory in light of the North Carolina Supreme Court's holding that a boundary must follow topographic features unless to do so would defeat the annexation.

Appeal by petitioners from judgment entered 26 March 1998 by Judge Jerry Cash Martin in Superior Court, Rowan County. Heard in the Court of Appeals 24 August 1999.

Adams, Hendon, Carson, Crow & Saenger, P.A., by S. J. Crow and Martin K. Reidinger, for petitioners-appellants.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Roddey M. Ligon, Jr., and Woodson, Ford, Sayers, Lawther, Short, Parrott & Hudson, by F. Rivers Lawther, Jr., for respondent-appellee.

TIMMONS-GOODSON, Judge.

On 18 February 1997, the City Council of Salisbury adopted two ordinances to annex involuntarily two areas into the corporate limits of the City of Salisbury. Property owners in the areas annexed ("petitioners") challenge the validity of both annexation ordinances. Annexation Area 1 ("Area 1") is generally southwest of the City while Annexation Area 2 ("Area 2") is generally northwest of the City.

The parties dispute whether four tracts of land located within Area 1 were used for governmental purposes and thus subject to involuntary annexation by the City of Salisbury ("respondent"); and whether the boundaries of Area 1 and Area 2 follow natural topographic features or streets whenever practical, thereby meeting legal requirements for annexation boundaries. The trial court affirmed the annexation of Area 1 and Area 2.

Petitioners' evidence at trial tended to show the following. Each of the four tracts within Annexation Area 1 is owned by Rowan County. The tracts in Annexation Area 1 in question are Lot 12, Lot 24, Lot 55 and Lot 187.

Lot 12 consists of 17.37 acres. There are no structures on the wooded lot, nor is there road access. A sewer easement runs along one of its boundaries. However, the sewer line is not in use.

Lot 24 contains 107 acres of land. It is mainly wooded and contains no structures. A road traverses the eastern edge. Part of a closed landfill occupies a small portion of the lot at its northern edge. The landfill has been closed since 1989. While respondent produced evidence at trial that Lot 24 serves to drain airport property, the County Manager testified that he did not consider any of the four tracts to be in use. The County Manager further testified that Lot 24 was being marketed for sale by the County.

Lot 55 is a wooded lot with no structures on it. It consists of 11.22 acres. A road passes through one edge of the lot.

Lot 187 contains 9.23 acres. There are no structures on the property. Some limitations exist regarding the height of any future structures that may be built on Lot 187 due to its proximity to the airport.

In preliminary maps, respondent assessed the use of the tracts in issue and determined that all four were vacant or not in use. In contrast, in the Annexation Ordinance, respondent indicated that the tracts were in use for governmental purposes. Additionally, respondent introduced a map at trial, the Airport Layout Plan ("the Plan"), which portrayed the four tracts in question as part of one overall parcel of land that is being used for governmental purposes.

According to the Plan, this parcel of land, which includes the four tracts in issue, advances the objectives of the County airport in that it serves as a buffer area between airport operations and residential property. Petitioners counter that the Plan is not evidence that the tracts are currently in governmental use, but is instead a map of the County's potential future plans for this parcel of land.

On the boundaries issue, petitioners contend that portions of the boundaries of both Area 1 and Area 2 do not meet legal requirements for the establishment of annexation boundaries in that the lines do not follow natural topographic features or streets whenever practical. As a result, the City cannot provide municipal services to all of the properties that it included in the annexation areas. Petitioners provide two examples of boundaries that allegedly fail to meet legal requirements.

One of the contested boundaries concerns annexed property located in the southwest quadrant of Annexation Area 2, south of Highway 70 and west of Majolica Road. According to petitioners' evidence at trial, respondent followed property lines and private right-of-way lines to set the boundary for the southwest quadrant rather than following natural topographic features or streets. Respondent cannot provide fire protection or sewer services to the southwest quadrant as it is inaccessible by vehicle. The City conceded that it could have set the boundary at Highway 70 and Majolica Road, and that by doing so, it would not have annexed property that it was unable to serve.

Respondent's evidence at trial tended to show that the City made a sincere effort to use natural topographic features and roads where it was deemed to be practical and that the City did use such features and roads in many instances.

Based on the evidence at trial, the court made the following relevant findings of fact:

> 18. The Petitioners did not contest the classification of properties for use purposes except for the City's classification of all of the property owned by Rowan County, and shown on Petitioners' Exhibit 9 or on Respondent's Exhibit 1 (which is labeled "Airport Layout Plan"), as governmental. The Petitioners contend that the various tax lots or tracts shown on these exhibits should be treated separately with some classified as governmental and others classified as undeveloped in which case they contend that the subdivision test of N.C. Gen. Stat. § 160A-48(c)(3) was not met. The Court finds and concludes that all of the property owned by Rowan County and shown on these exhibits was appropriately classified as governmental, and thus determines that Annexation Area 1 qualifies for annexation by virtue of meeting the subdivision test portion of the urbanization requirements of N.C. Gen. Stat. § 160A-48(c)(3). The land listed on Petitioners Exhibit 9 with Rowan County as owner is properly classified as governmental use pursuant to the holdings in Food Town Stores v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980); Lowe v. Town of Mebane, 76 N.C. App. 239, 332 S.E.2d 739 (1985); Adams-Millis Corp. v. Town of Kernersville, 6 N.C. App. 78, 169 S.E.2d 496, *cert. denied*, 275 N.C. 681 (1969); Thompson v. City of Salisbury, 24 N.C. App. 616, 211 S.E.2d 856 (1975), *cert. denied*, 287 N.C. 264, 214 S.E.2d 437 (1975); Chapel Hill Country Club v. Town of Chapel Hill, 97 N.C. App. 171, 388 S.E.2d 168 (1990); Shackelford v. City of Wilmington, 490 S.E.2d 578 (1997); and, other cases.
>
> The parcels of land owned by Rowan County and shown on Petitioners' Exhibit 9 and Respondent's Exhibit 1 are lands with a single owner and used for the single purpose of promoting the goals and objectives of the governmental entity Rowan County. The lands owned by the County and shown on the Airport Layout Plan contain: the airport with its runway, taxiways and parking facilities; airport-related buildings; radar facilities; a National Guard Armory with aircraft parking facilities as well as a road serving the Armory; an old animal shelter; three old landfills (with gas exhaust facilities); and, a sewer easement.
>
> The portion of this overall parcel owned by the County that does not have structures on it supports the goals and objectives of the County and its airport and air space in a number of ways.

These include: (1) the fact that such property serves as a buffer area between the runway area and adjoining residential properties; (2) a portion of this property was used as a borrow pit to provide dirt for a runway extension; (3) a portion of this property served at one time as a grassy landing strip for small planes; (4) a portion of this property contains a drainage ditch that carries water from the higher runway area to Grants Creek; and, (5) this property cannot be built upon without the County first submitting a form to the F.A.A., and in no event may the property be used in such a way as to interfere with the use of the parcel for airport purposes.

There has been no showing by the Petitioners that the governmental use of this parcel owned by the County was insignificant as compared to any other use.

. . . .

23. In Annexation Area 2, the City attempted to ascertain natural topographic features or streets to use in fixing the new municipal boundaries, and used such features where it was practical to do so, taking into consideration the effect on qualifications and service. In fixing the final proposed boundaries, the City used natural topographic features where practical and where such use did not have an adverse effect upon qualifications and service. The Petitioners presented no evidence that, in each instance where Respondent did not use a natural topographic feature or an actual street for a new municipal boundary, practical reasons did not exist for doing so.

24. To establish non-compliance with N.C. Gen. Stat. § 160A-48(e), regarding natural topographic features, Petitioners must show: (1) that the boundary of the annexed area does not follow natural topographic features or streets; (2) that it would have been practical for the boundary to follow such features; and (3) that the boundaries drawn by the municipality violated the intent of the statute by depriving citizens within the newly annexed area of essential City services. The appellate courts of this State have held that this section of the annexation statute is not mandatory. While some of the boundaries of each of the two (2) annexation areas do not follow natural topographic features or streets, Petitioners have failed to meet the burden of showing that it would have been practical to follow natural topographic features as boundaries; that to have done so would not have defeated the

overall annexation plan, and that the boundaries drawn by the City violated the intent of the statute by depriving citizens within the newly annexed area of essential City services.

Based on the findings of fact, the court made the following pertinent conclusions of law:

> 19. The method used by the City to determine the classification of the property located in Annexation Area 1, including the classification of the property owned by Rowan County and shown on Petitioners' Exhibit 9 and its Airport Layout Plan (Respondent's Exhibit 1), as governmental was calculated to provide reasonably accurate results. Area 1 meets the subdivision test portion of the urbanization requirements of the General Statutes and thus complies with the urbanization requirements of N.C. Gen. Stat. § 160A-48(c)(3).
>
> . . . .
>
> 25. The boundaries of Annexation Area 2 comply with the provisions of N.C. Gen. Stat. § 160A-48(e).

Petitioners appeal.

The issues presented by this appeal are whether the trial court erred (I) in finding that four tracts of land located within Area 1 are in use for governmental purposes; and (II) in finding that the boundaries of Area 1 and Area 2 follow natural topographic features and streets wherever practical.

The hearing was before a judge sitting without a jury. Findings of fact of the trial court are conclusive on appeal if supported by any competent evidence, even if there is evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (citation omitted). Conclusions of law are reviewable *de novo*. *Id.* Where there is *prima facie* evidence that a municipality has complied with the annexation statute, and a party appeals from the adoption of an annexation ordinance, the party attacking the annexation has the burden to show by competent evidence that the municipality failed to meet the statutory requirements. *Dale v. Morganton*, 270 N.C. 567, 574, 155 S.E.2d 136, 143 (1967) (citation omitted).

I.

[1] In their first assignment of error, petitioners argue that the trial court erred by finding that four tracts of land owned by Rowan

County and located within Area 1 are in use for governmental purposes. Petitioners contend that there was insufficient evidence of governmental use on said tracts; therefore, respondent City had no right to involuntarily annex the land. We agree.

An area may not be involuntarily annexed unless it is developed for urban purposes. N.C. Gen. Stat. § 160A-48(c) (Cum. Supp. 1998). According to the "subdivision test" of North Carolina General Statutes section 160A-48(c)(3), an area is sufficiently urbanized if "at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes[.]" N.C.G.S. § 160A-48(c)(3).

Respondent argues that the tracts in issue were in governmental use at the time of annexation; therefore, the tracts met the "subdivision test" of North Carolina General Statutes section 160A-48(c)(3) and were properly found to qualify for involuntary annexation. If, on the other hand, the tracts were not properly classified as in governmental use, then Area 1 does not meet the "subdivision test" and this annexation must fail.

As indicated by North Carolina General Statutes section 160A-48(c)(3), the use of property determines whether it may be involuntarily annexed. *See R.R. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964). In contrast, ownership of the property is not the relevant inquiry. *Id.* (holding the trial court improperly classified a thirteen acre tract as industrial where the entire tract was owned by a corporation but only one acre was being used by the corporation as a parking lot at the time of annexation).

Finding of Fact Number 18 by the trial court treats the issue of use classification of Area 1. Within Finding of Fact 18, the trial court indicates seven times that the property is owned by Rowan County. Since the use of the property at the time of annexation is the proper inquiry, county ownership of the property cannot support the conclusion that "Area 1 meets the subdivision test portion of the urbanization requirements of the General Statutes and thus complies with the urbanization requirements of N.C. Gen. Stat. § 160A-48(c)(3)."

Our Supreme Court also indicated in *Hook* that future plans for use are not relevant in determining whether property may be involuntarily annexed. The fact that the property in *Hook* was "being held for possible industrial use at some indefinite future time" did not sig-

nify that the property was industrially used. *Id.* at 520, 135 S.E.2d at 565. "[A]ctual, minimum urbanization is an essential requirement of the annexation act." *Thrash v. City of Asheville*, 327 N.C. 251, 257, 393 S.E.2d 842, 846 (1990). "The City's subdivision test calculations must reflect actual urbanization, not reliance on some artificial means of making an annexation appear urbanized." *Asheville Industries, Inc. v. City of Asheville*, 112 N.C. App. 713, 719, 436 S.E.2d 873, 877 (1993) (citing *Thrash*, 327 N.C. 251, 393 S.E.2d 842).

Petitioners argue that the trial court improperly relied on the Airport Layout Plan, respondent's Exhibit 1, in classifying the property as governmental. According to petitioners, the Plan is a planning map, depicting how the property in Area 1 may potentially be used in the future. Before we determine whether Area 1 met the subdivision test, we must ascertain as a preliminary matter whether the Plan "reflect[s] actual urbanization" or is merely "some artificial means of making an annexation appear urbanized." *Id.*

Clearly, the trial court relied on the Plan in determining that Area 1 was in governmental use. Within Finding of Fact Number 18, the trial court refers to the Plan numerous times, stating that "[t]he land listed on [the Plan] is properly classified as a government use . . . ." Additionally, the trial court concludes that "[t]he method used by the City to determine the classification of the property located in Annexation Area 1, including the classification of the property . . . shown on [the Plan] as governmental was calculated to provide reasonably accurate results."

By relying on the Plan, the trial court rejected petitioners' argument that the various lots within Area 1 should be treated separately with some classified as governmental and others classified as undeveloped. Instead, the Plan depicted the four tracts in issue as part of one overall parcel of land that was being used for governmental purposes.

We now address the issue of whether the trial court's reliance on the Plan in its findings of fact was supported by competent evidence. A municipality must use "methods calculated to provide reasonably accurate results" to determine whether property meets the subdivision test. N.C. Gen. Stat. § 160A-54 (Cum. Supp. 1998). The trial court cites the following cases in Finding of Fact Number 18 in support of its classification based on the Plan: *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980); *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985); *Adams-Millis Corp.*

v. Kernersville, 6 N.C. App. 78, 169 S.E.2d 496, *cert. denied*, 275 N.C. 681 (1969); *Thompson v. City of Salisbury*, 24 N.C. App. 616, 211 S.E.2d 856, *cert. denied*, 287 N.C. 264, 214 S.E.2d 437 (1975); *Chapel Hill Country Club v. Town of Chapel Hill*, 97 N.C. App. 171, 388 S.E.2d 168, *disc. review denied*, 326 N.C. 481, 392 S.E.2d 87 (1990); and *Shackelford v. City of Wilmington*, 127 N.C. App. 449, 490 S.E.2d 578 (1997). We note that this Court's decision in *Shackelford* has no precedential value in light of the *per curiam* vote of 3-3 in *Shackelford v. City of Wilmington*, 349 N.C. 222, 505 S.E.2d 80 (1998), and therefore do not rely on it in our analysis.

The above mentioned cases stand for the proposition that individual lots may be treated as a single tract for purposes of classification in annexation cases under certain circumstances. *Food Town Stores*, *Lowe* and *Adams-Millis* cite a two-prong test consisting of common ownership and common purpose. "In appraising an area to be annexed one of the methods which can be used to determine what is a tract is to consider several lots in single ownership used for a common purpose as being a single tract." *Lowe*, 76 N.C. App. at 242, 332 S.E.2d at 742.

Thompson and *Chapel Hill Country Club* both hold that the lots which make up a golf course may be treated as one tract as the entire course is in commercial or industrial use. *Thompson* and *Chapel Hill Country Club* are of dubious applicability in the case at bar except as they provide support for the obvious proposition that if the lots within a tract are found to be in governmental use, then the overall tract may be classified as in governmental use.

As indicated by the cases cited in Finding of Fact Number 18, tracts of land serve a common governmental purpose where they are in governmental use or they actively support governmental use. For example, in *Food Town Stores*, our Supreme Court found that four tracts, A, B, C and D, served a common industrial purpose where tracts A and B actively supported industrial improvements on tracts C and D. A and B supported industrial use on C and D in that: a sediment basin on B controlled erosion on C and D, B was the source of fill material for construction on C and D, employee parking facilities on C had expanded into A, and fill for C and D was taken from the boundary of A.

In the present case, the tracts within Area 1 served a common purpose if the four tracts in issue, Lot 12, Lot 55, Lot 187 and Lot 24, were in governmental use or supported governmental use on other

tracts within Area 1 at the time of annexation. Finding of Fact Number 18 states that the lots serve "the single purpose of promoting the goals and objectives of the governmental entity Rowan County." In support of this vague statement of purpose, the trial court makes the following findings:

> The lands owned by the County and shown on the Airport Layout Plan contain: the airport with its runway, taxiways and parking facilities; airport-related buildings; radar facilities; a National Guard Armory with aircraft parking facilities as well as a road serving the Armory; an old animal shelter; three old landfills (with gas exhaust facilities); and, a sewer easement.

The above uses do not establish that the tracts within Area 1 were being used for a common purpose. The majority of the stated uses did not take place on the four tracts in issue, and therefore, are not evidence that the four tracts were in governmental use or supported governmental use on other property within Area 1. For example, the airport with its runway, taxiways and parking facilities are not located on any part of Lot 12, Lot 55, Lot 187 or Lot 24. Similarly, there are no airport-related buildings on the lots in issue, nor are there radar facilities, a National Guard Armory or aircraft parking facilities. Past uses, such as "an old animal shelter" and "old landfills" do not provide evidence that the tracts were supporting governmental uses at the time of annexation. *See Thrash*, 327 N.C. 251, 393 S.E.2d 842.

Respondent presented evidence that there was a sewer easement for a single sewer line on one of the boundaries of Lot 12. However, the sewer line was not connected and the County made no use of it. Aside from the sewer line, Lot 12, consisting of 17.37 acres, was wooded, vacant and contained no structures. We conclude that the governmental use on Lot 12 was insignificant when compared to the use of the tract as a whole. *See Asheville Industries, Inc.*, 112 N.C. App. 713, 436 S.E.2d 873 (holding that the industrial use of a property was insignificant as compared to the nonindustrial use where the property was crossed by an industrial power line from a nearby electric generating plant).

Additionally, respondent presented evidence that a road passes through one edge of Lot 55. Otherwise, Lot 55, consisting of 11.22 acres, is overgrown with bushes and trees. Respondent labeled the entire Lot 55 as in governmental use because "[i]t's suitable for airport buildings and facilities[.]" Future plans are not relevant for clas-

sifying property. *See Hook*, 261 N.C. 517, 135 S.E.2d 562. We conclude that the actual governmental use on Lot 55 at the time of annexation was insignificant as compared to the nongovernmental use. *See Asheville Industries, Inc.*, 112 N.C. App. 713, 436 S.E.2d 873.

Additionally, the trial court cited the following uses in support of its finding that the tracts within Area 1 served a common purpose:

> The portion of this overall parcel owned by the County that does not have structures on it supports the goals and objectives of the County and its airport and air space in a number of ways. These include: (1) the fact that such property serves as a buffer area between the runway area and adjoining residential properties, (2) a portion of this property was used as a borrow pit to provide dirt for a runway extension; (3) a portion of this property served at one time as a grassy landing strip for small planes; (4) a portion of this property contains a drainage ditch that carries water from the higher runway area to Grants Creek; and (5) this property cannot be built upon without the County first submitting a form to the F.A.A., and in no event may the property be used in such a way as to interfere with the use of the parcel for airport purposes.

Again, we find that the above uses fail to establish that the tracts within Area 1 were being used for a common purpose. The second and third uses must be disregarded as they pertain to past activities. *See Thrash*, 327 N.C. 251, 393 S.E.2d 842. Turning to the fourth use, while respondent presented evidence that Lot 24 served to drain airport property, Lot 24 was being actively marketed for sale by the County. Clearly, Lot 24 was not supporting governmental use if the County sought to sell it.

Regarding the fifth above mentioned use, respondent put on evidence that Lot 187 is limited by Federal Aviation Administration regulations as to the height of buildings that may be constructed on it. However, a height limitation is not evidence of a current governmental use. Lot 187 could potentially be developed for residential use or industrial use without violating the height restriction. At the time of annexation, Lot 187 contained no structures of any kind and was not in governmental use or supporting governmental use.

Finally, the trial court indicated that the property within Area 1 serves a common purpose in that it acts as a buffer area between the runway area and adjoining residential properties. We are not con-

vinced that the property within Area 1 serves or supports a governmental purpose merely because it is in proximity to the airport runway. Property surrounding an airport can be developed for non-governmental uses. The geographical location of the tracts within Area 1 is not evidence that they are in governmental use.

In the present case, while the evidence supports a finding of common ownership, there is insufficient evidence that the lots served a common purpose. *See Food Town Stores*, 300 N.C. 21, 265 S.E.2d 123; *Lowe*, 76 N.C. App. 239, 332 S.E.2d 739; *Adams-Millis Corp.*, 6 N.C. App. 78, 169 S.E.2d 496. The County treated the tracts within Area 1 as separate tax lots. Lot 24 was being marketed for sale by the County as a separate parcel. In its urbanization calculations, respondent treated each tax parcel as a separate tract. In preliminary maps, respondent assessed the use of the individual tracts in issue and determined that all four were vacant and not in use.

Having determined that there was insufficient evidence that the lots within Area 1 served a common purpose at the time of annexation, we conclude that the trial court erred in treating them as a single tract. *See Lowe*, 76 N.C. App. at 242, 332 S.E.2d at 742. In light of the particular circumstances, the Plan was not a reasonable method of determining whether Area 1 met the subdivision test. *See Id.* Therefore, the trial court's conclusion of law that "[t]he method used by the City to determine the classification of the property located in Annexation Area 1 . . . was calculated to provide reasonably accurate results" is not supported by the findings of fact.

We agree with petitioners' contention that the Plan is in essence a planning map, depicting how the property in Area 1 may be used in the future. Rowan County Manager Tim Russell testified that the Plan "shows you the airport and potential development around the airport[.]" Russell further testified that the Plan includes additions to the existing development. For instance, the Plan depicts structures on Lot 55 which do not actually exist.

As discussed above, future plans for use are irrelevant in determining whether a property may be involuntarily annexed. Instead, the proper inquiry is the actual use at the time of annexation. Therefore, the fact that the four tracts in issue appear on the Plan does not support the conclusion that "Area 1 meets the subdivision test portion of the urbanization requirements of the General Statutes and thus complies with the urbanization requirements of N.C. Gen. Stat. § 160A-48(c)(3)."

The trial court did not make findings of fact regarding each tract, but instead made a blanket finding based on the Plan that the properties were properly classified as in governmental use. As the trial court did not make findings as to actual governmental use on the four lots at the time of annexation, we find no support for the conclusion of law that "Area 1 meets the subdivision test portion of the urbanization requirements of the General Statutes and thus complies with the urbanization requirements of N.C. Gen. Stat. § 160A-48(c)(3)." We conclude that the annexation of Area 1 was improper and therefore reverse.

II.

[2] In their second assignment of error, petitioners argue that the trial court erred by finding that the boundaries of Annexation Areas 1 and 2 follow natural topographic features and streets wherever practical. Having already determined that the involuntary annexation of Area 1 was improper, we confine our analysis to Area 2. The contested boundaries concern annexed property located in the southwest quadrant of Area 2, south of Highway 70 and west of Majolica Road. Petitioners argue that respondent impermissibly followed property lines and private right of way lines to set the boundary for the southwest quadrant rather than following natural topographic features or streets. We agree.

Whenever practical, a municipal governing board must follow "natural topographic features such as ridge lines and streams and creeks as boundaries, and may use streets as boundaries." N.C. Gen. Stat. § 160A-48(e) (1994). *See also* N.C. Gen. Stat. § 160A-36(d) (1994). Petitioners have the burden to show: "(1) that the boundary of the annexed area does not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features." *Greene v. Town of Valdese*, 306 N.C. 79, 82, 291 S.E.2d 630, 633 (1982).

In *Greene*, the petitioners presented no evidence that it would have been practical or reasonable to follow topographic features. In contrast, the respondent put on evidence that it would not have been practical to follow such features because to do so would have included an expanse of undeveloped land, thereby defeating the annexation. Our Supreme Court held that a municipality must follow natural features unless to do so would defeat the annexation.

> Where the boundary of the annexed area . . . can be established along [natural topographic features] without defeating the area's

> compliance with the other portions of G.S. 160A-36 the boundary must follow such features. Where, however, to follow natural topographic features would convert an area which would otherwise meet the statutory tests . . . into an area that no longer satisfies those requirements, the drawing of boundaries along topographic features is no longer "practical[.]"

Id. at 85, 291 S.E.2d at 634. *See also Matheson v. City of Asheville*, 102 N.C. App. 156, 402 S.E.2d 140 (1991) (finding that City was not required to extend annexation boundaries to natural ridgelines where to do so would have defeated City's compliance with urbanization requirements).

In the present case, petitioners met their burden of showing that the boundary of Area 2 fails to follow natural topographic features, and that it would have been practical for the boundary to follow such features. Heidi Galanti, Senior Planner in the City Planning Department, testified that a portion of Area 2 followed property lines and not natural topographic features or streets:

> Q: Now, if you can direct your attention to Area 2, there is a portion at the western boundary of Area 2 where the boundary simply follows property lines. Is that correct?
>
> A: That is correct.

Petitioners contend that a practical alternative was available to respondent in that respondent could have set the boundary at Highway 70 and Majolica Road, thereby excluding the southwest portion of Area 2. At trial, Galanti conceded that the City could have used the highway as a boundary and that by doing so, respondent would have improved its chances of complying with statutory urbanization requirements. Furthermore, Galanti testified that using the street as a boundary would have made it possible for the City to provide municipal services to the entire annexation area.

> Q: In light of the services that you are going to be unable to provide to this portion of Area 2, would it not have been more practical for the boundary to continue to follow Highway 70 down here?
>
> A: I don't know. I would say that—no.
>
> Q: At least you would be able to provide services to the whole area rather than just three-quarters of the area, wouldn't you?

A: Under those situations, I guess.

. . . .

Q: You say eliminating this portion of Area 2 would improve your percentage for qualifying Area 2 as urbanized. Correct?

A: It probably would have raised those numbers, yes.

In *Greene* and *Matheson*, following natural features or streets would have forced the City to include more land within the boundaries of the annexed area, thereby defeating the urbanization requirement for annexation. In contrast, in the present case, if respondent had followed natural features or streets it would have included less land in the annexed area and improved the chances that Area 2 would qualify for annexation.

We agree with respondent that the annexation of Area 2 is not null and void under the principles enunciated in *Weeks v. Town of Coates*, 121 N.C. App. 471, 466 S.E.2d 83 (1996). In *Weeks*, this Court held that an annexation ordinance was null and void where there was no *prima facie* evidence that the town attempted to comply with North Carolina General Statutes section 160A-36(d). In the present case, Galanti testified for respondent that "[w]henever there were topographic features that were practical to be used, they were used." Galanti also indicated that a sincere effort was made to use natural topographic features whenever practical. The testimony of Galanti constitutes *prima facie* evidence that respondent attempted to comply with the statutory requirements. Therefore, the decision in *Weeks* does not control. Rather, the applicable decisions by this Court are: *Lowe*, 76 N.C. App. 239, 332 S.E.2d 739, and *Rexham Corp. v. Town of Pineville*, 26 N.C. App. 349, 216 S.E.2d 445 (1975). *Weeks*, 121 N.C. App. at 476, 466 S.E.2d at 86.

In *Lowe*, this Court relied on the two-part test announced in *Greene*. Additionally, the *Lowe* court remarked on the legislative history of section 160A-36(d), which suggests that "the Legislature was concerned that a full range of municipal services be available to citizens in the annexed area." *Lowe*, 76 N.C. App. at 244, 332 S.E.2d at 743. This Court concluded in *Lowe* that boundary lines conformed with the requirements of section 160A-36(d) where the Town did not include developed land on both sides of the streets which served as boundaries.

Petitioners have failed to carry their burden of showing that it would have been practical to follow natural topographic features

> as boundaries, that to do so would not have defeated the overall annexation plan, and that the boundaries drawn by the town violated the intent of the statute by depriving citizens within the newly annexed area of essential city services.

Id.

In the case *sub judice*, we have already concluded petitioners have shown that it would have been practical for respondent to follow natural features and that it would not have defeated the overall annexation plan had respondent done so. Additionally, petitioners put on evidence that the City would be unable to provide essential municipal services within Area 2. Heidi Galanti, Senior Planner in the City Planning Department, testified as follows:

> Q: You were made aware that sewer service could only be provided to that portion of Area 2 with a pump installation. Correct?
>
> A: At some point I believe I was.
>
> Q: And you are aware, are you not, that the sewer plans for Area 2 do not include that pump station? Are you aware of that?
>
> A: Yes, I am.
>
> Q: So you are aware that that portion of Area 2 that was ultimately included in the annexation area does not have services proposed for it because the pump station wouldn't be put in. Correct?
>
> A: Correct.
>
> Q: Now, there are some roads that give access to this back portion, southwestern corner, of Area 2. Is that correct?
>
> A: Not that I'm aware of.
>
> Q: So for the fire department to put out a fire in this portion of Area 2, they would need a brush truck, or at least some form of off-road fire extinguishing apparatus to put out a fire in that area, wouldn't they?
>
> A: That would be my assumption.
>
> Q: I believe you heard Chief Brady testify the city department does not have any such brush truck. Correct?
>
> A: Correct.

The trial court's Conclusion of Law Number 24 reveals that the trial court relied on the test enunciated in *Lowe*.

> 24. . . . Petitioners have failed to meet the burden of showing that it would have been practical to follow natural topographic features as boundaries; that to have done so would not have defeated the overall annexation plan, and that the boundaries drawn by the City violated the intent of the statute by depriving citizens within the newly annexed area of essential City services.

We do not find support in the findings of fact for the above conclusion. The only finding regarding petitioners' burden is within Finding of Fact Number 23 and states: "Petitioners presented no evidence that, in each instance where Respondent did not use a natural topographic feature or an actual street for a new municipal boundary, practical reasons did not exist for doing so." The finding misstates petitioners' burden. As *Greene* and *Lowe* indicate, petitioners had the burden to show that it would have been practical to use topographic features or streets as boundaries. Petitioners did not, as the trial court suggests, have the burden to show that respondent did not have a practical reason to depart from natural features or streets in each instance that it did so. Believing that petitioners met their burden, we hold that the trial court's conclusion of law is in error.

[3] We also note that the trial court erroneously concluded that "appellate courts of this State have held that [G.S. 160A-48(e)] is not mandatory." In *Greene*, our Supreme Court stated that "the provisions of subsection (d) of G.S. 160A-36 contain no mandatory standards or requirements for annexation." *Greene*, 306 N.C. at 85, 291 S.E.2d at 634. The Court made this statement in support of its holding that a municipality may depart from topographic features in drawing boundaries where it would be impractical or "not possible of reasonable performance" to adhere to such features (internal quotations omitted). *Id.* While section 160A-48(e) does not provide "mandatory standards or requirements for annexation," we believe that the provision itself is mandatory in light of our Supreme Court's holding that a boundary "must" follow topographic features unless to do so would defeat the annexation. *Id.* Therefore, the trial court erred in so concluding.

For the reasons stated herein, the judgment of the trial court affirming both annexation ordinances is reversed.

Reversed.

Judges GREENE and HORTON concur.

BETTY S. BENTON (NOW ABSHER), ADMINISTRATRIX OF THE ESTATE OF JAMES LEE POPWELL, DECEASED, PLAINTIFF v. HILLCREST FOODS, INC.; WAFFLE HOUSE, INC.; DANIEL HERNANDEZ, JR.; PATSY LEFLER JONES; AND WAFFLE HOUSE HOLDING COMPANY, INC., DEFENDANTS

ARTHUR FRANKLIN BROWN, PLAINTIFF v. HILLCREST FOODS, INC.; WAFFLE HOUSE, INC.; DANIEL HERNANDEZ, JR.; PATSY LEFLER JONES; AND WAFFLE HOUSE HOLDING COMPANY, INC., DEFENDANTS

No. COA98-936

(Filed 21 December 1999)

1. Negligence— contributory—initiation of confrontation

In an action against a restaurant owner and franchisor for wrongful death and personal injuries based on a fight occurring at the restaurant, the trial court did not err in denying plaintiffs' motion for directed verdict and judgment notwithstanding the verdict on the issue of contributory negligence because plaintiffs failed to use ordinary care for their own safety, as evidenced by the facts that: (1) plaintiffs provoked the Mexican men, who shot them, by referring to them as "wetbacks"; (2) plaintiffs were aware that defendant Jones and the Mexican men were about to reenter the restaurant with loaded guns, yet plaintiffs refused to leave through the back door when restaurant employees told them they could do so to avoid a confrontation; and (3) plaintiffs initiated confrontation with the Mexican men, even though plaintiffs had been informed that the police would arrive shortly to resolve the situation.

2. Negligence— contributory—instructions—intentional act

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by submitting the issue of contributory negligence to the jury or by denying plaintiffs' motion for a new trial on the issue of contributory negligence even though plaintiffs' acts of initiating the physical confrontation were intentional and deliberate rather than negligent.

3. Appeal and Error— preservation of issues—failure to cite authority—abandonment of issue

Although plaintiffs contend the trial court erred in failing to instruct the jury on the doctrine of concurring acts of negligence in regard to its contributory negligence instruction, plaintiffs do not cite any legal authority nor do they make an argument for extension of the law in support of their argument as required by N.C. R. App. P. 28(b)(5), and therefore, this issue is abandoned.

4. Negligence— contributory—self-defense—instruction not required

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by failing to instruct the jury on the issue of self-defense in regard to its contributory negligence instruction because there is no support in North Carolina law for the proposition that a plaintiff is entitled to an instruction on self-defense in order to rebut the affirmative defense of contributory negligence.

5. Damages and Remedies— punitives—willful or wanton conduct not shown

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by granting defendant restaurant owner's motion for directed verdict as to the punitive damages claim based on willful or wanton negligence because: (1) willful or wanton conduct and gross negligence are the same standard of negligence under N.C.G.S. § 28A-18-2, and plaintiffs failed to show willful or wanton conduct; and (2) taken in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to justify a verdict for plaintiffs when the evidence presented only showed that no security measures such as locks or guards were in place to protect customers at the restaurant and the restaurant was located in a high crime area.

6. Negligence— contributory—recovery barred

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by granting defendants Waffle House, Inc., and Waffle House Holding Company, Inc.'s motion for directed verdict as to all claims because even if plaintiffs could show negligence

by either of these defendants, plaintiffs would have been barred from recovery based on their contributory negligence.

7. Trials— order of jury arguments

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by denying plaintiffs' motion for the last jury argument on the ground that defendants in effect introduced evidence by marking exhibits and questioning witnesses because the order of the jury arguments is in the discretion of the trial court and the trial court's decision is final.

8. Evidence— subsequent remedial measures

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not abuse its discretion by excluding evidence of subsequent remedial measures in the form of written instructions to security guards to lock the door in the event of a disturbance in the restaurant parking lot because: (1) N.C.G.S. § 8C-1, Rule 407 provides that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event; (2) the exception to Rule 407, which would allow the evidence of subsequent measures, is not met since defendants' testimony that there is no reason to lock the door refers to the perceived lack of necessity to do so and does not address the feasibility of locking the door; and (3) Rule 403 precludes its admission since the proffered evidence is of slight probative value and presents a danger that the jury would be unfairly prejudiced against defendant for not having taken a remedial measure earlier.

9. Evidence— expert—area crime data—exclusion

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by excluding the analysis of 1988-91 data from a crime analysis expert because: (1) plaintiffs were permitted to demonstrate defendants' knowledge of the need to provide adequate security measures to protect its business invitees; (2) in light of the fact that more recent data had been admitted, the trial court could have determined that data pertaining to criminal activity from 1988 to 1991 was merely cumulative; and (3) even if the trial court erred, the error was harmless in light of the fact that plaintiffs were found contributorily negligent and additional

crime data would not have affected the jury decision as to plaintiffs' negligence.

10. Witnesses— expert—failure to qualify—no pre-trial identification—similar testimony

In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not abuse its discretion by failing to qualify a witness as an expert in the field of security for restaurants and in excluding his opinions because: (1) plaintiffs violated a pre-trial discovery order by failing to identify the witness as an expert; and (2) plaintiffs retained another expert witness to testify as to the same security issues at the restaurant, and thus, the additional testimony would have been cumulative.

Appeal by plaintiffs and defendants from judgment entered 9 February 1998 by Judge Claude S. Sitton in Superior Court, Mecklenburg County. Heard in the Court of Appeals 31 March 1999.

Richard F. Harris, III for plaintiffs-appellants.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Erik A. Schwanz, for defendant-appellant Hillcrest Foods, Inc.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence, for defendants-appellants Waffle House, Inc. and Waffle House Holding Company, Inc.

TIMMONS-GOODSON, Judge.

On the morning of 11 July 1993, at approximately 3:00 a.m., James Lee Popwell ("Popwell") and Arthur Franklin Brown ("Brown") (collectively "plaintiffs") entered the Waffle House restaurant ("the restaurant") located at 3309 Mulberry Church Road in Charlotte, North Carolina. The restaurant is owned by Hillcrest Foods, Inc. ("defendant Hillcrest" or "Hillcrest") and was operated according to a franchise agreement with Waffle House, Inc. and Waffle House Holding Company, Inc. (collectively "defendants Waffle House" or "Waffle House"). Plaintiffs sat down at a booth and Amy Somers served their meals. When plaintiffs had almost finished eating, Patsy Jones ("Jones") and four Mexican men entered the restaurant and sat down in chairs directly across from plaintiffs. Jones had previously visited the restaurant and had been asked to leave as a result of her bad behavior towards sales persons and customers. Jones confronted

plaintiffs and told them to hurry up and get out of the booth. Plaintiffs remained in the booth.

Popwell was talking to a friend in another booth when Jones said, "What do you mean we're from the wrong f---ing country." Popwell responded, "That's not what I meant. I wasn't talking to you. That's not what I said." Jones turned and made a statement to the Mexican men in Spanish. Two of the Mexican men stood up and approached the booth. Popwell jumped up. Brown then stood between Popwell and Jones and said, "Calm down, let's, you know, let's stop this right here. Right now. There's no need for nothing like that." Jones responded, "I'm going to put my boys on you." Linda Landers, a cook for the restaurant, told Jones to be quiet or leave. Popwell and Brown sat down. Standing next to the booth looking at plaintiffs, Jones said, "I've got something for both of you." She then left the restaurant. Landers dialed 911 to report the altercation. Popwell and Brown left the booth to pay their bill.

Jones and two of the Mexican men walked to a car in the parking lot of the restaurant. Brown, Somers and others in the restaurant watched as Jones and the two Mexican men opened the trunk and removed guns. Employees of the restaurant told plaintiffs that they could leave through the back door to avoid a confrontation, but plaintiffs refused. Plaintiffs remained in the restaurant paying their bill when Jones and the two Mexican men reentered the restaurant armed with guns. Paul Katsadas, the manager trainee, told Jones and the Mexican men that they could not bring firearms into the restaurant. Jones threatened to shoot Katsadas, saying, "Shut up or I'll plant one in you too." Jones and the Mexican men approached plaintiffs, pushed them into the counter and encircled them. Jones taunted plaintiffs. Plaintiffs stopped trying to exit the restaurant and began fighting with the four Mexican men. During the altercation, Popwell was shot and killed. Brown suffered serious gunshot wounds.

Betty S. Benton filed a wrongful death action as administratrix of the Estate of James Lee Popwell, the decedent. Brown filed a personal injury action for injuries sustained during the incident. Both plaintiffs sued Hillcrest and Waffle House. Hillcrest and Waffle House filed motions for partial summary judgment as to punitive damages. Hillcrest's motion was denied while Waffle House's motion was granted.

At the end of plaintiff's evidence at trial, the court granted Waffle House's motion for a directed verdict. The court bifurcated the puni-

tive damages issue from the trial of the compensatory damages issues. Hillcrest's motion for directed verdict as to willful and wanton negligence was granted. The jury returned as its verdict that while Hillcrest was negligent, Brown and Popwell were contributorily negligent. All parties appeal.

Plaintiffs' Appeal

Plaintiffs raise numerous assignments of error. The dispositive issues presented by plaintiffs' appeal are whether the trial court erred: (I) in denying plaintiffs' motions for directed verdict and judgment notwithstanding the verdict on the issue of contributory negligence; (II) in failing to instruct the jury on concurring acts of negligence and self-defense; (III) in granting the motion for directed verdict for defendant Hillcrest as to the punitive damages claim; (IV) in granting the motion for directed verdict of defendants Waffle House as to all claims; (V) in denying plaintiffs' motion for the last jury argument; (VI) in excluding evidence of written instructions to security guards; (VII) in excluding crime analysis data from 1988-1991; and, (VIII) in failing to qualify Leroy Wagner, Jr. as an expert witness.

I.

[1] By their first assignment of error, plaintiffs argue that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict on the issue of contributory negligence. Specifically, plaintiffs contend that contributory negligence was not available as a defense because plaintiffs' actions were intentional and deliberate rather than negligent. We cannot agree.

A motion for judgment notwithstanding the verdict is a renewal of an earlier directed verdict motion; therefore, the same standard of review applies to both motions. *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998). When reviewing motions for directed verdict and judgment notwithstanding the verdict, the trial court must determine whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to present the case to the jury. *Id.* "The motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* In other words, the trial court should deny the motions if there exists substantial evidence or "such relevant evidence as a reasonable mind might accept as adequate to sup-

port a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). A directed verdict should not be granted when conflicting evidence has been presented on contested issues of fact. *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C.App. 237, 242, 446 S.E.2d 100, 103 (1994).

Only in extraordinary cases is it proper for the trial court to enter a directed verdict or judgment notwithstanding the verdict against a party in a negligence case. *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987). Generally, the issue of negligence as a basis for recovery or, in the alternative, contributory negligence as a bar to recovery, is for the jury. *Id.*

A person is guilty of contributory negligence if he or she does not use ordinary care for his or her safety. *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965).

> Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence.

Id. Ordinary care is defined as "such care as an ordinarily prudent person would exercise under similar circumstances to avoid injury." *Id.*

In the case *sub judice*, defendants presented the following evidence that plaintiffs failed to use ordinary care for their own safety. Plaintiffs provoked the Mexican men by referring to them as "wetbacks." Plaintiffs were aware that Jones and the Mexican men were about to reenter the restaurant with loaded guns, yet when employees of the restaurant told plaintiffs they could leave through the back door, plaintiffs refused. Plaintiffs initiated a physical confrontation with the Mexican men even though plaintiffs had been informed that the police would arrive shortly to resolve the situation. Viewing the evidence in the light most favorable to defendants, we believe there was substantial evidence that plaintiffs failed to use ordinary care for their own safety.

[2] Furthermore, we reject plaintiffs' argument that the doctrine of contributory negligence is not applicable on the grounds that plaintiffs' acts were intentional. The facts of this case are similar to those of *Taylor*, 320 N.C. 729, 360 S.E.2d 796, in which the plaintiff brought

an action against a tavernkeeper after third-parties inflicted injuries on plaintiff at the tavern. The *Taylor* court submitted the issue of contributory negligence to the jury where the plaintiff punched one of the third-parties and failed to avail himself of an earlier opportunity to leave the tavern when he knew the third-parties were drunk and had a reputation for carrying arms.

In the case *sub judice*, we conclude that the trial court did not err in submitting the issue of contributory negligence to the jury. We further conclude that the trial court did not err in denying plaintiffs' motion for a new trial on the issue of contributory negligence.

II.

[3] By their second assignment of error, plaintiffs argue that the trial court erred in instructing the jury as to contributory negligence in that the trial court failed to instruct the jury on the doctrines of concurring acts of negligence and self-defense.

"Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5). Plaintiffs do not cite any legal authority nor do they make an argument for extension of the law in support of their argument that the trial court erred in failing to instruct the jury on concurring acts of negligence. *See Strader v. Sunstates Corp.*, 129 N.C. App. 562, 500 S.E.2d 752, *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). Accordingly, the jury instruction issue relating to concurring acts of negligence is deemed abandoned.

[4] While self-defense may be raised in a civil action, self-defense is an affirmative defense which the *defendant* must raise in the pleadings. *Young v. Warren*, 95 N.C. App. 585, 383 S.E.2d 381 (1989). When evidence exists from which it may be inferred that a *defendant* acted in self-defense, he is entitled to a jury instruction on self-defense. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977).

In the present case, plaintiffs attempt to avail themselves of an affirmative defense by arguing that the trial court erred in failing to instruct the jury on self-defense. Plaintiffs fail to cite a case in which a plaintiff, rather than a defendant, was prejudiced by the trial court's failure to instruct the jury on self-defense. We do not find support in North Carolina law for the proposition that a plaintiff is entitled to an instruction on self-defense in order to rebut the affirmative defense of contributory negligence. Therefore, we conclude that the

trial court did not err in refusing to charge the jury on the doctrine of self-defense.

III.

[5] By their third assignment of error, plaintiffs argue that the trial court erred in granting the motion for directed verdict for defendant Hillcrest as to the punitive damages claim based on willful or wanton negligence. We cannot agree.

As a general rule, punitive damages may be recovered where tortious conduct is accompanied by an element of aggravation. *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E.2d 148 (1978). According to the wrongful death statute, punitive damages are recoverable "for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence[.]" N.C. Gen. Stat. § 28A-18-2 (1984).

Plaintiffs contend that "gross negligence" and "wilful or wanton conduct" refer to different standards of tortious behavior. According to plaintiffs, in a wrongful death case, "gross negligence" describes a lower level of tortious conduct than "wilful or wanton conduct."

In a recent case involving a contributory negligence claim, this Court held that "gross negligence . . . cannot be read to describe conduct less negligent than that suggested by the phrase 'wilful or wanton conduct.' " *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 669, 486 S.E.2d 472, 473, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998). *See also Weatherford v. Glassman*, 129 N.C. App. 618, 500 S.E.2d 466 (1998) (holding in a medical malpractice case that the standard of gross negligence embodies that of willful or wanton conduct).

This Court relied on the *Cissell* holding in a decision arising out of a wrongful death action. *Parchment v. Garner*, 135 N.C. App. 312, 520 S.E.2d 100 (1999). The *Parchment* court recognized that the phrases were interchangeable: "contributory negligence will not prohibit recovery where the defendant has engaged in willful or wanton conduct . . . which is often referred to as 'gross negligence[.]' " *Id.* at 316-17, 520 S.E.2d at 103 (citations omitted). Until the Supreme Court rules otherwise, we are bound by the precedent set by previous panels of this Court. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 504 S.E.2d 102 (1998). Therefore, we reject plaintiffs' argument that "gross negligence" constitutes a lower standard of negli-

gence than "wilful or wanton conduct" in the context of a wrongful death suit.

A wanton act is an act done with a "wicked purpose or . . . done needlessly, manifesting a reckless indifference to the rights of others." *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978) (citations omitted). An act is willful when there is a deliberate purpose not to discharge a duty, assumed by contract or imposed by law, necessary for the safety of the person or property of another. *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971) (citations omitted).

The facts of the present case are similar to those in *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855, *disc. review denied*, 301 N.C. 239, 283 S.E.2d 136 (1980). In *Wesley*, the plaintiff sued the bus company for failing to protect her from an assault which occurred in the restroom of the defendant's bus station at around 3:00 a.m. The plaintiff showed that the defendant's station was located in a high crime area in which drug arrests were common and that pimps, prostitutes and bums loitered at the station. The assailant, a loiterer, had bothered passengers in the station on other occasions and had been asked to leave the station on multiple occasions. The entrance to the women's restroom was not observable by employees at defendant's station, although technological means were available to make it so. While a police officer had spoken to defendant's agents about the need for and availability of security guards, the defendant had not provided any. The *Wesley* court found the evidence insufficient to submit the issue of willful and wanton negligence to the jurors even though the defendant had a special duty as a carrier to protect its passengers from assault.

In the case *sub judice*, the evidence presented by plaintiffs tended to show that no security measures such as locks or guards were in place to protect customers at the restaurant and the restaurant was located in a high crime area. When taken in the light most favorable to plaintiffs, the evidence was not sufficient as a matter of law to justify a verdict for plaintiffs. Therefore, the trial court did not err in granting the motion for directed verdict for defendant Hillcrest as to the punitive damages claim.

IV.

[6] By their fourth assignment of error, plaintiffs argue that the trial court erred in granting the motion for directed verdict of defendants

Waffle House as to all claims of the plaintiffs. We have already determined that the issue of whether plaintiffs were contributorily negligent was properly submitted to the jury. The jury found plaintiffs were contributorily negligent. Therefore, even if plaintiffs could show negligence on the part of Waffle House, plaintiffs would be barred from recovering from Waffle House. *See Butner v. R.R.*, 199 N.C. 695, 155 S.E. 601 (1930). Therefore, we do not need to reach the issue of whether defendants Waffle House are liable for the negligent acts or omissions of Hillcrest.

V.

[7] By their fifth assignment of error, plaintiffs argue that the trial court erred in denying plaintiffs' motion for the last jury argument on the ground that defendants in effect introduced evidence by marking exhibits and extensively questioning witnesses about such exhibits. We cannot agree.

The order of jury arguments is in the discretion of the trial court and its decision is final. *Pinner v. Southern Bell*, 60 N.C. App. 257, 262, 298 S.E.2d 749, 753, *disc. review denied*, 308 N.C. 387, 302 S.E.2d 253 (1983). Therefore, the trial court did not err in denying plaintiffs' motion for the last jury argument.

VI.

[8] By their sixth assignment of error, plaintiffs argue that the trial court erred in excluding evidence of subsequent remedial measures in the form of written instructions to security guards. We cannot agree.

Evidence of subsequent remedial measures "is not admissible to prove negligence or culpable conduct in connection with the event." N.C. Gen. Stat. § 8C-1, Rule 407 (1992). However, Rule 407 "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." *Id.* Rule 407 is based on the policy that individuals "should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers." *R.R. v. Trucking Co.*, 238 N.C. 422, 425, 78 S.E.2d 159, 161 (1953) (citations omitted).

Plaintiffs concede that the instructions to security guards were created after the shootings in issue. However, plaintiffs argue that the instructions, which state that the security guards should lock the door in the event of a disturbance in the parking lot, show the feasibility of precautionary measures and would have impeached defendants' testimony that there was no reason to lock the front door of the restaurant which was open twenty-four hours a day.

A witness for defendant stated, "There's no reason to lock the door." However, testimony that there is no reason to lock the door does not address the feasibility of locking the door. Instead, the statement refers to the perceived lack of necessity to do so. Therefore, whether or not it would have been possible to lock the door was not controverted, and evidence that such a measure would have been feasible is not admissible under Rule 407.

Furthermore, the trial court excluded the evidence following an objection based on Rule 403 by counsel for defendant Hillcrest. According to Rule 403, evidence is inadmissible when the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (1992).

Whether to exclude evidence under Rule 403 is within the sound discretion of the trial court; this Court will not disturb its ruling absent a showing that the ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988) (citations omitted). As we believe that the proffered evidence is of slight probative value and presents a danger that the jury would be unfairly prejudiced against defendant for not having taken the remedial measure earlier, we conclude that the trial court did not abuse its discretion in excluding evidence of a subsequent remedial measure.

VII.

[9] By their seventh assignment of error, plaintiffs argue that the trial court erred in excluding the analysis of 1988-1991 data from John Couchell, a crime analysis expert. We cannot agree.

The trial court may exclude relevant evidence "if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403.

In *Murrow v. Daniels*, 321 N.C. 494, 501, 364 S.E.2d 392, 397 (1988), our Supreme Court stated, "evidence of prior criminal acts by third parties on or near the premises involved is admissible to show a defendant's knowledge of the need to provide adequate security measures to protect its business invitees." Therefore, evidence of criminal acts near the premises in question is admissible unless it is excluded by another rule. *Id.* In *Murrow*, evidence of prior criminal acts occurring between 1977 and 1982 was admissible where the crime in issue took place in June 1982.

In the present case, the shooting incident at the restaurant occurred on 11 July 1993. The trial court allowed plaintiffs to introduce records of 911 calls from January 1988 through July 1993 concerning incidents at the restaurant. Furthermore, crime analyst John Couchell was allowed to testify as to the types of offenses that had prompted the 911 calls in 1992 and 1993.

Couchell also testified as to the crimes that had occurred within a one-half mile radius of the restaurant in 1992 and 1993. In addition to providing the total number of reported offenses for 1992 and 1993, Couchell provided breakdowns of the types of offenses which had been reported and whether they constituted violent crimes or property crimes.

While the plaintiff in *Murrow* was allowed to present evidence of crime for a greater temporal span than plaintiffs in the case *sub judice*, the data in *Murrow* pertained to a smaller geographical area. The *Murrow* plaintiff presented evidence of crimes that had taken place at an intersection of two highways, while plaintiffs in the present case presented evidence of crimes that had taken place within a one-half mile radius of the restaurant.

We do not believe the trial court's decision to exclude data pertaining to criminal activity from 1988 to 1991 violated the holding in *Murrow*. Based on the above evidence, plaintiffs were permitted to demonstrate defendants' knowledge of the need to provide adequate security measures to protect its business invitees.

In light of the fact that more recent data had been admitted, the trial court could have determined that data pertaining to criminal activity from 1988 to 1991 was merely cumulative. *See* N.C.G.S. § 8C-1, Rule 403. Furthermore, plaintiffs were found contributorily negligent, and additional crime data from Couchell would not have affected the jury decision as to plaintiffs' negligence. As such, even if

the trial court had erred in excluding the 1988-1991 data, such error would have been harmless. *See* N.C. Gen. Stat. § 1A-1, Rule 61 (1990). We conclude that the trial court did not err in excluding the analysis of 1988-1991 data from John Couchell, a crime analysis expert.

VIII.

[10] By their eighth assignment of error, plaintiffs argue that the trial court erred in failing to qualify Leroy Wagner, Jr. as an expert witness in the field of security for restaurants and in excluding his opinions. We cannot agree.

"If a party . . . fails to obey an order to provide or permit discovery . . . a judge . . . may make such orders in regard to the failure as are just[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (1990). The choice of sanctions under Rule 37 is within the trial court's discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 464 S.E.2d 504 (1995).

In the case at bar, plaintiffs violated a pre-trial discovery order in that they failed to identify Leroy Wagner, Jr. as an expert. Defendants did not have notice that plaintiffs would seek to qualify Wagner as an expert until trial. Therefore, it was within the trial court's discretion to exclude Wagner's testimony.

Furthermore, the trial court has broad discretion in determining the admissibility of expert witness testimony and its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. *Jennings v. Jessen*, 103 N.C. App. 739, 407 S.E.2d 264 (1991). Plaintiffs retained an expert witness, Alan H. Crawford, who testified as to security issues at the restaurant. Proffered testimony for Wagner reveals that Wagner would have testified as to the same security issues, such that his testimony would have been cumulative. We conclude that the trial court did not abuse its discretion in excluding Leroy Wagner, Jr. from testifying.

IX.

After reviewing all of plaintiffs' remaining assignments of error, we conclude that they are meritless.

Defendants' Appeals

Defendants' arguments and assignments of error depend on our finding merit in plaintiffs' appeal. Based on our disposition of plain-

tiffs' issues on appeal, we need not address the issues raised by defendants on appeal.

For all of the foregoing reasons, we hold that plaintiffs were afforded a fair trial free from prejudicial error and that judgment was properly entered for defendants.

No error.

Judges LEWIS and HORTON concur.

KAREN G. TWADDELL, PLAINTIFF v. GEORGE FRANKLIN ANDERSON, DEFENDANT

No. COA99-90

(Filed 21 December 1999)

1. **Child Support, Custody, and Visitation— support—foreign order—UIFSA—registration in North Carolina**

The trial court erred by finding that plaintiff had not met the child support registration requirements of UIFSA (the Uniform Interstate Family Support Act) where plaintiff's registration statement was sufficient to satisfy N.C.G.S. § 52C-6-602(a)(1), although some of the information could be found only upon a close reading.

2. **Child Support, Custody, and Visitation— support—foreign order—intervening North Carolina order**

The trial court erred in a child support action by finding that a North Carolina URESA order superseded and effectively voided an earlier California order. Both orders were prior to the enactment of UIFSA and, under URESA, more than one state could have simultaneous jurisdiction over a case and a subsequent order does not necessarily nullify a prior order. No North Carolina order in this case made any findings pertaining to nullification of the California order or to exclusive jurisdiction.

3. **Child Support, Custody, and Visitation— support—jurisdiction—foreign order**

The trial court's conclusion that North Carolina had sole jurisdiction over a child support action violated the federal Full Faith and Credit for Child Support Order Act (FFCCSOA) even

though that act was passed after the arrearages in question accrued under a 1981 California order. The FFCCSOA is remedial and was intended to have retroactive application.

4. **Child Support, Custody, and Visitation— support—full faith and credit—personal jurisdiction of foreign state**

A California child support order was entitled to full faith and credit in the courts of North Carolina where the California court had personal jurisdiction over defendant and none of the exceptions allowing collateral attack applied.

5. **Child Support, Custody, and Visitation— support—foreign order—statute of limitations**

The trial court erred in a child support action by concluding that the statute of limitations precluded enforcement of a 1997 California order which involved arrearages from a prior order. Once the arreages are reduced to judgment, that judgment is entitled to full enforcement in North Carolina for a period of ten years after its entry.

6. **Pleadings— Rule 11 sanctions—California child support order**

Plaintiff's counsel had grounds for seeking the registration of a California child support order and did not violate N.C.G.S. § 1A-1, Rule 11.

Appeal by plaintiff from order entered 29 October 1998 by Judge Karen A. Alexander in Craven County District Court. Heard in the Court of Appeals 21 October 1999.

Michael F. Easley, Attorney General, by Gerald K. Robbins, Assistant Attorney General, for plaintiff-appellant.

McCotter, McAfee & Ashton, PLLC, by Rudolph Alexander Ashton, III, and Robert J. McAfee, for defendant-appellee.

EDMUNDS, Judge.

This appeal arises from plaintiff's attempted registration, pursuant to the Uniform Interstate Family Support Act, of a foreign support order. On motion of defendant, the trial court vacated and dismissed the attempted registration and found sanctionable plaintiff's attempt to register the foreign support order. We reverse the order of the trial court.

On 16 June 1981, a superior court in California entered a stipulated support order pursuant to which defendant George Franklin Anderson was required to pay $200.00 per month in spousal support to plaintiff Karen Anderson (now Karen G. Twaddell) and $200.00 per month for each of their two children. Payments were to begin 1 July 1981. The provision for child support was incorporated into the court's 29 January 1982 order of legal separation, but this order did not include a requirement for spousal support. When the parties divorced on 14 June 1982, the California court incorporated the 29 January 1982 order into the divorce decree.

On 9 September 1986, plaintiff filed in California a petition for support pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA). The petition requested an order requiring defendant to (1) pay monthly child support of $400.00, (2) provide health insurance for his children, (3) pay $22,536.00 in child support arrears, and (4) pay $1,400.00 in spousal support arrears. In accordance with the terms of URESA, the petition was forwarded to the Clerk of Court in Craven County, North Carolina, where defendant was then living. The North Carolina court entered an order on 14 November 1986 (signed 6 June 1989) finding no arrearage in defendant's child support and requiring defendant to pay a total of $220.00 per month for his two children. Although the court further found that defendant was in arrears in his spousal support in an unspecified amount, it determined that defendant would not be held in contempt for the arrearage, but that plaintiff was entitled to a civil judgment against defendant "for said arrearages."

The North Carolina court held a show cause hearing on 26 June 1987 for defendant's alleged failure to comply with its 14 November 1986 order. The court found defendant in contempt and ordered that he could purge his contempt by paying his arrears of $230.00 plus a nominal service charge. On 28 October 1988, the trial court again found defendant in contempt for failure to pay his monthly child support obligations.

On 16 June 1993, the Craven County Clerk of Superior Court, in accordance with N.C. Gen. Stat. §§ 52A-29 and -30 (1992) (repealed 1996), sent defendant a Notice of Registration of Foreign Support Order. The Notice alleged that defendant owed in excess of $36,000.00 in unpaid child support as of 30 September 1992 and that he was to pay $400.00 per month in ongoing child support. Attached to the Notice were copies of the California order and the final judg-

ment of legal separation. Plaintiff voluntarily dismissed this attempted registration on 29 July 1993.

Later, the New Bern Child Support Enforcement Office (Support Office) attempted to have $94.01 per week for child support withheld from defendant's salary. On 29 November 1993, defendant filed a Motion for Immediate Restraining Order to prevent the Support Office from garnishing his wages. After issuing a temporary injunction, the trial court on 16 December 1993 (signed 24 March 1994) permanently enjoined the Support Office. At the same time, the court found defendant owed a child support arrearage of $357.17 and set out a schedule for repayment. The court further found that defendant's only child support obligation was to pay $220.00 per month and that no state or local official was to take any steps to collect any arrearage other than that set out in its order. The North Carolina court conducted another hearing on 2 June 1994, and, after determining that there was an arrearage of $141.78, found defendant in contempt.

On 2 September 1997, a California superior court entered an order setting forth child support arrearage as of 31 December 1996 in the amount of $86,509.54 and spousal support arrearage of $4,041.72, all of which accrued under the 1981 California order. On 15 September 1997, the North Carolina district court terminated defendant's child support obligation, finding that both children had reached the age of majority. The court also determined that all arrears had been paid in full in accordance with the 16 December 1993 North Carolina order.

On 7 July 1998, a second Notice of Registration of Foreign Support Order was filed with the Craven County Clerk of Superior Court. The order registered pursuant to this second Notice of Registration was the 2 September 1997 California order cited in the preceding paragraph. On 21 August 1998, defendant filed in Craven County a Petition to Vacate Registration and to Dismiss Attempted Registration of Foreign Support Order. The matter came for hearing, and on 29 October 1998, the trial court entered an order that both dismissed plaintiff's attempted registration and held that plaintiff's actions in attempting the registration were sanctionable under N.C. Gen. Stat. § 1A-1, Rule 11 (1990). From this order, plaintiff appeals.

I.

[1] Plaintiff first contends the trial court erred in finding that she failed to comply with the registration requirements of the

Uniform Interstate Family Support Act (UIFSA). *See* N.C. Gen. Stat. §§ 52C-1-100 to 52C-9-902 (1999). Any order of support issued by a court of another state may be registered in North Carolina for enforcement. *See* N.C. Gen. Stat. § 52C-6-601 (1999). To register such a foreign order, the documents set out in N.C. Gen. Stat. § 52C-6-602(a) (1999) must be submitted to the tribunal for the county in which the obligor resides. The trial court found that plaintiff's registration did not contain certain required documentation.

Under URESA, *see* N.C. Gen. Stat. §§ 52A-1 to -32 (1992) (repealed 1996), which was replaced by UIFSA, registration was proper so long as the plaintiff "substantially complied with the requirements of the statute." *Silvering v. Vito*, 107 N.C. App. 270, 274, 419 S.E.2d 360, 363 (1992). Because "[b]oth URESA and UIFSA were promulgated and intended to be used as procedural mechanisms for the establishment, modification, and enforcement of child and spousal support obligations," *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997) (citing N.C. Gen. Stat. § 52C-3-301 official comment), we hold that, under UIFSA, as under URESA, substantial compliance with the requirements of section 52C-6-602 will suffice to accomplish registration of the foreign order.

Plaintiff contends she was in substantial compliance with the statute. The provisions in dispute are section 52C-6-602(a)(1), which requires that a registration request include a "letter of transmittal to the tribunal requesting registration and enforcement," and section 52C-6-602(a)(5), which requires that the registration request include the "name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted." The record indicates that plaintiff submitted a "Registration Statement," which contained the case number, date, and county of the California order; the parties to the action and their respective addresses and employers; and the support amount, date of last payment, and total amount of arrears. The Statement was signed by the Records Custodian in California and notarized, then forwarded to the Craven County Clerk of Court. We hold that this material is sufficient to satisfy section 52C-6-602(a)(1). Plaintiff's packet also included the name and address of the California agency to which support payments were to be remitted. Although this information may be found only upon a close reading of plaintiff's submitted material, we hold that plaintiff also substantially complied with section 52C-6-602(a)(5). Accordingly, the trial court erred in finding that plaintiff had not met the registration requirements of UIFSA.

II.

[2] Next, plaintiff contends the trial court erred in concluding that the 1986 North Carolina intervening order superseded the 1981 California order so that when defendant satisfied his responsibilities under the North Carolina order, all duties under the California order also were satisfied. The 1986 North Carolina order found that the "Court/Administrative Agency has jurisdiction of the parties and subject matter of this case." That order included no finding that jurisdiction in North Carolina was continuing or exclusive. Subsequent North Carolina orders reiterated that North Carolina had "subject matter jurisdiction" over the case. Pursuant to those prior North Carolina orders, the North Carolina court found in its 1998 order that, at plaintiff's request, North Carolina previously had taken continuing and exclusive jurisdiction over the case and that North Carolina was now the only court to have such jurisdiction over the case. The issue, therefore, is whether the 1986 North Carolina order, issued under URESA, had the effect of nullifying the original 1981 California support order.

Initially, we must determine whether to apply URESA or UIFSA in resolving this issue. We previously have held that UIFSA will apply to all support orders registered in North Carolina after 1 January 1996. *See Welsher*, 127 N.C. App. 521, 491 S.E.2d 661. However, the *Welsher* case dealt with a 1996 registration (pursuant to UIFSA) of a 1985 foreign support order. Accordingly, that case dealt with a foreign support order entered while URESA was the controlling law but registered after UIFSA replaced URESA. We face a different issue in the case at bar, where we must determine which statute to apply in interpreting an order entered in California in 1981, then registered and modified in North Carolina in 1986 pursuant to URESA, all prior to the enactment of UIFSA. Because this is a matter of first impression in North Carolina, we first look to other jurisdictions for guidance.

In *Child Support Enforcement v. Troxel*, 931 S.W.2d 784 (Ark. 1996), an Arkansas Office of Child Support Enforcement (OCSE) on 10 February 1995 petitioned an Arkansas county court of chancery to register a 1985 foreign divorce decree pursuant to UIFSA, which had replaced the Revised Uniform Reciprocal Enforcement of Support Act (RURESA) in Arkansas in 1993. OCSE also sought child support arrearages against the defendant based on support ordered in the foreign divorce decree. The chancery court denied the petition, finding that a 1987 Arkansas RURESA support order had superseded the 1985

foreign divorce decree. On appeal, reasoning that because the chancery court was dealing with the effect of the 1987 Arkansas RURESA support order, the Arkansas Supreme Court determined that it must "construe the Arkansas RURESA statute in effect at the time of the 1987 Arkansas order." *Id.* at 785. We find the holding of the Arkansas Supreme Court logical and therefore persuasive. *See also State, Dept. of Revenue v. Valdez*, 941 P.2d 144 (Alaska 1997) (interpreting language of URESA to conclude that order of responding state did not nullify prior order of initiating state); *S.C. Dept. of Social Services v. Hamlett*, 498 S.E.2d 888 (S.C. Ct. App. 1998) (applying URESA to determine effect of superseding order on foreign support order).

Additionally, although URESA was repealed in North Carolina effective 1 January 1996, the repeal did not

> affect pending actions, rights, duties, or liabilities based on the Act, nor does it alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the Act. After the effective date of this act, all laws repealed shall be treated as remaining in full force and effect for the purpose of sustaining any pending or vested right as of the effective date of this act and for the enforcement of rights, duties, penalties, forfeitures, and liabilities under the repealed laws.

Act of July 29, 1995, ch. 538, sec. 7(b), 1995 N.C. Sess. Laws 1962, 1979. Construing this language in light of Arkansas' holding in *Troxel*, we hold that the effect of the 1986 North Carolina URESA order on the 1981 California order shall be determined in accordance with URESA.

Under URESA, a subsequent order does not necessarily nullify a prior order. To the contrary, URESA stated: "[t]he remedies herein provided are in addition to and not in substitution for any other remedies." N.C. Gen. Stat. § 52A-4 (1992) (repealed 1996). URESA also contained an anti-nullification clause:

> A support order made by a court of this State pursuant to this Chapter does not nullify and is not nullified by a support order made by a court of this State pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law regardless of priority of issuance, *unless otherwise specifically provided by the court*. . . . Amounts paid for a particular period pursuant to any

> support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this State.

N.C. Gen. Stat. § 52A-21 (1992) (repealed 1996) (emphasis added). Accordingly, under URESA, more than one state could have simultaneous jurisdiction over a case. *See Welsher*, 127 N.C. App. at 524, 491 S.E.2d at 663.

Consistent with the anti-nullification language of URESA, we previously have held that acceptance of payments under a URESA order issued in a foreign state and registered in North Carolina does not imply a relinquishing of all rights under the original foreign support order. *See Stephens v. Hamrick*, 86 N.C. App. 556, 358 S.E.2d 547 (1987). In *Stephens*, a South Carolina court entered an order providing that the plaintiff-wife would have custody of the children and that the defendant would pay $40.00 per week in child support. Subsequently, the plaintiff moved to Florida and the defendant moved to North Carolina. The plaintiff initiated an action in Florida for child support under URESA, the result of which was a North Carolina order directing the defendant to pay $75.00 per month in child support. Eighteen years later, the plaintiff registered in North Carolina the original South Carolina support order and sought to collect the deficiency between what the defendant paid under the North Carolina URESA order ($75.00 per month) and the original South Carolina order ($40.00 per week). The trial court dismissed the plaintiff's action, holding in part, that "by accepting payments under [the] North Carolina URESA order, plaintiff had abandoned her rights to child support payments awarded under a prior South Carolina support order." *Id.* at 558, 358 S.E.2d at 548. We reversed, holding:

> [I]t is clear that the trial court erred by concluding that plaintiff's acceptance of payments under the URESA order barred her rights under the South Carolina order. The plaintiff is entitled to bring an action to enforce the South Carolina order . . . and the defendant is entitled to receive credit, under N.C.G.S. § 52A-21, for the payments he made under the URESA order.

Id. at 558-59, 358 S.E.2d at 549. This holding is consistent with the majority of other jurisdictions that have addressed this issue. *See, e.g., Wearb v. Luks*, 708 So. 2d 181 (Ala. Civ. App. 1997); *Westberry v. Reynolds*, 653 P.2d 379 (Ariz. Ct. App. 1982); *Tanbal v. Hall*, 878 S.W.2d 724 (Ark. 1994); *Lorenzo v. Skowronski-Thompson*, 738 So. 2d 967 (Fla. Dist. Ct. App. 1999); *State ex rel. Holleman v. Stafford*, 584

N.W.2d 242 (Iowa 1998); *Hamlett*, 498 S.E.2d 888. In the case at bar, neither the 1986 North Carolina order nor any subsequent North Carolina order made any findings pertaining to nullification of the California order or to exclusive jurisdiction. Although the 24 March 1994 order stated that "[o]ther than the arrears of $357.17 due and owing as of December 16, 1993, the Defendant has no other accumulated arrearage for the support and maintenance of the minor children born of the marriage," this order was entered upon defendant's motion to enjoin the New Bern Child Support Enforcement Office from garnishing his wages and increasing the amount withheld for child support; there is no indication that the California order was even before the court, much less that the court specifically intended to nullify that order. We therefore hold that the trial court erred in finding that the 1986 North Carolina URESA order, or any subsequent North Carolina order, superseded and effectively voided the earlier California order.

III.

[3] Next, plaintiff contends the trial court's conclusion that North Carolina had exclusive jurisdiction over the case violated the Full Faith and Credit for Child Support Order Act (FFCCSOA). *See* 28 U.S.C.A. 1738B (Supp. 1999). When dealing with multiple child support orders, FFCCSOA provides guidelines for determining which order will be recognized for purposes of continuing, exclusive jurisdiction, stating in pertinent part:

> (3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

28 U.S.C.A. § 1738B(f). In the case at bar, the 1981 California order was issued in the home state of the children. All child support payments made by defendant were sent to plaintiff in California, where she had custody of the children. Accordingly, FFCCSOA mandates that the California order be recognized for purposes of continuing, exclusive jurisdiction.

However, FFCCSOA became effective in 1994 and subsequently was amended. We must therefore determine whether FFCCSOA

applies retroactively to arrearages that accrued prior to the Act's effective date. Because this is an issue of first impression in North Carolina, we again begin our analysis with a survey of other jurisdictions.

The Georgia Court of Appeals addressed this issue in *Georgia Dept. of Human Resources v. Deason*, 520 S.E.2d 712 (Ga. Ct. App. 1999). That court stated:

> [T]he legislative history does not expressly state the intent of Congress regarding retroactivity. The language and purpose of both the Act and the legislative history are that of remedial legislation, looking toward retroactive application to assist in the collection of past arrearages. Thus, the problem will continue into the future, and the purpose of the Act would be frustrated unless it is applied retroactively, which would require that congressional intent be inferred through construction to imply retroactivity.
>
> . . . "[W]here retroactivity is concerned, we believe that the Supreme Court has directed us to infer congressional intent from an accumulation of clues in the language and legislative history of the statutes." "It is well settled that legislation that is interpretive, procedural, or remedial must be applied retroactively, while substantive amendments are given only prospective application. 'Substantive acts are generally defined as those which create, confer, define, or destroy rights, liabilities, causes of action, or legal duties. Procedural acts describe methods for enforcing, processing, administering, or determining rights, liabilities, or status.' "
>
> Under [*Bradley v. Richmond School Board*, 416 U.S. 696, 40 L. Ed. 2d 476 (1974)], there are three factors to determine on review if there is manifest injustice present: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights."
>
> In this case, the statute imposes no new obligation, because the obligation of support arises at the birth of the minor child. The statute merely reinforces an existing obligation of child support. It deals with remedial matters of great congressional concern, i.e., the inability to enforce interstate child support orders, resulting in arrearages. Finally, the obligor is not deprived of a right that has matured or become unconditional, because . . . the preexisting obligation remains the same. Thus, under *Bradley*,

> the obligor suffers no manifest injustice when the Act is applied retroactively.

Id. at 719-20 (internal citations omitted). Numerous other jurisdictions have reached the same conclusion and applied FFCCSOA retroactively. *See, e.g., In re Marriage of Yuro*, 968 P.2d 1053 (Ariz. Ct. App. 1998); *In re Marriage of Lurie*, 39 Cal. Rptr. 2d 835 (Cal. Ct. App. 1995); *Peterson v. Israel*, No. FA 97 07 16665, 1998 WL 457919, at *1 (Conn. Super. Ct. July 22, 1998); *DCSE/Jennings v. DeBussy*, 707 A.2d 44 (Del. Fam. Ct. 1997); *Day v. Child Support Enforcement Div.*, 900 P.2d 296 (Mont. 1995); *Isabel M. v. Thomas M.*, 624 N.Y.S.2d 356 (N.Y. Fam. Ct. 1995). *But see Lorenzo*, 738 So. 2d 967; *Lewis v. Lewis*, No. 96APF07-868, 1997 WL 128566, at *1 (Ohio Ct. App. Mar. 18, 1997).

North Carolina courts have considered the impact of a statute in determining whether it is to have retroactive application. Ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively. *See Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). "The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Id.* We agree with the Georgia Court of Appeals that FFCCSOA is remedial and that the legislature intended its application to be retroactive. We further observe that defendant had an ongoing duty to provide for his children throughout their minority. We therefore hold that FFCCSOA is to be applied retroactively in North Carolina and that arrearages that have accrued under the California order are enforceable. Accordingly, the trial court's conclusion that North Carolina had sole jurisdiction over the case violated FFCCSOA and was error.

IV.

[4] We next address plaintiff's contention that the trial court erred in failing to grant full faith and credit to the 1997 California order. A judgment rendered by a court of one state binds the courts of another state as to the merits adjudicated. *See* U.S. Const. art. IV, § 1. Therefore, this Court is "bound to recognize and enforce a valid judgment rendered by a sister state." *Pieper v. Pieper*, 108 N.C. App. 722, 725, 425 S.E.2d 435, 436 (1993). In *Silvering*, 107 N.C. App. 270, 419 S.E.2d 360, we discussed whether a Florida URESA judgment, which calculated arrearages that had accrued under a California support order, was subject to full faith and credit by North Carolina courts.

> In *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980), where the plaintiff moved to North Carolina and registered an Arizona judgment for arrearages, this Court held that "a final judgment [is] entitled to full faith and credit [citation omitted] and is conclusive on the amount owed by defendant[.]" *Id.* at 350, 271 S.E.2d at 587. The *Fleming* Court also opined that "[u]nder the full faith and credit clause of the Constitution of the United States, a judgment rendered by the court of one State is, in the courts of another State of the Union, binding and conclusive as to the merits adjudicated. It is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based." *Id.*

Id. at 274-75, 419 S.E.2d at 363 (alterations in original). We therefore concluded: "Here, the arrearages due under the California order of support were reduced to judgment in Florida. Accordingly, the judgment entered by the State of Florida is entitled to full faith and credit . . . ." *Id.* at 275, 419 S.E.2d at 364.

Based on our holding in *Silvering*, we hold that, nothing else appearing, the California order is entitled to full faith and credit in the courts of North Carolina. However, the full faith and credit provision is subject to limited exceptions. A foreign judgment may be attacked collaterally upon the following grounds: "(1) lack of jurisdiction; (2) fraud in procurement; or (3) that it is against public policy." *McGinnis v. McGinnis*, 44 N.C. App. 381, 388, 261 S.E.2d 491, 496 (1980) (citation omitted). Defendant claims that the 1997 California order was entered without personal jurisdiction over him. Therefore, we must determine whether the law of California provides for personal jurisdiction over an out-of-state resident.

Cal. Family Code § 4905 (West 1999) provides in pertinent part:

> In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if any of the following apply:
>
> . . . .
>
> (3) The individual resided with the child in this state.
>
> (4) The individual resided in this state and provided prenatal expenses or support for the child.

This statute permits a California tribunal to obtain personal jurisdiction over a nonresident defendant in an action to determine arrearages based on a prior California support order. Although this is an issue of first impression in North Carolina, we note that a similar result was reached in *Child Support Enforcement v. Brenckle*, 675 N.E.2d 390 (Mass. 1997) (holding that Alaska had personal jurisdiction over nonresident defendant under UIFSA to issue judgment setting amount of arrears because child was resident of Alaska and defendant had resided with child in Alaska).

Defendant claims that he was denied such due process rights as adequate notice that the action was before the California court in 1997. However, there is no evidence of record that this issue was raised before the trial court. In defendant's Petition to Vacate Registration, he contended only that "the attempt to register the Decree from the state of California is in contravention of the Uniform Interstate Family Support Act." In its order vacating the petition, the only findings made by the trial court pertaining to personal jurisdiction are the following:

> 2. The attempt to register the decree from the state of California fails to conform with the Uniform Interstate Family Support Act.
>
> . . . .
>
> 8. George Anderson has no contact whatsoever with the state of California. He is not a resident there and does not have any contacts whatsoever with the state of California.

There is nothing in the trial court's findings regarding any of the other claims that defendant now makes on appeal. This Court can only consider the pleadings and filings before the trial court; the parties cannot raise new issues or theories for the first time on appeal. *See Holterman v. Holterman*, 127 N.C. App. 109, 112, 488 S.E.2d 265, 267 (1997); N.C. R. App. P. 10(b)(1). Defendant's argument is without merit.

Because the California court had personal jurisdiction over defendant and none of the exceptions allowing collateral attack on the California order applied in this instance, we hold that the California order is entitled to full faith and credit in the courts of North Carolina.

V.

[5] Plaintiff next contends the trial court erred in concluding the statute of limitations precluded the enforcement of the arrears as stated in the 1997 California order. We addressed a similar issue in *Silvering*, 107 N.C. App. 270, 419 S.E.2d 360. The *Silvering* case stated with regard to the issue of the statute of limitations for arrearages:

> [T]he prescribed period for the commencement of actions "[u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition," is ten years. In the case *sub judice*, the application of this statute does not prevent recovery of the full amount entered by the trial court. Enforcement of periodic sums of support arrearages due under a support order which became due more than ten years before the institution of an action for judicial determination of the amount due are barred by the ten year statute of limitations. *Lindsey v. Lindsey*, 34 N.C. App. 201, 203, 237 S.E.2d 561, 563 (1977). *Once the amount of arrearages is reduced to judgment, however, as occurred when the Florida court entered its order, that judgment is entitled to full enforcement in North Carolina for a period of ten years after its entry. Arrington v. Arrington*, 127 N.C. 190, 197, 37 S.E. 212, 214 (1900).

Id. at 275, 419 S.E.2d at 363 (second alteration in original) (emphasis added); *see also Pieper*, 108 N.C. App. at 728, 425 S.E.2d at 438 ("Having reduced the amount of arrearage to valid judgment, absent any applicable exceptions, we are bound to apply the Full Faith and Credit Clause and provide full enforcement of the judgment in North Carolina.").

Pursuant to *Silvering* and *Pieper*, we hold that the trial court erred in concluding that the statute of limitations precluded enforcement of the 1997 California order.

VI.

[6] Finally, plaintiff contends the trial court erred in finding plaintiff's actions in attempting to register the 1997 California order subject to sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 (1990). Rule 11(a) of the North Carolina Rules of Civil Procedure states in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . .

Id. Recognizing the adverse impact of sanctions under this Rule, our appellate courts have encouraged trial judges to act under Rule 11 only after careful consideration.

> Rule 11 should "not have the effect of chilling creative advocacy," *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir. 1989), and therefore, in determining compliance with Rule 11, "courts should avoid hindsight and resolve all doubts in favor of the signer." *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1469-70 (2d Cir. 1988), *rev'd in part on other grounds*, 493 U.S. 120, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989).

Bryson v. Sullivan, 102 N.C. App. 1, 8, 401 S.E.2d 645, 651, *rev'd on other grounds*, 330 N.C. 644, 412 S.E.2d 327 (1992).

The applicable standard for review of the granting or denial of sanctions under Rule 11 is as follows:

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

In the case at bar, we have held that plaintiff had grounds for seeking to register the California order. Therefore, counsel for plaintiff did not violate Rule 11.

We note in conclusion that this case demonstrates the need for, and value of, UIFSA. The tension between the North Carolina courts and California courts, both acting under URESA, is palpable from the record. Numerous experienced trial judges have dealt with this case, and the evident exasperation of the trial court, which had the unenviable duty of sorting out the conflicting claims, is understandable. However, when facts that have evolved over a period of time are superimposed upon an unsettled area of the law, as has happened in the case at bar, resolution of disputed issues is far from obvious. Understanding that we speak with the great advantage of hindsight, we reemphasize the salient language quoted above from *Bryson* and again encourage the trial courts to impose sanctions only with caution in the face of conditions such as are presented in this case.

Reversed.

Judges WYNN and HORTON concur.

DAVID L. HARRY, JR. AND WIFE, MARY C. HARRY, PLAINTIFFS v. CRESCENT RESOURCES, INC., DEFENDANT, AND TIMOTHY G. KORNEGAY, ADDITIONAL DEFENDANT

No. COA98-1598

(Filed 21 December 1999)

1. Deeds— restrictive covenants—negative appurtenant easement

The trial court did not err in concluding plaintiffs, owners of residential lots in the pertinent subdivision, did not have a property right in the nature of a negative appurtenant easement limiting the use of the remnant parcels to undeveloped open space based on their deeds and the deeds of their predecessors in title describing their property with reference to the subdivision plat on which the four remnant parcels appear as open undeveloped space because: (1) plaintiffs' property adjoined the waters of the lake, so that they did not need access over the remnant parcels to reach its waters; (2) there is no evidence of record that the developer sold the lots to plaintiffs and their neighbors based on representations that the remnant parcels would remain open and undeveloped, or that plaintiffs purchased the lots based on the

representations or actions of the developer; and (3) plaintiffs do not have an easement appurtenant in and to the remnant parcels merely because the parcels appeared on the recorded subdivision plat.

2. Deeds— restrictive covenants—doctrine of implied equitable servitudes—doctrine of common servitudes

Although plaintiffs, owners of residential lots in the pertinent subdivision, argue the doctrine of implied equitable servitudes applies to this case to show the developer of the subdivision plat intended to impose a common servitude on the unnumbered remnant parcels, North Carolina has not adopted that doctrine and the Court of Appeals declined to extend our similar doctrine of common servitudes because there is nothing of record to give notice to purchasers that the remnant parcels are part of a common scheme of development, and the evidence indicates otherwise.

3. Unfair Trade Practices— sufficiency of evidence

The trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to allege a claim for unfair and deceptive acts arising out of the sale of remnant parcels of land where plaintiffs own residential lots in the pertinent subdivision because there is no support for such a cause of action in the record.

Appeal by plaintiffs from judgment entered 24 July 1998 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1999.

In 1969, Duke Power Company conveyed certain real property surrounding Lake Norman to Crescent Land & Timber Corporation, now known as Crescent Resources, Inc. (Crescent). One of the conveyed tracts was Parcel No. 28, known as the P. A. Stough Tract. On 4 May 1976, Crescent filed a plat (the subdivision plat) in the Mecklenburg County Registry subdividing a portion of the P. A. Stough Tract into five residential building lots. The plat also dedicated two 60-foot rights-of-way, known as Torchlight Drive (now Belle Isle Drive) and Mollypop Lane. Four small, unnumbered, irregularly-shaped parcels of land (the remnant parcels) were left over from the creation of the lots, streets, and causeways on the subdivision plat. The remnant parcels were smaller than the residential lots; three of the remnants were .25 acre, and the fourth remnant was .43

acre. The five residential building lots on the subdivision plat were numbered 28 through 33, and ranged in size from 0.58 acres to 1.44 acres. Each remnant parcel had an assessed value of $150.00 for property tax purposes.

The five residential lots were sold by reference to the subdivision plat. The plaintiffs, David L. Harry, Jr., and wife, Mary C. Harry, own one of the lots, identified as Lot No. 32. Each of the conveyances in the plaintiffs' chain of title refer to the subdivision plat. Each of the deeds conveying the five residential lots contained detailed restrictions and conditions, including a restriction on further subdivision of the lot conveyed, which applied to the use of the lots.

On 29 July 1997, Crescent contracted to sell the remnant parcels to the additional defendant, Timothy G. Kornegay (Kornegay) for $101,000.00. In September of 1997, Kornegay obtained building permits to allow him to construct recreational piers extending from the remnant parcels. Kornegay also applied to the Charlotte-Mecklenburg Utilities Department for the extension of utility lines to one of the remnant parcels.

On 12 November 1997, plaintiffs brought this action seeking a declaration that the remnant parcels could not be used "for any purpose" and must be "held and maintained by [Crescent] and its successors in title as undeveloped open space" for the benefit of plaintiffs and four of their neighbors. Crescent deeded the four remnant parcels to Kornegay in March 1998. The restrictions in the deeds to Kornegay did not contain any covenant against further subdivision of the parcels, nor were there building setback restrictions. The language of the deeds limit the use of the remnant parcels to "recreational purposes." Crescent also agreed to release a restriction against residential use if the lots became "buildable," and if Kornegay paid a release fee of $99,000.00 per lot. Following the conveyance of the remnant parcels, plaintiffs moved to join Kornegay as an additional party defendant, and also moved to amend their complaint to allege unfair and deceptive trade practices arising out of the sale of the parcels to Kornegay. Both plaintiffs and defendant Crescent moved for summary judgment. The trial court (1) ordered Kornegay to be joined as an additional party defendant; (2) denied the motion to amend the complaint to add a claim for unfair and deceptive trade practices; (3) denied plaintiffs' motion for summary judgment; and (4) granted defendants' motion for summary judgment on the plaintiffs' claim for easement rights, but denied defendants' motion for

summary judgment on the plaintiffs' claim to have building setback lines enforced. Plaintiffs appealed, and the trial court certified the matters appealed from as subject to immediate review by this Court under Rule 54(b).

The Tryon Legal Group, by Jerry Alan Reese, for plaintiff appellants.

Robinson, Bradshaw & Hinson, P.A., by Robert C. Sink, for Crescent Resources, Inc., defendant appellee.

Rayburn, Moon & Smith, P.A., by James B. Gatehouse and Tricia L. Rolewicz, for Timothy G. Kornegay additional defendant appellee.

HORTON, Judge.

[1] Plaintiffs contend that they have a property right in the nature of "a negative appurtenant easement limiting the use of the Remnant Parcels to undeveloped open space" because their deeds, and those of their predecessors in title, describe their property with reference to the subdivision plat on which the four remnant parcels appear as open undeveloped space. We disagree, and affirm the judgment of the trial court.

An appurtenant easement is

> an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land. *Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973). It is well settled in this jurisdiction that an easement may be created by dedication. This dedication may be either a formal or informal transfer and may be either implied or express. *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E.2d 748 (1954).

Shear v. Stevens Building Co., 107 N.C. App. 154, 161-62, 418 S.E.2d 841, 846 (1992). When a developer sells residential lots in a subdivision by reference to a recorded subdivision plat which divides the tract of land into "streets, lots, parks and playgrounds," a purchaser of one of the residential lots "acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement." *Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted). The right acquired by the purchaser, whether it be characterized

as a dedication or as an appurtenant easement, may not be revoked over the objection of the purchaser because "the existence of the right was an inducement to and a part of the consideration for the purchase of the lots." *Id.*

With two exceptions which we will discuss below, North Carolina appellate decisions have dealt with appurtenant easements in the context of subdivision plats on which the various tracts had been labeled to designate the particular uses for which the tract was intended. For example, in *Realty Co. v. Hobbs*, the land in question was designated for "golf links and playgrounds." In *Conrad v. Land Co.*, 126 N.C. 776, 36 S.E. 282 (1900), an area on the plat was marked as "Grace Court," and was surrounded by areas designated for streets. Our Supreme Court held that Grace Court and the streets shown on the plat "should forever be open to the purchasers and to the public." *Id.* at 780, 36 S.E.2d at 283.

The Court reasoned that the purchasers "had been induced to buy under the map and plat, and the sale was based not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds *designated on the map* should forever be open to the purchasers and their assigns." *Id.* (emphasis added). *See also Stines v. Willyng, Inc.*, 81 N.C. App. 98, 344 S.E.2d 546 (1986) (area on plat designated as "Park Property" burdened with easement in favor of purchasers of lots, but areas not shown on plat not sufficiently described to be burdened with an easement), *Hinson v. Smith*, 89 N.C. App. 127, 365 S.E.2d 166, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988) (area in question shown on plat as "Beach"); *Gregory v. Floyd*, 112 N.C. App. 470, 435 S.E.2d 808 (1993) (on amended plat, location of the boat ramp indicated by an arrow, and "BEACH" written in the unsubdivided part of the property); and *Whichard v. Oliver*, 56 N.C. App. 219, 287 S.E.2d 461 (1982) (plats showed "streets, lots, parks and beaches").

Here, the remnant parcels in question were described by metes and bounds on the subdivision plat, but were not designated for any specific purpose, such as streets, parks, playgrounds, or beaches. Plaintiffs rely, however, on the decision of our Supreme Court in *Gaither v. Albemarle Hospital*, 235 N.C. 431, 70 S.E.2d 680 (1952), and the decision of this Court in *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 418 S.E.2d 841 (1992), to support their position that they have an easement in the remnant parcels although the parcels were not labeled in any way on the subdivision plat from which plaintiffs purchased their lot.

In *Gaither*, Riverside Land Company recorded a plat in 1902 which divided the lands it owned along the Pasquotank River (River) into 50-foot building lots. A street designated as Riverside Avenue ran along the eastern edge of the River. Between Riverside Avenue and the high water mark of the River was a strip of land which was wide enough in some areas to be divided into numbered building lots, although some had a depth of much less than 50 feet. The strip of land between Riverside Avenue and the River narrowed to 6 feet or less in the area of the lots owned by plaintiff Gaither, and was not divided into lots or numbered. Gaither owned four building lots on the eastern edge of Riverside Avenue. Thus Gaither's lots were separated from the River by Riverside Avenue and the strip of land. Elizabeth City and Pasquotank County wanted to build a breakwater in the River 150 feet from the shoreline and in front of the plaintiff's lots, and then fill in the area between the breakwater and the shore for the purpose of building a public park. The trial court appointed a referee to ascertain the facts in the matter. Among other things, the referee concluded

> "4. That by recording the plat in Book 26, at page 236, and indicating on said plat that there was only a narrow bank between Riverside Avenue and the waters of Pasquotank River, and by failing to indicate that said narrow strip of bank had been subdivided and by selling lots in said subdivision by plat and lot number, the Riverside Land Company dedicated such narrow strip or bank to the use of the public in reaching the waters of Pasquotank River.
>
> * * * *
>
> "6. . . . That the said proposed construction of the park should be enjoined as a nuisance."

Gaither, 235 N.C. at 438, 70 S.E.2d at 686.

The trial court adopted almost all of the referee's report and held as a matter of law that the "defendants [were] estopped and precluded from construction of said proposed park." On appeal to our Supreme Court, appellants raised the following question:

> "Does the recordation of the Riverside Land Company plat, showing a strip of land to the east of Riverside Avenue as undivided land, constitute a dedication of the strip for such a purpose as to give the plaintiffs a special property right therein sufficient to support their original complaint?"

Id. at 442, 70 S.E.2d at 690. The Court first stated the general rule that a landowner who subdivides his land into "lots, streets, alleys, and parks," records a plat showing that subdivision, and then sells lots pursuant to that plat, "thereby dedicates the streets, alleys, and parks . . . to the use of the purchasers, and those claiming under them, and of the public." *Id.* at 443, 70 S.E.2d at 690. The general rule is based on principles of equitable estoppel, because purchasers who buy lots with reference to a plat are induced to rely on the implied representation that the "streets and alleys, courts and parks" shown thereon will be kept open for their benefit. Consequently, the grantor of the lots is "equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created." *Id.* at 444, 70 S.E.2d at 690.

The Court then discussed the right of access to the navigable waters of the Pasquotank River, and held that "the Riverside Land Company, being a riparian owner of land fronting on Pasquotank River, a navigable stream, shown on, and in accordance with, the plat by which it sold lots, had the right to grant to purchasers of such lots access over its water frontage land to the waters of the river. And the conclusions of law on the facts found appear logical." *Id.* at 445, 70 S.E.2d at 691. The Court then discussed the question of the proposed park project as a nuisance, and held that the "fact that the obstruction may be a source of public benefit has been held not to relieve it of its character as a nuisance." The Court then affirmed the decision of the trial court, with one Justice dissenting on the "question of dedication." *Id.* at 445-46, 70 S.E.2d at 692.

Plaintiffs contend that the decision in this case is controlled by the reasoning of the Supreme Court in *Gaither*. We disagree. In *Gaither*, the undesignated strip of land between the River and Riverside Drive was described as no more than six feet wide at any point. As the strip widened, however, it was divided into lots and the lots were numbered. The finding of the Referee, to which no exception was taken, reads as follows:

> "4. That said plat indicates numerous lots, laid off and numbered for purpose of sale to the public. That on the eastwardly course of Riverside Avenue there were numerous 50-foot lots, laid off and numbered, between said Riverside Avenue and the Pasquotank River. That some of the lots were of a depth between Riverside Avenue and Pasquotank River of as little as 9 to 18 feet. That, specifically, the lot designated as No. 161 had a depth on one side of 9 feet and on the other side of 12 feet; that Lot No. 162

> had a depth on one side of 12 feet and on the other of 15 feet; that Lot No. 163 had a depth on one side of 15 feet and on the other side 24 feet. That on the course of Riverside Avenue running south 4 deg. west where there was indicated a strip of land no more than six feet wide at any point no lots were laid off and numbered."

Id. at 434, 70 S.E.2d at 684.

A person who bought lots in reliance on the plat at issue in *Gaither* could have reasonably assumed that when the strip of land between the River and Riverside Avenue narrowed to six feet or less, it became unsuitable for building lots and would not be used for the same. In the case now before us, the remnant parcels were smaller than other residential lots shown on the plat, but were substantially larger than a "strip" of land. Further, the *Gaither* plaintiff and others who purchased lots on the east side of Riverside Avenue had no other access to the River and could reasonably assume that the "narrow strip" or "narrow bank" of land gave them access to the River. In the case before us, however, the property of the plaintiffs adjoined the waters of the lake, so that they did not need access over the remnant parcels to reach its waters. Finally, in *Gaither* the "small strip of land" was not described on the plat by metes and bounds as were the remnant parcels in the case before us. We also note that in *Gaither* there were several legal theories which supported an injunction against the proposed park project, including the theory that it would constitute a nuisance in a navigable stream.

In *Shear*, the second case relied on by plaintiffs, residential lots were sold by the Stevens Corporation in the subdivision known as Cardinal Hills in Raleigh. The Stevens Corporation was the predecessor of a partnership, the Stevens Building Company (collectively, the developers). The plat map for Cardinal Hills, filed in 1956 and revised in 1957, depicted about 300 subdivided lots, in addition to a lake known as White Oak Lake, and undeveloped areas surrounding the lake. The undeveloped areas included a playground. There was nothing on the Cardinal Hills' plat to indicate that White Oak Lake was reserved for future development. Further, there was no reference in either the deeds or the restrictive covenants to an easement relating to use of the lake nor were there any restrictions upon its use. The plaintiffs in *Shear* presented evidence that purchasers of lots in Cardinal Hills were told that the use of White Oak Lake was for residents of the subdivision; that residents of the subdivision commonly used the lake; that various residents attempted to buy portions of the

undeveloped property around the lake to insure their access to the lake, but were told that the undeveloped land around the lake was for the use of the community; that residents were encouraged to maintain the portion of the undeveloped land adjoining their property. Plaintiffs also introduced evidence of newspaper advertisements for lots in Cardinal Hills which described the lots as overlooking "one of Wake County's most beautiful lakes." *Shear*, 107 N.C. App. at 158, 418 S.E.2d at 843-44. Advertisements for homes described them as "lake-front" homes or as homes "with a view of the lake." *Id.* at 158, 418 S.E.2d at 844.

In 1988, the developers were notified that the earthen dam which created White Oak Lake was in need of repair. If the dam were not repaired, the lake would eventually have to be drained. Developers partially drained the lake and then filed a plat map in 1988, dividing the undeveloped land around the lake and the additional land obtained by draining the lake into 24 building lots. Plaintiff landowners filed suit to enjoin the sale of the lots. The trial court ordered that the landowners had an easement appurtenant to the lake; that the developers had a right to develop a portion of such lands but that some land needed to remain open to accommodate the easement; that the lake should be maintained at the level shown on the 1988 plat; and that the developers and the landowners should divide the costs of maintaining the lake and dam. All parties appealed. This Court held that the trial court erred in its conclusion that the plaintiff landowners had an easement only to the lake. Although some of the language in the Court's discussion of the issues seems to support the Harrys' position, the dispositive holding of the Court appears to be that

> [t]he easement for the benefit of the Cardinal Hills landowners was created simultaneously with the Cardinal Hills development in the late 1950's. The easement was created by (1) selling and conveying lots with reference to the plat map, (2) making oral representations about the availability and permanency of the lake and the undeveloped land surrounding the lake and (3) using the landowners' opportunity to use these areas as an inducement to sell lots. Therefore, it is only logical to conclude that the easement was both to the lake and to the undeveloped land as it existed in the late 1950's.

Thus, in *Shear* there was ample evidence, in the form of the developer's oral representations and actions, of the developer's intent to create an easement to both the lake and the surrounding property. In the case before us, there is no evidence of record that the developer

sold the lots to the plaintiffs and their neighbors based on representations that the remnant parcels would remain open and undeveloped, nor that the plaintiffs purchased the lots based on the representations or actions of the developer. Further, the plaintiffs have waterfront access to the lake without recourse to the access provided by the remnant parcels.

In summary, the plaintiffs argue they have an easement appurtenant in and to the remnant parcels merely because the remnant parcels appeared on the recorded subdivision plat. That position is not supported by our prior decisions nor those of our Supreme Court. Furthermore, we do not believe that plaintiffs' position is grounded in sound public policy. The free use of property is favored in our State. When there are doubts about the use to which property may be put, those doubts should be resolved in favor of such free use. *Hullett v. Grayson*, 265 N.C. 453, 144 S.E.2d 206 (1965). Here, the fact that the remnant parcels were depicted on the subdivision plat is not sufficient to demonstrate a clear expression of the intent of Crescent to grant an easement appurtenant to the plaintiffs. Plaintiffs do not forecast evidence from which we could find a clear expression of such intent, nor do plaintiffs offer evidence that they were induced to purchase their property by the oral representations or actions of the developer with regards to the remnant parcels. In the absence of a forecast of such evidence, the trial court properly entered summary judgment for the defendants and against the plaintiffs on their claims for establishment of an easement, and for a permanent injunction against development of the remnant parcels.

[2] Plaintiffs also contend that the doctrine of implied equitable servitudes applies in this case. Under that doctrine, the owners of lots in a subdivision in which most of the lots were conveyed subject to common restrictions, may impose those restrictions against persons whose deeds did not include such restrictions, but who were on notice that such restrictions applied to the lots in the subdivision. We have not adopted the doctrine of implied equitable servitudes in North Carolina, although our Supreme Court has recognized that

> when an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee. Moreover, the right to enforce may be exercised by subsequent grantees against any purchaser who takes

> land in the tract with notice of the restrictions. A purchaser has such notice whenever the restrictions appear in a deed or in any other instrument in his record chain of title. . . .
>
> That a subdivision has been developed pursuant to a "general plan" of common restrictions is, of course, a statement of legal conclusion that the grantor *intended* to impose a common servitude upon all the parcels conveyed for the mutual benefit of all the grantees and their successors.

Hawthorne v. Realty Syndicate, Inc., 300 N.C. 660, 665, 268 S.E.2d 494, 497-98, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 442 (1980) (emphasis in original). In the case before us, plaintiffs argue that the common scheme of development restricted building lots to a minimum size of 30,000 square feet. Assuming for the purposes of argument there was such a common scheme, the subdivision plat in this case reveals that only three of the five residential building lots shown thereon were at least 30,000 square feet in size. Further, there is no evidence that the developer intended to impose a common servitude on the unnumbered remnant parcels. Indeed, plaintiffs contend that the remnant parcels were not intended to be sold at all, but rather held as open undeveloped parcels for the benefit of plaintiffs and their neighbors. We decline to extend the doctrine of common servitudes, as it is set forth in *Hawthorne*, to the situation in this case. Here, there is nothing of record to give notice to purchasers that the remnant parcels are part of a common scheme of development, and the evidence indicates otherwise.

[3] Finally, we find nothing in the record to demonstrate that the trial court's denial of plaintiffs' motion to amend their complaint to allege a claim for unfair and deceptive acts was an abuse of its discretion. *Isenhour v. Universal Underwriters*, 345 N.C. 151, 478 S.E.2d 197 (1996). Indeed, we do not find support for such a cause of action in this record. Consequently, plaintiffs' assignment of error is denied.

Affirmed.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. ANTONIO LAMONT BROOME

No. COA98-1372

(Filed 21 December 1999)

1. Drugs— trafficking—weight of mixture

There was no fatal variance between the indictment and the proof where defendant was indicted for trafficking by possession of 200-400 grams of cocaine, the State introduced a package of cocaine mixture seized from defendant's car weighing 273 grams, and the State's expert testified that the package contained only 27 grams of pure cocaine. N.C.G.S. § 90-95(h)(3)(a) states that it is a felony to possess a substance or mixture that is 200 grams or more and the relevant question is the weight of the total substance seized regardless of the purity.

2. Appeal and Error— assignments of error—basis for argument

One of the defendant's arguments on appeal from a cocaine trafficking charge was dismissed where it was based entirely on an assignment of error submitted to the Court of Appeals in a motion to amend the record which the Court of Appeals had denied.

3. Drugs— constructive possession—automobile

There was sufficient evidence that defendant possessed cocaine within the meaning of N.C.G.S. § 90-95(h) where defendant owned and was present in the car in which the police found the drugs, the drugs were deposited there at defendant's direction, and defendant was the lone occupant of the car at the time the drugs were seized. Regardless of whether defendant was able to escape, there was no plain error in the trial court finding sufficient evidence of defendant's intent and capability to control the disposition and use of the cocaine in his automobile.

4. Drugs— trafficking by possession—attempt

The trial court did not err in a cocaine trafficking prosecution by refusing to charge the jury on the lesser included offense of attempt where defendant contended that the evidence of possession was equivocal, but the offense was complete at the time of defendant's arrest.

5. Criminal Law— entrapment—sufficiency of evidence

There was no plain error in a cocaine trafficking prosecution where the trial court did not instruct on entrapment. Viewed in the light most favorable to defendant, the situation described by the evidence amounted to no more than providing opportunity. The invitation to defendant neither rose to the level of persuasion, trickery, or fraud by the police to induce defendant to purchase cocaine nor indicates that the plan to sell the cocaine originated with the State.

6. Evidence— hearsay—personal knowledge—corroboration

There was no plain error in a cocaine trafficking prosecution in the admission of testimony from an officer about setting up the drug deal. Although defendant contended that the testimony must have been based on a conversation with another and went to matters not within the officer's personal knowledge, the State's questions called for the officer to testify as to what may have occurred after the alleged conversation and his testimony consisted of details of the drug transaction derived from the officer's subsequent participation in the deal. Assuming the testimony was hearsay, it corroborated the third party's direct testimony.

7. Constitutional Law— effective assistance of counsel

There was no error in a cocaine trafficking prosecution where defendant alleged ineffective assistance of counsel but the outcome was not affected by defense counsel's alleged failings.

Appeal by defendant from judgment entered 26 June 1998 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 September 1999.

On 5 September 1997 Defendant-Appellant Antonio Broome (Broome) was arrested for trafficking in cocaine in violation of N.C. Gen. Stat. § 90-95(h). On 27 August 1997, John Morgan (Morgan) had been arrested and charged with three counts of trafficking in cocaine. As part of a plea agreement, Morgan agreed to assist the police with drug enforcement in the Charlotte-Mecklenburg area. Broome's case was one in which Morgan assisted.

During the presentation of the case for the State, Morgan testified for the State that Broome called him and asked if he knew of anyone from whom Broome could purchase cocaine. Morgan called Officer Bobby Tarte (Officer Tarte) of the Charlotte-Mecklenburg Police

Department, who set up a "reverse-sting" at a local Hooters restaurant parking lot on 5 September.

Officer Tarte testified that on 5 September he went to the Hooters parking lot with Morgan carrying nine ounces of cocaine obtained from the police crime lab. Broome was waiting in his car. The parking lot was surrounded by eight to ten police units. As Tarte and Morgan pulled alongside Broome, Broome rolled down his window and asked that they move to another location. Officer Tarte declined. Morgan then got into the front seat of Broome's car and Tarte got into the back seat. Broome handed Tarte a tube sock filled with a large amount of money, and asked Tarte if he had brought "everything he was supposed to bring." Over Broome's objection, Tarte testified that he understood this question to be an inquiry as to whether Officer Tarte had brought cocaine. Officer Tarte responded that he had brought the cocaine. According to Tarte, Broome requested that Tarte "put the cocaine in his [Broome's] car" and "place it on his back seat." Tarte got out of Broome's car, retrieved the cocaine from his trunk, and returned to Broome's car, placing the drugs in the back seat of Broome's car. Broome never actually touched the drugs. Tarte then got out of Broome's car and removed his hat, signaling to nearby undercover officers to move in. Broome attempted to drive away, but before he was able to leave the parking lot, he punctured his tires on a "stop stick" that police left in his path.

For the defense, Broome testified that Morgan called him on 3 September, telling him that he had "something" to show him. Morgan called him back on 5 September to arrange the meeting between Broome and a drug source at Hooters. In the Hooters parking lot, Morgan got into the front seat and Officer Tarte got into the back seat of Broome's car. Officer Tarte placed a package of cocaine mixture on the back seat. Broome admitted carrying a tube sock of cash (later determined to be $3502), but testified that the money was for an outstanding $3100 debt to an automotive shop on South Tryon Street in Charlotte for a prior purchase of new rims for Broome's car. The trial transcript reveals that the defense entered a receipt for Broome's purchase of the rims into evidence, but an actual copy of the receipt was not included in the record. Broome did not recall attempting to flee and did not think his tires were punctured by a "stop stick."

After the jury found Broome guilty of trafficking in cocaine, the trial court sentenced him to seventy to eighty-four months in prison. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Mary Dee Carraway, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

EAGLES, Chief Judge.

[1] Defendant Broome was indicted for trafficking by possession of 200-400 grams of cocaine in violation of N.C. Gen. Stat. § 90-95(h). The State introduced as evidence a package of cocaine mixture seized from Broome's car weighing 273 grams; however, the State's expert testified that the package contained only 27 grams of pure cocaine. Defendant argues that because of this "fatal variance" between the State's proof and the offense charged in the indictment, he was denied his constitutional right to sufficient notice of the charge against him, to prepare a proper defense, and to avoid double jeopardy. *See State v. Ingram*, 20 N.C. App 464, 466, 201 S.E.2d 532, 534 (1974).

Preliminarily, we note that Broome's attorney failed to renew his motion to dismiss the case at the close of evidence, necessary to properly preserve this issue. N.C. R. App. P. 10(b)(3). The issue is therefore abandoned. *Id.* At defendant's urging, we have evaluated his first assignment of error under the plain error rule. N.C. R. App. P 10(c)(4); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). We find no plain error.

To support his contention that his conviction should be vacated, Broome cites *State v. White*, 3 N.C. App. 31, 164 S.E.2d 36 (1968) and *State v. Rush*, 19 N.C. App. 109, 197 S.E.2d 891 (1973). In *Rush*, this Court arrested judgment against a drug offender convicted of an offense not contained in the indictment. Unlike *Rush*, the defendant here was indicted, tried and convicted of the same offense, trafficking by possession of cocaine in violation of G.S. 90-95(h). In *White*, this Court found a fatal variance between an indictment alleging various traffic violations and the proof of those violations—a traffic citation with an inaccurate violation date. This Court vacated the defendant's sentence, holding that "[t]he allegation and proof must correspond . . . [so that] the defendant will know with what he is charged." *Id.* at 33, 164 S.E.2d at 38-39. The rule in *White*, while authoritative, is an incomplete statement of the law as it relates to this case.

In *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575 (1981), this Court held that "[n]ot every variance . . . is sufficient to require a motion to dismiss." *Tyndall* at 61, 284 S.E.2d 577, citing *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L.Ed.2d 281 (1977). Here, as in *Tyndall*, a drug offender based his assignment of error on an alleged variance between the indictment and the State's proof. Specifically, Broome argues that possession of a 273-gram mixture containing only 27 grams of *pure* cocaine is legally insufficient to support a conviction for trafficking in 200-400 grams of cocaine. G.S.90-95(h)(3)(a) states that it is a felony to possess a "substance *or mixture* . . . [that] [i]s 200 grams or more, but less than 400 grams." (Emphasis added). Consistent with the legislative intent of this statute—to deter large-scale trafficking in "mixtures containing controlled substances"—we hold, as we did in *Tyndall*, "that the quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation under G.S. 90-95(h)(3)." *Tyndall* at 60-61, 284 S.E.2d at 577. Because it is unlawful to traffic in either pure or mixed cocaine, the relevant question here is the weight of the total substances seized, regardless of the substances' purity. Because the package contents seized from Broome's car weighed 273 grams, we hold that there was no variance. This assignment of error is overruled.

[2] On 2 February 1999, we denied Broome's motion to amend the record to include a new assignment of error. Broome's second argument is based entirely on the proposed amendment to the record excluded by our 2 February order. Therefore, Broome's second argument is not supported by the record and is dismissed pursuant to N.C. R. App. P. 10(c)(1).

[3] In his third assignment of error, Broome argues that there was insufficient evidence that he "possessed" cocaine within the meaning of G.S. 90-95(h). Because Broome failed to renew his motion to dismiss at the close of evidence, we may consider this assignment of error only under the plain error rule. N.C. R. App. P. 10(c)(3),(4); *State v. Harris*, 315 N.C. 556, 564, 340 S.E.2d 383, 388 (1976). Although the cocaine mixture was seized from his vehicle's back seat, Broome essentially argues that the drugs never left the police's possession because (1) Officer Tarte put the drugs in Broome's back seat, (2) the parking lot was surrounded by police, (3) Broome was unable to leave the lot, and (4) Broome never touched the drugs. We are not persuaded.

Possession may be actual or constructive. Constructive possession may be proven by evidence of defendant's intent to control the disposition of a particular object. *See State v. Alston*, 131 N.C. App. 514, 508 S.E.2d 315 (1998); *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700 (1992), *overruled on other grounds*, *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994); *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885 (1984). We have held that "[a]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where [a] controlled substance was found." *Hunter*, 107 N.C. App. at 409, 420 S.E.2d at 705, citing *Dow*, 70 N.C. App. at 85, 318 S.E.2d at 886. Unlike the *Alston* case cited by Broome, Broome owned and was present in the car in which the police found the drugs. Moreover, Broome was the lone occupant of the car at the time the drugs were seized from his car, the drugs having been deposited there at Broome's direction. Regardless of whether he was able to escape, Broome had the power to control the automobile in which the substances were found, raising an inference of possession sufficient to go to the jury. *Hunter*.

After careful review, we hold that there was no plain error in the trial court finding sufficient evidence of Broome's intent and capability to control the disposition and use of the cocaine found in his automobile. Officer Tarte testified (and Morgan confirmed) that he received a tube sock full of cash from Broome. Officer Tarte and Broome both testified that Tarte put a package of cocaine in the back seat of Broome's vehicle. Officer Tarte testified that he and Broome discussed the contents of the package before Tarte left Broome's vehicle. We hold there was sufficient evidence from which a jury could find that Broome took possession of the cocaine in exchange for cash payment. Accordingly, we overrule this assignment of error.

[4] Broome next argues that because the court erred in refusing to charge the jury on the lesser included offense of attempt, due process, *Beck v. Alabama*, 447 U.S. 625, 638, 65 L.Ed.2d 392, 403 (1980), and state law, *State v. Childress*, 228 N.C. 208, 209, 45 S.E.2d 42, 44 (1947) (interpreting G.S. § 15-170), entitle him to a new trial. We disagree.

An attempted crime is an intentional "overt act" done for the purpose of committing a crime but falling short of the completed crime. *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 192 (1982); *State v. Gray*, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277 (1982), *cert. denied*, 306 N.C. 746, 295 S.E.2d 482 (1982). An attempted crime is generally

considered a lesser offense of that crime. *See Collins*, 334 N.C. at 59, 431 S.E.2d at 191; *Gray*, 58 N.C. App. at 106, 295 S.E.2d at 277. N.C. Gen. Stat. § 15-170 requires that the jury be instructed on the lesser included offense of attempt if "(1) the evidence is equivocal on this element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of the element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. Whittaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982). Broome contends that the evidence was equivocal on the element of possession and that the jury could have reasonably found that the defendant did not have constructive possession of the cocaine. Without the element of possession, he argues that his "interaction with Tarte and his attempt to leave the parking lot" could reasonably be seen by a jury as overt acts falling short of the completed offense of trafficking.

An attempt charge is *not* required if the State's evidence tends to show completion of the offense, *see Whittaker* at 119, 296 S.E.2d at 275; *Gray*, 58 N.C. App. at 106-07, 293 S.E.2d at 277, and there is no conflicting evidence relating to the elements of the crime charged, *Gray*; State *v. McLean*, 2 N.C. App. 460, 463, 163 S.E.2d 125, 126 (1968). Based on the State's uncontroverted evidence of possession discussed above, we hold that the offense of trafficking was complete at the time of Broome's arrest. The trial judge properly refused to instruct on an attempt.

[5] We next decide whether the trial court erred in failing to instruct on the defense of entrapment. We note that because Broome did not request an entrapment instruction at trial, he must show plain error. N.C. R. App. P. 10(b)(3),(4); *State v. Allen*, 339 N.C. 545, 554-55, 453 S.E.2d 150, 155 (1995), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997); *State v. Connell*, 127 N.C. App. 685, 691, 493 S.E.2d 292, 296 (1997), *disc. rev. denied*, 347 N.C. 579, 502 S.E.2d 602 (1998); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The United States Supreme Court has observed that "it is a rare case in which an improper instruction will justify a reversal of a criminal conviction when no objection was made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed.2d 203, 212 (1977). We discern no plain error.

Entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975). To establish entrapment, Broome must show "(1) acts

of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, [and] (2) . . . [that] the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities." *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978), citing *Stanley*. Broome testified that (1) Morgan initiated the drug transaction by asking Broome to meet him at Hooters to "show him something"; (2) Officer Tarte placed drugs in his car voluntarily, and not at Broome's request; and (3) the tube sock of cash was payment for automobile rims, not drugs. Arguing that "[a] defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant," Broome contends that his testimony proved that he was entitled to an entrapment instruction. *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983), citing *Walker*.

Law enforcement "may rightfully furnish to the players of [the drug] trade *opportunity* to commit the crime in order that they may be apprehended. It is only when a person is *induced* by the officer to commit a crime which he did not contemplate that we must draw the line." *Stanley* at 33, 215 S.E.2d at 598 (emphasis added). Thus, "[t]he court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take," *id.* at 32, 215 S.E.2d at 597, or that "the Government play[ed] on the weaknesses of an innocent party and beguil[ed] him into committing crimes which he otherwise would not have attempted." *Id.* at 31, 215 S.E.2d at 597, citing *Sherman v. United States*, 356 U.S. 369, 376, 2 L.Ed.2d 848, 853 (1958).

Viewed in the light most favorable to the defendant, the situation described by the evidence presented here amounts to no more than "providing opportunity." Even if Morgan invited Broome to Hooters to "show [Broome] something," this invitation neither rises to the level of "persuasion, trickery or fraud" by the police for the purpose of inducing Broome to purchase nine ounces of cocaine nor indicates that the plan to sell the cocaine originated with Officer Tarte or Morgan. Broome's testimony does not contradict the State's contention that Broome knew that the "something" allegedly referred to by Morgan was cocaine. Moreover, Broome failed to explain why he handed over a tube sock containing $3502 in cash to Officer Tarte, a

total stranger who (according to Broome) suddenly appeared uninvited in Broome's car with nine ounces of cocaine in hand. Finally, Broome's attempted escape from the Hooters lot is inconsistent with his contention that he had been duped by Morgan and the police. We therefore overrule this assignment of error.

[6] We next decide whether the court committed plain error in failing to exclude the following exchange:

> Q. [by the district attorney]: [W]hat did Mr. Morgan [the police informant] tell you about [his contact with Broome]?
>
> MR. CONNELLY [defense counsel]: Objection.
>
> . . . .
>
> COURT: Objection sustained. Next question.
>
> . . . .
>
> Q. Officer Tarte, after your conversation with Mr. Morgan, what . . . happened?
>
> A. A drug deal . . . was then set up.
>
> Q. What kind of drug deal?
>
> A. A drug deal to sell nine ounces of cocaine.
>
> Q. An [sic] who was going to sell the cocaine?
>
> A. I was going to sell the cocaine.
>
> Q. Who were you going to sell it to?
>
> A. Antonio Broome.
>
> . . . .
>
> Q. When was the meeting or the deal to take place?
>
> A. On the 5th, of September, around between [sic] tenant [sic] 11 o'clock.
>
> . . . .
>
> Q. And where was the meeting site going to be?
>
> A. 5226 East Independence Boulevard, Hooters Restaurant.

Broome first argues that Officer Tarte's testimony must have been based on his conversation with Mr. Morgan, and that the testimony

was therefore inadmissible because it went to matters not within Officer Tarte's personal knowledge. A proponent of testimonial evidence must show that the witness has personal knowledge of the matter testified to; however, "[e]vidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. R. Ev. 602. *See also State v. Riddick*, 315 N.C. 749, 757, 340 S.E.2d 55, 59 (1986) ("testimony of [a witness that she heard defendant make a statement] was sufficient to show her ability to perceive and hear the defendant's statements and thus, to support a finding that she had personal knowledge of the matters in question"). Here, the key question leading to the testimony assigned as plain error was: "a*fter* your conversation with Mr. Morgan, what . . . happened?" (Emphasis added). Subsequent follow-up questions elicited details about what happened.

At best, the State's questions called for Officer Tarte to testify as to what may have occurred *after* his alleged conversation with Morgan, and not as to what Morgan told him *in* the conversation. Officer Tarte's testimony therefore consisted of details of the drug transaction derived from his subsequent participation in the deal, not from any prior conversation with Morgan. Therefore, Officer Tarte's testimony was based on his personal knowledge of events as he observed them and was admissible under Rule 602.

Assuming arguendo that Tarte's testimony was hearsay, we note that prior out-of-court statements may be admitted for the limited purpose of corroborating the witness' courtroom testimony, *State v. Coffey*, 345 N.C. 389, 403, 480 S.E.2d 664, 672 (1997), *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed.2d 935 (1988), but only when those statements are consistent with and substantially similar to the trial testimony, *Coffey; State v. Riddle*, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986). Here, Officer Tarte's direct testimony corroborated Morgan's direct testimony that a deal had been made to purchase nine ounces of cocaine from Morgan's drug source (Officer Tarte). The deal was to take place at Hooters on 5 September. Though Officer Tarte testified before Morgan, the State rightly argues that a limiting instruction was not required because none was requested. *State v. Noble*, 326 N.C. 581, 585, 391 S.E.2d 168, 171 (1990); *State v. Bryant*, 282 N.C. 92, 97, 191 S.E.2d 745, 749 (1972), *cert denied*, 410 U.S. 987 (1973). Accordingly, we overrule this assignment of error.

[7] Finally, we consider whether Broome was denied effective assistance of counsel at trial. To prevail, Broome must show that counsel's

performance "fell below an objective standard of reasonableness" in that (1) it was "deficient" and (2) the deficiency "prejudiced the defense," in that "there is a reasonable probability that, but for counsel's ineffective performance, the result of the proceedings would have been different." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987); *State v. Braswell*, 312 N.C. 553, 561-63, 324 S.E.2d 241, 248 (1985). Broome recites various alleged failings of defense counsel: failure to renew the motion to dismiss; failure to object to jury instructions; failure to request an entrapment instruction; and failure to object to Officer Tarte's testimony. Moreover, he argues deficiency in defense counsel's lack of knowledge about Morgan's plea agreement, as well as counsel's failure to move for mistrial or to locate, recall and cross-examine the State's key witness upon discovering the terms of the plea agreement. Broome argues that counsel instead wrongly allowed evidence of the plea agreement to be published to the jury.

We are not persuaded that the outcome of this trial was affected by defense counsel's alleged failings. *Braswell*, 312 N.C. 563, 324 S.E.2d 248 (1985) ("an error, even an unreasonable error, does not warrant a reversal of a conviction unless there is a reasonable probability that, but for counsel's errors there would have been a different result in the proceedings"). Accordingly, we find no error.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ROBERT HUGHES

No. COA98-1514

(Filed 21 December 1999)

1. Constitutional Law— double jeopardy—waiver—pleas of guilty and no contest

Defendant waived his right to assert a double jeopardy violation for the crime of accessing computers when he pled guilty to the felony of obtaining property by false pretense and pled no contest to the felony of accessing computers because a plea of guilty or no contest waives all defenses other than the sufficiency of the indictment.

2. Sentencing— active prison sentence—restitution can only be recommended

Although defendant failed to object to the judgments or the amount of restitution ordered at the sentencing hearing, the Court of Appeals considered this argument to prevent manifest injustice and concluded the trial court erred in requiring defendant to make restitution in the amount of $550,283.75 for the charge of accessing computers in Count III of the indictment when an active prison sentence was imposed on this count, and on remand, the trial court is required to indicate whether it is recommending that defendant is to make restitution as a condition of work release or post-release supervision.

3. Sentencing— aggravating factor—great monetary loss—felony accessing computers—not element of offense

Even though defendant did not object to this alleged error at the sentencing hearing, the Court of Appeals exercised its discretion and determined the trial court did not err in finding as an aggravating factor that the offense of felony accessing computers involved damage causing great monetary loss and consequently by sentencing defendant in the aggravating range because: (1) the amount of money involved in the offense is not an element of N.C.G.S. § 14-454 and only comes into play at the time of sentencing; and (2) nearly three million dollars were diverted, with Excel being forced to initiate a civil suit to recoup some of these funds at great expense and inconvenience.

4. Sentencing— aggravating factor—great monetary loss—conspiracy

The trial court did not err in finding as an aggravating factor that the offense of conspiracy involved damage causing great monetary loss because: (1) the evidence does support the finding of damage causing great monetary loss; and (2) the issue is not properly before the court since defendant did not state in his assignments of error that the aggravating factor cannot be applied to the offense of conspiracy.

5. Sentencing— mitigating factors—sufficiency of evidence

The trial court did not err in failing to find certain statutory mitigating factors because the evidence was not conclusive that: (1) defendant had made substantial restitution to the victim, since Excel was forced to bring a civil lawsuit and employ an investigator in order to obtain monies and property from defend-

ant; (2) defendant had been a person of good character or has a good reputation in the community in which he lives; (3) defendant had a positive employment history and was gainfully employed; or (4) defendant had a support system.

6. Probation and Parole— no findings longer period necessary—intermediate punishment

The trial court erred in placing defendant on supervised probation for a period of sixty months without making findings that a period longer than thirty-six months was necessary because defendant received intermediate punishment, and therefore, N.C.G.S. § 15A-1343.2(d) provides that he should not receive probation for more than thirty-six months unless on remand the trial court makes findings that a longer period of probation is necessary.

Appeal by defendant from judgments entered 9 June 1998 by Judge W. Russell Duke, Jr. in Superior Court, Wayne County. Heard in the Court of Appeals 4 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. Harris, for the State.

Narron, O'Hale, and Whittington, P.A., by J.M. Cook and John P. O'Hale, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Robert Hughes ("defendant") appeals from judgments entered upon his convictions based on his pleas of guilty to conspiracy, obtaining property by false pretense and five counts of aiding and abetting corporate malfeasance and his plea of no contest to felony accessing computers.

All charges arose from the embezzlement of $2,941,430.63 from the account of Excel Home Fashions, Inc. ("Excel"). Excel is a multinational corporation based in New York which manufactures shower curtains, tablecloths and related items. The crimes in issue concern the Excel plant located in Goldsboro, North Carolina.

The factual basis for defendant's guilty and no contest pleas as recited by the State for the trial court tended to show the following. When the semi-annual inventory was conducted at the Goldsboro plant in June 1997, the main operating officer found a significant shortage of funds. An investigation revealed that the problem origi-

nated in the accounting department. Discrepancies existed between computer entries of payments made to vendors and the actual payments made as evidenced by canceled checks. While the computer entries showed that checks were written to major vendors, in actuality the checks had been written to Hughes Fabric and Lace, a fictitious company from which Excel never purchased materials. The person responsible for issuing the checks to Hughes Fabric and Lace was defendant's sister, co-defendant Terry Hunter, who was employed by Excel as an accounts payable clerk.

Defendant received the checks payable to Hughes Fabric and Lace and deposited them in bank accounts at the Wachovia Bank and Centura Bank in Goldsboro. Defendant had established the bank accounts in the name of Hughes Fabric and Lace. Periodically, defendant issued checks drawn on these accounts to co-defendants Terry Hunter and Tony Hughes as well as to his parents, sister-in-law and brother-in-law. The sum of $2,941,430.63 was diverted to defendant in the form of checks payable to Hughes Fabric and Lace. Approximately 1.1 million dollars was recovered from defendant. Roughly 1.1 million dollars was diverted to co-defendants Terry Hunter and Tony Hughes. The out-of-pocket loss for Excel was $328,042.96. Additionally, Excel has proceeded civilly to recoup diverted funds at an expense of $142,446.66.

On 16 March 1998, defendant was indicted on one count of conspiracy to commit the felonies of obtaining property by false pretense, malfeasance of corporation officers and agents, and accessing computers; one count of obtaining property by false pretense; one count of felony accessing computers; one count of possession of stolen property; and fifty-nine counts of aiding and abetting malfeasance by a corporate agent. On 20 May 1998, defendant entered pleas of guilty to conspiracy, false pretense and aiding and abetting malfeasance by a corporate agent and entered a plea of no contest to felony accessing computers. All of the remaining counts were dismissed and prayer for judgment was continued.

On 9 June 1998, defendant was sentenced to an active term of imprisonment for a minimum term of eight months and the corresponding maximum of ten months for the conviction of obtaining property by false pretense. Additionally, defendant was sentenced to a minimum of sixteen months and a maximum of twenty months for felony accessing computers. Finally, defendant was sentenced to a minimum of eight months and a maximum of ten months of active imprisonment for aiding and abetting malfeasance by a corporate

agent. The court ordered the sentences to run consecutively and ordered defendant to pay restitution in the amount of $550,283.75.

A sentence which was to run at the expiration of the active one was suspended and defendant was placed on supervised probation for a period of sixty months. The suspended sentence consisted of the following: a sentence of no less than eight months and no more than ten months for conspiracy; a sentence of no less than eight months and no more than ten months based on two consolidated counts of aiding and abetting corporate malfeasance; and a sentence of no less than eight months and no more than ten months based on two more consolidated counts of aiding and abetting corporate malfeasance. In total, defendant received a sentence of a minimum of twenty-four months and a maximum of thirty months which was suspended.

The trial court found as an aggravating factor that the offenses involved damage causing great monetary loss and found as a mitigating factor that defendant had accepted responsibility for his criminal conduct. Defendant appeals.

The issues presented by this appeal are whether the trial court erred: (I) in failing to arrest judgment for the offense of accessing computers; (II) in requiring defendant to make restitution for an offense for which defendant had received an active term of imprisonment; (III) in imposing a sentence greater than the presumptive sentence for the crimes of conspiracy, felony accessing computers, and for all other remaining charges; (IV) in failing to find the statutory mitigating factors submitted by defendant; and (V) in placing defendant on supervised probation for a period of sixty months.

I.

[1] Defendant argues in his first assignment of error that the trial court erred when it failed to arrest judgment for the crime of accessing computers. This issue is not properly before the Court. Defendant entered a plea of no contest to the felony of accessing computers. He entered a plea of guilty to the felony of obtaining property by false pretense. Subsequently, defendant filed a motion to arrest judgment with respect to the felony of accessing computers, arguing that to sentence him for accessing computers and for obtaining property by false pretense would amount to multiple punishment for the same offense in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 to the North Carolina Constitution. Defendant's motion was denied at sentencing.

The defendant may waive the constitutional right not to be placed in jeopardy twice for the same offense. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971) (holding that the defendant waived his constitutional right not to be placed in double jeopardy when he entered a plea of guilty after his plea of double jeopardy was overruled). A defense of double jeopardy is abandoned by a subsequent plea of guilty. *Id.* By knowingly and voluntarily pleading guilty, an accused "waives all defenses other than that the indictment charges no offense." *State v. Caldwell*, 269 N.C. 521, 526, 153 S.E.2d 34, 37-38 (1967) (citations omitted). Additionally, the plea of guilty waives "the right to trial and the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions." *Id.* Like a plea of guilty, a plea of no contest waives all defenses other than the sufficiency of the indictment. *State v. Smith*, 279 N.C. 505, 183 S.E.2d 649 (1971) (citation omitted).

In the present case, defendant entered a guilty plea to obtaining property by false pretense and a no contest plea to accessing computers. We conclude that defendant waived the right to assert a double jeopardy violation by entering pleas of guilty and no contest. Therefore, it is not necessary for us to determine whether the evidence would show that defendant was unlawfully placed in jeopardy a second time for the same offense.

II.

[2] By his second assignment of error, defendant argues that the trial court improperly required defendant to make restitution in the amount of $550,283.75 in the judgment entered on the charge of accessing computers in Count III of the indictment. The trial court sentenced defendant on Count III to an active term of imprisonment of not less than sixteen nor more than twenty months in the North Carolina Department of Corrections and ordered him to pay restitution. Defendant argues that the trial court may not lawfully order restitution when an active prison sentence has been imposed.

According to our rules of appellate procedure, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C.R. App. P. 10(b)(1). In the present case, defendant failed to object to the judgments or the amount of restitution ordered at the sentencing hearing. Similarly, defendant failed to object to the trial court's order that defendant make restitution in the judgments entered on

Counts XI, XVI, XIX, and I. Therefore, the issue of whether restitution was properly ordered is not properly before this Court.

Nevertheless, in order to prevent manifest injustice to defendant, we have considered the argument that the trial court erred in both requiring defendant to make restitution and imposing an active sentence in its judgment on Count III of the indictment and we find that it has merit. N.C.R. App. P. 2. When a court imposes an active prison sentence, the court may *recommend* restitution to the Secretary of Correction as a condition of work-release. N.C. Gen. Stat. § 148-33.2(c) (Cum. Supp. 1998). Additionally, the court may *recommend* restitution to the Post-Release Supervision and Parole Commission as a condition of post-release supervision and parole. N.C. Gen. Stat. § 148-57.1(c) (Cum. Supp. 1998). Finally, restitution may be ordered as a condition of probation. N.C. Gen. Stat. § 15A-1343(d).

In the present case, defendant was not placed on probation in the judgment imposed on Count III of the indictment. He received an active sentence of imprisonment of not less than sixteen nor more than twenty months. The trial court was authorized only to "recommend" that defendant make restitution as a condition of work release or post-release supervision. Therefore, the trial court did not have the authority to order defendant to make restitution in the amount of $550,283.75 in the judgment on Count III.

On remand, the trial court is directed to clarify its judgment by indicating whether it recommends defendant make restitution as a condition of work release or post-release supervision.

III.

[3] Defendant argues in his third assignment of error that the trial court erred in finding as an aggravating factor that the offense involved damage causing great monetary loss and consequently sentencing defendant in the aggravated range. This issue is not properly before the Court. Defendant did not object to the alleged error at the sentencing hearing. Therefore, he has waived his right to appellate review. N.C.R. App. P. 10(b)(1). In our discretion, however, we have examined defendant's argument and find that it is without merit.

Under Structured Sentencing, the trial court may find as an aggravating factor that "[t]he offense involved an attempted or actual taking of property of great monetary value or damage causing great

monetary loss, or the offense involved an unusually large quantity of contraband." N.C. Gen. Stat. § 15A-1340.16(d)(14). The State bears the burden of proving by a preponderance of the evidence that the aggravating factor exists. N.C. Gen. Stat. § 15A-1340.16(a). The trial court's finding of an aggravating factor must be supported by "sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence." *State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991).

Defendant argues that the legislature took into consideration the element of great loss when creating the presumptive offense level for the crime of felony accessing computers. North Carolina General Statutes section 14-454 provides that if the fraudulent artifice results in damage greater than $1,000, the violation is a Class G felony. N.C. Gen. Stat. § 14-454 (Cum. Supp. 1998). It is error for an aggravating factor to be based on circumstances which are part of the essence of a crime. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985). "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" N.C. Gen. Stat. § 15A-1340.16 (1997).

In the present case, evidence that the offense involved damage causing great monetary loss is not necessary to prove an element of felony accessing computers. The amount of money involved in the offense is not an element of North Carolina General Statutes section 14-454. Instead, the money amount comes into play only at the time of sentencing.

> A violation of this subsection is a Class G felony if the fraudulent scheme or artifice results in damage of more than one thousand dollars ($1,000), or if the property or services obtained are worth more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-454 (Cum. Supp. 1998).

Defendant further argues that the evidence does not support the aggravating factor of damage causing great monetary loss. We disagree. Defendant, along with his sister and brother, diverted nearly three million dollars from Excel. Defendant received $2,817,320.43 of the diverted funds. Excel was forced to initiate a civil suit to recoup some of these funds at great expense and inconvenience. The uncontroverted evidence is that Excel has out-of-pocket loss of $328,042.96, which figure does not take into account the expenses

Excel incurred in collecting funds. We conclude that the trial court did not err in finding the aggravating factor of damage causing great monetary loss.

[4] Defendant next argues that the aggravating factor of damage causing great monetary loss was improperly applied to the offense of conspiracy inasmuch as the evidence does not support the factor. As stated above, we believe the evidence does support the finding of damage causing great monetary loss.

Defendant also argues in his brief that the aggravating factor of damage causing great monetary loss can not be applied to the offense of conspiracy because the crime was complete when defendant and his co-defendants agreed to defraud Excel, such that no damage had occurred at the time the offense was completed. However, defendant did not state in his assignments of error that the aggravating factor can not be applied to the offense of conspiracy. "Except as otherwise provided herein, 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 10." N.C.R. App. P. 10(a). Therefore, the issue is not properly before the Court.

IV.

[5] Defendant's argument in his fourth assignment of error asserts that the trial court erred in failing to find certain statutory mitigating factors. We cannot agree.

The defendant bears the burden of persuasion for mitigating factors where he seeks a term below the presumptive range. *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983). Trial judges have discretion and latitude in determining whether a mitigating circumstance exists. *State v. Graham*, 309 N.C. 587, 592, 308 S.E.2d 311, 315 (1983). When a defendant argues that the trial court erred in failing to find a mitigating factor, he must show that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn and that the credibility of the evidence is manifest as a matter of law." *Jones*, 309 N.C. at 220, 306 S.E.2d at 455 (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395 (1979)). The court must find a mitigating circumstance when the evidence that it exists is substantial, uncontradicted, and manifestly credible. *Id.*

Defendant requested that the trial court find that he had made substantial restitution to the victim, that he had been a person of

good character or has a good reputation in the community in which he lives, that the defendant had a positive employment history and was gainfully employed and that he had a support system. The trial court declined to make any such findings in mitigation.

Defendant argues that the uncontradicted and manifestly credible evidence of record shows that defendant made substantial restitution to the victim for purposes of North Carolina General Statutes section 15A-1340.16(e)(5). In *State v. McDonald*, 94 N.C. App. 371, 380 S.E.2d 406 (1989), our Supreme Court found that the trial court did not err in failing to find the mitigating factor that the defendant had made substantial restitution in a larceny case where the defendant initially abandoned the stolen property but later led police to it. In the present case, Excel was forced to bring a civil lawsuit and employ an investigator in order to obtain monies and property from defendant. By analogy to *McDonald*, the facts in this case do not conclusively establish that defendant made substantial restitution.

Defendant argues that the uncontradicted and credible evidence offered at the sentencing hearing and contained in the pre-sentence investigative report demonstrates that defendant was a person of good character or had a good reputation in the community in which he lived. At the sentencing hearing, counsel for defendant indicated that seven people were present who "would testify" that defendant had a support group and enjoyed a good reputation. However, no such testimony was offered as the parties agreed that the attorneys would recite the evidence to the court in lieu of formal evidentiary presentation. The pre-sentence investigative report contains three character references. One is from defendant's employer of less than one year. The other references are from defendant's sister and mother-in-law. We believe that the trial court could in its discretion determine that this evidence was not manifestly credible or that it was not substantial enough to conclusively establish that defendant was a person of good character or had a good reputation in his community.

Finally, we do not believe that defendant met his burden of proving by a preponderance of the evidence that he had a positive employment history and was gainfully employed. Counsel for defendant stated in the sentencing hearing that defendant "at all times, since graduation from high school, has been in school and has been gainfully employed." Additionally, counsel for defendant stated that defendant "works every day."

The pre-sentence investigative report provides the following evidence in support of defense counsel's claims. Defendant began working for Goldsboro Drug Company in December 1993. The record does not disclose how long defendant was employed by Goldsboro Drug Company. Defendant began working for R. L. Dresser in Raleigh, North Carolina in August 1997 and stopped working in November 1997. The record suggests that defendant was simultaneously working for ProSound II in Kinston, North Carolina, as he was employed there in September 1997. He worked full time for ProSound II until he was arrested in March 1998. In summary, the pre-sentence report indicates that defendant held one full-time job for about six months. The trial court in its discretion could have found that this employment history did not amount to substantial or manifestly credible evidence that defendant had a positive employment history or was gainfully employed. We conclude that the trial court did not err in failing to find the above mentioned statutory mitigating factors.

V.

[6] In his fifth assignment of error, defendant argues that the trial court erred in placing defendant on supervised probation for a period of sixty months without making findings that a period longer than thirty-six months was necessary. We agree.

According to North Carolina General Statutes section 15A-1343.2(d):

> Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:
>
> . . . .
>
> (4) For felons sentenced to intermediate punishment, not less than 18 nor more than 36 months[.]

N.C. Gen. Stat. § 15A-1343.2(d) (1997). Defendant received intermediate punishment for Counts XI, XVIII, XVI, XIX and I. Therefore, the length of probation should not have exceeded thirty-six months. North Carolina General Statutes section 15A-1343.2(d) does provides that "[i]f the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years . . . ." N.C.G.S. § 15A-1343.2(d). In the present case, however, the trial court did not make a finding that a longer period of pro-

bation was necessary. We conclude that the case should be remanded for resentencing so that the trial court may designate a probationary period in accordance with North Carolina General Statutes section 15A-1343.2(d) or make findings that a longer period of probation is necessary.

Affirmed in part, reversed in part and remanded for resentencing.

Chief Judge EAGLES and Judge MARTIN concur.

BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC. D/B/A BMA OF CONCORD D/B/A METROLINA KIDNEY CENTER OF CONCORD (LESSEE) AND CONCORD NEPHROLOGY ASSOCIATES (LESSOR), PETITIONERS-APPELLANTS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE, AND DIALYSIS CARE OF NORTH CAROLINA, LLC D/B/A DCNC, LLC, RESPONDENT-INTERVENOR-APPELLEE

No. COA98-1499

(Filed 21 December 1999)

1. **Hospitals and Other Medical Facilities— certificate of need—final agency decision—requirements for application**

Although Bio-Medical Applications' argument that the Department of Health and Human Services exceeded its authority and jurisdiction and committed errors of law by awarding a certificate of need to Dialysis Care on the basis of an application that was never shown to be conforming to all applicable criteria is technically correct, this argument when applied to the facts and unusual procedural posture of this case reveals Bio-Medical Applications was not prejudiced by these alleged mistakes or omissions under a Settlement Agreement between the Department and Dialysis Care since they were corrected by information supplied before the final agency decision.

2. **Hospitals and Other Medical Facilities— certificate of need—whole record test—requirements for application**

The Department of Health and Human Services' final agency decision concerning an application for a certificate of need was supported by the evidence because the whole record test reveals the application was originally rejected because it did not contain

some required information, the evidence of need was provided by the time the parties agreed to a settlement, additional information was provided during argument before the administrative law judge, and the Department relied on all of the information before it issued the final agency decision.

3. Hospitals and Other Medical Facilities— certificate of need—size of dialysis unit—issue not previously addressed

The Department of Health and Human Services' final agency decision concerning an application for a certificate of need was not erroneous based on a lack of findings regarding the size of the proposed dialysis facility because there are no specific size requirements for a dialysis facility, and the issue of size is not properly before the court because it was not addressed by the Department of Health and Human Services on Dialysis Care's appeal.

4. Hospitals and Other Medical Facilities— certificate of need—whole record test—not arbitrary and capricious

The Department of Health and Human Services' final agency decision that approved the application for a certificate of need was not arbitrary and capricious because the whole record test reveals all the necessary criteria had been met.

5. Hospitals and Other Medical Facilities— certificate of need—final agency decision—adoption of administrative law judge's prior decision

The Department of Health and Human Services' final agency decision that approved the application for a certificate of need was not defective under N.C.G.S. § 150B-51(a) for failure to state specific reasons why the Department did not adopt multiple portions of the administrative law judge's recommended decision because the final agency decision essentially adopted the administrative law judge's recommended decision and the rule does not require a point-by-point refutation of the judge's findings and conclusions.

6. Administrative Law— final agency decision—recusal of final decision-maker

The Director of the Division of Facility Services did not err in refusing to recuse herself, upon Bio-Medical Applications' request, from the final agency decision even though she had previously approved the settlement agreement and was in essence

reviewing her own decision to award a certificate of need to Dialysis Care because the final agency decision-maker in this case had no personal stake in the outcome of the final agency decision which would require her disqualification under N.C.G.S. § 150B-36(a).

Appeal by petitioners Bio-Medical Applications of North Carolina, Inc., et. al., from the final agency decision entered 2 July 1998 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 16 September 1999.

Moore & Van Allen, PLLC, by Joy Heath Thomas, Dean M. Harris, and Kelly M. Simeon, for petitioners-appellants.

Michael F. Easley, Attorney General, by Staci Tolliver Meyer, for respondent-appellee.

Poyner & Spruill, L.L.P., by William R. Shenton, Thomas R. West, and Michelle L. Frazier, for respondent-intervenor-appellee.

WYNN, Judge.

Bio-Medical Applications of North Carolina, Inc. appeals from a final agency decision of the North Carolina Department of Health and Human Services[1] awarding a Certificate of Need to Dialysis Care of North Carolina, L.L.C. Our review of the whole record reveals substantial evidence to support the Department of Health and Human Services' award. We, therefore, affirm the award.

Dialysis Care of North Carolina, L.L.C. d/b/a DCNC, L.L.C.[2] provides dialysis and related services to North Carolina patients. Bio-Medical Applications of North Carolina, Inc. d/b/a BMA of Concord d/b/a Metrolina Kidney Center of Concord and Concord Nephrology Associates (collectively referred to in this opinion as "Bio-Medical Applications") provide similar services.

The 1995 State Medical Facilities Plan and a Semi-Annual Dialysis Report identified the need for fourteen additional dialysis stations in Rowan County. In response, Dialysis Care and Bio-Medical

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1. Formerly the Department of Human Resources. N.C. Gen. Stat. § 143B-138.1 (1998 Cum. Supp.).

2. Dialysis Care moves this Court to take judicial notice of its corporate name change to Total Renal Care of North Carolina, LLC. We grant this motion, but for the sake of clarity in this opinion, we will refer to the corporation as Dialysis Care.

Applications filed Certificate of Need applications to establish the new dialysis stations. The Department of Health and Human Services denied their applications, and the two dialysis providers appealed the decision.

In settlement of that appeal, Dialysis Care received a Certificate of Need to add fourteen stations to its already existing facility in Salisbury, North Carolina. In addition, Dialysis Care and Bio-Medical Applications agreed not to propose a new dialysis center in Rowan County until after 1 July 1996.

On 16 July 1996, Dialysis Care applied to the Department of Health and Human Services to establish a new dialysis center in Kannapolis, Rowan County, North Carolina. Dialysis Care planned to transfer ten stations from its existing facility in Salisbury. In addition to the dialysis services, Dialysis Care also planned to set up a home-training area to teach patients how to perform dialysis themselves.

The Department of Health and Human Services reviewed and denied Dialysis Care's application for a Certificate of Need, finding that the application did not conform with statutory and regulatory review criteria—specifically, N.C. Gen. Stat. §§ 131E-183(a)(3), (4), (5), (6), (12), and (18), and 10 N.C. Admin. Code 3R.2213(a)(7) and (b)(7). In short, the Department of Health and Human Services found that Dialysis Care (1) failed to show that there was a need for the new facility, (2) submitted a floor plan that was inconsistent with its proposal for a home-training area, and (3) failed to provide data about the number of infected patients and the number of patients who had become infected in the past year as required by 10 N.C.A.C. R3.2213(a)(7). Dialysis Care appealed the denial of the Certificate of Need to the Department of Health and Human Services. Bio-Medical Applications apparently did not have notice of that appeal because the Department of Health and Human Services neglected to publish notice of Dialysis Care's appeal in its official Monthly Reports.

Upon appeal to the Department of Health and Human Services, Dialysis Care submitted more data about the need for a new facility. That information resulted in a Settlement Agreement with the Department of Health and Human Services to grant a Certificate of Need to Dialysis Care. The Department of Health and Human Services approved the settlement through its Director of the Division of Facility Services on 12 May 1997.

On 3 July 1997, Bio-Medical Applications petitioned for a contested case hearing with the Office of Administrative Hearings to contest the award of a Certificate of Need to Dialysis Care by the Settlement Agreement. An Administrative Law Judge recommended affirming the award of a Certificate of Need to Dialysis Care.

When the matter came on before the Director of Facility Services for a final agency decision, Bio-Medical Applications moved to disqualify the Director as the final decision maker for the Department of Health and Human Services since she had previously approved the Settlement Agreement. The Director, however, denied that motion and issued the Department of Health and Human Services' final agency decision which adopted most of the Administrative Law Judge's recommendations. This appeal followed.

On appeal, Bio-Medical Applications offers five arguments as to why the Department of Health and Human Services' decision to grant a Certificate of Need should be reversed. In addition, the Department of Health and Human Services and Dialysis Care assign as error the Administrative Law Judge's denial of their motion to dismiss Bio-Medical Applications' petition as untimely. We hold that the Department of Health and Human Services did not err in awarding a Certificate of Need to Dialysis Care and therefore, we do not reach the issue of whether the Administrative Law Judge erred in denying Dialysis Care's motion to dismiss.

The North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 et seq., governs both trial and appellate court review of administrative agency decisions. *See Eury v. North Carolina Employment Sec. Comm'n*, 115 N.C. App. 590, 596, 446 S.E.2d 383, 387 (1994). Under § 150B-51(b),

> . . . the 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 petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decision 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. 150B-29, 150B-30, 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1995). Although this statute "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. North Carolina Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118, (1994); *see also State ex rel. Utilities Comm'n v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981) (stating that the "nature of the contended error dictates the applicable scope of review").

We first note the unusual procedural posture of this case. The Settlement Agreement between the Department of Health and Human Services and Dialysis Care addressed only those parts of Dialysis Care's application for a Certificate of Need that the Department of Health and Human Services initially found did not conform to various criteria. The Settlement Agreement did not address each and every criterion because most issues had been resolved in the initial review. Significantly, while Bio-Medical Applications challenges the final agency decision affirming the Settlement Agreement, the initial review of Dialysis Care's application is not the subject of this appeal. Therefore, we consider only those matters that the Department of Health and Human Services and Dialysis Care addressed in the Settlement Agreement and the final agency decision. This limited and narrow review is important to note because Bio-Medical Applications offers some arguments pertaining to issues not addressed by the Department of Health and Human Services during Dialysis Care's appeal.

[1] Bio-Medical Applications first argues that the Department of Health and Human Services exceeded its authority and jurisdiction and committed errors of law by awarding a Certificate of Need on the basis of an application that was never shown to be conforming to all applicable criteria. While this argument is technically correct, we disagree with it as applied to the facts and unusual procedural posture of this case.

The appropriate standard of review for an assertion that a Department of Health and Human Services decision is based on an

error of law is *de novo* review. *See Hubbard v. State Const. Office, N.C. Dep't of Admin.*, 130 N.C. App. 254, 257, 502 S.E.2d 652, 656 (1998); *In re Appeal of Ramseur*, 120 N.C. App. 521, 524, 463 S.E.2d 254, 256 (1995). Under N.C. Gen. Stat. § 131E-183(a), the Department of Health and Human Services must review Certificate of Need applications and determine whether such applications conform to applicable criteria before issuing a Certificate of Need. The Department of Health and Human Services' own rules mandate that the Department either not issue a Certificate of Need to a non-conforming applicant, or issue a Certificate of Need with conditions to ensure conformity. 10 N.C.A.C. 3R.0313(a).

Case law also supports the proposition that an application must be found consistent with the statutory criteria before a Certificate of Need may be issued. *See, e.g., Retirement Villages, Inc. v. N.C. Dep't of Human Resources*, 124 N.C. App. 495, 477 S.E.2d 697 (1996).

Bio-Medical Applications bases its argument on the fact that prior to the Settlement Agreement, Dialysis Care failed to provide information regarding the number of infected patients and the number of patients who had recently converted to infected status, as required by 10 N.C.A.C. R3.2213(a)(7). After a review of the record, we find no evidence that Dialysis Care satisfied this criterion before entering into the Settlement Agreement. In fact, the Department of Health and Human Services' project analyst admitted that Dialysis Care did not provide the required information.

But this appeal is not from the Settlement Agreement alone; rather, Bio-Medical Applications also appeals from the Department of Health and Human Services' final agency decision which affirmed the issuance of the Certificate of Need to Dialysis Care. Before rendering the final agency decision, the Department received and considered additional information from Dialysis Care, including the number of infected patients—information that is useful in determining whether a provider will be able to provide safe and quality care to its patients. By supplying such information, Dialysis Care satisfied the Department's concerns as to whether it would be able to adequately care for its patients. We, therefore, find that Bio-Medical Applications was not prejudiced by these alleged mistakes or omissions under the Settlement Agreement because they were corrected by the final agency decision.

[2] Bio-Medical Applications next argues that the Department of Health and Human Services' final agency decision failed to make cru-

cial findings of fact and was unsupported by and contrary to the evidence of record. We disagree.

When it is alleged that a final agency decision was not supported by the evidence, this Court must apply the "whole record" test. *See Retirement Villages*, 124 N.C. App. at 498, 477 S.E.2d at 699. In applying the whole record test, the reviewing court is required "to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence'." *In re Meads*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Meads*, 349 N.C. at 663, 509 S.E.2d at 170 (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)).

Under the whole record test, "an agency's ruling should only be reversed if it is not supported by substantial evidence." *Retirement Villages*, 124 N.C. App. at 498, 477 S.E.2d at 699. We should not replace the Department of Health and Human Services' judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter was before us *de novo*. *See In Re Meads*.

Bio-Medical Applications alleges that the Department of Health and Human Service's final decision "fails to include any Findings on whether, at the time of settlement, the Department of [Health and Human Services] had any credible basis to support a determination of conformity on the need issue, the home training/square footage issue or on the reporting requirement for infectious disease patients." As we noted in our discussion of Bio-Medical Applications' first argument, we do not look at the Settlement Agreement only, but also take into consideration the information supplied to the final agency decision maker. After a review of the record, we hold that the Department of Health and Human Services had reasonable grounds to believe that all criteria were met when it issued the final decision.

As listed in the summary of the facts, Dialysis Care's application for a Certificate of Need was originally rejected because it did not contain some required information. However, the record shows that evidence of need was provided by the time the parties agreed to the settlement. Information regarding the location of the home-training area and the number of infected patients was provided during argument before the Administrative Law Judge. When the Department of

Health and Human Services issued the final agency decision, it relied on *all* of the information, not just that provided before the Settlement. Upon review of this evidence, we hold that there was ample information upon which the Department of Health and Human Services could reasonably have based the final agency decision.

[3] Bio-Medical Applications also finds fault with the lack of findings regarding the size of the proposed facility. We first note that there are no specific size requirements for a dialysis facility. In any case, the issue of size was not a point addressed by the Department of Health and Human Services on Dialysis Care's appeal, and therefore is not a proper issue for this Court to address.

[4] Bio-Medical Applications next argues that the Department of Health and Human Services' final agency decision that approved Dialysis Care's application was arbitrary and capricious. We disagree.

A decision by an administrative agency "is arbitrary and capricious if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decision making." *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988). As explained by our Supreme Court:

> The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . .

Act-Up Triangle v. Comm'n for Health Services for the State of N.C., 354 N.C. 699, 707, 483 S.E.2d 388, 393 (1997). (Citations omitted).

To determine whether the Department of Health and Human Services was arbitrary and capricious, we once again employ the whole record test. *See Retirement Villages*, *supra*. Under this test, we review all competent evidence to determine whether the final agency decision is supported by substantial evidence.

Bio-Medical Applications argues that the evidence on record fails to show that Dialysis Care rectified the non-conforming parts of its application. However, the trial transcript shows ample evidence upon which the Administrative Law Judge and the Department of Health

and Human Services could have relied in finding that all criteria were met. In particular, the testimony of the Department of Health and Human Services' project analyst addressed the issues of need, market share, patient support, and utilization. The Administrative Law Judge also heard evidence concerning the number of patients with an infectious disease and the number of patients who had converted to infected status in the past year. Finally, the Department of Health and Human Services showed that its initial finding that the proposed site did not include a training room was in error—the blueprint was smudged, making it partially illegible—but this error was rectified during the course of the appeal.

Bio-Medical Applications also argues that the Certificate of Need award was arbitrary because it "appears that the Department of [Health and Human Services'] decision-maker did not even carefully read the Department of [Health and Human Services] Final Agency Decision before signing it . . . ." Reviewing the evidence under the whole record test, we find that the final agency decision was supported by evidence which tended to show that all the necessary criteria had been met. Such being the case, we cannot find fault on that ground with the Director of the Division of Facility Services' approval of the settlement.

[5] Bio-Medical Applications next argues that the Department of Health and Human Services' final agency decision is defective under N.C. Gen. Stat. § 150B-51(a) (1995) in that it fails to state specific reasons why the Department of Health and Human Services did not adopt multiple portions of the Administrative Law Judge's Recommended Decision. We disagree.

N.C. Gen. Stat. § 150B-51(a) states:

> [I]f the [Department of Human Resources] did not adopt the recommended decision, the court shall determine whether the [Department of Human Resources'] decision states the specific reasons why the Department of Human Resources did not adopt the recommended decision. If the court determines that the Department of Human Resources did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the Department of Human Resources to enter the specific reasons.

However, this rule *does not* require a point-by-point refutation of an Administrative Law Judge's findings and conclusions. *See Webb v.*

N.C. Dep't of Env't, Health and Natural Resources, Coastal Resources Comm'n, 102 N.C. App. 767, 770, 404 S.E.2d 29, 31 (1991). We find no error in the fact that the final agency decision essentially adopted the Administrative Law Judge's Recommended Decision.

[6] Bio-Medical Applications finally argues that the Director of the Division of Facility Services erred in refusing to recuse herself upon its request, and thereby denied the company its due process rights. We disagree.

The Administrative Procedure Act states that a final decision maker for the Department of Health and Human Services may be disqualified due to "personal bias or other reason." N.C. Gen. Stat. § 150B-36(a) (1995).

In this case, Bio-Medical Applications does not argue that the Director was biased—rather, Bio-Medical Applications argues that the Director should have recused herself because she reviewed her own decision to award a Certificate of Need to Dialysis Care. A similar and more compelling issue was presented to our Supreme Court in *Hearne v. Sherman*, 350 N.C. 612, 516 S.E.2d 864 (1999). Our Supreme Court reviewed the facts of *Hearne* in which a final decision maker rejected the findings of both an Administrative Law Judge and the State Personnel Commission, and instead based his final decision on *his own testimony and credibility* from the earlier proceeding. Our Supreme Court split evenly on the issue of whether the fairness notions of due process were offended leaving the matter affirmed without precedential value. Although we do not rely on *Hearne* to decide the issue in this case, it is difficult to escape the fact that the case at bar presents a much less drastic example of an agency decision maker reviewing her own work. Unlike the final agency decision maker in *Hearne*, who reviewed his own testimony and credibility, the final agency decision maker in this case had no personal stake in the outcome of the final agency decision. We, therefore, hold that her failure to recuse herself did not amount to a violation of Bio-Medical Applications' due process rights.

Affirmed.

Judges JOHN and EDMUNDS concur.

MICHAEL CLARK AND PATRICK NEWTON, PETITIONERS v. CITY OF ASHEBORO, A MUNICIPAL CORPORATION; W. JOSEPH TROGDON, MAYOR; DAVID H. SMITH, COUNCILMAN; BARBARA HOCHULI, COUNCILWOMAN; JOHN MCGLOHON, COUNCILMAN; DAVID JARRELL, COUNCILMAN; NANCY HUNTER, COUNCILWOMAN; ARCHIE PRIEST, COUNCILMAN; AND TALMADGE BAKER, COUNCILMAN, RESPONDENTS

No. COA99-240

(Filed 21 December 1999)

1. Zoning— special use permit—mobile home parks—conditions

There was ample evidence in the record of a special use permit proceeding that petitioners had satisfied the specific requirements set forth in the ordinance for the development of mobile home parks.

2. Zoning— special use permit—mobile home parks—injury to adjoining property

Petitioners seeking a special use permit for the development of a mobile home park complied with a condition in the special use ordinance that the use not substantially injure the value of the adjoining property. Petitioners presented expert testimony through an appraiser that the proposed mobile home park would not result in any substantial diminution of the value of the adjacent property and, except for oblique references in the testimony of several landowners in the vicinity, there was no competent evidence to the contrary.

3. Zoning— special use permit—mobile home parks—conditions—no material danger to public health or safety

Petitioners who were seeking a special use permit for a mobile home park met their burden of introducing substantial evidence that the proposed use would not materially endanger the public health or safety. The generalized fears expressed by witnesses were that the mobile home park would be inhabited by lower-income persons who would constitute a danger to the neighborhood and no competent evidence was presented in support of any of the contentions or positions opposing the park.

4. Zoning— special use permit—mobile home parks—conditions—conformity with area

Petitioners seeking a special use permit for a mobile home park met their burden of demonstrating compliance with a requirement that the use be in harmony with the area in which it

was to be located and in general conformity with the plan of development of Asheboro. The inclusion of manufactured housing parks in the R40 classification is equivalent to a "legislative finding" that such parks are compatible with other uses permitted in the district and the Council in this case gave no reason for finding that the mobile home park proposed by petitioners would be an incompatible use.

5. Zoning— special use permit—mobile home parks—findings

The trial court did not err by concluding that respondents (the Town Council) failed to make adequate findings of fact when denying an application for a special use permit for a mobile home park where the Council appears to have based its contention regarding impact on the neighborhood on a statement by a Council member which was at best conclusory and did not amount to a finding, and which was not based on competent, material, and substantial evidence.

6. Zoning— special use permit—review by superior court

The trial court did not err when reviewing the denial of a special use permit for a mobile home park by issuing a decree directing the city to issue the permit where the court properly determined that the denial was not supported by appropriate findings and that there was no competent evidence rebutting the prima facie case made by petitioners.

Appeal by respondents from judgment entered 28 December 1998 by Judge Steve A. Balog in Randolph County Superior Court. Heard in the Court of Appeals 28 October 1999.

On 10 February 1998, Michael Clark and Patrick Newton (the petitioners) filed an application with the City of Asheboro for a special use permit to develop a mobile home park on a 26-acre tract of land owned by Haymes Brothers, Inc. (the property). Petitioners had an option to purchase the property, and no question was raised about their standing to request a special use permit. The Haymes property is located outside the city limits of Asheboro, but is within the extraterritorial jurisdiction of the City of Asheboro and is subject to the City of Asheboro Zoning Ordinance (the Ordinance). On 7 May 1998, the Asheboro City Council (the Council) held a public hearing on petitioners' application. Petitioners offered evidence that they had complied with all conditions set out in the Ordinance, and six persons who reside near the Haymes property made statements in opposition

to petitioners' application. Reynolds Neely, the Planning Director, presented background information including staff recommendations in favor of the application. The Council postponed final action on the application in order for petitioners to prepare a new site plan showing the relocation of certain dumpsters and closing access from the proposed mobile home park to a nearby road. A member of the Council also wanted additional time to view the site and to study the situation of the adjoining homeowners. On 4 June 1998, the Council voted to deny the petitioners' application on the grounds that two necessary conditions had not been met. On 22 June 1998, petitioners petitioned the Superior Court of Randolph County for certiorari, which was allowed. The superior court heard the matter, concluded that the denial of petitioners' application was not based on competent, material and substantial evidence, and ordered that the City of Asheboro issue a special use permit to petitioners. Respondents appealed.

Gavin, Cox, Pugh, Etheridge and Wilhoit, L.L.P., by Alan V. Pugh, for petitioner appellees.

Smith & Alexander, L.L.P., by Archie L. Smith, Jr., for respondent appellants.

HORTON, Judge.

The North Carolina Constitution provides that the "General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and . . . may give such powers and duties to counties, cities and towns and other governmental subdivisions as it may deem advisable." N.C. Const. Art. VII, § 1. Pursuant to this constitutional provision, our legislature has delegated its zoning powers to the various municipalities located throughout the State. N.C. Gen. Stat. § 160A-381(a) provides that:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes and to provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11. These

> regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The regulations may also provide that the *board of adjustment or the city council may issue special use permits or conditional use permits* in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.

Id. (Cum. Supp. 1998) (emphasis added).

Here, petitioners applied for a special use permit, which our Supreme Court has defined as " 'one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.' " *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (citation omitted), *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

Pursuant to N.C. Gen. Stat. § 160A-381, the Asheboro City Council created a zoning ordinance to regulate the use of land located within the municipality of Asheboro. The Asheboro Zoning Ordinance includes a "Special Uses" section titled "Article 600," which provides guidelines for obtaining a special use permit.

Article 600 provides that one who wishes to obtain a special use permit must first submit an application to the zoning administrator. The planning director then prepares an analysis of the application for consideration by the City Council. The zoning administrator then gives public notice of a hearing before the Council regarding the applicant's request for a special use permit. At the hearing, the Council is to receive evidence in the form of testimony and documents in support of the application for the special use permit. In an effort to persuade the Council, the applicant must satisfy four "General Standards" for approval of a special use permit:

> 1. That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved.
>
> 2. That the use meets all required conditions and specifications.
>
> 3. That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and,

4. That the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Asheboro and its environs.

The Ordinance provides further that the Council make "general findings based upon substantial evidence contained in its proceedings." The Ordinance also provides that Council make a decision following the hearing, either to approve the application, approve it with conditions attached, or deny it.

If the Council denies the application, its decision "shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-381(c) (Cum. Supp. 1998). Our Supreme Court has defined the role of the superior court in reviewing a decision of a city council:

> [I]t is clear that the task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:
>
> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.
>
> . . . .
>
> In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order *but whether the evidence before the town board was supportive of its action.* In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board. *The trial court, reviewing the decision of a town board on a conditional use permit application, sits in the posture of an appellate court.*

> The trial court does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.

Concrete Co., 299 N.C. at 626-27, 265 S.E.2d at 383 (emphasis added) (citations omitted).

The "arbitrary and capricious" standard applies, among other things, to a town council's refusal of a request for a mobile home park. The Council "cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, a mobile-home park would 'adversely affect the public interest.' " *In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970) (citation omitted). Further, the Council "must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits." *Id.* Therefore, in making a decision on an application for a special use permit, the Council may not arbitrarily violate its own rules, but must comply with the provisions of its Ordinance. *See Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974). Compliance with the Ordinance provisions ensures that each application for a special use permit will be considered on its own merits, and not granted or denied based on improper or irrelevant factors. It also allows some predictability of future use to persons who invest in real property.

Here, respondent City contends the trial court erred in concluding as a matter of law that petitioners presented competent, material and substantial evidence establishing their compliance with the preconditions of the Ordinance relating to the issuance of a special use permit. We note that the issue of whether "competent, material and substantial evidence" is present in the record is a conclusion of law. "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 591, 513 S.E.2d 812, 816 (1999). The "competent, material and substantial evidence" standard is part of a test adopted by our Supreme Court, which

> outlined the two-step decision-making process the town had to follow in granting or denying an application for a special use permit:
>
> (1) When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the

> issuance of a special use permit, *prima facie* he is entitled to it. (2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Concrete Co., 299 N.C. at 625, 265 S.E.2d at 382 (citations omitted). Here, the superior court concluded that:

> 2. The Petitioners in this cause presented competent, material and substantial evidence establishing facts sufficient to meet all four general standards set out in Section §602 as well as the specific standards set out in Section §629 of the Asheboro City Zoning Ordinance necessary for the issuance of a special use permit.
>
> 3. The evidence presented contra to Petitioners' application was insufficient to support Respondents' denial of Petitioners' application for a special use permit, and therefore said denial was not supported by competent, material and substantive evidence contra.
>
> 4. The Respondents failed to follow the procedures specified in case law by failing to make findings of fact based on the evidence presented necessary to support its[] conclusions that one or more of the general standards in its ordinance were not met, nor sufficient to allow this Court to review the application by Respondents of such facts to the ordinance had such facts existed.

In order to review properly the judgment of the superior court, we must determine whether petitioners produced competent, material and substantial evidence to show their compliance with the four general conditions of Article 602 of the Ordinance, so that they are *prima facie* entitled to issuance of a special use permit. If we determine that petitioners were *prima facie* entitled to a permit, we must then determine whether there was competent, material and substantial evidence in opposition to their application upon which Council could base a denial of the special use permit.

[1] Before addressing conditions No. 1 and No. 4 of the Ordinance, both of which were the Council's basis for denial of the permit, we hold that it is clear from the record that petitioners introduced competent, material and substantial evidence to demonstrate their compliance with conditions numbered 2 and 3. An applicant meets General Standard No. 2 by complying with the provisions of Section

629 of Article 600, which provides numerous additional regulations for the development of mobile home parks. Section 629 regulates parking, lot size, and water and sewer service, among other things. There is ample evidence in the record that petitioners satisfied the specific requirements set forth in Section 629, and it appears from the testimony of the Planning Officer and the concession of counsel that petitioners' compliance with this standard is not contested.

[2] Petitioners also complied with condition No. 3, which provides that the special use not "substantially injure the value of adjoining or abutting property . . . ." Petitioners presented expert testimony through a real estate appraiser who testified that the proposed mobile home park would not result in any substantial diminution of the value of the property adjacent to it. In forming his opinion, the appraiser also studied other mobile home parks, and the effects of their establishment on the values of surrounding property. Except for oblique references in the testimony of several landowners in the vicinity of the property in question, there is simply no competent evidence to the contrary. Further, although respondent devotes a portion of its argument to whether petitioners complied with condition No. 3, failure to comply with that condition was not a basis for the decision by the Council.

[3] The Council denied petitioners' application based on their alleged failure to comply with conditions No. 1 and No. 4 of the General Standards. The minutes of the Council hearing reflect the following action:

> Mr. Priest moved that the request for a Special Use Permit for a mobile home park be denied because he felt that Condition Nos. 1 and 4 were not met (will endanger public health or safety and will not be in harmony with the neighborhood). Mrs. Hunter seconded the motion. Council Members Jarrell, McGlohon, and Smith voted for the motion. Mr. Baker voted against the motion. The motion carried. (Mrs. Hochuli was absent).

We disagree with respondents' contention that petitioners did not meet their burden of introducing substantial evidence demonstrating that the proposed use would not materially endanger the public health or safety as required by general standard no. 1. Petitioners' plan for a mobile home park provided for treated city water, city sanitary sewage, regular garbage pickup, street standards and recreation. Petitioners agreed to extend water and sewer services to the area. The mobile home park would be buffered around its perimeter, and

would be surrounded in part by an 8-foot solid wooden fence. Plans included an on-site manager for the park. The park would be "practically invisible" from Gold Hill Road, and there would be no access to Cedar Falls Road at all. The increased traffic on Gold Hill Road, a major thoroughfare, would be well within the projections of the Department of Transportation.

Six persons testified in opposition to the establishment of the mobile home park in their area. Their evidence was primarily an expression of their fears that the mobile home park would be an "eyesore," and would bring crime and increased traffic. For example, one witness testified that she was "horrified at the . . . idea of a quiet community being invaded by eighty-six mobile homes . . ." and felt they were being "targeted because we are not in the upper income level . . . ." Another witness testified that "usually trailer parks bring trouble . . . ." Several persons felt that persons from the mobile home park would come and go through their backyards, and their personal property would be at risk of theft. Another witness expressed that the mobile home park would bring "drugs and alcohol . . . and prostitution" would accompany establishment of the mobile home park. An unidentified male person who may have been one of the sworn witnesses felt that even a solid wooden fence 8-feet tall would not prevent the "criminals" from getting through. Thus, the generalized fears expressed by the witnesses were that the mobile home park would be inhabited by lower-income persons who would constitute a danger to the neighborhood. No competent evidence was presented, however, in support of any of the contentions or positions of witnesses opposing the mobile home park.

[4] We also hold that petitioners met the burden of demonstrating compliance with General Standard No. 4, which requires that a use be in harmony with the area in which it is to be located and in general conformity with the plan of development of Asheboro. The property on which petitioners plan their mobile home park is located within the R40 district, a classification which permits manufactured housing parks. Petitioners argue, and we agree, that the inclusion of manufactured housing parks in the R40 district is equivalent to a "legislative finding" that such parks are compatible with other uses permitted in the district. *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980); *see also*, *Book Stores v. City of Raleigh*, 53 N.C. App. 753, 281 S.E.2d 761 (1981). Here, the Council gave no reason for finding that the mobile home park proposed by petitioners would be a use incompatible with the other uses of prop-

erty in the R40 district, and exceeded its authority by doing so. Such an action constituted "an unlawful exercise of legislative power by the Board . . . in violation of Article II, Section I, of the Constitution of North Carolina." *Keiger v. Board of Adjustment*, 278 N.C. 17, 23, 178 S.E.2d 616, 620 (1971). Thus, as in *Book Stores*, petitioners

> produced substantial evidence of the facts and conditions required for issuance of the permit. No evidence to the contrary was presented. There was thus no basis for findings denying the permit, and the permit should have been granted.

Book Stores, 53 N.C. App. at 758, 281 S.E.2d at 764.

[5] Respondents contend the trial court erred in concluding as a matter of law that respondents failed to make adequate findings of fact to support denial of the special use application. As previously stated in our citation of *Concrete*, a " 'denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.' " *Concrete* Co., 299 N.C. at 625, 265 S.E.2d at 382. Also, the "General Standards" provision of the Ordinance provides: "The City Council shall make these general findings based upon substantial evidence contained in its proceedings." Respondents appear to base their contention on a statement made by Mr. Archie Priest, one of the Council members who moved to deny the petitioners' application:

> [MR. PRIEST]: Mr. Mayor, I make a motion we deny this request.
>
> THE MAYOR: Based on—Based on—
>
> [MR. PRIEST]: I haven't had anything brought to our attention about safety, and I agree with David [Smith, Councilman] a hundred percent, the impact it's going to take on the neighborhood.

The Council then voted to deny petitioners' request. The statement from Councilman Priest is at best conclusory, and does not amount to a finding of fact. Further, the statement by the Councilman is not based on competent, material and substantial evidence in the record on the issues of safety and conformity with other uses in the area in question. We hold that the trial court did not err in concluding that respondents failed to make adequate findings of fact to support denial of the special use application.

[6] Finally, respondents contend the superior court's judgment was not supported by the record. Upon the review by a superior court

upon writ of certiorari issued pursuant to N.C. Gen. Stat. § 160A-381, the superior court may vacate an order based on findings of fact not supported by the evidence, and may give relief from an order of the Board which is found to be " 'arbitrary, oppressive or attended with manifest abuse of authority.' " *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 55, 344 S.E.2d 272, 274 (1986) (citation omitted). Here, the superior court properly determined that the decision of the Board was not supported by appropriate findings, that there was no competent evidence which rebutted the *prima facie* case made by petitioners, and properly reversed the decision of the Board. The superior court then issued a decree directing the City of Asheboro to issue a special use permit to petitioners. The trial court's directive is consistent with previous decisions of our Supreme Court and this Court. *See, for example, Ellis*, 277 N.C. at 426, 178 S.E.2d at 81 ("The judgment . . . is reversed, and the cause is remanded to the Superior Court for entry of judgment directing the commissioners to issue the special-exception permit for which appellants applied."). *See also, Book Stores*, 53 N.C. App. at 759, 281 S.E.2d at 764-65 ("The judgment is reversed, and the cause is remanded for entry of judgment directing the Board of Adjustment to issue the special use permit.").

Affirmed.

Judges McGEE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. ROGER DALE BROOKS

No. COA98-1576

(Filed 21 December 1999)

1. Homicide— first-degree murder—defendant as perpetrator—sufficiency of evidence

The trial court did not err in a homicide case by failing to dismiss the charge of first-degree murder based on insufficient evidence to show that the victim's assault was committed by defendant because taken in the light most favorable to the State: (1) it is a logical deduction that defendant went to the victim's place of business for money, as he had many times before; (2) in conjunc-

tion with the evidence showing motive and opportunity, a reasonable inference could be drawn that defendant made false statements in an effort to exculpate himself; and (3) the evidence was substantial, creating more than a suspicion as to the element that defendant was the perpetrator of the crime.

2. Homicide— second-degree murder—lesser included offense—state of mind

The trial court did not err in a homicide case by submitting the lesser included offense of second-degree murder as a possible jury verdict because it is not unreasonable to conclude that a rational trier of fact could find that defendant lacked the requisite state of mind to be convicted of first-degree murder when the evidence tends to establish that defendant had been drinking heavily and smoking crack cocaine for several hours before committing the murder.

3. Constitutional Law— speedy trial—estoppel—burden to show State negligently or willfully delayed

The trial court did not err in a homicide case by denying defendant's pretrial motion to dismiss on the grounds that his right to a speedy trial was violated under the Sixth and Fourteenth Amendments when his trial began approximately twenty-eight months after he was indicted because: (1) defendant is estopped from requesting a speedy trial for at least twelve of the twenty-eight months when the record reflects his continued requests for new court-appointed counsel and his failure to accept four of the five counsel appointed to him; and (2) for the remaining sixteen-month delay, defendant has failed to meet his burden of showing that the State negligently or willfully delayed the trial when defendant's uncooperativeness had been a contributing factor, and even though the most prejudicial fact in the claim was that defendant was still in jail, none of defendant's prior four attorneys had requested bond.

4. Sentencing— mitigating factors—not found—sentence within presumptive range

The trial court did not err in a homicide case by sentencing defendant for second-degree murder without finding mitigating factors because the trial court sentenced defendant within the presumptive guidelines for his offense, and therefore, findings of mitigating or aggravating factors were not required.

Appeal by defendant from judgment entered 11 March 1998 by Judge J. Marlene Hyatt in Lincoln County Superior Court. Heard in the Court of Appeals 19 October 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General G. Patrick Murphy, for the State.

Brenda S. McLain for defendant-appellant.

HUNTER, Judge.

Roger Dale Brooks ("defendant") appeals his conviction for the second degree murder of Lee Thornburg ("Thornburg") who died of massive head trauma on 1 October 1995. Defendant assigns error to the trial court in its: (1) failure to dismiss the charge of first degree murder at the close of all the evidence due to insufficient evidence presented to show that Thornburg's assault was committed by defendant; (2) denial of defendant's pretrial motion to dismiss on the grounds that his right to a speedy trial was violated under the Sixth and Fourteenth Amendments of the United States Constitution; (3) submission of second degree murder as a possible jury verdict due to the lack of evidence presented which negated premeditation and deliberation; and (4) sentencing defendant without finding mitigating factors. We find no error.

Evidence at trial tended to show that on 17 August 1995, defendant had been drinking vodka since approximately 7:30 a.m. at his mother's home. Later that morning, he cashed his paycheck, purchased a 12-pack of beer and went to his friend Crawley's house—only minutes away from Thornburg's machine shop, in an area which locals called "uptown"—where he continued drinking beer and wine and smoking crack cocaine throughout the day. Defendant used the remainder of his paycheck to purchase the crack cocaine.

About 2:00 p.m., defendant left Crawley's house stating that he had spent all his money on crack cocaine and he was going to get more money. Defendant returned between 5:00-6:00 p.m. with blood covering his shirt. When asked what happened, defendant said two black men jumped him and busted his nose. After changing shirts, defendant left again and upon returning brought with him more crack cocaine than he had purchased earlier with his paycheck.

Later that night, defendant returned home to his mother's house wearing a different t-shirt from the one he had left home in that morning. Defendant told his daughter's boyfriend that he had been in a

fight "uptown." "Somebody jumped him from behind" and "he knocked [the] man down and got on top of him and beat him in the head" but the man "wouldn't die." Defendant then proceeded to put his shoes and jeans in the washer and pour bleach over them, saying he had to wash out drops of blood. However, the next morning, defendant told his mother it was not blood, but vomit on his clothes; and when she pulled defendant's clothes from the dryer, she noted that his jeans had bleach blotches on them.

On 17 August 1995 about 7:50 p.m., Thornburg was found, by his sister and brother-in-law, unconscious with his head bludgeoned and lying in a pool of blood in his machine shop. He died on 1 October 1995 without ever regaining consciousness. Evidence was offered by the State, and uncontradicted by defendant, that Thornburg was assaulted before 5:50 p.m., the time his sister went to the machine shop to deliver dinner and was unable to get in.

Upon obtaining an arrest warrant for defendant on 24 August 1995, Detective Robert Hallman brought defendant back to the police station and advised him of his rights. Detective Hallman further advised defendant of his conversations with several people, including statements made that defendant had been seen at Crawley's house with blood on him; that defendant had washed his clothes that same night when he arrived home; and, that defendant had said "he beat a man in the head and he would not die." Defendant responded to Detective Hallman by stating, "Yes, sir, I told you that. It sounds overwhelming. Go ahead and serve the warrant. I want to talk to a lawyer."

On 31 August 1995, SBI Agent Brian Delmas, a latent fingerprint specialist, processed the crime scene looking for footwear impressions observed by officers during the initial crime scene search where Thornburg was assaulted. Using amido black, a chemical which reacts with protein and hemoglobin to stain blood making it visible to the naked eye, Agent Delmas was able to lift, photograph and enhance footwear impressions left at the crime scene. These impressions were not clear enough to make an identical match with defendant's shoes; however, they were consistent in sole design, size, shape, and general wear as the Rugged Outback right shoe taken from defendant at the time of his arrest. The State presented additional evidence showing that none of the law enforcement officers, emergency medical service providers or Thornburg's sister and brother-in-law had on shoes with a sole design similar to defendant's right shoe.

Additional evidence presented tended to show that Major Jerry Hallman of the Lincolnton Police Department secured the crime scene from the time the body was discovered on 17 August through 31 August 1995 when the footwear impressions were taken. The director of 911 communications for Lincoln County testified that there was only one assault reported on 17 August 1995, and that call came from Thornburg's place of business.

Defendant was indicted on 9 October 1995 and the case went to trial on 2 March 1998 (twenty-eight months later). Between 14 November 1995 and 11 September 1996, defendant went through four court-appointed attorneys and yet continued to demand that the court appoint another. Defendant requested an attorney from outside of Lincoln or Cleveland counties suggesting, without reason, that all attorneys in those counties would have a conflict of interest with his case. It was defendant's fifth court-appointed attorney ("Mr. Teddy") who carried the case to trial.

[1] Defendant's first assignment of error is that his motion to dismiss the charge of first degree murder was erroneously denied by the trial court. We disagree.

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. N.C. Gen. Stat. § 14-17 (1994). There are several elements necessary to establish a *prima facie* case. However, in the case *sub judice*, because defendant argues only that the State's evidence lacked any showing that defendant committed the crime, that is the only element with which this Court will concern itself.

Our Supreme Court has long held that in order to withstand a defendant's motion to dismiss, the State must present

> substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. . . .
>
> In ruling on the motion to dismiss, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. The trial court need not concern itself with the weight of the evidence. In reviewing the sufficiency of the evidence, the question for the trial court is whether there is "any evidence tending to prove guilt or which reasonably leads to this conclusion as

> a fairly logical and legitimate deduction." Once the court decides a reasonable inference of defendant's guilt may be drawn from the evidence, "it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty."

State v. Cross, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434-35 (1997) (citations omitted).

Therefore, the ultimate question for the Court is whether a reasonable inference of the defendant's guilt may be drawn from the evidence presented at trial. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). If a reasonable inference of defendant's guilt may be inferred from the evidence, his motion to dismiss should be denied. However if, upon consideration of all the evidence, only a suspicion of guilt is raised, then the evidence is insufficient, and the motion to dismiss should be granted. *State v. Wilson*, 345 N.C. 119, 125, 478 S.E.2d 507, 511 (1996).

It is uncontroverted that the State has indeed raised a suspicion of defendant's guilt. In fact, several witnesses, including defendant's own mother, questioned whether defendant had something to do with Thornburg's murder. However, suspicion alone is not enough. In *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930), North Carolina's then Chief Justice Stacy wrote:

> It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

Id. at 431, 154 S.E. at 731 (citations omitted).

In the case at bar, the State presented evidence that Thornburg probably knew his assailant, that Thornburg knew defendant, that defendant had many times borrowed money from Thornburg and pawned his mother's things to Thornburg without his mother's permission, that Thornburg had a note on his desk stating "Brooks" owed him money, that no one was with defendant around the time Thornburg was murdered, and that a right shoe print found at the crime scene was consistent in sole design, size, shape and general

wear as the right shoe defendant was wearing at the time of his arrest. We find it a logical deduction that defendant again went to Thornburg for money as he had many times before.

Further, the State presented uncontroverted evidence that on the day of the murder defendant spent his entire paycheck on beer and crack cocaine before the time of the murder and that after the time of the murder, defendant not only came back to Crawley's house with more cocaine than he had purchased at the beginning but also with his shirt covered in blood. Additionally, three witnesses testified to different stories told them by defendant regarding the blood on his clothes; one of which was that defendant had been in a fight "uptown" and had "beat a man in the head" but the man "wouldn't die." In conjunction with the evidence showing motive and opportunity, this Court holds that a reasonable inference could be drawn that defendant made false statements in an effort to exculpate himself. *State v. Marion*, 200 N.C. 715, 719, 158 S.E. 406, 407-08 (1931).

Defendant argues that because the State's expert was unable to definitively find "unique identifiable characteristics" in the print to match with defendant's shoe, the print was unreliable. He further contends that the print along with the State's other evidence were "too tenuous and speculative to have justified submitting the case to the jury." We disagree.

The record before this Court reveals that defendant neither argues now nor preserved at trial the right to argue that the submission of the shoe print to the jury was erroneous. Had this been his contention, this Court would have been required to "determine whether the *Palmer* 'triple inference' test ha[d] been met." *State v. Ledford*, 315 N.C. 599, 611, 340 S.E.2d 309, 317 (1986). *See also State v. Palmer*, 230 N.C. 205, 213, 52 S.E.2d 908, 913 (1949). Instead, this Court must determine only whether the print along with all the other evidence combined is sufficient to support defendant's conviction. *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309.

Taken in the light most favorable to the State, we conclude that the evidence set out above against defendant was substantial, creating more than a suspicion as to the element that defendant was the perpetrator of the crime. Thus, it was a question for the jury to decide. *State v. Marion*, 200 N.C. 715, 719, 158 S.E. 406, 407-08. Therefore, we find the trial court properly denied defendant's motion to dismiss.

[2] Defendant's second assignment of error is that the trial court erred in submitting murder in the second degree as a possible jury verdict. Again, we disagree.

North Carolina law has long settled that a jury instruction of a lesser included offense is required "if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

In the case at bar, the evidence tends to establish that at the time the murder was committed, defendant had been drinking heavily and smoking crack cocaine for several hours. It is not unreasonable then that a rational trier of fact could find that defendant lacked the requisite state of mind—that is, the necessary specific intent of premeditation and deliberation—for first degree murder. In *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988), the defendant there, as here, had been seen heavily drinking for several hours before the assault. Witnesses described him as obviously drunk or high, just as in the case at bar. There, our Supreme Court ruled it was proper for the jury to be instructed as follows:

> "[I]f upon considering the evidence with respect to the defendant's intoxication you have a reasonable doubt as to whether the defendant formulated the specific intent required for a conviction of first degree murder, you will not return a verdict of first degree murder. You will then consider whether or not he would be guilty of second degree murder."

Id. at 344, 372 S.E.2d at 535 (citation omitted). The Court went on to explain that:

> While there is some evidence to the contrary, when viewed in the light most favorable to defendant, the evidence of [this] defendant's state of intoxication is enough to require the voluntary intoxication instruction.

Id. at 348, 372 S.E.2d at 538. Accordingly, due to defendant's voluntary intoxication, we find the trial court's instruction of second degree murder was proper.

[3] Regarding defendant's assertion that he was denied his Sixth and Fourteenth Amendment rights to a speedy trial, we find this argument to be meritless.

The record shows that over the course of the first year, defendant was appointed five attorneys, four of which defendant requested be removed although the court found one not to have received actual notice of appointment for almost two months. Defendant's third attorney, Ms. Killian, whom he "fired" four times, finally petitioned the court to allow her to withdraw. Additionally, while defendant was represented by the first four attorneys, he continued to file *pro se* motions with the court. Mr. Teddy, the attorney who finally represented defendant at trial, was defendant's fifth court-appointed attorney.

In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court outlined the four factors to be considered when a defendant claims his right to a speedy trial has been violated: (1) length of delay; (2) reasons for delay; (3) defendant's assertion of his right to a speedy trial; and (4) the prejudice to defendant resulting from the delay. In considering these factors, the court noted that they must be considered together, and that the different factors and the reason for the delay may be weighed differently.

In this light, defendant's own actions must be considered with regard to the length and reason for delay. Out of the approximately twenty-eight months it took for defendant's case to come to trial, twelve months were spent by him firing his court-appointed attorneys (from indictment on 9 October 1995 until Mr. Teddy was appointed on 24 September 1996).

During that time but never after, defendant twice motioned the court for a speedy trial; however, both were *pro se* motions even though defendant had counsel. The first motion came between his second and third firings of Ms. Killian. Defendant's second motion was filed as part of his complaint that he was not getting effective assistance of counsel. We therefore, find defendant's complaint of lack of a speedy trial was fallacious because he wanted court-appointed counsel but refused to accept any counsel appointed to him at the time. Without defendant asserting his right to proceed *pro se*, a claim that his right to a speedy trial was violated is untenable. The record clearly reflects defendant's continued requests for new court-appointed counsel. We hold that defendant is estopped from requesting a speedy trial while not accepting the counsel

appointed to him. Therefore, that delay of time is excludable from consideration. *Id.*

However, we now analyze the remaining delay period. In determining whether defendant was prejudiced by the remaining sixteen-month delay, the burden is placed on the defendant to show that he was, in fact, prejudiced. *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101. Where the defendant presents a *prima facie* case showing the delay to be directly attributable to the State's negligence or willfulness, the burden then shifts to the State to show that the delay (or periods of the delay) were excludable. *State v. Pippin*, 72 N.C. App. 387, 324 S.E.2d 900 (1985).

At the pre-trial hearing, Mr. Teddy asserted that the State had not been forthcoming with his discovery requests. However, he admitted that the blame could not solely be laid on the State, that his client's uncooperativeness had been a contributing factor. Further, Mr. Teddy found that the most prejudicial fact in the speedy trial claim was that defendant was still in jail. However, Mr. Teddy again readily admitted that none of defendant's attorneys before him had requested bond. At that hearing, upon Mr. Teddy's request, defendant was released on bond to await trial. We find that defendant has failed to meet his burden of showing that the State negligently or willfully delayed trial. Thus, the defendant's claim is without merit. *Id.*

[4] Defendant's final assignment of error is based on the trial court's failure to find that certain mitigating circumstances existed and thus should have lowered his sentence. Under N.C. Gen. Stat. § 15A-1340.16(a), a trial court's consideration of mitigating or aggravating circumstances in light of the presumptive sentence is discretionary, "and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 15A-1340.16(a) (1997).

Our courts have long held that "the trial court must consider all mitigating and aggravating factors before imposing a sentence *other than* the presumptive term." *State v. Green*, 101 N.C. App. 317, 322, 399 S.E.2d 376, 379 (1991) (citation omitted) (emphasis added). "Nevertheless, where the trial court imposes sentences within the presumptive range for all offenses of which defendant was convicted, he is not obligated to make findings regarding aggravating and mitigating factors." *State v. Rich*, 132 N.C. App. 440, 452-53, 512 S.E.2d 441, 450 (1999). In the case at bar as in *Rich*, the trial court sentenced defendant within the presumptive guidelines for his offense; there-

fore, no findings of mitigating or aggravating factors were required. Thus, there was no abuse of discretion as to the trial court's sentencing of defendant.

No error.

Judges GREENE and WALKER concur.

CARROLL DOUGLAS RICHARDSON, LONNIE L. CARPENTER, JUDY M. CARPENTER, PHYLLIS F. McMANUS, ANDREW D. McEACHIN, ROBERTA W. McEACHIN, HELEN L. FAIRES, RUTH BURKE, EDNA MOSER, CHARLES EDWARD GESSNER, JULIE GESSNER, RICHARD A. PRICE, BILLIE H. PRICE AND OLIVE R. McLEOD, PETITIONERS v. UNION COUNTY BOARD OF ADJUSTMENT AND GHB BROADCASTING CORPORATION, RESPONDENTS

No. COA97-263

(Filed 21 December 1999)

1. Zoning— special use permit—notice

The trial court did not err in a zoning case regarding a special use permit application by concluding that petitioners received adequate notice of a public hearing under § 11 of the Union County Land Use Ordinance since N.C.G.S. § 153A-345 confers authority to handle zoning matters on the county board of adjustment, and even if the more general rule under N.C.G.S. § 1A-1, Rule 6 applied, petitioners have not demonstrated that they were prejudiced by any lack of notice since they did not seek to obtain any new or different evidence other than that already presented, nor did they show how they would have benefitted from a later hearing.

2. Zoning— Board of Adjustment—discretion in limiting testimony

The trial court did not err in a zoning case regarding a special use permit application by determining that interested persons were permitted to testify before the Board of Adjustment because the record reveals that both sides were given adequate time to present evidence, and case law, as well as § 101(b) and (c) of the Union County Land Use Ordinance, gives the Board discretion in equitably limiting testimony.

3. Zoning— special use permit—completion of application

The trial court did not err in a zoning case regarding a special use permit application by concluding that the Administrator of the Union County Inspection Department complied with § 56(a) of the Union County Land Use Ordinance when he reported to the Board of Adjustment that the application was complete when it was missing the square feet in the lot and the identification of individual trees eighteen inches in diameter or more because the Ordinance allows for more or less information depending on the application, and petitioners offer no evidence to show the Administrator's decision to accept less was in error.

4. Zoning— Board of Adjustment—burden of persuasion—established standards

The trial court did not err in a zoning case regarding a special use permit application by concluding that the Board of Adjustment did not improperly combine established standards or alter petitioners' burden of persuasion because: (1) there is no indication that the Board's combining of the standards was arbitrary, oppressive, or attended with manifest abuse of authority; (2) the Board, as an administrative agency, is presumed to properly perform its duties unless there is a showing that the agency was arbitrary or capricious in its decision-making; (3) neither the record nor petitioners' brief sets out evidence to show how the Board's combining of these considerations prejudiced them; (4) petitioners do not cite any rule or case law which shows that the Board erroneously combined the considerations; and (5) the Ordinance does not require that the Board must deny the permit even if one of the four considerations is found.

5. Zoning— special use permit—application requirements

The trial court did not err in a zoning case regarding a special use permit application by concluding that the Board of Adjustment's action of granting the permit was based on conclusions fully supported by the findings of fact, even though the Board did not make written findings of fact a part of its motion to issue the permit, because nowhere in the Union County Land Use Ordinance is there a requirement that the Board's vote to approve the permit must be simultaneous with its written approval.

Appeal by petitioners from an order entered 13 November 1996 by Judge Donald R. Huffman in Union County Superior Court. Heard in the Court of Appeals 19 October 1999.

Clark, Griffin & McCollum, LLP, by Joe P. McCollum, Jr., for petitioner-appellants.

John T. Burns and Lewis R. Fisher for respondent-appellees.

HUNTER, Judge.

Petitioner-appellants, Carroll Douglas Richardson, *et al.*, ("petitioners") seek to reverse the trial court's order affirming respondent-appellee Union County Board of Adjustment's ("Board") decision to approve the special use permit application of respondent-appellee, GHB Broadcasting Corporation ("GHB"), to build a radio tower in petitioners' community. Petitioners argue that the trial court erred in finding that the Board complied with the Union County Land Use Ordinance ("Ordinance") then in effect regarding specific stages of GHB's application process, namely: (1) that all adjoining property owners received adequate notice; (2) that interested persons were permitted to testify before the Board regarding the application; (3) that the Administrator of the Union County Inspection Department complied with the Ordinance when he reported to the Board that the application was complete; (4) that the Board did not improperly combine established standards or alter petitioners' burden of persuasion to petitioners' detriment; (5) that the Board's action to grant the special use permit was fully supported by findings of fact; and (6) that the Board followed all required procedures in considering and acting on GHB's application. Petitioners argue that as a result of the foregoing assignments of error, the trial court's order affirming the Board's granting of the special use permit is erroneous. However, we disagree and therefore affirm the trial court's ruling.

The relevant and undisputed facts are as follows: GHB desired to construct and operate a broadcast tower, 500 feet in height, and a transmitter building, 20 feet by 20 feet, for the purpose of broadcasting the radio station WIST-FM. On 4 March 1996, before beginning construction, GHB filed the proper application and attachments with the Board for a special use permit as required by the Ordinance. On 7 March 1996, GHB engaged Robert Morrison of Morrison Appraisal, Inc. to conduct an appraisal of the property in question, specifically with regard to whether "the proposed development [would] substantially injure the value of the adjoining or abutting property." On 15 March 1996, Mr. Morrison proffered his appraisal comparing the applicant site to three other existing tower sites, along with his opinion as to the impact of the applicant property's proposed use. In that opinion, Mr. Morrison stated:

> Based on the information [I have] gathered, it is the appraiser's opinion that if the proposed site plans is [sic] followed and all other county requirements are met, then the proposed use of the property will not substantially injure the value of the adjoining or abutting property.

As required by Article VI § 102 of the Ordinance, the Board responded by sending out a "Notice of Public Hearing of Union County Board of Adjustment" to the applicant property owner, adjoining property owners and interested property owners. The notice was mailed on 22 March 1996 with the hearing date set for 1 April 1996. On the date of the hearing, petitioners' attorney faxed a letter to GHB's attorney of record objecting to the hearing being held, stating "the required ten (10) days notice has not been given" and that "[b]ecause of the short period of notice the parties have not had sufficient time to obtain necessary evidence for the hearing." However, the hearing went on as scheduled for 1 April 1996, and petitioners fully participated.

Following the hearing, on 23 April 1996 the Board issued its written decision to grant GHB the special use permit. In its decision, the Board found GHB's application to be "complete in all respects," and found that the permit issuance would: (a) not materially endanger the public health or safety; (b) not substantially injure the value of adjoining or abutting property; (c) be in harmony with the area in which it is to be located; and (d) be in general conformity with the land development plan, thoroughfare plan, or other plan officially adopted by the Board.

[1] Petitioners' first assignment of error settles on whether the period between 22 March and 1 April is "adequate notice" by law. We conclude that it is.

In their brief before this Court, petitioners argue that § 102(2) of the Ordinance which requires notice to be given "[a]t least ten days before the meeting" was violated. It is petitioners' contention that the Ordinance's wording of "at least" actually means more than. However, in citing § 11 of the Ordinance which states that "in computing such period, the day of the event [here, the hearing] shall not be included but the day of the action [the mailing] shall be included," petitioners' argument is misplaced. In applying § 11 of the Ordinance, we begin counting on the mailing date of 22 March and end 31 March, the day before the hearing. We conclude ten days of notice was given.

In the alternative, petitioners argue that N.C. Gen. Stat. § 1A-1, Rule 6 applies which requires the same 10-day notice, although computed differently. We hold that Rule 6 does not apply.

The Legislature confers on each county's board of adjustment the authority to

> hear and decide appeals . . . . The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice of the appeal to the parties, and decide the appeal within a reasonable time. . . .
>
> The board shall hear and decide all matters referred to it or upon which it is required to pass *under the zoning ordinance.*

N.C. Gen. Stat. § 153A-345(b) and (c) (1991) (emphasis added). In the case at bar, the general principles of statutory interpretation must be applied.

> 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, *cert. denied*, 307 N.C. 272, 299 S.E.2d 218 (1982).

The language of § 11 of the Ordinance is clear and unambiguous. It requires a minimum ten-day "notice of a public hearing" be given and further states how that ten days should be calculated. Furthermore, § 11 of the Ordinance is also very specific and particular in its application, stating that this notice is a required action of "the zoning administrator." On the other hand, N.C. Gen. Stat. § 1A-1, Rule 6 comprehensively covers the computation of "any period of time prescribed," but addresses no particular event or issue. Therefore, in construing § 11 of the Ordinance and Rule 6 *in para materia*, the Legislature's intent to confer authority to handle such zoning matters to the county board of adjustment is clear. Further, petitioners neither offer nor do we find any authority holding that Rule 6 applies to ordinances of local governments. Thus, we hold that the Board did not err in applying § 11 of the Ordinance and, under the Ordinance, there was adequate notice.

Notwithstanding, even if Rule 6 were applicable, this Court has held that petitioners

> do[] not have an absolute right to the notice requirement of Rule 6. Notice may be waived. Also, a new trial [or hearing] will not be granted for a mere technical error. It is incumbent on [petitioners] to show [they were] prejudiced.

Jenkins v. Jenkins, 27 N.C. App. 205, 206, 218 S.E.2d 518, 519 (1975).

In the case at bar, the Board specifically asked petitioners' attorney, "if you had had more time, what would have occurred?" In response, petitioners offered only the possibility of having a real estate agent do an appraisal to determine "what they thought the impact was." However, petitioners did not suggest that the appraisal they sought would be any different from that already presented by Morrison Appraisal, Inc.

This Court has long held that where petitioners "suggested no additional testimony that would have been available to [them] at a later hearing and fail[ed] to show how [they] might have benefited from a later hearing[,]" they were not prejudiced by the Board's failure to postpone the hearing. *Brandon v. Brandon*, 10 N.C. App. 457, 461, 179 S.E.2d 177, 180 (1971). *See also Symons Corp. v. Quality Concrete Constr., Inc.*, 108 N.C. App. 17, 422 S.E.2d 365 (1992) (no reversible error where the party arguing lack of notice was not prejudiced by it); *J. D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 376 S.E.2d 254 (1989) (where defendant attended and participated in the hearing, suggested no additional testimony which would have been available to him at a later hearing, and did not show how he would have benefited from a later hearing, defendant has waived the notice requirement).

In light of the fact that petitioners at bar did not seek to obtain any new or different evidence than that already presented by GHB, nor did they show how they would have benefited from a later hearing, petitioners have not demonstrated to this Court they were prejudiced by any lack of notice. Thus, we find no error on the part of the trial court regarding notice.

[2] Petitioners next argue that the trial court erred in finding interested persons, along with adjoining and non-adjoining property owners, were permitted to testify at the hearing. Sections 101(b) and (c) of the Ordinance require that:

> [T]he hearing shall be open to the public and all persons interested in the outcome of the appeal application shall be given an opportunity to present evidence and arguments . . . .
>
> [However,] [t]he board . . . may place reasonable and equitable limitations on the presentation of evidence and arguments . . . so that the matter at issue can be heard and decided without undue delay.

We hold that the very ordinance on which petitioners stand is the same ground on which their argument is lost. The record reveals the Board gave adequate time for both sides to present evidence. Though the attorney for GHB stated he had four witnesses, it appears only two actually testified on behalf of the permit. Yet there were ten persons allowed to testify in opposition to the permit, several of which were not adjoining property owners. Additionally, two of the adjoining property owners testified they did not live on the property affected.

The requirement that a public hearing be held is mandatory. However, we find that not only does the Ordinance specifically give the Board discretion in equitably limiting testimony but case law does as well:

> The contention that the [Board was] required to hear all persons in attendance without limitation as to number and time is untenable. The opponents as well as the proponents were at liberty to select those whom they regarded as their best advocates to speak for them. [The law does] not contemplate that all persons entertaining the same views [should] have an unqualified right to iterate and reiterate these views in endless repetition.

Freeland v. Orange County, 273 N.C. 452, 457, 160 S.E.2d 282, 286 (1968). Having heard testimony from both sides of the issue, the Board was not obligated to allow every person to testify. Nothing in the record reflects an abuse of discretion in its limiting testimony. Therefore, we reject petitioners' argument.

[3] Petitioners' third assignment of error is that the trial court erred in finding the Administrator complied with § 56(a) of the Ordinance when he reported to the Board that GHB's application was complete. Petitioners argue that missing from GHB's application was the number of square feet in the lot, as required by Appendix A, § A-2, and the identification by common or specific name of individual trees eighteen inches in diameter or more, as required by

Appendix A, § A-5(b)(2); thus, the Board should have determined GHB's application to be incomplete. We find this argument unpersuasive.

Section 56 of the Ordinance simply requires the Administrator (or some staff member) to submit to the Board a report with the application that sets out his "findings concerning the application's compliance" with § 49 of the Ordinance regarding completeness. The record does not contain such a report. However, in the record, the issued permit lays out the Board's findings which it made from GHB's application, the Administrator's recommendation and the public hearing. These findings include the square footage and exact acreage to the thousandth of an acre. Furthermore, petitioners' other claims regarding the completeness of the application are addressed by § 49(d) of the Ordinance which states:

> The presumption established by this ordinance is that all of the information set forth in Appendix A is necessary to satisfy the requirements of this section. However, it is recognized that each development is unique, and therefore the permit issuing authority may allow less information or require more information to be submitted according to the needs of the particular case. . . . [T]he applicant may rely in the first instance on the recommendations of the administrator as to whether more or less information than that set forth in Appendix A should be submitted.

Because the Ordinance allows for more or less information depending on the application, and because petitioners offer no evidence to show the Administrator's decision to accept less was in error, we reject petitioners' argument.

[4] As its fourth assignment of error, petitioners contend the trial court erred in finding that the Board did not improperly combine standards altering petitioners' burden of persuasion. This argument is also unpersuasive.

Regarding the standard of reviewing the decision of the Board of Adjustment, the superior court is bound by the Board's findings of fact if they are supported by evidence introduced at the hearing before the Board. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986). Those findings of fact are conclusive and the Board's decisions are final. *Id.* "The inquiry on review upon writ of certiorari under N.C.G.S. Sec. 153A-345 is whether the Board committed an error of law or whether an order of the Board is arbitrary,

oppressive or attended with manifest abuse of authority." *Teen Challenge Training Center, Inc. v. Bd. of Adjustment of Moore County*, 90 N.C. App. 452, 453, 368 S.E.2d 661, 663 (1988).

In the case at bar, § 54(c) of the Ordinance sets out four considerations which, upon finding any one of them, the Board "may still deny the permit." It is petitioners' contention that in combining the last two considerations, the Board altered its burden of persuasion. However, the record reveals no evidence presented by petitioners that any of the four considerations "more probably [existed] than not" as required by the Ordinance. In fact, from the record, we find no indication that the Board's combining of the standards was arbitrary, oppressive or attended with manifest abuse of authority. On the contrary, the transcript reveals that the Board considered all four separately and then, toward the end of its discussion, combined standards three and four.

As an arm of the county zoning board, a Board of Adjustment is a municipal agency governed by general administrative agency statutes. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974). As such, the law in North Carolina presumes that the Board (the administrative agency) has properly performed its duties, and the presumption is rebutted only by a showing that the agency was arbitrary or capricious in its decision making. *Adams v. N.C. State Bd. of Reg. for Prof. Eng. and Land Surveyors*, 129 N.C. App. 292, 501 S.E.2d 660 (1998). Having failed to show that the Board was either arbitrary or capricious in its combining of the standards, petitioners have failed to rebut the presumption as well.

Additionally, neither the record nor petitioners' brief to this Court sets out evidence to show how the Board's combining of these considerations prejudiced them. Although petitioners state that their burden of persuasion was heightened, they provide no evidence that if the Board agreed with them that one of the standards existed, the Board would have denied GHB's permit. As cited by petitioners in its brief, even where the trial court has committed error, if that error is not prejudicial, then it is harmless. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983).

Finally as to this assignment of error, petitioners do not cite any rule or case law which shows that the Board erroneously combined the considerations. Thus, we find that the Board had the right to combine the considerations, just as it had the right to still allow the application even if it had found one of the considerations to be more

probable than not. The Ordinance does not require that the Board deny the permit even if one of the four considerations is found; it simply states it "may" deny the permit on those grounds.

[5] For its fifth assignment of error, petitioners argue that the trial court erred in finding that the Board's action of granting the permit was based on conclusions fully supported by findings of fact. It is petitioners' position that because the Board did not make written findings of fact a part of its motion to issue GHB's permit, that the findings in the permit document signed by the Board's chairman are void. We reject this argument also.

Section 58 of the Ordinance sets out what issues should be considered by the Board in its decision to approve an application. It requires the Board to consider whether the application is complete and complies with all the applicable requirements. If no adverse action is taken, the Board's *nonaction* "shall be taken as an affirmative finding by the [B]oard that the application is complete" and "it shall issue the permit." Additionally, this section of the Ordinance requires specific findings, based on the evidence to be set out only where the permit is denied.

It is true that § 106 of the Ordinance requires the Board to reduce its decision to issue a special use permit to writing, and to include its "findings and conclusions, as well as supporting reasons or facts, whenever this [O]rdinance requires the same as a prerequisite to taking action." However, we find that the Board's issued permit satisfies this requirement. Nowhere in the Ordinance do we find that the Board's vote to approve the permit must be simultaneous with its written approval, and petitioners offer no evidence to the contrary.

Since petitioners' remaining two assignments of error are based on previous assignments of error, it is unnecessary to address them. Furthermore, once GHB submitted a completed application to the Board, the burden shifted to petitioners to show why the permit should be denied. From the record, we find no evidence that petitioners met its burden. Instead, we conclude the trial court had sufficient evidence to affirm the Board's decision.

Affirmed.

Judges GREENE and WALKER concur.

RUTH C. SCURLOCK, EMPLOYEE, PLAINTIFF v. DURHAM COUNTY GENERAL HOSPITAL, EMPLOYER, AMERISURE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA98-1563

(Filed 21 December 1999)

1. Workers' Compensation— timeliness—claim for further compensation

An Industrial Commission order that workers' compensation be resumed retroactively was remanded for further findings where defendants contended that plaintiff's application for further compensation was barred by the two-year-statute of limitations for change-of-condition cases under N.C.G.S. § 97-47, but plaintiff also alleged that she was in compliance with all rehabilitative services and this was a case still pending under N.C.G.S. § 97-25 rather than a change-of-condition case. An employee's refusal to cooperate only bars her from receiving compensation until her refusal ceases.

2. Workers' Compensation— close of case—unilateral Form 28B

The unilateral filing of a Form 28B did not foreclose an employee's right to further compensation where the compensation had only been temporarily suspended. The filing of a Form 28B with the Industrial Commission, combined with forwarding that form to the employee, will preclude further recovery by the employee after two years only if the original claim was closed to begin with.

3. Workers' Compensation— treatment—refusal to cooperate—reinstatement of compensation—findings

A workers' compensation case was remanded to the Industrial Commission for further findings where plaintiff was attempting to have her compensation reinstated and should have been required to show that she was now willing to cooperate with medical treatment and rehabilitative services, but the Commission instead concluded that defendants' own noncompliance estopped them from claiming that the refusal continued, in effect placing the burden on defendants. A prior order and award which applied to both parties does not change the standard that plaintiff must meet the threshold burden of showing that she is now willing to cooperate, and an order for plaintiff to cooperate has no bearing on whether she is now cooperating.

4. Workers' Compensation— treatment—selection of physician—findings

A workers' compensation action was remanded for further findings on the issue of whether a particular doctor was now the treating physician where the Industrial Commission made no findings as to whether plaintiff sought authorization for her own physician within a reasonable time. The mere fact that plaintiff was seeing this doctor at the time of the prior opinion does not mean that she was authorized to do so.

Appeal by defendants from opinion and award filed 24 June 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 1999.

Robin E. Hudson for plaintiff-appellee.

Young Moore and Henderson P.A., by Joe E. Austin, Jr. and Dawn M. Dillon, for defendant-appellants.

LEWIS, Judge.

This appeal stems from a compensable work-related injury that occurred over nine years ago. Although this case is mired in procedural and factual complexities, a recitation of its convoluted history is nonetheless necessary in order to fully understand the issues and arguments raised on appeal.

Plaintiff worked for defendant Durham County General Hospital as a licensed practical nurse. While attempting to lift a patient, plaintiff strained her lower back on 7 August 1990. Dr. Robert Lincoln, plaintiff's treating physician, concluded that her injury was such that she could not return to the same employment, but was still employable in sedentary labor. She and her employer subsequently entered into a Form 21 agreement, under which defendants would pay her $332.94 per week for "necessary weeks," beginning 8 August 1990. A supplemental agreement was thereafter filed with the Industrial Commission, listing plaintiff as temporarily totally disabled.

On 1 July 1991, defendants filed an application with the Industrial Commission seeking to stop payment of compensation. Defendants alleged plaintiff was not complying with prescribed medical treatment and vocational rehabilitation. On 16 February 1993, Deputy Commissioner Tamara R. Nance authorized the discontinuation of payments to plaintiff because she was being uncooperative with the

rehabilitative efforts offered by her employer. Among other things, the deputy commissioner found that plaintiff was resistant to physical therapy, refused to participate in certain aspects of an eight-week spine rehabilitation program, used her cane in a way inconsistent with her claimed injuries, exaggerated her pain, and demonstrated no desire to ever return to work. The deputy commissioner also found that, despite her being capable of some employment, plaintiff refused to apply for jobs and intentionally presented herself poorly at any job interviews arranged for her. On appeal, the Full Commission specifically incorporated many of the findings and conclusions made by the deputy commissioner. Due to plaintiff's lack of cooperation, the Full Commission, in its 12 April 1994 opinion and award, ordered the discontinuation of compensation retroactively to 25 June 1991, the date at which plaintiff's noncompliance began. The Commission then gave defendants a credit for eighty-seven weeks of compensation it had already paid to plaintiff. Curiously, the Full Commission's opinion also included the following order:

> Defendants shall provide and plaintiff shall cooperate with, vocational rehabilitative services, and any continued medical treatment or physical therapy recommended by plaintiff's doctors.

Plaintiff's subsequent appeal to this Court was dismissed because she neglected to timely file the proposed record on appeal with the Industrial Commission.

In the meantime, plaintiff stopped seeing Dr. Lincoln for her back pain. Instead, over defendants' objection, plaintiff began seeing Dr. Dianne Scott at Duke University Medical Center. Dr. Scott diagnosed plaintiff with degenerative arthritis and concluded plaintiff was in fact not employable. Following this new diagnosis, plaintiff sought to have her compensation reinstated. On 15 August 1994, she also petitioned the Commission to authorize Dr. Scott as her new treating physician. Defendants asked plaintiff to see Dr. Lincoln again for a second opinion. Plaintiff refused to do so, and Dr. Lincoln stated that he no longer wished to treat her due to her prior uncooperative demeanor. Defendants then asked plaintiff to visit Dr. Lee Whitehurst for a second opinion, but she again expressed reluctance and never saw Dr. Whitehurst.

Unable to reach a resolution, plaintiff thereafter filed a Form 33 request for hearing with the Industrial Commission on 23 February 1995, alleging she had a change of condition and was currently complying with all vocational and rehabilitative efforts being offered. In

an opinion and award filed 3 April 1997, Deputy Commissioner Pamela T. Young denied her application as being time-barred because her change-of-condition petition was filed more than two years after her last compensation check was received. The deputy commissioner also denied plaintiff's request to have Dr. Scott authorized as her treating physician. In doing so, the deputy commissioner again noted plaintiff's uncooperative demeanor, finding that she had failed to apply for suitable work and had refused to see the physicians provided by defendants. The deputy commissioner also noted plaintiff's continued exaggeration of her back pain, pointing out that plaintiff had been observed at Lowe's a few weeks before her hearing walking with a faster gait than in the past and without any noticeable limp, using her cane only to point to objects and not for any ambulatory assistance.

On appeal, the Full Commission reversed. The Commission first concluded this was not a change-of-condition case and thus the two-year statute of limitations did not apply. The Commission then concluded that, because defendants did not provide plaintiff with the treatment recommended by Dr. Scott and others at Duke University, the *defendants* were not in compliance with its earlier 12 April 1994 award, which ordered them to provide plaintiff with continued medical treatment and rehabilitative services. Based upon the defendants' own non-compliance, the Full Commission concluded defendants were estopped from alleging plaintiff's continued non-compliance. Accordingly, it ordered the resumption of compensation retroactively to 12 April 1994, the date of its prior opinion. Finally, the Full Commission approved plaintiff's request to authorize Dr. Scott as her treating physician. From this 24 June 1998 opinion and award, defendants now appeal.

[1] At the outset, we must determine whether plaintiff's 23 February 1995 claim for further compensation was time-barred. Final awards of benefits are reviewable based upon an employee's change of condition, but only if the application for further compensation is filed within two years from the issuance of the last compensation check. N.C. Gen. Stat. § 97-47 (1991). Defendants argue that, because plaintiff's last compensation check was issued on 16 February 1993 and her change-of-condition application was not filed until 23 February 1995, her claim for further compensation is time-barred. We conclude that this is not a change-of-condition case under section 97-47, but a case still pending under section 97-25. Accordingly, the two year statute of limitations does not apply.

Significantly, this entire litigation ensued from defendants' application to suspend compensation benefits. Such suspension of payments is permitted under section 97-25 upon the "refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure." N.C. Gen. Stat. § 97-25 (Supp. 1998). However, an employee's refusal to cooperate only bars her from receiving compensation until her refusal ceases. *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1996), *disc. review denied*, 345 N.C. 347, 483 S.E.2d 177 (1997). An employee is entitled to resumption of her benefits "upon a proper showing by [the employee] that [s]he is willing to cooperate with defendants' rehabilitative efforts." *Id.* Although plaintiff here alleged a change of condition in her Form 33 request for hearing, she also alleged that she was currently in compliance with all rehabilitative services. It is this latter allegation that permitted her to seek the resumption of benefits here. Accordingly, the Full Commission correctly concluded that this was not a change-of-condition case.

[2] Defendants nonetheless argue that their filing of a Form 28B with the Industrial Commission, which purported to close the case, effectively made this a change-of-condition case and required plaintiff to apply for further compensation within two years. Following the first deputy commissioner's award suspending compensation to plaintiff, defendants filed a Form 28B with the Commission to report the compensation they had paid plaintiff to date. Form 28B includes the following notation and question:

> NOTICE TO EMPLOYEES: If the answer to Item No. 16 [sic, should be 17] below is "Yes," this is to notify you that upon receipt of this form your compensation stops. If you claim further compensation, you must notify the Commission in writing within two (2) years from the date of receipt of your last compensation check.
>
> 17. Does This Report Close the Case, including final compensation payment? ________ (YES OR NO)

Apparently under the belief that the deputy commissioner's award had *permanently* suspended payments to plaintiff, defendants answered this question in the affirmative and then filed the completed form with the Industrial Commission. A copy was sent to plaintiff for her signature. Plaintiff did not sign the form, but returned it to defendants with a letter stating the form was "premature." Defendants rely on *Chisholm v. Diamond Condominium Constr.*

Co., 83 N.C. App. 14, 348 S.E.2d 596 (1986), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 106 (1987), to suggest that, due to Form 28B's explicit notice provision, the case was conclusively resolved when they answered question seventeen in the affirmative, filed the form with the Commission, and received no claim for further compensation from plaintiff until more than two years later. Defendants' reliance on *Chisholm*, however, is misguided.

In *Chisholm*, the employer and employee entered into a Form 21 agreement for compensation for "necessary weeks." *Id.* at 15, 348 S.E.2d at 597. Significantly, the "necessary weeks" period ended, the employee received a final compensation check for the necessary weeks, and the employee thereafter returned to work for a new employer. *Id.* at 15, 348 S.E.2d at 598. The employer thereafter filed a Form 28B with the Industrial Commission and sent a copy of that form to the employee, who did not sign the form. *Id.* The employee later petitioned for further compensation, but did not allege any change of condition. *Id.* In concluding that the employee could not pursue her claim for further compensation, this Court remarked:

> [T]he execution and filing of I.C. Form 28B in fact closed plaintiff's case and terminated his claim for injuries arising out of the 10 July 1974 accident. Plaintiff's signature was not a necessary element for the proper execution of the form. It is sufficient that the insurer gave plaintiff notice of the closing and of his right to claim further benefits after the closing by forwarding a copy of Form 28B.

Id. at 17, 348 S.E.2d at 599 (citation omitted).

Defendants have taken this language in *Chisholm* out of context. The filing of a Form 28B with the Industrial Commission, combined with the forwarding of that form to the employee, will preclude further recovery by the employee after two years—but *only if* the original claim was closed to begin with. In *Chisholm*, the original claim was closed; the "necessary weeks" period had expired and the employee had returned to work. By filing Form 28B, the employer in *Chisholm* was simply notifying the employee that her claim was closed and that she therefore only had a limited right to further compensation. Here, on the other hand, the defendants unilaterally tried to close the case by filing a Form 28B, even though plaintiff's compensation had only been temporarily suspended. Such unilateral efforts by the employer or its insurance carrier have no effect in foreclosing an employee's right to further compensation. *Beard v.*

Blumenthal Jewish Home, 87 N.C. App. 58, 63, 359 S.E.2d 261, 264 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988). Plaintiff's claim was never closed, but was still pending upon a showing that she would comply with medical and rehabilitative treatment. Accordingly, defendants' argument is without merit.

[3] Having concluded that plaintiff's 23 February 1995 claim was not time-barred, we now proceed to the substantive merits of the Full Commission's opinion and award resuming plaintiff's compensation. In doing so, we begin with a recitation of our standard of review. In an appeal from the Industrial Commission, our review is limited to two questions: (1) whether the findings of fact are supported by the evidence; and (2) whether the conclusions of law are supported by those findings. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). With respect to the first inquiry, the Commission's findings of fact are conclusive on appeal so long as they are supported by *any* competent evidence, even if evidence exists that would support contrary findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413, *reh'g denied*, 350 N.C. 108, — S.E.2d — (1998). Furthermore, the ultimate fact-finding body is the Full Commission, not the original deputy commissioner: "It is the [Full] Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Id.* Thus, the fact that two separate deputy commissioners and a previous panel of the Full Commission had found plaintiff to be generally uncooperative (both before and after 12 April 1994) is of no consequence to this appeal so long as there is some evidence in the record to support this panel of the Full Commission's own findings and so long as those findings support its ultimate award.

Here, the Full Commission's findings and conclusions do not support its 24 June 1998 opinion and award. Accordingly, we reverse and remand. As noted previously, through her 23 February 1995 petition to the Commission that is the subject of this appeal, plaintiff was attempting to have her compensation reinstated. To do so, however, plaintiff was required to show that she was now willing to cooperate with her employer's offers of medical treatment and rehabilitative services. *Sanhueza*, 122 N.C. App. at 608, 471 S.E.2d at 95. However, the Full Commission never made any finding that plaintiff was at any point willing to cooperate. Instead, the Commission concluded that defendants' own non-compliance "estopped [them] from claiming that plaintiff's refusal continued." In effect, the Commission placed the burden on the defendants to show they were in compliance with the original 12 April 1994 opinion and award, rather than with the

plaintiff, as *Sanhueza* requires. The original 12 April 1994 opinion and award did order defendants to provide, and plaintiff to cooperate with, vocational rehabilitative services and continued medical services. But the fact that this order applied to both parties does not change the relevant legal standard, namely, that *plaintiff* must meet the threshold burden of demonstrating she is now willing to cooperate before she is entitled to have her payments resumed. Thus, the Full Commission's previous order for defendants to provide medical and rehabilitative treatment was conditioned upon plaintiff first showing she was now willing to cooperate.

We note that the Full Commission did make the following finding relevant to plaintiff's cooperation: "Plaintiff's refusal to cooperate with vocational rehabilitation efforts ended April 12, 1994 when she was ordered by the Industrial Commission to cooperate." This finding is simply not borne out by the evidence. A mere order by the Industrial Commission for the plaintiff to cooperate has no bearing on whether she is in fact now willing to do so. Plaintiff cannot simply rely on the order; she must affirmatively establish her present willingness to cooperate in order for compensation to be resumed. Because the Full Commission focused only on defendants' non-compliance and made no finding as to plaintiff's own compliance, or lack thereof, we must remand this case for further findings by the Industrial Commission.

[4] In light of the need to remand this case for a determination as to whether plaintiff is presently willing to cooperate with medical and rehabilitative treatment, it becomes necessary to address defendants' other argument on appeal regarding who is authorized to give plaintiff treatment in the first place. In its 24 June 1998 opinion and award, the Full Commission approved plaintiff's request to have Dr. Scott authorized as her treating physician. Again, we hold that the Commission made insufficient findings to support this award.

Generally speaking, " 'an employer has the right, in the first instance, to select the physician, surgeon or hospital to treat and care for an injured employee.' " *Schofield v. Tea Co.*, 299 N.C. 582, 586, 264 S.E.2d 56, 60 (1980) (quoting W. Schneider, 10 *Workmen's Compensation Text* § 2005 (3d ed. 1953)). Pursuant to this right, the employer here authorized plaintiff to see Dr. Lincoln. After Dr. Lincoln and plaintiff refused to continue their physician-patient relationship, the employer subsequently authorized plaintiff to visit Dr. Whitehurst. Plaintiff, however, had begun seeing Dr. Scott in the meantime, despite her employer's repeated objections. An injured

employee does have the right to procure her own physician, but only upon the Commission's approval. *Id.* at 591, 264 S.E.2d at 62. Such a request for authorization must be made within a reasonable time after associating that physician. *Id.* at 593, 264 S.E.2d at 63. Here, plaintiff began seeing Dr. Scott in June of 1991, but made no specific request for authorization with the Commission until 15 August 1994, more than three years after her visits began. Though we profess doubts as to how a three-year delay could be reasonable, ultimately this is not for us to determine. Rather, the Industrial Commission must make specific findings as to whether approval was sought within a reasonable time after her treatments with Dr. Scott began. *Id.* at 594, 264 S.E.2d at 64. The Full Commission made no such findings here, requiring a remand for that determination.

Plaintiff relies on the fact that she was seeing Dr. Scott at the time of the first hearing before the Full Commission, coupled with the fact that the Commission's opinion and award at that time specifically noted plaintiff had seen Dr. Scott, to suggest that treatment with Dr. Scott was somehow "authorized" by the Commission in its 12 April 1994 opinion. However, the mere fact that plaintiff was seeing Dr. Scott at the time of the prior opinion does not mean that she was authorized by the Commission to do so. Accordingly, the Full Commission's conclusion in its 24 June 1998 opinion that Dr. Scott had been "authorized" by the original Full Commission award is unfounded. The question of Dr. Scott's authorization was not even raised until plaintiff petitioned for authorization on 15 August 1994, months *after* the earlier Full Commission award.

In conclusion, we remand this case to the Full Commission for specific findings regarding whether plaintiff is presently willing to cooperate and, if so, when such willingness began. Such willingness must be measured only in terms of plaintiff's willingness to cooperate with her *authorized* physicians. Accordingly, we also remand on the issue of whether Dr. Scott was in fact an authorized physician. On remand, the Full Commission must determine whether plaintiff's request for authorization was made within a reasonable time after she began seeing Dr. Scott. If not timely made, plaintiff's request for authorization necessarily must be denied.

Reversed and remanded.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. EDDIE JUNIOR SPINKS, DEFENDANT

No. COA99-94

(Filed 21 December 1999)

1. Constitutional Law— speedy trial—prejudice from delay

The State did not violate defendant's constitutional right to a speedy trial for murder where defendant was charged on 13 July 1992, his first trial ended with a jury unable to reach a verdict and a mistrial in March of 1993, and the case was not again calendared for trial until April of 1998. Defendant failed to show that the delay was due to the neglect or wilfulness of the prosecutor and failed to show prejudice from the delay in that he did not call the missing witnesses at his first trial and did not request a speedy trial during the delay.

2. Evidence— recorded recollection—statement not written or recalled by witness—impeachment

The trial court erred in the retrial of a murder defendant five years after the original trial by admitting a written pretrial statement by a State's witness where the witness's recollection of the events was not clear but there was no showing that the statement was made or adopted when the matter was fresh in the witness's memory and that it reflected her knowledge correctly. Her subsequent testimony made clear that she did not write the statement herself, did not read it before signing it, did not recall the matters in the statement, and disagreed with some of it. There was no foundation for suggesting that the statement was independently admissible and it was not used properly to impeach her because she denied making some of the prior statements. N.C.G.S. § 8C-1, Rule 803.

3. Evidence— waiver of objection—cross-examination

Defendant in a murder prosecution did not waive his objection to a written statement by a State's witness when he cross-examined her for the purpose of showing that the statement was unreliable. Defendant did not refer to or rely upon portions of the statements as substantive evidence.

Appeal by defendant from judgment entered 1 May 1998 by Judge W. Douglas Albright in Randolph County Superior Court. Heard in the Court of Appeals 28 October 1999.

Eddie Junior Spinks (defendant) was tried at the 20 April 1998 Session of Randolph County Superior Court for the murder of William Lacy Marley (Marley). Evidence for the State tended to show that on 27 March 1992, defendant was "hanging out" at the mobile home residence of Mr. Russell Lineberry in the vicinity of Ramseur, North Carolina. Eric Gladden and Ronald McKenzie were also among the individuals at the Lineberry residence that day. The victim Marley, also known as "Big Daddy," came to Lineberry's residence, and Marley and defendant began arguing. Marley accused the defendant of "messing with his girlfriend." Shortly after their argument, Marley left the residence and walked toward his vehicle. McKenzie testified that defendant, who was holding a rifle with a banana clip, followed Mr. Marley outside the trailer and said, "you didn't know I had this on me, you MF." McKenzie further testified that he then heard a shot, following which Marley got into his car and drove off. Defendant, McKenzie, and Gladden remained at Lineberry's trailer. About twenty to thirty minutes later, Marley returned to the trailer. Marley parked his car across the road in front of the trailer, and walked toward the trailer with a shotgun in his hands. As Marley approached the trailer, three or four shots were fired from the trailer. The bullets struck Marley, his shotgun discharged into the air, and Marley fell to the ground. Marley then got up and staggered back to his vehicle. Someone then took Marley to the hospital.

Dwayne Lassiter testified for the defendant that defendant and Marley fired at about the same time. Defendant testified that prior to the day of the shooting he had been told by both Dwayne Lassiter and Tito Alston, that "Big Daddy" was looking for him and had threatened to kill him. As a result, defendant said he went home, got his gun and put it in the car. Defendant testified that he and Marley argued when Marley came to the trailer, Marley stating that the defendant had said something out of the way to his girlfriend. According to defendant, Marley kept pushing him, and Marley stated that when he returned to the trailer "he was going to blow the motherf---g doors off." Defendant explained that he followed Marley out of the trailer to his car because Marley had said he was coming back and defendant did not know whether Marley had a gun in his car. The argument continued while defendant was standing by the passenger side of Marley's car and Marley was standing by the driver's side of the car. Marley then stated, "I'll be back, you know." Defendant further testified he had his finger on the trigger of the rifle he was holding, and the rifle accidentally discharged into the ground. Defendant testified that he then left the trailer "cause [he] didn't want no trouble"; that Marley returned with a shot-

gun, screaming "Come out motherf----r; Where you at; I'm going to kill you!" Defendant said that Marley went inside the trailer while defendant was sitting in the nearby woods, and that Marley continued to scream and yell. Defendant further testified that when Marley left, defendant returned to the trailer and was standing in the yard when Marley again returned to the trailer. Defendant ran into the house and watched Marley from a window. When Marley approached the trailer with his shotgun, defendant testified that Marley's gun went up and defendant heard a shot; that defendant pointed his gun out of the window and began shooting. Three bullets from defendant's rifle entered the front of Marley's body. Officers of the Randolph County Sheriff's Department testified that they found six spent twenty-two caliber shell casings inside the mobile home and two spent sixteen-gauge shotgun shells in the yard of the mobile home.

Defendant was convicted of second-degree murder. From the imposition of judgment based on the jury verdict, defendant appealed.

Attorney General Michael F. Easley, by Assistant Attorney General T. Brooks Skinner, Jr., for the State.

Bell & Browne, P.A., by Charles T. Browne, for defendant appellant.

HORTON, Judge.

Defendant contends that the trial court (I) erred in denying his constitutional right to a speedy trial, (II) committed prejudicial error by excluding evidence of an uncommunicated threat made by the deceased against defendant, (III) committed prejudicial error by admitting into evidence a written pretrial statement of a witness for the State, (IV) erred in denying his motion to dismiss at the close of the State's case and at the close of all the evidence, and (V) erred in failing to properly instruct the jury on self-defense.

Right to Speedy Trial

[1] Defendant contends the trial court erred in denying his motion to dismiss on the grounds that the State violated the defendant's constitutional right to a speedy trial. The State charged defendant with murder on 13 July 1992, and he was tried at the 15 March 1993 Criminal Session in Randolph County Superior Court. The jury was unable to reach a verdict and the trial judge declared a mistrial. Defendant's case was not again calendared for trial until the 20 April 1998

Criminal Session in Randolph County Superior Court, more than five years later. In his pretrial motion to dismiss, defendant maintained he was prejudiced by the delay in his second trial because he was having difficulty locating witnesses whose whereabouts were known in 1993. The State argued, among other things, that a large number of murder cases were pending in the district and that defendant's case had already been tried once, resulting in a hung jury. Upon hearing the arguments of the State and of defense counsel, the trial judge denied defendant's motion to dismiss.

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972).
>
> So, unless a fixed time limit is prescribed by statute, a claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant. The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." . . .
>
> Thus the circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution. An accused who has caused or acquiesced in the

> delay will not be allowed to use it as a vehicle in which to escape justice.

State v. McKoy, 294 N.C. 134, 140-41, 240 S.E.2d 383, 388 (1978) (citations omitted). With regard to the third factor, waiver by defendant, the U.S. Supreme Court has held that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972). Applying the reasoning of *McKoy* to the case before us, we hold the trial court did not err in denying defendant's motion to dismiss. Defendant failed to show that the delay was due to the neglect or wilfulness of the prosecution. Defendant contends that, because of the five-year delay in recalling his case, he has been unable to locate two witnesses in preparation for his defense of the second trial. The record reveals, however, that defendant failed to call all his witnesses in the first trial. At the pretrial hearing, upon inquiry by the trial court, defense counsel considered one of the witnesses to be crucial to the defense, but the witness was not called in the first trial. In denying defendant's motion to dismiss, the trial judge noted, among other things, that

> Number. No speedy trial motion has heretofore been filed by the defendant demanding a trial of any sort until the motion was filed on Wednesday prior to the convening of this Session . . . .
>
> . . . .
>
> Number. Attorney Browne defended the defendant at the prior trial. The defendant's contention that these witnesses are crucial and material is somewhat undercut by the fact that neither of those witnesses was considered crucial enough to be called at the prior trial.
>
> Number. Other witnesses are currently available to the defendant as to the facts and circumstances surrounding the fatal encounter. Alston and Brooks are not the sole witnesses who can supply these details.
>
> Number. Although this case has been lingering on the docket following the mistrial in 1993 the press of other cases and trials and the presentation of a number of capital murder trials have consumed the intervening court sessions.

For the above reasons, and particularly considering that defendant never requested a speedy trial during the five-year interval following

his first trial, defendant has failed to show how he has been prejudiced by the delay, and we hold the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

Admission of Written Pretrial Statement

[2] Defendant also argues the trial court committed reversible error by admitting into evidence a written pretrial statement of Catherine Yancey, a witness for the State. Because Yancey's memory of the events of 27 March 1992 was not clear, the State requested her to read a statement marked State's Exhibit 14 to refresh her recollection. Exhibit 14 was represented to be a summary of Yancey's oral statement, as written by a police investigator in the course of his investigation of this case. After reading over the written statement, Yancey said "she remember[ed] some of this," but it soon became apparent that she was not able to testify from her "refreshed" memory: "I can't tell you exactly who said what." When the District Attorney began to go over the statement with Yancey, she began to take issue with certain matters set forth in the statement. When asked whether she had read the document prior to signing it, Yancey stated, "I didn't even read it. I just signed this piece of paper." After Yancey said she could not remember some parts of the statement, the State introduced the statement into evidence over the objection of defendant. The State then had Yancey read the entire statement to the jury.

N.C. Gen. Stat. § 8C-1, Rule 803(5) (1992) of the North Carolina Rules of Evidence provides:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (5) Recorded Recollection.—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. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The rule applies in an instance where a witness is unable to remember the events which were recorded, but the witness recalls having

made the entry at a time when the fact was fresh in her memory, and the witness knew she recorded it correctly. *See* Brandis & Broun on North Carolina Evidence, § 224, p. 110 (5th ed. 1998). "In this instance, the writing itself is the evidence and, but for the existence of a hearsay exception, inadmissible. Rule 803(5) supplies the exception." *Id.* Further, "[t]he record need not have been made by the witness herself; it is enough that she be able to testify that [1] she saw it at a time when the facts were fresh in her memory, and that [2] it actually represented her recollection at the time." *Id.* at 111. If the trial court determines that the recorded recollection is admissible as an exception to the hearsay rule, Rule 803(5) allows the statement to be read into evidence, but the statement not may not be received as an exhibit unless offered by an adverse party. The rationale behind the last sentence of the Rule is "[t]o prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined . . . ." N.C. Gen. Stat. § 8C-1, Rule 803, Commentary, p. 177.

Here, the trial court erred in allowing the statement to be read into evidence without a showing that the statement "was made or adopted by [Yancey] when the matter was fresh in [her] memory and to reflect that knowledge correctly." Subsequent to the admission of the statement, Yancey's testimony makes it clear that not only does she not recall the matters in the statement, she disagrees with some of the statements found therein. It appears from Yancey's testimony that she did not write the statement herself, and that she did not read it before signing it. The State offered no evidence to the contrary. Further, by the plain language of Rule 803(5), it was error to admit the written statement as an exhibit. *See State v. Hollingsworth*, 78 N.C. App. 578, 581, 337 S.E.2d 674, 676-77 (1985) (trial court erred in admitting letter as a recorded recollection where witness 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). It appears that the State was anxious to admit the written statement of Yancey into evidence because it contained the following statement allegedly made by the defendant prior to the shooting: "if Big Daddy came down that he was going to shoot Big Daddy." The prejudice to defendant's claim of self-defense is obvious, particularly considering that no other witness testified that defendant stated he was going to shoot Marley if he returned to the trailer. Further, Yancey's testimony on cross-examination demonstrated that she was not even present at the trailer prior to the shooting at a time when she could have heard the defendant make such a threat towards the victim. The State argues that

the written statement of Yancey was not offered as substantive evidence, but was used either to refresh her recollection or to impeach her credibility. *State v. Demery*, 113 N.C. App. 58, 67, 437 S.E.2d 704, 710 (1993). In the alternative, the State contends that defendant waived his objection to the admission of the statement as an exhibit when defendant cross-examined Yancey about the recorded statement. *Id.* We disagree.

[3] We have already discussed briefly the issue of present recollection refreshed; after reading the statement, Yancey was able to recall some parts of the statement from her refreshed memory, but also denied making or was unable to recall other parts of the document. The use of a document in order to refresh a witness' recollection does not make it admissible if offered by the party calling the witness, although it may be admissible for other reasons. Brandis & Broun on North Carolina Evidence, § 172, p. 570. Here, the State's attempt to refresh the witness' recollection was unsuccessful, and no foundation was laid to suggest that the recorded statement was independently admissible. *See* N.C. Gen. Stat. § 8C-1, Rule 901(a). Yancey did not authenticate the statement by acknowledging she made the statement, nor did the State call the investigating officer to testify that she made the statement which he recorded.

Regarding the issue of impeachment, the State argues that Yancey's testimony was inconsistent with some of the statements she made to the police at the time of the shooting, and therefore the recorded statement was admissible for impeachment purposes.

> North Carolina Rule of Evidence 607 allows a party to impeach its own witness, and Rule 611 allows the use of leading questions on direct examination of a hostile witness. N.C. Gen. Stat. § 8C-1, Rules 607 & 611 (1994). Furthermore, the State may attempt to impeach a hostile witness by asking him whether he previously made certain prior inconsistent statements. N.C. Gen. Stat. § 8C-1, Rule 607 (1994); *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). However, impeachment by a prior inconsistent statement may not be permitted where it is used as a mere subterfuge to get evidence before the jury which is otherwise inadmissible. *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757 (citations omitted) (State improperly attempted to impeach its own witness by calling the detective to whom the witness had made a prior inconsistent statement and having him read the entire statement into the record).

State v. Price, 118 N.C. App. 212, 216, 454 S.E.2d 820, 822-23, *disc. review denied*, 341 N.C. 423, 461 S.E.2d 766 (1995). *Demery* is distinguishable on its facts from the case before us. In *Demery*, we reasoned that "[i]t is permissible to use a prior statement to impeach a witness where there is *proof* that on another occasion he has made statements inconsistent with his testimony. At trial, Brooks acknowledged having made the prior statement." *Demery*, 113 N.C. App. at 67, 437 S.E.2d at 710 (emphasis added) (citations omitted). Here, although Yancey admitted to *signing* the recorded statement, she denied making some of the prior statements. Yancey specifically denied that she heard the defendant state that, "if Big Daddy came down there that he was going to shoot him." There is no competent evidence of record to suggest that Yancey made the statements as summarized in the police investigator's notes.

Lastly, the State contends that defendant waived his objection to the admission of Yancey's statement when defendant cross-examined her about the statement. We disagree.

> Under the equally well-established exception to the waiver rule, a timely objection is not waived when the objecting party later offers evidence "for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question."

State v. Townsend, 99 N.C. App. 534, 537, 393 S.E.2d 551, 553 (1990) (citations omitted). Here, defendant cross-examined Yancey for the purpose of showing that the statement was unreliable. Defendant did not refer to, nor rely upon, portions of the statements as substantive evidence.

In conclusion, the purported summary of Yancey's oral statement marked State's Exhibit 14, which was allegedly written by an investigating officer who was not called as a witness by the State, was not admissible in evidence as a recorded recollection of Yancey under the plain language of Rule 803(5). Further, the statement did not serve to refresh the witness' recollection, nor was it properly used to impeach her. Finally, defendant's objection to the offer of State's Exhibit 14 in evidence was not waived. The admission of Yancey's written statement into evidence was prejudicial error, and entitles defendant to a new trial.

In light of our decision, we decline to consider defendant's remaining assignments of error, as they are not likely to recur upon a new trial.

New trial.

Judges McGEE and EDMUNDS concur.

WILLIAM A. TUCKER, JR. AND JAMES P. ASHBURN, T.C. HOMESLEY, JR., AND WILLIAM Y. WILKINS, AS CO-ADMINISTRATORS OF THE ESTATE OF WILLIAM ARNOLD TUCKER, SR., PLAINTIFFS v. ANNE STEWART WESTLAKE (AKA ANNE STUART HARLEY TUCKER WESTLAKE) AND HUSBAND, WILLIAM RICHARD WESTLAKE, DEFENDANTS

No. COA99-211

(Filed 21 December 1999)

1. Evidence— unprobated will—action for resulting trust

The trial court erred in an action to establish a resulting trust in the admission of an unprobated will on the issue of intent where the only issue before the jury was Mrs. Tucker's intent in 1972, when she purchased the property and titled it in defendant's name, and the will spoke only to her intent in 1961 and was testamentary in nature. However, there was no prejudice in light of other evidence.

2. Evidence— negotiated agreement and consent order—action for resulting trust

There was no prejudicial error in an action to establish a resulting trust in the improper admission of a negotiated agreement and consent order from the estate administration of Mr. Anderson, from whose widow the property in question was purchased. N.C.G.S. § 8C-1, Rule 408 sets forth a broad exclusionary rule prohibiting introduction of compromise offers and agreements; however, there was an abundance of evidence otherwise showing that Ms. Tucker (the purchaser) intended to treat the property as a gift to her daughter (in whose name the property was titled).

3. Trials— continuance—insufficient time to prepare for trial

The trial court did not abuse its discretion by denying a motion for a continuance where plaintiffs alleged an insufficient time to prepare for trial in that the court calendar was sent to them two weeks before the trial was to begin, but the litigation had been going for four years and a previous appeal had held that

a directed verdict motion was improperly granted, so that plaintiffs would surely have known that a second trial was imminent, and plaintiffs failed to show how an out-of state deposition taken three weeks before the trial changed the underlying issue.

Judge WYNN dissenting in part.

Appeal by plaintiffs from judgment entered 30 September 1998 by Judge Peter M. McHugh in Iredell County Superior Court. Heard in the Court of Appeals 25 October 1999.

Sharon H. Lowe for plaintiff-appellants.

Pope, McMillan, Kutteh, Simon & Baker, P.A., by William H. McMillan, for defendant-appellees.

LEWIS, Judge.

This case stems from a dispute over the ownership of property located at 528 Walnut Street in Statesville, North Carolina, which is presently titled in the name of defendant Anne Stewart Westlake. Plaintiff William A. Tucker, Jr. and Mrs. Westlake are brother and sister and the only children of Dorcas T. Tucker. In 1972, Dorcas Tucker purchased the Walnut Street property from the estate of her cousin, Ina Anderson, following Mrs. Anderson's death. Because Mrs. Tucker's husband would not co-sign the promissory note or deed of trust, the property was titled in the name of defendant Anne Westlake, with the accompanying promissory note signed by Mrs. Westlake and her husband, William Westlake, also a defendant here. Although defendants were the debtors of record, Mrs. Tucker subsequently made all the payments on the debt. The note has now been paid in full and the deed of trust has been canceled of record. Pursuant to a provision in Mrs. Anderson's will, her husband, Thomas Anderson, lived on the property until his death in 1977. Mrs. Tucker then lived on the property from 1977 until 1994, when she died intestate.

Plaintiff William Tucker, Jr. claims that, despite the property being titled in his sister's name, his mother actually owned the property by virtue of a resulting trust, since his mother paid for the property. Upon his mother's death, he contends the property then passed to him and his sister by intestate succession, entitling him to a one-half undivided interest. Defendant Mrs. Westlake, on the other hand, claims that her mother intended the property to be a gift to her, such that she owns the property outright. At trial, the jury was only asked

to decide whether a resulting trust had been created by the actions of Mrs. Tucker. The jury answered in the negative, and plaintiffs now appeal.

[1] Essentially, this case concerns Dorcas Tucker's intent: did she intend to make a gift to her daughter of the Walnut Street property or create a resulting trust for her own benefit? In this regard, plaintiffs submit two evidentiary arguments for our consideration relating to that intent. First, they contest the admission of a copy of Mrs. Tucker's purported last will and testament from 1961. It was found among her effects following her death, but the original has never been found or probated. It purports to leave all her property to defendant Anne Westlake. Because the will was never probated (Mrs. Tucker's estate instead being distributed via intestacy), the trial judge allowed its introduction for the sole purpose of showing Mrs. Tucker's intent. The jury was then given a limiting instruction to that effect. We conclude that the admission of this will in evidence was error.

Under our rules, all relevant evidence is admissible. N.C.R. Evid. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. In other words, evidence is relevant if it has any logical tendency, no matter how slight, to prove a fact at issue. *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). The determination of relevancy must be measured in light of the issues actually before the jury at trial. *Pearce v. Barham*, 267 N.C. 707, 712, 149 S.E.2d 22, 26 (1966). Here, the only issue before the jury was Mrs. Tucker's *inter vivos* intent in 1972 when she purchased the Walnut Street property and titled it in defendant Anne Westlake's name. Even assuming the purported copy of the unprobated will is indeed a true indication of Mrs. Tucker's intent, it only speaks to her intent in 1961 and thus has little or no bearing on her intent in 1972. More significantly, however, this is a will, which is testamentary in nature. How Mrs. Tucker purportedly intended to dispose of her property at her death simply bears no logical relation to how she intended to treat the Walnut Street property during her lifetime.

Though we have found no North Carolina case law discussing the introduction of unprobated wills into evidence, we find the following summary of the common law instructive:

> [I]t is the general rule, both under statute and otherwise, that a probated will is admissible in evidence, and that an unprobated

> will is not receivable into evidence . . . . [A]n unprobated will, under governing statute or otherwise, may not be admissible as evidence affecting title to property, although it may be admissible for purposes other than that of a will. Thus, such an unprobated instrument has been held admissible to show an acknowledgment of liability on the part of the testator, as for services rendered, or to show that one called as a witness against a later will is interested, as a devisee under the former will, in having the latter will set aside, and is therefore incompetent.

95 C.J.S. *Wills* § 579 (1957) (footnotes omitted). Defendants have done that which the common law forbade: introduce an unprobated will in evidence in an attempt to affect title to property. To admit such evidence circumvents all the rules of probate that have been formulated to ensure that a will represents the clear, unequivocal, and final intent of the decedent. Accordingly, the trial court erred by admitting the purported 1961 copy of Mrs. Tucker's will, even if for the limited purpose of showing her intent.

Although the trial court erred by admitting the copy of Mrs. Tucker's 1961 will into evidence, this does not end our inquiry. "It is fundamental that no reversal or new trial will be awarded where there is no prejudicial error." *Keels v. Turner*, 45 N.C. App. 213, 219, 262 S.E.2d 845, 848, *disc. review denied*, 300 N.C. 197, 269 S.E.2d 624 (1980). We conclude that the admission of the 1961 will resulted in no prejudice to plaintiffs. The jury heard ample evidence suggesting Mrs. Tucker intended the Walnut Street property to be a gift to defendant Anne Westlake. Various tax listings submitted by Mrs. Tucker to Iredell County specifically listed Mrs. Westlake as the owner of the property. A neighbor testified that Mrs. Tucker always referred to the property as belonging to Mrs. Westlake. All the insurance policies on the home were titled by Mrs. Tucker in Mrs. Westlake's name. And a building permit for certain work on the home was also issued in Mrs. Westlake's name. Furthermore, there was evidence, including several letters plaintiff William Tucker, Jr. wrote to Mrs. Westlake, showing that Mr. Tucker himself understood the property belonged to her. In light of all this other evidence, we cannot say that plaintiffs were prejudiced by the trial court's error.

[2] Plaintiffs' next evidentiary argument pertains to the admission of certain items relating to the settlement of Thomas Anderson's estate. Upon Mr. Anderson's death in 1977, a dispute between Mrs. Tucker and the administratrix of Mr. Anderson's estate arose as to ownership of certain personal property in the Walnut Street home, given that Mr.

Anderson had lived there for a period of time. In an attempt to settle the dispute, plaintiff William Tucker, Jr., on behalf of his mother, authored a document entitled "Negotiated Agreement between Dorcas T. Tucker, et al. and Elizabeth S. Boyd, Executrix of the Estate of Thomas H. Anderson." The agreement was dated 22 October 1985 and included the following stipulation: "Anne S.H. Westlake, 6 Pine Drive, Westport, Connecticut is the owner of the house at 528 Walnut Street, Statesville . . . ." The agreement was never signed; instead the parties subsequently entered into a consent order on 13 December 1985, which both Mrs. Tucker and plaintiff William Tucker, Jr. signed. That consent order included a similar stipulation: "Anne Stewart Westlake is the owner of the house at 528 Walnut Street." The trial court admitted both the Negotiated Agreement and the subsequent consent order to show Mrs. Tucker's intent and to show plaintiff William Tucker, Jr.'s understanding of his mother's intent regarding the Walnut Street property, namely that it ultimately belonged to his sister. Plaintiffs contend these documents were offers of compromise that were inadmissible under Rule 408. Again, we agree with plaintiffs' contention.

Rule 408 sets forth a broad exclusionary rule that prohibits the introduction of compromise offers, compromise agreements, and statements made during compromise negotiations. N.C.R. Evid. 408. The rule is founded on the premise that compromise offers are not necessarily suggestive of liability, but may be more a product of a desire to bring a dispute to a close. 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 106 (4th ed. 1993). Rule 408, therefore, is designed to encourage settlements. *Id.* By its very terms, Rule 408 only applies when the evidence is being used to prove liability or to show the invalidity of the claim; the rule does not prohibit evidence from being introduced for other purposes, such as bias or prejudice. N.C.R. Evid. 408. Here, defendants introduced the Negotiated Settlement and the consent order for the very purpose prohibited by the rule—to show that plaintiffs' assertion of an ownership interest in the Walnut Street property is invalid.

Defendants argue that Rule 408 is inapplicable here because the compromise offers were made in 1985, ten years before the present dispute arose. There is no question that Rule 408 necessarily requires an existing dispute before it is applicable. *See Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 88, 394 S.E.2d 824, 828, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). But nowhere does the rule suggest that the existing dispute must also be

the pending one. Here, there was an existing dispute regarding Mr. Anderson's estate at the time the compromise offers were made. That is all Rule 408 requires.

Defendants also point out that the prior dispute concerned the ownership of personal property within the Walnut Street home, not the ownership of the Walnut Street home itself. They argue that a stipulation with respect to the ownership of the home had no bearing on that dispute and thus should not be excluded by Rule 408. We disagree. Distinct admissions of independent facts encompassed within compromise offers were admissible under the common law. Broun, *supra*, § 106. This is no longer the case, however, since the promulgation of Rule 408—*any* admissions that are included in compromise offers are excludable under Rule 408. *Id.* Thus, the stipulation with respect to ownership of the Walnut Street home, although not necessary for the adjudication of the 1985 dispute, is still inadmissible under Rule 408 because it is encompassed within a negotiated settlement agreement.

In passing, we note that plaintiff William Tucker, Jr. was technically not a party in the 1985 dispute over Mr. Anderson's estate. Some commentators have suggested that Rule 408 should not apply when the present litigant (i.e. plaintiff William Tucker, Jr.) was not a party to the prior dispute in which the compromise offer was made. *See, e.g.*, 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 135 (2d ed. 1994) (discussing the parallel provision in the Federal Rules of Evidence). This is logical, since the rule is designed to encourage settlements and a non-litigant arguably has no incentive to make a compromise offer that tends to suggest his own liability when he is not party to any suit in need of settling. But here, although Mr. Tucker may not have technically been a party, he was acting on behalf of his mother, who was a party to the suit. He thus had a legitimate incentive to settle the 1985 dispute. Accordingly, applying a "non-litigant limitation" to Rule 408 does not seem particularly warranted under the facts here.

Although the trial court improperly admitted the Negotiated Agreement and the consent order, we again conclude that the error was harmless. As stated earlier, there was an abundance of evidence otherwise showing that Mrs. Tucker intended to treat the Walnut Street property as a gift to her daughter.

[3] Finally, plaintiffs contest the trial court's denial of their motion to continue. Rulings on motions to continue are within the sound dis-

cretion of the trial judge and are thus not reviewable absent a manifest abuse of that discretion. *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 49, 362 S.E.2d 578, 582 (1987), *disc. review denied*, 321 N.C. 473, 364 S.E.2d 921 (1988). We find no such abuse of discretion here.

Plaintiffs moved for a continuance here on the ground that they allegedly had insufficient time to prepare for trial. Specifically, they complain that the court calendar was not sent to them until just two weeks before the trial was to begin. We find this unpersuasive. This litigation has been going on for four years. Plaintiffs previously appealed to this Court from a grant of defendants' motion for a directed verdict at the conclusion of a first trial. In an unpublished opinion filed 16 June 1998, we held that the directed verdict motion had been improperly granted. Plaintiffs would surely have known that a second trial was then imminent.

Plaintiffs also maintain that an out-of-state deposition they had taken three weeks before trial had significantly changed the issues to be litigated, leaving them insufficient time to prepare for trial. Changed conditions are indeed a significant factor in considering a motion to continue. *Green v. Maness*, 69 N.C. App. 292, 294, 316 S.E.2d 917, 919, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984). Here, however, the issue over the course of this litigation has always remained the same: whether Mrs. Tucker intended the Walnut Street property to be a gift or a resulting trust. Plaintiffs have failed to show how the out-of-state deposition changed this underlying issue in any way. Accordingly, we conclude that the trial judge committed no abuse of discretion in denying plaintiffs' motion for a continuance.

No prejudicial error.

Judge MARTIN concurs.

Judge WYNN dissents in part.

Judge WYNN dissenting in part.

We all agree that the admission into evidence of the copy of Mrs. Tucker's 1961 unprobated will was error. Agreeably, the will was irrelevant to the issue of Mrs. Tucker's intent in 1972, and it defied the common law by being used in an attempt to affect title to the property. We, however, disagree as to whether the erroneous admission of the copied will was prejudicial error. I say it was.

The majority says that the plaintiffs were not prejudiced by the copied will's introduction because Mrs. Tucker submitted various tax listings showing Mrs. Westlake as the owner; a neighbor testified that Mrs. Westlake was the owner; the insurance policies were in Mrs. Westlake's name; and a building permit had been issued to Mrs. Westlake. None of that evidence presents a determinative defense to the plaintiffs' claim that the property was being held under a resulting trust. *See Ray v. Norris*, 78 N.C. App. 379, 382, 337 S.E.2d 137, 140 (1985) (stating that a "resulting trust arises when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. A trust of this sort . . . results from the fact that one man's money has been invested in land and the conveyance taken in the name of another"). Indeed, all of that evidence was consistent with the initial reasoning that Mrs. Tucker had titled the property in the name of Mrs. Westlake—to camouflage her actual ownership.

In my opinion, other evidence made this case a very close call for the trier of fact. For instance, Mrs. Tucker made all of the mortgage, insurance and tax payments while Mrs. Westlake made none of the payments.

Significantly, the record on appeal shows that in 1986, Mrs. Westlake verified a "Petition for Appropriate Relief, Permanent Injunction and Temporary Restraining Order" in which she joined Mrs. Tucker and Dr. William Tucker, Jr. against the City of Statesville, North Carolina. In that petition, Mrs. Westlake averred:

> That the Petitioner, Anne Westlake, is the title owner of that property generally known as 528 Walnut Street in Statesville, North Carolina, said property being held for the use and benefit of the Petitioner, Dorcas T. Tucker, and being administered by the Petitioner, Dr. William A. Tucker, Jr.

Thus, I believe that the plaintiffs have met their burden of showing prejudicial error exists on appeal. *See Kennedy v. James*, 252 N.C. 434, 113 S.E.2d 889 (1960) (holding that the burden is on the appellant to show prejudicial error amounts to a denial of some substantial right). Therefore, unlike the majority, I cannot say that the erroneous introduction of the copied will did not prejudicially affect the outcome of this matter. Consequently, I would award the parties a new trial without the introduction of the tainted evidence.

STATON v. BRAME

[136 N.C. App. 170 (1999)]

PHILIP A.R. STATON, PLAINTIFF, AND INGEBORG STATON, MERCEDES STATON, THE 1991 REVOCABLE LIVING TRUST OF INGEBORG STATON, AND THE 1983 REVOCABLE LIVING TRUST OF MERCEDES STATON, PLAINTIFFS, AND WILLIAM E. WEST, JR., INTERVENOR-PLAINTIFF v. THOMAS BRAME, JERRI BRAME, JERRI BRAME D/B/A T&J VENTURES, T&J VENTURES, INC., S&B INVESTMENTS, JRB INVESTMENTS, JRB INVESTMENTS, INC., GLOBAL SPORTS MANAGEMENT CO., GLOBAL LAND MANAGEMENT, INC., AND DARRELL WILSON, DEFENDANTS, CROSS-CLAIMANTS, AND THIRD-PARTY DEFENDANTS, AND CENTURA BANK, DANNY WRENN, GEORGE R. JARVIS, POYNER & SPRUILL, POYNER & SPRUILL, L.L.P., CURTIS TWIDDY, ESQ., AND CORNELIUS COGHILL, ESQ., DEFENDANTS; PHILIP A.R. STATON, PLAINTIFF, AND INGEBORG STATON, MERCEDES STATON, THE 1991 REVOCABLE LIVING TRUST OF INGEBORG STATON, AND THE 1983 REVOCABLE LIVING TRUST OF MERCEDES STATON, PLAINTIFFS AND THIRD-PARTY PLAINTIFFS v. CENTURA BANK, DANNY WRENN, GEORGE R. JARVIS, POYNER & SPRUILL, POYNER & SPRUILL, L.L.P., CURTIS TWIDDY, ESQ., AND CORNELIUS COGHILL, ESQ., DEFENDANTS AND THIRD-PARTY DEFENDANTS, AND CENTURA BANK, THIRD-PARTY PLAINTIFF v. PHILIP A.R. STATON, JERRI R. BRAME, PHILIP A.R. STATON, TRUSTEE OF STATON FOUNDATION DECLARATION OF THE TRUST DATED DECEMBER 6, 1993, ALL UNKNOWN AND UNASCERTAINED HEIRS OF THE ESTATE OF PHILIP A.R. STATON, INGEBORG E. STATON, BENEFICIARY OF THE INGEBORG E. STATON REVOCABLE LIVING TRUST DATED NOVEMBER 3, 1993, EDUARDO ARBOLEDA, MINOR CHILD OF INGEBORG E. STATON, VIVIANA ARBOLEDA, MINOR CHILD OF INGEBORG E. STATON, ROBERTO ARBOLEDA, MINOR CHILD OF INGEBORG E. STATON, ALL UNKNOWN AND UNASCERTAINED HEIRS OF THE ESTATE OF INGEBORG E. STATON, AND MICHAEL F. EASLEY, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, THIRD-PARTY DEFENDANTS; PIEDMONT INSTITUTE OF PAIN MANAGEMENT, T. STUART MELOY, M.D., NANCY I. FALLER, D.O., AND WILLIAM JOSEPH MARTIN, D.O., PLAINTIFFS, AND INGEBORG STATON, MERCEDES STATON, THE 1991 REVOCABLE LIVING TRUST OF INGEBORG STATON, AND THE 1983 REVOCABLE LIVING TRUST OF MERCEDES STATON, PLAINTIFFS AND THIRD-PARTY PLAINTIFFS v. CENTURA BANK, DANNY WRENN, GEORGE R. JARVIS, POYNER & SPRUILL, POYNER & SPRUILL, L.L.P., CURTIS TWIDDY, ESQ., AND CORNELIUS COGHILL, ESQ., DEFENDANTS AND THIRD-PARTY DEFENDANTS, AND CENTURA BANK, THIRD-PARTY PLAINTIFF v. PHILIP A.R. STATON, JERRI R. BRAME, PHILIP A.R. STATON, TRUSTEE OF STATON FOUNDATION DECLARATION OF THE TRUST DATED DECEMBER 6, 1993, ALL UNKNOWN AND UNASCERTAINED HEIRS OF THE ESTATE OF PHILIP A.R. STATON, INGEBORG E. STATON, BENEFICIARY OF THE INGEBORG E. STATON REVOCABLE LIVING TRUST DATED NOVEMBER 3, 1993, EDUARDO ARBOLEDA, MINOR CHILD OF INGEBORG E. STATON, VIVIANA ARBOLEDA, MINOR CHILD OF INGEBORG E. STATON, ROBERTO ARBOLEDA, MINOR CHILD OF INGEBORG E. STATON, ALL UNKNOWN AND UNASCERTAINED HEIRS OF THE ESTATE OF INGEBORG E. STATON, AND MICHAEL F. EASLEY, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, THIRD-PARTY DEFENDANTS

No. COA98-1501

(Filed 21 December 1999)

Constitutional Law— self-incrimination—different proceeding

The trial court erred by granting a motion to compel defendant Brame's response to deposition questions in this state action involving misappropriation of funds when he had previously given relevant testimony in a deposition as part of federal bankruptcy/equitable distribution proceedings. The federal bankruptcy/equitable distribution proceeding is a separate proceeding from the state court action, and defendant's waiver of his right against self-incrimination in the federal proceeding did not apply in the state court action.

Judge WYNN concurs in the result only.

Appeal by defendant Samuel Thomas Brame from order entered 21 August 1998 by Judge Ben F. Tennille in Forsyth County Superior Court. Heard in the Court of Appeals 16 September 1999.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., for plaintiff-appellees Ingeborg Staton, Mercedes Staton, The 1991 Revocable Living Trust of Ingeborg Staton, and The 1983 Revocable Living Trust of Mercedes Staton.

Adams Kleemeier Hagan Hannah & Fouts, by Robert G. Baynes, W. Winburne King, III, and Christine L. Myatt, for defendant-appellee Centura Bank, and Smith Helms Mulliss & Moore, L.L.P., by Larry B. Sitton, for Poyner & Spruill, L.L.P., Curtis Twiddy, and Cornelius Coghill.

Edward Jennings for defendant-appellant Samuel Thomas Brame.

Bell, Davis & Pitt, P.A., by James R. Fox, for Philip Staton, no brief filed.

Randolph M. James for Darryl Wilson, no brief filed.

Bennett & Guthrie, L.L.P., by Richard V. Bennett, for Minor Party Beneficiaries of Trust, no brief filed.

Blanco Tackbery Combs & Matamoros, by Reginald F. Combs, for Minor Party Beneficiaries of Trust, no brief filed.

Michael F. Easley, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the State, no brief filed.

Jerri S. Russell, pro se, no brief filed.

Edward L. Powell for Piedmont Institute of Pain Management, T. Stuart Meloy, M.D., Nancy I. Faller, D.O., and William Joseph Martin, D.O., no brief filed.

Ivey, McClellan, Gatton & Talcott, L.L.P., by Charles M. Ivey, III, Trustee of Estate of Jerri Russell, Bankruptcy, no brief filed.

M. Bruce Magers, Chapter 7 Trustee, no brief filed.

EDMUNDS, Judge.

This suit originated with an allegation that defendants mishandled and misappropriated funds belonging to plaintiffs. The issue before us is the propriety of the trial court's order requiring defendant Samuel Thomas Brame (Brame) to provide testimony in the instant case. Although Brame previously had given relevant testimony at a deposition conducted as part of bankruptcy proceedings, he asserted his Fifth Amendment right not to respond to deposition questions in the case at bar. The trial court granted Centura Bank's (Centura) motion to compel Brame's testimony. Brame appeals on the ground that the trial court's order violates his rights under the Fifth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. We reverse.

As a preliminary matter, we note that the caption of the 21 August 1998 order appealed from lists only one plaintiff and one defendant in each action and leaves all other parties under the rubric "et al." Appendix B of the Rules of Appellate Procedure requires that all parties be named in the caption. *See Buie v. Johnston*, 69 N.C. App. 463, 463 n.1, 317 S.E.2d 91, 92 (1984). The instant case illustrates the importance of this rule; defendant Brame, whose actions constitute the subject of this appeal, is not named in the caption of the order from which the appeal was taken and is only identified as a party defendant on page six of that order. However, the record also contains a 29 July 1998 order that appears to contain the complete caption. We adopt the heading of this order as setting out the correct caption of the case.

The intricate backdrop of this case need not be set out in detail. Plaintiffs Philip A.R. Staton, Ingeborg E. Staton, and Mercedes Staton (the Statons), who lived abroad, inherited a block of stock in the Pan American Beverage Company. Trusts were set up for Ingeborg and Mercedes Staton. The Statons wired funds to an account called the PIM Group Clearing Account at Centura in Winston-Salem in 1993. Defendants Brame and his former wife, Jerri Russell (Russell), who

were living in the United States, were provided powers of attorney by the Statons. These defendants were to allocate funds from the PIM Group Clearing Account into investments for the Statons and to manage their assets pursuant to a written fee arrangement. The Statons maintained little control over Brame's treatment of their money until early 1996. Brame allegedly used funds from the PIM Group Clearing Account for his own personal benefit and for speculative and unsuccessful business ventures and investments. In 1996, the Statons and others filed the first of several claims (the Staton cases) against Brame, Russell, and Centura for Brame's alleged misuse of the money. Centura asserted claims against Brame for contribution and indemnification. The various suits against Brame were joined for discovery.

After the 1996 institution of the Staton cases, the United States Internal Revenue Service informed Brame that he was the target of an ongoing criminal investigation concerning many of the matters relevant to the Staton cases. Subsequently, on 21 December 1998, a federal indictment was returned against Brame in the Middle District of North Carolina.

Centura and other parties to the Staton cases attempted to depose Brame on 27 March 1997. At that point, Brame was aware that a criminal investigation had begun. The deposition did not take place because Brame asserted his privilege against self-incrimination, pursuant to the Fifth Amendment of the United States Constitution. Centura's subsequent motion to compel Brame's deposition testimony, filed on 23 April 1998, was denied. However, on 20 July 1998, Centura filed a Motion to Reconsider, citing Brame's waiver of his Fifth Amendment privilege at a 1 August 1997 deposition conducted as part of a pending bankruptcy action.

Centura's Motion to Reconsider and supporting exhibit revealed that on 27 December 1996, Brame filed a petition in bankruptcy in the United States Bankruptcy Court for the Middle District of North Carolina. Russell, Brame's former wife, also filed for bankruptcy at the conclusion of the marriage. On 1 August 1997, Brame was deposed in an equitable distribution action, which had been removed to the Bankruptcy Court. He was questioned by an attorney for the Trustee in Bankruptcy and by an attorney for Russell. When questioning began, Brame responded, "I did not decide to talk until late yesterday. I spent several sleepless nights. But it's time to clear the air. It was the toughest decision I think I've ever made in my

life not to plead the Fifth . . . ." He then answered questions posed to him.

The trial court found that by answering questions in the bankruptcy/equitable distribution proceeding, Brame waived his Fifth Amendment privilege against self-incrimination in the case at bar. "Having knowingly waived his right for his personal benefit, he should not be allowed [to] assert those same rights in this litigation where it might be beneficial to him not to testify." The trial court then granted Centura's Motion to Reconsider and ordered Brame to answer deposition questions. Brame appeals.

Whether Brame's waiver of his Fifth Amendment rights in a hearing related to bankruptcy binds him for the purposes of this case is a question of law. We review questions of law *de novo*. *See Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 470 S.E.2d 552 (1996). Brame contends the trial court's order requiring him to provide deposition testimony violates his rights under the United States and North Carolina Constitutions. We begin with a review of pertinent cases. An analogous issue arose in *State v. Pearsall*, 38 N.C. App. 600, 248 S.E.2d 436 (1978). *Pearsall* involved an armed robbery in which two defendants were charged, then tried separately. One defendant, Williams, after being convicted, entered notice of appeal. Williams then provided self-incriminating testimony at her co-defendant's first trial. However, when Williams was called as a witness at the co-defendant's second trial, she refused to testify, exercising her Fifth Amendment rights. Noting that Williams' own appeal was still pending at the time she refused to testify when called as a witness in the second trial, we held that her testimony in the first trial did not operate as a waiver of her Fifth Amendment rights in the second trial. "It is the majority view that a witness who testifies to incriminating matters in one proceeding does not thereby waive the right to refuse to answer as to such matters on subsequent, separate, or independent trial or hearing." *Id.* at 603, 248 S.E.2d at 438 (citations omitted).

We reaffirmed the *Pearsall* rule with our holding in *State v. Hart*, 66 N.C. App. 702, 311 S.E.2d 630 (1984). In *Hart*, two defendants were charged with drug-related offenses. One defendant, Smith, refused to testify as a defense witness at Hart's trial because he feared his testimony would incriminate him in his own pending trial. However, Smith previously had executed a written statement to the effect that the drugs were not Hart's. Despite the existence of this statement, we held that Smith had not waived his Fifth Amendment right to refuse

to give testimony in Hart's criminal trial. "The rule in this state and most others . . . is that a witness who testifies to incriminating matters in one proceeding does not thereby waive the right to refuse to answer questions concerning such matters at a subsequent hearing or trial." *Id.* at 705, 311 S.E.2d at 632 (citing *Pearsall*, 38 N.C. App. 600, 248 S.E.2d 436).

In light of our prior holdings, the relevant issue before us is whether the federal bankruptcy/equitable distribution proceeding, in which Brame provided testimony, is a separate proceeding from the Staton cases, in which he asserts his Fifth Amendment rights. Centura cites *In re Mudd*, 95 B.R. 426 (Bankr. N.D. Tex. 1989) for the proposition that a civil suit and equitable distribution/bankruptcy proceeding are the same proceeding. In *Mudd*, the debtor testified at five examinations conducted pursuant to Bankruptcy Rule 2004. At the sixth Rule 2004 examination, however, the debtor invoked his Fifth Amendment privilege and refused to answer questions, claiming that additional indictments were pending against him. The court implicitly found that all of the Rule 2004 examinations were the same proceeding and explicitly found that the defendant's answers in earlier examinations presented a distorted and incomplete picture. The court held that the defendant's original waiver of his Fifth Amendment privilege in prior examinations constituted a waiver in subsequent examinations conducted pursuant to Rule 2004, in which the trustee sought details of the defendant's previous testimony, "*unless* revealing those details would further incriminate him or subject him to new areas of incrimination." *Id.* at 431.

Mudd is readily distinguishable. A civil deposition in state court is manifestly different from an equitable distribution/bankruptcy proceeding in federal court. Not only are there significant procedural and jurisdictional differences, the two depositions have different purposes. Brame's deposition in the bankruptcy matter pertained to resolution of equitable distribution matters between Brame and his former spouse; the attempted deposition in the case at bar apparently related to his authority to act on behalf of plaintiffs. Unlike the defendant in *Mudd*, Brame was not being asked to provide details underlying earlier testimony he had provided in the same type of proceeding before the same court. Therefore, Brame was entitled to exercise his right against self-incrimination under the Fifth Amendment of the United States Constitution, and the trial court erred when it granted Centura's motion to compel Brame to answer deposition questions.

Accordingly, it is unnecessary to address Brame's claim under Article I, Section 23 of the North Carolina Constitution. "[B]ecause the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be 'accorded lesser rights' no matter how we construe the state Constitution." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). We have determined that Brame effectively invoked his Fifth Amendment right against self-incrimination when he was deposed in the case at bar; he has no lesser right under our state constitution.

Finally, on 25 August 1999, Centura and Poyner & Spruill filed a joint motion pursuant to N.C. R. App. P. 9(b) for leave to amend the record on appeal to include material relating to a superseding indictment returned against Brame on 28 June 1999. The Statons oppose the motion, contending that the records in question originated after the trial court's order to compel was entered and after notice of appeal was given. The motion for leave to amend is denied.

Reversed.

Judge JOHN concurs.

Judge WYNN concurs in the result only.

McCLURE ESTIMATING COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF v. H. G. REYNOLDS COMPANY, INC. AND SAFECO INSURANCE COMPANY OF AMERICA, DEFENDANTS

No. COA98-1552

(Filed 21 December 1999)

1. **Appeal and Error— appealability—improper venue**

   The denial of defendants' motion to dismiss for improper venue was immediately appealable because the erroneous denial would work an injury which could not be corrected if an appeal was not allowed before the final judgment.

2. **Venue— performance bond—county where construction performed**

   The trial court erred by denying defendants' motion to dismiss for improper venue a payment bond claim arising from a

construction contract, and the case was remanded for transfer of venue, where defendant Reynolds entered into a contract with the Warren County School System for the construction of additions at schools; Reynolds subcontracted with plaintiff for the roof systems; plaintiff performed several steps in the preparation of the roof systems in Martin County; a dispute arose over the final payment; and plaintiff brought an action in Martin County. Although N.C.G.S. § 44A-28(a) states that actions on payment bonds shall be brought in the county where the contract or any part thereof has been performed, the statutory definitions, the plain language, the context, and the federal case law all support the interpretation that the "contract" is the prime contract and that "any part thereof" refers to contracts which physically span more than one county. The prime contract here was performed in Warren County.

Appeal by defendants from order entered 23 June 1998 by Judge Clifton W. Everett, Jr. in Martin County Superior Court. Heard in the Court of Appeals 20 September 1999.

Barber & Associates, P.A., by Timothy C. Barber and Sean T. Partrick, and Pritchett, Cooke & Burch, P.L.L.C., by Jonathon E. Huddleston, for plaintiff-appellee.

Safran Law Offices, by V. A. Anderson, Jr. and Todd A. Jones, for defendants-appellants.

TIMMONS-GOODSON, Judge.

On 19 May 1995, H. G. Reynolds Company, Inc. ("defendant") entered into a contract with the State of North Carolina through its political subdivision, the Warren County School System, for the construction of additions at three Warren County schools ("the project"). Defendant was the general contractor on the project. On 30 May 1995, defendant entered into a Labor and Material Payment Bond Agreement in the amount of $3,303,600.00 for which defendant was principal, codefendant Safeco Insurance Company of America ("Safeco") was surety and the Warren County Board of Education was obligee.

In December of 1995, defendant entered into an oral subcontract with McClure Estimating Company ("plaintiff") whereby plaintiff agreed to design and construct sloping metal roof systems on the three Warren County Schools for a contract price of $315,052.38.

Plaintiff performed several steps of the roof construction at his office in Martin County. The design and preparation of the roof system were performed in Martin County, the trim flashing and roof curbs were cut, welded and fabricated in Martin County and approximately 50% of the architectural trim was cut, welded and fabricated in Martin County. Plaintiff completed construction of the roof systems. Defendant refused to pay plaintiff the final $27,101.61 due on the contract. Defendant alleges that the roof constructed by plaintiff resulted in repeated leaks, damages and delays in completion of the project in accordance with the contract. Additionally, Safeco refused to honor its obligations on the payment bond.

Plaintiff filed a summons and complaint, asserting a payment bond claim and alleging breach of contract and Quantum Meruit. Defendants filed an Answer, Counterclaim and Motions to Dismiss or in the Alternative, to Remove to Warren County, asserting that the payment bond claim was brought in the wrong county. Plaintiff filed an Answer to Defendants' Counterclaim and an Amended Answer to Defendants' Counterclaim. Defendants filed an Amended Motion to Dismiss and an Amended Motion to Compel Arbitration and Stay Proceedings Pending Arbitration.

A hearing was held on 1 June 1998 in which plaintiff alleged that venue was correct in Martin County. The trial court denied defendants' Motion to Dismiss, stating that venue was proper in Martin County. Defendants appeal.

The dispositive issue on appeal is whether a payment bond claim may be brought in the county where some portion of a subcontract was performed. By their first assignment of error, defendants argue that the trial court committed reversible error in denying defendants' Motion to Dismiss plaintiff's payment bond claim because that claim was brought in the incorrect county. We agree.

[1] We first address plaintiff's argument that defendants' Motion to Dismiss Due to Improper Venue is premature in that it is interlocutory and does not affect a substantial right. We disagree and conclude that defendants' Motion to Dismiss is directly appealable.

In *DesMarais v. Dimmette*, 70 N.C. App. 134, 318 S.E.2d 887 (1984), this Court held that an order denying a Motion for Change of Venue was directly appealable. "We hold that an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be cor-

rected if no appeal was allowed before the final judgment." *Id.* at 136, 318 S.E.2d at 889. In the case *sub judice*, an order erroneously denying defendants' Motion to Dismiss for Lack of Venue would similarly "work an injury . . . which could not be corrected if no appeal was allowed before the final judgment." *Id.* Therefore, we conclude that an appeal lies of right to this Court.

[2] This is a case of first impression in North Carolina. Under the North Carolina Model Payment and Performance Bond Act, otherwise known as North Carolina's "Little Miller Act," "[e]very action on a payment bond . . . shall be brought in a court of appropriate jurisdiction in a county where the construction contract or any part thereof is to be or has been performed." N.C. Gen. Stat. § 44A-28(a) (1995).

The federal Miller Act requires payment bond claims to be brought in "any district in which the contract was to be performed and executed and not elsewhere." 40 U.S.C.A. § 270b (West Supp. 1998). When the North Carolina General Assembly adopted the Act, it added the phrase "or any part thereof." N.C.G.S. § 44A-28(a).

Defendants argue that the statutory language within section 44A-28(a), "the construction contract," refers to the prime contract, or the contract between the general contractor and the owner of the project. *Id.* Therefore, defendants contend that venue is proper only in the county where the prime contract was performed. According to defendants, the statutory language "or any part thereof" speaks to the situation where the construction of public improvements contemplated by the prime contract physically spans more than one county. *Id.*

In contrast, plaintiff argues that the language "the construction contract" addresses subcontracts as well as the prime contract. *Id.* Plaintiff further argues that the addition of the phrase "or any part thereof" in the North Carolina Model Act demonstrates legislative intent that venue be proper outside the county where the prime contract was performed. *Id.* In other words, under plaintiff's interpretation, venue would be proper not only where the contract between the general contractor and the owner of the project was performed, but also where some portion of a subcontract was performed.

In the instant case, plaintiff argues that venue is proper in Martin County because plaintiff performed several steps in the process of constructing the roof systems in its Martin County office. Specifically,

all roof system design as well as the cutting and welding of trim flashing and roof curbs was performed in Martin County.

In determining whether the statutory language, "the construction contract," in section 44A-28(a) of Article 3 refers only to the prime contract, we first look to the applicable statutory definitions. *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974). The statutory definitions control within Article 3 unless the context requires otherwise. N.C. Gen. Stat. § 44A-25 (1995). "Construction contract" is defined as "any contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highways." N.C.G.S. § 44A-25(2). The definition of "construction contract" is ambiguous. The words "any contract" do not necessarily refer to the prime contract exclusively. Yet, the definition does not explicitly include subcontracts.

A subcontractor is defined as "any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract." N.C.G.S. § 44A-25(6). In other words, pursuant to section 44A-25(6), the subcontractor enters into a contract, best termed a "subcontract," to "furnish labor or materials . . . in connection with a construction contract." *Id.* The statutory language suggests that "the construction contract" is a single overarching contract.

A "contractor" is defined as "any person who has entered into a construction contract with a contracting body." N.C.G.S. § 44A-25(4). "Contracting body" means "any department, agency, or political subdivision of the State of North Carolina which has authority to enter into construction contracts." N.C.G.S. § 44A-25(3). Pursuant to the statutory definitions, a construction contract is a contract between a contractor and the State, otherwise known as the prime contract. In the case at bar, defendant, the contractor, entered into such a contract with the State of North Carolina through its political subdivision, the Warren County School System.

Where the statutory definitions are ambiguous, the words must be given their ordinary meaning. *In re Clayton-Marcus Co.*, 286 N.C. at 219-20, 210 S.E.2d at 202. The plain meaning of the language within North Carolina General Statutes section 44A-28(a) supports an interpretation that "the construction contract" refers to the prime contract. N.C.G.S. § 44A-28(a). Use of the definite article "the" suggests that the legislature referred to one specific contract, the prime

contract, rather than all of the subcontracts entered into on a given project.

The statutory definition of "construction contract" within section 44A-25 must be read within context. N.C.G.S. § 44A-25. The addition of the definite article "the" prior to the words "construction contract" within section 44A-28(a) is a significant limiting term. N.C.G.S. § 44A-28(a).

This Court has determined that the court will look to the federal Miller Act where there is no corresponding state case regarding North Carolina General Statute sections 44A-25 *et seq. Syro Steel Co. v. Hubble Highway Signs, Inc.*, 108 N.C. App. 529, 534, 424 S.E.2d 208, 211 (1993). Overwhelmingly, federal courts have held that venue is proper where the project which is the subject of the prime contract is located. *See, e.g., United States ex rel. Vermont Marble Co. v. Roscoe-Ajax Constr. Co.*, 246 F. Supp. 439 (N.D. Cal. 1965); *United States ex rel. Caswell Equipment Company v. Fidelity and Deposit Company of Maryland*, 494 F. Supp. 354 (D. Minn. 1980); *United States ex rel. Essex Machine Works, Inc. v. Rondout Marine, Inc.*, 312 F. Supp. 846 (S.D.N.Y. 1970); *United States ex rel. Coffey v. William R. Austin Company, Inc.*, 436 F. Supp. 626 (W.D. Okla. 1977); *United States ex rel. Harvey Gulf International Machine, Inc. v. Maryland Casualty Company*, 573 F.2d 245 (5th Cir. 1978); *McDaniel v. University of Chicago*, 512 F.2d 583 (7th Cir.), *vacated*, 423 U.S. 810, 46 L.Ed.2d 30 (1975); *United States ex rel. Capolino Sons v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2nd Cir. 1966); and *United States ex rel. Cal's A/C v. Famous Construction Corporation*, 982 F. Supp. 1219 (W.D. La. 1997).

Plaintiff relies on one federal case, *United States ex rel. Expedia, Inc. v. Altex Enterprises, Inc.*, 734 F. Supp. 972 (M.D. Fla. 1990), in which the court held that a bond claim was properly brought in Florida where work on a construction project was performed and delivered rather than in Bermuda where the project was located. In *Expedia*, the plaintiff had performed nearly all of the subcontract in Florida; only the installation took place in Bermuda. Additionally, the facts of *Expedia* depart from the norm in that the project was located in Bermuda, outside of the territorial United States. The ruling in *Expedia* is in conflict with prior and subsequent federal court rulings and we decline to follow it in the instant case.

We conclude that statutory definitions, the plain language, context and federal case law support an interpretation that "the con-

struction contract" addressed in section 44A-28(a) is the prime contract. N.C.G.S. § 44A-28(a). It follows that "any part thereof" also refers to the prime contract. *Id.* Therefore, we agree with defendant's contention that the legislature included the language "any part thereof" in contemplation of a construction contract which physically spans more than one county. For example, where the physical improvement is a highway which crosses county lines, venue would be proper in any of the counties in which the project is located.

In interpreting ambiguous statutory language, this Court should avoid a construction which will lead to "unjust, oppressive, or absurd consequences." *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 802 (1948). If this Court were to interpret "or any part thereof" to include the subcontractor's portion of the work, an unjust result would be reached in that any subcontractor or supplier who contributed to the completion of the prime contract could file a payment bond claim in any county in North Carolina where a small portion of the work was performed. A general contractor would be forced to defend multiple claims in counties throughout the state all related to the same public project. Judicial resources would be wasted and an injustice to the general contractor would ensue.

Finally, we agree with defendants that *Midsouth Const. Co. v. Wilson*, 71 N.C. App. 445, 322 S.E.2d 418 (1984), is not controlling in the case at bar. In *Midsouth*, the construction project was located in Mecklenburg County. The general contractor brought a breach of contract claim against a subcontractor on the project in Harnett County. The subcontractor answered the complaint in Harnett County, and filed a bond claim against the general contractor in Mecklenburg County as well as a Motion for Change of Venue to move the plaintiff's original breach of contract claim to Mecklenburg County. The court ruled against the subcontractor, finding that the general contractor had properly brought the breach of contract claim in Harnett County. The subcontractor's bond claim, however, was properly filed in Mecklenburg County where the project was located.

In the instant case, plaintiff did not merely bring a breach of contract claim against defendants but also brought a claim against the payment bond. The holding in *Midsouth* regarding proper venue for a breach of contract claim does not expand venue for claims against the payment bond and we decline to expand it now. We conclude that the holding in *Midsouth* does not control the issue in the instant case of whether the claim against the payment bond should have been brought in Warren County where the project was located.

Where a defendant makes a Motion to Dismiss for Lack of Venue and indicates that venue is proper elsewhere, and venue is indeed proper elsewhere, the trial court should treat the Motion to Dismiss as a Motion for a Change of Venue. *Coats v. Hospital*, 264 N.C. 332, 141 S.E.2d 490 (1965).

In the present case, defendants made a Motion to Dismiss for Lack of Venue in which they indicated that venue was proper in Warren County rather than Martin County. Plaintiff filed a complaint in Martin County where some portion of the subcontract was performed. However, the prime contract was performed in Warren County. Having determined that plaintiff's bond claim was brought in the incorrect county, we conclude that the trial court erred in failing to remove the case to Warren County.

Defendant did not seek to appeal or petition for certiorari on the interlocutory orders relating to compelling arbitration and staying the proceeding; therefore, these issues are not before us.

For the reasons stated herein, the judgment of the trial court denying defendants' Motion to Dismiss plaintiff's payment bond claim is reversed and the case is remanded for entry of an order transferring venue to Warren County.

Reversed and Remanded.

Chief Judge EAGLES and Judge MARTIN concur.

ROSS E. HIXSON, JR., INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GINA RENEE HIXSON, DECEASED, PETITIONER-APPELLANT V. PAMELA KREBS, RESPONDENT-APPELLEE

No. COA99-239

(Filed 21 December 1999)

1. Wrongful Death— death of child—parental entitlement to settlement proceeds—determination of abandonment of child—exceptions to rule

In a case determining entitlement to the proceeds of a wrongful death settlement in the estate of the parties' daughter, the trial court erred in granting summary judgment in favor of respondent-

mother on the issue of whether she abandoned her daughter before her daughter's fatal accident because a jury could conclude that respondent relinquished her parental claims and abandoned decedent, which would bar respondent from the proceeds of the wrongful death settlement under N.C.G.S. § 31A-2 unless respondent meets an exception under the statute such as: (1) resuming care of the child at least one year prior to the death of the child, and continuing the care until her death; or (2) being deprived of the custody of the child under an order of a court of competent jurisdiction and substantially complying with all orders of the court requiring contribution for the child's support.

2. Wrongful Death— death of child—parental entitlement to settlement proceeds—abandonment of child—no exceptions met

In a case determining entitlement to the proceeds of a wrongful death settlement in the estate of the parties' daughter, if on remand for trial the court determines that respondent-mother abandoned her child, she will not be entitled to share in her child's wrongful death benefits because: (1) she was not deprived of the custody of her child under an order of a court of competent jurisdiction; and: (2) she does not meet the requirements for an exception under N.C.G.S. § 31A-2(2).

Appeal by petitioner from order entered 15 December 1998 by Judge W. Osmond Smith in Granville County Superior Court. Heard in the Court of Appeals 28 October 1999.

Edmundson & Burnette, L.L.P., by R. Gene Edmundson and J. Thomas Burnette, for petitioner-appellant.

Haywood, Denny & Miller, L.L.P., by Robert Levin and Thomas H. Moore, for respondent-appellee.

McGEE, Judge.

Petitioner Ross E. Hixson, Jr. appeals from an order of summary judgment entered in favor of respondent Pamela Krebs determining that respondent is entitled to one-half of the proceeds from a wrongful death settlement in the estate of the parties' daughter, Gina Renee Hixson. The record tends to show the following: Petitioner and respondent were formerly married to one another. Gina Renee Hixson and Wendy Elaine Hixson were born of the parties' marriage. Petitioner and respondent signed a separation agreement, which was

incorporated into their divorce judgment in 1976, agreeing that petitioner would have custody of the parties' two minor daughters, and respondent would have visitation. Gina Hixson was eighteen years old when she was killed in an automobile accident in 1991. Petitioner qualified as administrator of his daughter's estate and instituted a wrongful death action on behalf of his daughter's estate.

Petitioner recovered $95,000 in the wrongful death action. In his official capacity as administrator of his daughter's estate, petitioner filed a declaratory action in August 1997 seeking a declaration of rights to the proceeds recovered in the wrongful death action. Respondent answered and subsequently filed a motion for summary judgment. By order entered 1 December 1997, summary judgment was granted for respondent. Petitioner appealed the summary judgment to our Court. The appeal was dismissed by this Court in an unpublished opinion on 18 August 1998 because petitioner filed suit only in his capacity as executor of the estate of Gina Renee Hixson, and the estate was not an aggrieved party entitled to appeal the summary judgment in the declaratory judgment action to determine division of the wrongful death proceeds.

Petitioner filed an identical complaint on 12 August 1998, except the second complaint was on behalf of petitioner individually as well as in his official capacity as administrator of his daughter's estate. Respondent filed an answer on 8 September 1998 and moved for summary judgment on 22 October and 5 November 1998. Petitioner also filed a motion for summary judgment on 5 November 1998. The trial court granted summary judgment in favor of respondent on 15 December 1998, and petitioner filed notice of appeal to our Court on 8 January 1999. Petitioner failed to include a table of authorities in his brief in violation of N.C.R. App. P. Rules 26(g) and 28(b)(1). Nonetheless, we will consider the arguments of the petitioner under the provisions of N.C.R. App. P. Rule 2 "to prevent manifest injustice" to petitioner.

[1] Petitioner argues on appeal that the trial court erred in granting summary judgment for respondent because respondent has not proven the absence of a question of material fact regarding whether she abandoned her daughter before the fatal accident. Gina Hixson died without a will, and our state's Intestate Succession Act provides that:

> If the intestate is not survived by a child, children or any lineal descendent of a deceased child or children, but is survived by

> both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share.

N.C. Gen. Stat. § 29-15(3) (1984); *see Newlin v. Gill, State Treasurer*, 293 N.C. 348, 349, 237 S.E.2d 819, 820 (1977). However, a parent who abandons her or his child may not share in the intestate estate. Chapter 31A of the North Carolina General Statutes, entitled "Acts Barring Property Rights," provides:

> Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

N.C. Gen. Stat. § 31A-2 (1984). The statute also precludes the abandoning parent from sharing in wrongful death proceeds. *Williford v. Williford*, 26 N.C. App. 61, 63, 214 S.E.2d 787, 788, *aff'd*, 288 N.C. 506, 219 S.E.2d 220 (1975). Thus, if respondent "wilfully abandoned the care and maintenance" of her deceased daughter, she may not share in the $95,000 wrongful death award. N.C.G.S. § 31A-2. However, by the second exception to the rule, if respondent was "deprived of the custody [of the decedent] under an order of a court of competent jurisdiction," N.C.G.S. 31A-2(2), and respondent "substantially complied with all orders of the court requiring contribution to the support of the child," *id.*, then she may "share in the wrongful death proceeds notwithstanding an abandonment of the daughter by [her]." *Lessard v. Lessard*, 77 N.C. App. 97, 102, 334 S.E.2d 475, 478 (1985), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986).

Respondent argues that "[t]he issue of how the wrongful death proceeds are to be split in this case has been previously determined by this Court and this Court's prior decision is binding upon the estate." We disagree. Our previous opinion in this case recited the facts and then held that "[a]t the outset, we note that petitioner's appeal must be dismissed." We concluded neither the estate, nor petitioner in his capacity as executor of the estate, were aggrieved parties

entitled to appeal. Hence, our Court did not reach the question whether respondent was entitled to share in the wrongful death award.

In *Lessard,* however, our Court did address the same issue that is now before us: should summary judgment be granted when there is evidence that a parent abandoned a child, but that parent may qualify under the second exception to the rule precluding abandoning parents from sharing in the child's estate. Our Court determined in *Lessard* that whether or not a father abandoned his daughter could not be appropriately resolved by summary judgment where the mother presented evidence that the father "made few, if any, attempts to manifest any love or concern for, or interest in, the child, and refused to perform 'a natural obligation of parental care' by declining to permit the child to live in his home." *Lessard,* 77 N.C. App. at 101, 334 S.E.2d at 477-78. We next determined that under N.C.G.S. § 31A-2(2) the father's substantial compliance with a judgment requiring his financial support of the child also was a question for the jury. *Lessard,* 77 N.C. App. at 101-02, 334 S.E.2d at 478. As in *Lessard,* we first address the issue of abandonment and then consider the exception in N.C.G.S. § 31A-2(2).

Petitioner filed affidavits in support of his motion for summary judgment signed by him and the parties' daughter, Wendy Hixson. Respondent argues that the trial court should not have considered "[t]he affidavits [which] . . . contain improper hearsay assertions and improper legal conclusions[.]" However, the record shows that the affidavits provided by petitioner contain facts from personal knowledge, independent of any legal conclusions, *see* N.C. Gen. Stat. § 1A-1, Rule 56(e), and therefore we reject respondent's contention.

Petitioner stated in his affidavit that: respondent's visits with their children were infrequent and short in duration after the divorce in 1976. Respondent agreed to give custody of their children to petitioner if he paid her bills and made a down payment on a car for her. Respondent did not visit the children more frequently or for longer periods after the visitation schedule was modified in 1977 but did mail birthday and Christmas gifts consisting of a doll or stuffed animal to their daughters. Respondent moved to another state in 1982, and when petitioner asked the Department of Social Services for assistance in collecting child support, he was told that obtaining child support would be very difficult. Respondent's visits were sporadic until 1988, when Gina refused to communicate or visit with respond-

ent any further. From 1988 until her death in 1991, Gina had no relationship with respondent. Petitioner requested child support from respondent for the benefit of their minor daughters over the years but did not receive any child support from respondent for their daughters. Petitioner also paid the entirety of Gina's college expenses shortly before she died. Petitioner worked two jobs from 1970 to 1992 to provide adequate care and financial support for the children. Respondent did not contribute to the $10,000 in burial expenses that petitioner paid following their daughter's death.

Wendy stated in her affidavit filed in support of petitioner's summary judgment motion that: when she was a minor, she saw respondent infrequently and that she continues to see respondent infrequently; as children, she and Gina visited the respondent on some holidays and sometimes in the summers. She further stated that when Gina reached ten years of age, she refused to see respondent but would see her occasionally. She stated that for the two years prior to her death, Gina totally refused to visit with respondent when respondent was in town, except infrequently, and then for only thirty minutes. Wendy does not recall respondent's ever giving her or her sister more than five dollars at any time. During the last two years of her sister's life, Gina did not want to and did not have a relationship with respondent.

Our Supreme Court has defined abandonment as:

> [A]ny wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. [Citations omitted.] Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence.
>
> . . . .
>
> Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. [Citation omitted.]

Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (quoted in *Lessard*, 77 N.C. App. at 101, 334 S.E.2d at 477). As in *Lessard*, respondent in this case may have abandoned the decedent according

to the definitions cited in *Pratt*. Respondent may have "wilful[ly]" and "intentional[ly]" behaved in such a way as to "evince[] a settled purpose to forego all parental duties and relinquish all parental claims to the child" when she made infrequent and short visits with her daughters and refused to support them financially. *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. It could be found that she "refus[ed] to perform the natural and legal obligations of parental care and support," as she may have "withh[eld] [her] presence, [her] love, [her] care, the opportunity to display filial affection, and willfully neglect[ed] to lend support and maintenance." Thus, a jury could conclude that respondent "relinquish[ed] all parental claims and abandon[ed] the [decedent]." *Id.* Summary judgment was granted in error on the issue of whether respondent abandoned Gina Hixson.

[2] Nevertheless, if respondent was "deprived of the custody" of Gina Hixson "under an order of a court of competent jurisdiction" and "substantially complied with all orders of the court requiring contribution to the support of the child," N.C.G.S. § 31A-2(2) provides she may share in the wrongful death benefits even if she abandoned her child. The separation agreement dated 3 February 1975 between petitioner and respondent provides in relevant part that:

> NOW, THEREFORE, said parties for and in consideration of the acts and things herein respectively by them agreed to be done and performed, do mutually agree, each with the other as follows:
>
> . . . .
>
> It is agreed that the said Ross Hixson, Jr. shall have the exclusive supervision, custody, care and control of the said Wendy Elaine Hixson and Gina Renee Hixson, and the said Pamela Kay Hixson shall visit with the said children so long as it does not interfere with their health, eating and sleeping habits.
>
> . . . .
>
> It is agreed that the said Ross Hixson, Jr. shall be responsible for and pay all outstanding bills as of the date of this separation agreement.

We first consider whether, pursuant to their separation agreement, respondent was "deprived of the custody of [] her child under an order of a court of competent jurisdiction[.]" N.C.G.S. 31A-2(2). The 8 April 1976 divorce judgment provides:

THIS CAUSE having come on to be heard before the Undersigned Judge Presiding on the 8 day of April, 1976, and it appearing to the Court that both parties to this action have reached a mutual agreement and desire the same to be embodied in this Court's Judgment, the Court now makes the following Findings of Fact:

. . . .

That there were two children born of this marriage[.] These children are now, under the terms of the Separation Agreement hereinafter referred to, in the custody of [Ross Hixson].

That [Ross Hixson] remains a fit and proper person to have custody of these children subject only to such visitation privileges as [Pamela Hixson] and [Ross Hixson] may agree upon from time to time.

That [Pamela Hixson] and [Ross Hixson] entered into a Separation Agreement dated February 3, 1975, a copy of which is attached to the Complaint in this action, and which terms both [Pamela Hixson] and [Ross Hixson] agree remain just and equitable in this matter.

. . . .

All controversies raised by the Complaint and Answer filed in this action have been settled by the parties.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

. . . .

That the terms of the Separation Agreement dated February 3, 1975, are incorporated herein by reference thereto.

The divorce judgment, in its findings of fact and conclusions of law, relied upon the provisions of the prior separation agreement and clearly did not "deprive" respondent of the custody of Gina Hixson. "[T]he legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." *Wood v. Stevens & Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979) (citations omitted); *see also Regional Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990) ("Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those

words are ordinarily used."). To "deprive" is "to take something away from." The American Heritage College Dictionary 374 (3d ed. 1997); *see also* Black's Law Dictionary 304 (6th ed. 1991) ("deprivation" is "a taking away or confiscation[.]"). Respondent agreed that petitioner would have custody of their children in the parties' separation agreement signed more than a year prior to the entry of the divorce judgment. Thus, respondent was not "deprived of the custody of [] her child under an order of a court of competent jurisdiction," and respondent does not meet the requirements for an exception under N.C.G.S. § 31A-2(2).

We therefore reverse the entry of summary judgment and remand for trial.

Reversed and remanded.

Judges HORTON and EDMUNDS concur.

VAUGHAN S. WINBORNE, JR., PLAINTIFF v. MICHAEL F. EASLEY, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, COLON WILLOUGHBY, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE 10TH PROSECUTORIAL DISTRICT, AND NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS

No. COA98-1523

(Filed 21 December 1999)

1. Elections— limitation on fund-raising during legislative sessions

The trial court did not err in addressing the issue of whether part of N.C.G.S. § 163-278.13B (a)(2), the definition of "limited contributee" in a statute addressing limitations on fund-raising during legislative sessions, was unconstitutional even though plaintiff raised the constitutionality of the statute as it applied to challengers and to political committees desiring to contribute to challengers, because that issue was also properly before the court since plaintiff was seeking a means to obtain contributions from lobbyists and their political committees during the legislative session.

2. Elections— limitation on fund-raising during legislative sessions—compelling governmental interest—not narrowly tailored

The trial court did not err in finding N.C.G.S. § 163-278.13B (a)(2), the definition of "limited contributee" in a statute addressing limitations on fund-raising during legislative sessions, to be unconstitutional as applied to independent political committees accepting contributions on behalf of candidates because although the statute was enacted for the compelling governmental interest of preventing corruption or the appearance of corruption among both incumbents and challengers while the General Assembly is in session, the statute was not narrowly tailored to serve a compelling governmental interest.

3. Elections— limitation on fund-raising during legislative sessions—compelling governmental interest—narrowly tailored

The trial court did not err in finding that N.C.G.S. § 163-278.13B, a limitation on fund-raising during legislative sessions, was constitutional as applied to plaintiff candidate for the General Assembly as a challenger because: (1) a compelling governmental interest was addressed in amending the statute to include challengers; (2) the statute is narrowly tailored in its application to challengers, as well as incumbents; and (3) plaintiff has made no showing that the statute invidiously discriminates against him as a challenger.

Appeal by defendants from an order entered 7 October 1998 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 23 September 1999.

White & Associates, by J. David Stradley, for plaintiff-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorneys General Susan K. Nichols, Alexander McC. Peters, and James Peeler Smith, for defendants-appellants.

Deborah K. Ross and Mebane Rash Whitman for amicus curiae American Civil Liberties Union of North Carolina Legal Foundation, Inc.

WALKER, Judge.

On 2 October 1998, plaintiff filed this action seeking to enjoin defendants from enforcing N.C. Gen. Stat. § 163-278.13B on the

ground that the statute unconstitutionally infringed upon his freedom of speech under the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiff asserted that the statute was unconstitutional as applied to him as a non-incumbent candidate for the General Assembly and as to political action committees desiring to contribute to non-incumbent candidates.

Plaintiff's motion for preliminary injunction, along with defendants' motion to dismiss, was heard on 5 October 1998. Since supporting affidavits and witness testimony were offered by the parties during this hearing, the trial court converted, at defendants' request, the defendants' motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 7 October 1998, after making findings and conclusions, the trial court held that while N.C. Gen. Stat. § 163-278.13B furthered a compelling governmental interest, it was not narrowly tailored to that interest and was unconstitutional. The trial court then entered a declaratory judgment granting partial summary judgment to each party.

Plaintiff's allegations in his complaint included the following:

> 9. Plaintiff Winborne was unopposed of the Democratic nomination for N.C. House District 92 seat, and on May 6, 1998, Mr. Winborne became the Democratic nominee for said seat.
>
> . . .
>
> 11. Since January, 1998, Plaintiff Winborne has actively campaigned for the District 92 N.C. House seat.
>
> 12. The general election will take place on November 3, 1998.
>
> . . .
>
> 14. Section 163-278.13B prohibits political action committees from making contributions to members of, or candidates for, the General Assembly or Council of State while the General Assembly is in session. Additionally, the section prohibits members of, or candidates for, the General Assembly from receiving or soliciting contributions from political action committees while the General Assembly is in session.
>
> 15. The General Assembly convened on May 11, 1998 and continues in session.

> 16. According to widely publicized reports, leaders of the General Assembly have stated that the Assembly may not adjourn until after the general election.
>
> 17. Currently, the general election is approximately 5 weeks away.
>
> . . .
>
> 23. On account of the threat of enforcement of N.C. Gen. Stat. § 163-278.13B, Plaintiff Winborne has been, and continues to be, deprived of contributions to his campaign.
>
> 24. On account of the threat of N.C. Gen. Stat. § 163-278.13B, Plaintiff SEANC has been, and continues to be, deprived of the opportunity to contribute to campaigns of candidates for the General Assembly.

N.C. Gen. Stat. § 163-278.13B(b) and (c), which became effective on 1 January 1998, limits fund-raising during the legislative session, and provides:

> (b) Prohibited Solicitations.—While the General Assembly is in regular session, no limited contributee . . . shall: (1) Solicit a contribution from a limited contributor to be made to that limited contributee or to be made to any other candidate, officeholder, or political committee; . . . .
>
> (c) Prohibited Contributions.—While the General Assembly is in regular session: (1) No limited contributor shall make or offer to make a contribution to a limited contributee. . . . (4) No limited contributee shall accept a contribution from a limited contributor.

N.C. Gen. Stat. § 163-278.13B(b) and (c) (Cum. Supp. 1998). "Limited contributor" is defined as:

> a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes, that lobbyist's agent, or a political committee that employs or contracts with or who parent entity employs or contracts with a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes.

N.C. Gen. Stat. § 163-278.13B(a)(1) (Cum. Supp. 1998). "Limited Contributee" is defined as:

> a member of or candidate for the Council of State, a member of or candidate for the General Assembly, or a political committee the purpose of which is to assist a member or members of or candidate or candidates for the Council of State or General Assembly.

N.C. Gen. Stat. § 163-278.13B(a)(2) (Cum. Supp. 1998).

In its order, the trial court's findings can be summarized as follows: (1) The statute was passed to prevent corruption or the appearance of corruption among both incumbent and non-incumbent legislative candidates. (2) The General Assembly, in adopting the statute, recognized that one of its legislators could be wrongfully influenced by money given directly to him or her during the session or by a lobbyist's threat to give money to a challenger if the incumbent fails to support a program sought by the lobbyist. (3) The prevention of corruption or the appearance of corruption is sufficient to justify some limitation on campaign contributions and thus the free speech protected thereunder by the First and Fourteenth Amendments. The underlying justification for the "in session" prohibition is that lobbyists and their related political committees should not affect or appear to affect ongoing legislation by directly contributing to or receiving solicitations from lawmakers or by threatening contributions to non-incumbent candidates. (4) The statute is overly broad since it is only the "direct" solicitation, contribution, pledge, or threat to contribute that results in the appearance of corruption. The prohibitions relating to the political committees for individual candidates or groups of candidates, which are registered with and regulated by the State Board of Elections, constituted an impermissible restriction on political free speech. (5) That portion of the "limited contributee" definition which pertains to a political committee established to assist an incumbent or challenger for the General Assembly is overly broad and invalid since it imposes a too rigid restriction on political free speech in violation of the First and Fourteenth Amendments to the United States Constitution. This does not, however, invalidate the remainder of the statute in question since the offending language can be severed. With the removal of political committees from the definition of "limited contributee," the remainder of the statute would meet constitutional muster.

After making these findings, the trial court concluded:

> N.C. Gen. Stat. § 163-278.13B was enacted by the General Assembly in furtherance of a valid and compelling governmental

interest—the prevention of corruption and the appearance of corruption and impropriety while the General Assembly is engaged in the business of the people of the State of North Carolina. However, the prohibition imposed by N.C. Gen. Stat. § 163-278.13B, which bans solicitation and contributions by lobbyists and their related political committees to independent committees to elect candidates, incumbent or challenger, is overly broad and invalid in that it imposes a too rigid restraint and restriction on political free speech under the First and Fourteenth Amendments to the United States Constitution. With this particular part removed, the remainder of N.C. Gen. Stat. § 163-278.13B is valid, lawful and remains in effect.

Finally, the trial court entered a declaratory judgment which holds:

a. That N.C.G.S. 163-278.13B was enacted for a compelling governmental purpose to wit: to protect the State and the Legislative Branch of Government from actual corruption or the appearance of corruption or impropriety while the General Assembly is in session.

b. That the portion of N.C.G.S. 163-278.13B(a)(2) "Limited Contributee" which provides that a Limited Contributee means **"a political committee the purpose of which is to assist a member or members of or candidate or candidates for the Council of State or General Assembly"** is overly broad and invalid in that it imposes a too rigid restriction on political free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

c. That the remaining portion of N.C.G.S. 163-278.13B(a)(2) is a valid and appropriate restriction on political contributions and enacted to achieve a compelling governmental interest, . . . and does not violate political free speech secured under the First and Fourteenth Amendments to the United States Constitution.

d. That N.C.G.S. 163-278, of which N.C.G.S. 163-278.13B is a part, contains a severability clause. . . . Accordingly, this Court has the authority to and orders the severance of the invalid language as set forth above from N.C.G.S. 163-278.13B(a)(2).

e. That having severed the invalid language from N.C.G.S. 163-278.13B(a)(2), that section of the statute now reads: N.C.G.S.

163-278.13B(a)(2). **(2) "Limited contributee" means a member of or candidate for the Council of State, a member of or candidate for the General Assembly.**

[f.] That N.C.G.S. 163-278.13B, as it now reads, is valid and enforceable <u>**in its entirety**</u> and a lawful and valid limitation on political free speech, not in conflict with or violation of the First and Fourteenth Amendments to the United States Constitution.

Defendants set forth two assignments of error: (1) the trial court erred in declaring a part of N.C. Gen. Stat. § 163-278.13B(a)(2) unconstitutional when the issue was not raised by the parties, and (2) the trial court erred in granting partial summary judgment to plaintiff on the ground that the statute was unconstitutional as applied to independent political committees of candidates. Plaintiff cross-assigns as error the trial court's award of partial summary judgment to defendants since defendants have failed to demonstrate that this statute serves a compelling governmental interest as applied to the plaintiff.

[1] We first address defendants' contention that the trial court erred in concluding that part of N.C. Gen. Stat. § 163-278.13B(a)(2) was unconstitutional when the issue had not been raised in the trial court. Defendants argue that plaintiff, at the hearing, only raised the constitutionality of the statute as it applied to challengers and to political committees desiring to contribute to challengers. Thus, the trial court addressed an issue not before it.

Plaintiff counters by pointing out that he alleged in his complaint that the statute was unconstitutional because it was "not narrowly tailored to serve any substantial state interest" and was "impermissibly over broad." He further contended that he was "deprived of contributions to his campaign" because of the threat of enforcement of this statute and therefore requested relief from its provisions. Since plaintiff, in this action, was seeking a means to obtain contributions from lobbyists and their political committees during the legislative session, we conclude the issue was properly before the trial court and it did not err in addressing the scope of the definition of "limited contributee" as it pertains to plaintiff as a challenger.

[2] We next address defendants' argument that the trial court erred in finding N.C. Gen. Stat. § 163-278.13B(a)(2) to be unconstitutional as applied to independent political committees accepting contributions on behalf of candidates. Defendants contend it would not be appro-

priate to compare an independent political committee for a legislative candidate with that of a committee established for a judicial candidate, as the trial court did. Further, defendants argue that a legislative candidate would be closely allied with his or her political committee, thus preventing it from being independent.

Restrictions on campaign finance which burden expressive activity under the First Amendment must be narrowly tailored to serve a compelling governmental interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657, 108 L. Ed. 2d 652, 662 (1990), *citing Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659 (1976). The United States Supreme Court in *Austin* applied the strict scrutiny analysis and recognized that the prevention of corruption and the appearance of corruption were "legitimate and compelling" governmental interests for restricting campaign finance. *Austin*, 494 U.S. at 658, 108 L. Ed. 2d at 664. However, because political free speech under the First Amendment has such a high status, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S at 15, 46 L. Ed. 2d at 685. Thus, when the government restricts political contributions and expenditures, it must employ means narrowly drawn to serve its compelling governmental interest. *Id.* at 25, 46 L. Ed. 2d at 691.

N.C. Gen. Stat. § 163-278.13B prohibits, while the General Assembly is in session, incumbents from soliciting or accepting contributions from lobbyists and prohibits lobbyists from making contributions to incumbents. The statute also prohibits lobbyists or their related political committees from indirectly threatening incumbents, while the General Assembly is in session, with contributions to challengers. Thus, the trial court properly concluded that N.C. Gen. Stat. § 163-278.13B was enacted for a compelling governmental interest, i.e. the prevention of corruption or the appearance of corruption among both incumbents and challengers while the General Assembly is in session.

However, the trial court found that the remedy set forth in N.C. Gen. Stat. § 163-278.13B was not narrowly tailored to serve a compelling governmental interest. The statute prohibits "limited contributees" from soliciting or accepting contributions from "limited contributors." The definition of "limited contributee" in the statute includes "a political committee the purpose of which is to assist a member or members of or candidate or candidates for the . . . General

Assembly." Thus, the statute prohibits political committees for the candidates, in addition to the candidates themselves, from soliciting or accepting contributions from lobbyists. The trial court was correct in concluding that this prohibition on political committees, however, was not narrowly drawn to serve the compelling governmental interest of preventing corruption or the appearance of corruption while the General Assembly is in session and therefore constituted an impermissible restriction on political free speech. Thus, the trial court did not err in severing "political committee" from the definition of "limited contributee."

[3] Plaintiff cross-assigns as error the trial court's finding that N.C. Gen. Stat. § 163-278.13B was constitutional as applied to him as a challenger. Plaintiff contends that the statute is not narrowly tailored because it prohibits contributions to challengers who have no influence to peddle.

The trial court observed that the rationale for changing the law to include challengers was to prevent lobbyists and their political committees from using the "threat" of contribution to a challenger as pressure to cause an incumbent to vote on an issue which the lobbyist or the related political committee opposed or championed and to eliminate that outside influence from being asserted against the incumbent. The trial court did not err in concluding that a compelling governmental interest was addressed in amending the statute to include challengers. Therefore, the statute is narrowly tailored in its application to challengers, as well as incumbents.

Further, the United States Supreme Court held that "absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which imposes evenhanded restrictions on its face." *Buckley*, 424 U.S. at 31, 46 L. Ed. 2d at 695. Plaintiff has made no showing in this record that the statute invidiously discriminates against him as a challenger; therefore, his cross-assignment of error is overruled.

Affirmed.

Judges LEWIS and WYNN concur.

DAVID L. HARRY, JR., AND WIFE, MARY C. HARRY, PETITIONERS-APPELLANTS v. MECKLENBURG COUNTY, NORTH CAROLINA; THE ZONING BOARD OF ADJUSTMENT OF MECKLENBURG COUNTY, NORTH CAROLINA; LUCINDA S. CHANDLER, AS MEMBER AND CHAIRPERSON OF THE ZONING BOARD OF ADJUSTMENT OF MECKLENBURG COUNTY; WEST P. HUNTER, JR., KAREN LABOVITZ, THOMAS A. MUSSONI, PATRICIA W. NYSTROM, WILLIAM D. SIMMERVILLE, MARGARET STRALEY AND RICHARD S. YODER, AS MEMBERS OF THE BOARD OF ADJUSTMENT OF MECKLENBURG COUNTY, NORTH CAROLINA; ROBERT L. BRANDON, IN HIS CAPACITY AS ZONING ADMINISTRATOR OF MECKLENBURG COUNTY, NORTH CAROLINA; AND TIMOTHY G. KORNEGAY, RESPONDENTS-APPELLEES

No. COA99-476

(Filed 21 December 1999)

Zoning— principal structures—piers

The Mecklenburg County Board of Adjustment and the trial court erred by deciding and affirming that pier permits should be issued for certain lots on Lake Norman. The only logical construction of the ordinance is that a single family dwelling house is the principal use or structure on a residential building lot in this district, that a pier would constitute an accessory use and structure, and that no accessory use or structure shall be approved, established, or constructed before the principal use is approved. Although the interpretation of the ordinance by those charged with its execution and administration is entitled to deference, the Court of Appeals is not bound by an interpretation contrary to the express purpose of the ordinance.

Appeal by plaintiffs from judgment entered 1 December 1998, and order denying stay entered 3 December 1998, by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1999.

Respondent Timothy G. Kornegay (Kornegay) contracted to purchase four small lots (the remnant parcels) on Lake Norman from Crescent Resources, Inc. (Crescent). David L. Harry, Jr., and wife, Mary C. Harry (plaintiffs), own a residential lot near the remnant parcels. In a separate action, Mecklenburg County File No. 97-CvS-14726, plaintiffs sought a declaration that the remnant parcels must be held by Crescent Resources, Inc., and its successors in title, as "undeveloped open space" and for no other purpose. The denial of plaintiffs' action for declaratory judgment was affirmed by this Court in a separate opinion filed this date.

On 15 September 1997, Kornegay applied to the Charlotte-Mecklenburg Engineering and Building Standards Department (the Department) for permits to build piers on each of the remnant parcels. On 18 September 1997, the Department issued permits to Kornegay, allowing construction of one pier on each of the remnant parcels. When plaintiffs became aware of the issuance of the permits, they sought to have them revoked. The request for revocation of the permits was denied, and plaintiffs appealed to the Zoning Board of Adjustment of Mecklenburg County (the Board). A hearing was held before the Board on 14 January 1998, but respondent Kornegay was not notified of the hearing. After a hearing, a divided Board voted to revoke the pier permits. At Kornegay's request, and over plaintiffs' objection, the Board voted to rehear the matter, and voted on 11 March 1998 to reverse its prior decision and reinstate the issuance of the pier permits. Plaintiffs petitioned the Mecklenburg County Superior Court for certiorari, mandamus, and a decree revoking the building permits. The trial court issued its judgment on 1 December 1998 affirming the action of the Board. On 3 December 1998, the trial court denied plaintiffs' motion to stay construction of the piers during appeal. This appeal followed.

The Tryon Legal Group, by Jerry Alan Reese, for plaintiff appellants.

Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by James O. Cobb, for all defendant appellees other than Timothy G. Kornegay.

Rayburn, Moon & Smith, P.A., by James B. Gatehouse, for defendant appellee Timothy G. Kornegay.

HORTON, Judge.

Although plaintiffs assign numerous errors to the judgment of the superior court which affirmed the action of the zoning board, the primary question before us is whether a pier may be a "principal structure" within the meaning of the Mecklenburg County Zoning Ordinance. We hold that a pier is not a principal structure within the meaning of the Zoning Ordinance of Mecklenburg County, North Carolina (the Ordinance), and reverse the decision of the superior court.

The Ordinance governs the "development and use of all land and structures in the unincorporated area of Mecklenburg County which is outside of the zoning jurisdiction of any other governmental unit." Section 1.103. The lots here in question were within the area gov-

erned by the Ordinance at all times pertinent hereto. Furthermore, there is no dispute that when the permits were issued, the remnant parcels were located in the single family residential (R-3) zoning district, the highest and most restrictive zoning district under the Ordinance. Section 9.102. The purposes of single family residential districts, according to the Ordinance, are

> to protect and promote the development of single family housing and a limited number of public and institutional uses. The standards for these districts are designed to maintain a suitable environment for family living at various densities to accommodate preferences for different housing types. The R-3 and R-4 districts are directed toward suburban single family living.

Section 9.201. Piers are not listed among the uses permitted by right in the single family districts (Section 9.202), nor are they included among the uses permitted under prescribed conditions (Section 9.203). Accessory uses and structures which are "clearly incidental and related to the permitted principal use or structure on the lot" are permitted in the R-3 district. Section 9.204(1). The Ordinance further provides that an "accessory use or structure may be approved in conjunction with approval of the principal use." However, "[n]o accessory use or structure shall be approved, established, or constructed before the principal use is approved in accordance with these regulations." Section 12.401.

Section 12.515 of the Ordinance sets out special requirements for facilities located on or adjacent to the Catawba River and its impoundments, including Lake Norman. The section provides in pertinent part that the purpose of the section is "to provide *supplemental restrictions* to protect and enhance water quality, safety, and public recreational opportunities on the Catawba River and its impoundments," including Lake Norman. (Emphasis added.) The section contains the portions of the Ordinance upon which the Board and the superior court based their decisions:

> (1) In addition to the uses permitted in the underlying district elsewhere in these regulations, the following uses shall be permitted as of right provided they meet all requirements of this Part *and all other requirements established in these regulations:*
>
> (a) Piers.
>
> . . . .

(7) Special requirements for other uses along the Catawba River and its impoundments are as follows:

(a) all principal structures, except for boathouses, piers, walkways, breakwaters, and marine railways, shall be located at least 40 feet landward from the full pond level[.]

Section 12.515(1) & (7) (emphasis added).

Based on the language of Section 12.515(1) and (7), the Board concluded that

> the Zoning Administrator was correct that a pier can be a principle [*sic*] structure as per Code Sections 12.515(1) and (7) of the Mecklenburg County Zoning Ordinance.

Following its thorough review of the matter, the trial court concluded that it "found no errors of law in the record" and affirmed the decisions of the Board. Thus, the question before us is whether the conclusions of the Board and the trial court were correct as a matter of law.

We are to construe municipal ordinances, such as the Zoning Ordinance here in question, "according to the same rules as statutes enacted by the legislature." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "The basic rule is to ascertain and effectuate the intent of the legislative body . . . . The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Id.* (citations omitted).

Turning first to the language of the ordinance, we find that "accessory uses and structures" which are "clearly incidental and related to the permitted principal use or structure on the lot" are allowed. Section 9.204(1). A "[p]rincipal building or structure" is defined as a "building or structure containing the primary use of the lot," and "[p]rincipal use" is the "primary purpose or function that a lot serves or is proposed to serve." Section 2.201. While a pier is certainly a "structure," it is clear from the Ordinance that the primary purpose of a lot in the R-3 district is single family housing and the R-3 district is directed toward suburban single family living. Section 9.201. The only logical construction of the Ordinance is that a single family dwelling house is the principal use or structure on a residential building lot in the R-3 district, and that a pier would constitute an

accessory use and structure "incidental" to the primary use of the lot. With regard to accessory uses and structures, the Ordinance also provides that "[n]o accessory use or structure shall be approved, established, or constructed *before* the principal use is approved in accordance with these regulations." Section 12.401 (emphasis added).

Both the Board and the superior court rely on the language of Section 12.515 of the Ordinance to support the conclusion that a pier may be a principal structure within the meaning of the Ordinance. In doing so, they ignore other pertinent language of the Section, which language provides that the purpose of the Section is to provide "supplemental restrictions" on Lake Norman properties. Section 12.515 provides that "[t]he restrictions of this Part shall be *supplemental* to any other standards established in these regulations and governing any individual property on or adjacent to the Catawba River and its impoundments." (Emphasis added.) Piers are among those uses permitted as a matter of right "provided they meet all requirements of this Part and all other requirements established in these regulations[.]" Section 12.515(1). Defendants base their argument on the language of (7)(a) of Section 12.515 which provides that "[a]ll principal structures, except for boathouses, piers, walkways, breakwaters, and marine railways, shall be located at least 40 feet landward from the full pond level[.]"

Defendants argue that the implication of Section 12.515(7)(a) is that piers may be "principal structures." We agree that the subsection is not artfully worded, but do not agree that the language or intention of the drafters was to make the enumerated marine structures "principal" structures within the meaning of the Ordinance. First, the apparent intent of Section 12.515(7)(a) is to make it clear that marine structures, which are normally built in or near the water, need not be set back 40 feet from the water. Second, counsel have not directed our attention to, nor are we able to find, any other provision of the Ordinance which intimates that a pier can be a principal structure. Indeed, the general provisions with regard to a lot in the R-3 district make it clear that a single family residence is the primary use of such lot. Third, the provisions of Section 12.515, by their own terms, are supplemental to "any other standards" established by other provisions of the Ordinance. Giving "supplemental" its plain meaning, the provisions of Section 12.515 are intended to add to, or complete, the preceding sections of the Ordinance, not to replace or modify them.

Finally, the Ordinance itself contains rules which govern its construction. Section 2.101(3) provides that "[i]n the event of any conflict in limitations, requirements, or standards applying to an individual use or structure, the more stringent or restrictive provision shall apply." Even assuming that the provisions of Section 12.515(7) cause a conflict with the restrictions and regulations governing the use of land in the R-3 district, the more "stringent or restrictive" interpretation would be to treat piers as accessory structures, not as principal structures.

We are aware that the interpretation of the Ordinance by those who are charged with execution and administration of the zoning ordinance is entitled to consideration and some deference. *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). Therefore, we have carefully considered the testimony of the Zoning Administrator. However, we are not bound by any interpretation adopted by the Board that is contrary to the express purpose of the Ordinance, particularly as it relates to the purposes of the R-3 district and the uses permitted therein. Consequently, the decision of the Board and the superior court must be reversed.

It is, therefore, ordered that the decision of the Superior Court of Mecklenburg County is reversed and the case is remanded to the Superior Court of Mecklenburg County. The superior court is to enter a judgment reversing the decisions of the Zoning Board of Adjustment of Mecklenburg County which granted pier permits to the defendant Timothy G. Kornegay.

Reversed and remanded.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA BY AND THROUGH THE ANSON/RICHMOND CHILD SUPPORT ENFORCEMENT AGENCY, EX REL, ANITA H. DESSELBERG, PLAINTIFF v. DANNY R. PEELE, DEFENDANT

No. COA99-151

(Filed 21 December 1999)

1. Process and Service— personal jurisdiction—certificate of addressing and mailing—foreign child support order

Although there was no affidavit averring the circumstances of service as required by N.C.G.S. § 1-75-10(4) to prove service by mail in a foreign country, the trial court did not err in concluding a German court had personal jurisdiction over defendant-father in a child support matter because the actions of the German court and the U.S. Marshal's office satisfied the requisite proof of service since plaintiff is able to prove service by mail in a foreign country by a certificate of addressing and mailing by the clerk of court, just as a North Carolina citizen is allowed to do pursuant to N.C.G.S. § 1A-1, Rule 4(j3).

2. Process and Service— certified mail—foreign child support order

Even if the U.S. Marshal's signed statement indicating that the German child support court documents were mailed certified to defendant-father had deficiencies, plaintiff presented satisfactory proof of proper service of process under N.C.G.S. § 1A-1, Rule 4(j)(1)(c) because: (1) the U.S. Marshal sent process by certified mail, return receipt requested, to defendant at the address where defendant admitted he lived; (2) defendant admitted he received papers from the U.S. Marshal service and positively identified his signature on the return receipt; (3) defendant testified he took the papers to his lawyer upon receipt some four months before the noticed trial date; and (4) there was sufficient proof the German court sent an English translation of the summons and complaint.

3. Child Support, Custody, and Visitation— support—foreign order—comity

The trial court did not err by giving effect to a German court's judgment of paternity and order for child support because North Carolina courts may recognize and enforce orders from foreign countries under the principle of comity of nations so long as the foreign court has jurisdiction over the cause and the parties.

Appeal by defendant from order entered by Judge Kevin M. Bridges in Richmond County District Court. Heard in the Court of Appeals 25 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Gerald K. Robbins, for the State.

Drake & Pleasant, by Henry T. Drake, for the defendant-appellant.

EAGLES, Chief Judge.

This case presents the question of whether the District Court of Richmond County may enforce a German court's child support order.

Defendant Danny R. Peele served in the United States Army and was stationed in Germany for fifteen months beginning in September of 1982. Within nine months after defendant left Germany, plaintiff Anita Desselberg gave birth to a son, Danny Frank Desselberg. In 1986, plaintiff filed a complaint with the local court in Habfurt, Germany seeking to establish paternity and child support. The German court then contacted the U.S. Marshal's office to facilitate service on the defendant. On 10 February 1986, the U.S. Marshal's office caused the defendant to be served with notice of the complaint by certified mail at his home in Hamlet, North Carolina. Defendant admitted that he received "the first batch of papers" in February of 1986 and positively identified his signature on the certified mail receipt. Defendant could not remember whether the papers had an English translation, but he did testify that "he knew what they were concerning." Defendant testified that he took the papers he received in the mail to a local attorney, not his appellate counsel. Defendant claims that this attorney told him not to worry about this matter and that he would "get back to [him] on it." Defendant claims that the attorney did not contact him and therefore defendant took no further action.

On 10 June 1986, the German court entered an order determining defendant to be the father of Danny Frank Desselberg and ordering him to pay child support. The German court modified this award by order in 1993 increasing the amount owed. On 14 November 1995, plaintiff registered the German court orders in Richmond County pursuant to the Uniform Reciprocal Enforcement of Support Act, G.S. Ch. 52A, repealed 1995 N.C. Sess. Laws 538 s. 7(a). On 17 November

1995, the Richmond County Sheriff's Office served the Notice of Registration of the Foreign Support Order on the defendant. On 1 December 1995, defendant filed a motion seeking to vacate registration of the order.

On 6 October 1997, the motion was heard in the Richmond County District Court. On 22 February 1998, the trial court issued an order denying defendant's motion to vacate. In its order, the trial court found that defendant had been properly served with the original 1986 complaint. The court also concluded that the plaintiff was entitled to register the foreign support order in Richmond County. Defendant appeals.

Defendant claims that he was not properly served with notice of the original complaint. Defendant argues that the record does not contain a document certifying service of the original complaint. Additionally, defendant claims that there was no English translation of the summons and complaint supplied by the German court. Therefore, defendant contends that the German court insufficiently served him under Rule 4 of the North Carolina Rules of Civil Procedure and that the German court lacked personal jurisdiction over him. Accordingly, defendant argues that North Carolina courts may not enforce the German court's judgment. We disagree and affirm the trial court.

"A court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods." *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999). Absent valid service, a court does not acquire personal jurisdiction and the action must be dismissed. *Id.* The purpose of the service requirement is to provide the party with notice and allow him an opportunity to answer or plead otherwise. *Id.* Here, plaintiff sought service under G.S. § 1A-1 N.C.R. Civ. P. 4(j)(1)(c) (Supp. 1998). Rule 4(j)(1)(c) provides that a party may serve another party "By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivered to the addressee." This method of service is also accepted by international treaty under the Hague Convention. *See Hayes v. Evergo Telephone Company, Ltd.*, 100 N.C. App. 474, 397 S.E.2d 325 (1990). Article Ten of the Convention states:

> Provided the State of destination does not object, the present Convention shall not interfere with—

> (a) the freedom to send judicial documents by postal channels directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State or origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

20 U.S.T. 362, T.I.A.S. 6638, Article 10. The United States has not objected to service pursuant to "postal channels." *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986).

[1] Here, defendant does not dispute that he received the German summons and complaint. Defendant claims that no one properly proved service by filing an affidavit averring the circumstances of service of the German court documents as required by G.S. § 1-75.10(4) (1996). Therefore, defendant argues the German court never had jurisdiction to enter the original 1986 judgment. G.S. § 1A-1 N.C.R. Civ. Pro. 4(j2)(2) (Supp. 1998) provides that "before judgment by default may be had on service by registered mail, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. § 1-75.10(4)." G.S. § 1-75.11 (1996) states that "where a defendant fails to appear in the action within apt time the court shall before entering a judgment against such defendant require proof of service of the summons in the manner required by G.S. § 1-75.10 . . . ." G.S. § 1-75.10 provides:

> Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> . . . .
>
> (4) Service by Registered or Certified Mail. In the case of service by registered or certified mail, by affidavit of the serving party averring:
>
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

Further we note that for cases involving service in a foreign country a party may prove service by mail by "an affidavit or a certificate of addressing and mailing by the clerk of court." G.S. § 1A-1 N.C.R. Civ. P. 4(j3) (Supp. 1998).

While there is no affidavit as required by G.S. § 1-75.10, a careful reading of the record indicates that the actions of the German court and the U.S. Marshal's office satisfied the requisite proof of service. A North Carolina citizen may prove service by mail in a foreign country by a certificate of addressing and mailing by the clerk of court. N.C.R. Civ. P. 4(j3). In the interest of fairness, the plaintiff should also be able to prove service by mail in the same fashion. The actions of the German court and U.S. Marshall's Office satisfy this burden.

Here, the Local Court of Habfurt Germany requested service by certificate on Danny R. Peele at Rt. 3, Box 544, Hamlet, North Carolina, pursuant to the Hague Convention. Defendant admitted that he lived at that address when the German court sent the request. The U.S. Marshal's signed statement indicated that the documents were mailed certified as P277 933 485 on 5 February 1986, were served on 10 February 1986 and the receipt returned was signed on 12 February 1986. This signed statement bears the seal of the German court. The record also contains the return receipt bearing the signature of Danny R. Peele. At the hearing, defendant positively identified the signature as being his and testified that he lived at Rt. 3, Box 544, Hamlet, North Carolina, in February of 1986. We hold that this is sufficient competent evidence to support the trial court's findings that the defendant was properly served. Accordingly, we hold that the German court had personal jurisdiction over the defendant and its original judgment is valid.

[2] Assuming arguendo that the U.S. Marshal's signed statement has deficiencies, defendant's argument still fails. This Court has stated that it is the service of process and not the return of the officer which confers jurisdiction. *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 462, 265 S.E.2d 633, 635 (1980); *Parris v. Disposal, Inc.*, 40 N.C. App. 282, 288, 253 S.E.2d 29, 33, *disc. review*

denied, 297 N.C. 455, 256 S.E.2d 808 (1979). In *Williams*, this Court further stated that

> the officer's return shall constitute proof of service in fact, and the better practice is for officials to make the return specifying in detail upon whom and in what manner process was served, we do not construe that statute as precluding the plaintiff, in a case where the return on its face does not affirmatively disclose facts showing nonservice, from offering additional proof to establish that service was made as required by law.

Williams, 46 N.C. App. at 462, 265 S.E.2d at 635.

Here, plaintiff presented satisfactory proof of the service of process. Defendant admitted that he lived at Rt. 3, Box 544, Hamlet, North Carolina, in February of 1986. The U.S. Marshal's service sent process by certified mail, return receipt requested, to defendant at that address. Defendant admitted that he received papers from the U.S. Marshal service and positively identified his signature on the return receipt. Additionally, defendant testified that he took the papers to his lawyer upon receipt some four months before the noticed trial date. We hold that this constitutes sufficient proof of service under N.C.R. Civ. Pro. 4(j)(1)(c).

There is also sufficient evidence that the German court sent an English translation of the summons and complaint. Defendant testified that he was not sure whether an English translation accompanied the German summons and complaint. However, defendant did testify in regard to the papers, "that he knew what it was concerning." Further, he took the 1986 complaint and summons to an attorney who was going to write Congress about obtaining a paternity test. Based on this competent evidence, the trial court could have found that defendant was properly served.

[3] Finally, defendant argues that the trial court erred by giving effect to the German court's judgment of paternity and order for child support. Neither the Full Faith and Credit Clause of the United States Constitution nor the Full Faith and Credit for Child Support Orders Act 28 U.S.C. 1738B (1994) applies to orders entered by foreign countries. *See Southern v. Southern*, 43 N.C. App. 159, 258 S.E.2d 422 (1979). However, North Carolina courts may recognize and enforce orders from foreign countries under the principle of comity of nations. *Id.* Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another

nation, having due regard both to international duty and convenience, and to the right of its own citizens." *Id.* at 161-62, 258 S.E.2d at 424. So long as the foreign court has jurisdiction over the cause and the parties, our courts may choose to enforce a foreign order. *Id.* at 162, 258 S.E.2d at 424. We have already held that the German court obtained jurisdiction over the defendant. Defendant has made no showing of any fundamental unfairness or a violation of his rights to Due Process. Therefore, the trial court was within its power to enforce the German court's order under the principle of comity. Accordingly, we affirm the trial court.

Affirmed.

Judges JOHN and HUNTER concur.

THROUGH THE LOOKING GLASS, INC., PETITIONER-APPELLANT v. THE ZONING BOARD OF ADJUSTMENT FOR THE CITY OF CHARLOTTE, NORTH CAROLINA, RESPONDENT-APPELLEE

No. COA99-69

(Filed 21 December 1999)

Zoning— variance—similar situations

A trial court decision affirming the Board of Adjustment's denial of variances was reversed and remanded where, despite the similarities between defendant's lot and requested variance and a neighboring lot which received a similar variance, the Board denied petitioner's request without setting forth sufficient findings and conclusions for the appellate court to adequately determine whether the decision was supported by competent, material, and substantial evidence or whether it was arbitrary and capricious.

Appeal by petitioner from judgment entered 14 October 1998 and filed 16 October 1998 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 1999.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., for petitioner-appellant.

City of Charlotte, Office of the City Attorney, by Assistant City Attorneys David M. Smith and Robert E. Hagemann, for respondent-appellee.

WALKER, Judge.

Petitioner requested that the Board of Adjustment (Board) for the City of Charlotte grant it variances. At its meeting on 24 February 1998, the Board denied the following two variances: (1) elimination of the 10 foot Class C buffer requirement for the adjoining residence which was zoned residential to allow the driveway to remain in place, and (2) elimination of a 5 foot setback for the driveway. Petitioner then appealed through a *writ of certiorari* to the superior court, which determined that respondent's decision was supported by material, competent, and substantial evidence based upon the whole record and affirmed the decision.

Petitioner's evidence before the Board tended to establish the following: In November 1997, petitioner purchased the fifty foot lot (Lot) at 1818 Lombardy Circle, which consists of less than one-half of an acre. At that time, the Lot was zoned O-2 for office use and the previous owner had used it as both a residence and a floral shop. Petitioner planned to use the Lot as an office for its antique business, which would organize antique buying trips for individuals and dealers who wanted to purchase antiques overseas. In transacting its business, petitioner would not deliver, store, or show goods at its office. Petitioner would use the office only to arrange the buying trips and to conduct the accounting functions associated with these trips. Additionally, while petitioner has three employees who work in the office, it also has an adequate number of parking spaces at the rear of the Lot for more vehicles than required by the zoning ordinance (Ordinance).

When petitioner acquired the Lot, the three other lots at the northwest end of Lombardy Circle, which are also located in the O-2 zone, were used as a Wildlife Federation office building, a parking lot, and a multiple-tenant office building. After purchasing the lot, petitioner learned that the prior owner had failed to secure the necessary permits to operate the floral shop on the Lot and that the property could not be used as an office without meeting certain buffer requirements which are imposed on property zoned O-2 and

which abuts a residential zone. Petitioner alleges that it did not know or have reason to know when it acquired the Lot that either the current or purposed use of the Lot was in violation of the Ordinance. Thus, petitioner filed an application requesting variances from the Ordinance.

The applicable provisions of the Ordinance for lots in an O-2 zone are set forth as follows: Code Tables 12.302 (a) and (b) require a parcel less than one-half acre developed as an office use to provide a 10 foot Class C buffer where the parcel abuts a single family use or zoning district. Code Section 12.206(3) provides that no off-street parking or driveways are permitted within 5 feet of any exterior lot line. Code Section 9.705(1)(f) requires a minimum 5 foot side yard for nonresidential development.

The standards for granting a variance are set forth in § 5.108 of the Ordinance which provides:

> (1) Before granting a variance, the Board . . . shall find: (a) That practical difficulties or unnecessary hardship would result from the strict application of these regulations; and (b) That the spirit of these regulations should be observed by taking into consideration the general intent of these regulations . . ., and (c) That the public safety and welfare have been protected and substantial justice done.
>
> . . .
>
> (3) Only the following three conditions shall constitute a practical difficulty or unnecessary hardship and all three must be met: (a) The difficulty or hardship would result only from these regulations and from no other cause, including the actions of the owner or previous owners of the property; and (b) The difficulty or hardship is peculiar to the property in question and is not generally shared by other properties in the same neighborhood and/or used for the same purposes; and (c) The difficulty or hardship resulting from the application of these regulations would prevent the owner from securing a reasonable return or making a reasonable use of the property. . . .

Petitioner alleges that the variances sought by it were essentially identical to those sought in February 1997 by the property owner of the lot which is directly across the street (lot 22). Lot 22 had been granted five variances by the Board:

> 1) a 10 foot variance in the required 10 foot wide Class "C" buffer adjacent to Tax Parcel Number 151-023-23 (eliminate buffer) to allow the existing driveway to remain;
>
> 2) a 5 foot variance in the required 5 foot separation from any lot line to allow the same driveway in the side yard;
>
> 3) a 10 foot variance in the required 10 foot wide Class "C" buffer adjacent to Tax Parcel Number 151-023-14 (eliminate buffer) to allow parking in the rear yard;
>
> 4) a 5 foot variance in the required 5 foot side yard adjacent to Tax Parcel Number 151-023-23 (eliminate required side yard) to allow an existing carport to remain; and
>
> 5) a .7 foot variance in the required side yard adjacent to Tax Parcel Number 151-023-21 (O-2 zoning) to allow an existing screen porch to remain, **with the condition that a 6 foot wooden fence be erected along the rear property line with the planting of two (2) trees and that the existing wooden fence is maintained as currently erected. . . .**

The Board, however, denied petitioner's request for two variances, and its findings included the following:

> 19. The Applicant submitted a Board decision letter of February 25, 1997, pertaining to lot 22 across the street from the Applicant's property, where the Board granted in part a variance from the 10 foot buffer and 5 foot driveway separation.
>
> 20. The Board cannot adequately assess the Board's lot 22 decision based upon the submitted material. Each decision rests upon the particular facts in the case. The lot 22 case reveals, for example, that an existing wooden fence had to be maintained between the driveway and the abutting property.

Based on these findings, the Board concluded:

> In respect to Code Section 5.108 "Standards for Granting a Variance:"
>
> 1. The hardship is not the result of the Zoning Ordinance but that the Applicant's lot has difficulty accommodating a 10 foot buffer on one side and a 5 foot driveway separation from residentially zoned property.

2. The spirit of the Zoning Ordinance would not be observed if a 10 foot buffer requirement on one side and a 5 foot driveway separation were both completely eliminated to allow an office use to abut a single-family residentially zoned district, and, therefore, the Board would be in effect amending the Zoning Ordinance.

3. The purpose of the buffer and separation requirements is to protect the welfare of the Lombardy Circle neighborhood and, therefore, the elimination entirely of both requirements to allow an office use in a residential structure would not achieve substantial justice.

Judicial review of the decision of the Board of Adjustment is limited to: (1) reviewing the record for errors in law; (2) insuring procedures specified in both the statute and ordinance are followed; (3) insuring appropriate due process rights of a petitioner are protected, including the right to offer evidence, to cross-examine witnesses, and to inspect documents; (4) insuring decisions of the town board are supported by competent, material and substantial evidence in the whole record; and (5) insuring the decisions are not arbitrary and capricious. *Crist v. City of Jacksonville*, 131 N.C. App. 404, 507 S.E.2d 899 (1998). On appeal from a decision of the Board of Adjustment, the reviewing court must determine whether the Board made sufficient findings of fact which are supported by the evidence before it. *Id.* Findings of fact are an important safeguard against arbitrary and capricious action by the Board because they establish a sufficient record upon which this Court can review the Board's decision. *Id.* Thus, the Board must set forth the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision and may not rely on findings which are merely conclusory in form. *Shoney's v. Bd. of Adjustment For City of Asheville*, 119 N.C. App. 420, 458 S.E.2d 510 (1995).

Here, the Board's findings referenced its prior decision regarding lot 22, but only to the extent that it could not "assess the Board's lot 22 decision based upon the submitted material." Apparently the Board did not render a decision with findings and conclusions in granting the variances for lot 22. The record only contains a letter from the zoning administrator to the applicant for lot 22 advising that the Board granted the requested variances on 25 February 1997. However, the record on appeal contains information which reveals that lot 22 is essentially identical to petitioner's lot. Both lots are approximately the same size, zoned O-2 for office use, and adjoin the

same residential district. The two variances sought by petitioner here are also essentially identical to two of those which were granted for lot 22 in that both properties sought variances to eliminate the 10 foot buffer and the 5 foot separation requirement.

We recognize that the Board of Adjustment is not required to grant a petitioner a variance merely because it granted another petitioner a variance for the same type of property in the same district. *See* PHILIP P. GREEN, JR., FUNCTIONS OF THE ZONING BOARD OF ADJUSTMENT IN NORTH CAROLINA, 1974, at 4 (Institute of Government, The University of North Carolina at Chapel Hill); *Harden v. Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926). Instead, the Board should closely examine the facts in each case to determine whether the variance should be granted under the standards of the ordinance. GREEN, *supra*, at 4. Where the fact situations are exactly the same in two cases, the decisions should, of course, be the same. *Id.* Where the facts differ, each case must be examined independently to determine whether its facts bring it within the principles of the ordinance. *Id.* The Board's interpretation of the meaning of these principles should remain uniform, but not its decisions where different fact situations are involved. *Id.*

The only reason assigned by the Board that lot 22 is distinguishable from petitioner's lot is that the existing fence had to be maintained on lot 22. Petitioner argues, however, that its lot likewise contains a fence which it is willing to maintain. Furthermore, the Board in its findings and conclusions failed to address § 5.108(3) of the Ordinance when it concluded that the hardship here did not result from the Ordinance but from the fact that petitioner's lot has difficulty accommodating a 10 foot buffer on one side and a 5 foot driveway separation from residentially zoned property. Despite the similarities in the two lots and in the variances requested for both of these lots, the Board denied petitioner's request for the two variances without setting forth sufficient findings and conclusions for this Court to adequately determine whether its decision was supported by competent, material, and substantial evidence or whether its decision was arbitrary and capricious.

Therefore, the order of the superior court affirming the Board's decision is reversed, and the cause is remanded to the superior court for remand to the Board for further proceedings consistent with this opinion.

Reversed and remanded.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. MARLON KEITH WILLIAMS

No. COA98-1426

(Filed 21 December 1999)

1. Drugs— trafficking in cocaine—possession element—sufficiency of evidence

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to dismiss based on insufficient evidence to establish the possession element of the charge, even though defendant did not have actual possession of an illegal substance, because an inference of constructive possession arises when a defendant has exclusive control over the premises where the controlled substance is found.

2. Criminal Law— instructions—requested—exact language not required—given in substance

The trial court did not err in a trafficking in cocaine case by refusing to give two requested jury instructions because the trial court is not required to give a requested instruction in the exact language of the request, so long as the instruction is given in substance.

3. Criminal Law— instructions—repetition—judge fulfilling obligation to instruct and clarify

The trial court did not err in a trafficking in cocaine case by clarifying the possession instruction to the jury three times, as requested by the jury, because the judge was merely fulfilling his obligation to instruct and clarify any source of confusion.

Appeal by defendant from judgment entered 23 June 1998 by Judge John M. Gardner, Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 1999.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for the State.

Yurko & Owens, P.A., by N. Todd Owens, for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 22 June 1998 session of Mecklenburg County Superior Court. The jury returned a verdict of guilty on one count of trafficking in cocaine by possession of 200 grams or more but less than 400 grams. Defendant was sentenced to seventy to eighty-four months' imprisonment. Defendant appeals, making three arguments.

The State's evidence tended to show the following. As of 20 August 1997, defendant had been living in Rooms 319 and 321 at the McDonald's Inn in Mecklenburg County, North Carolina, for two months. The rooms had a connecting door and defendant had keys to both rooms. A fire occurred at the hotel on 20 August 1997, to which police officers responded and were present to assist hotel patrons in removing their personal belongings from their rooms. Defendant was escorted by an officer to Room 319 to gather his personal belongings. Defendant authorized the officer to enter Room 319; the connecting door to Room 321 was open.

Upon entrance, the officer noticed a gun case and bullets on the floor. Defendant stated there was no gun in the room and allowed the officer to look around the rooms. The officer observed defendant's clothing and personal items in both rooms. As defendant removed his personal belongings, the officer discovered $8130 in cash under the box spring of a bed. The cash consisted of thirty-three ten dollar bills, three hundred ten twenty dollar bills, twelve fifty dollar bills and ten one-hundred dollar bills. The officer called for assistance to detain defendant, but defendant had already driven out of the parking lot. The officer conducted a more thorough search and discovered in Room 321 a traffic citation issued to defendant, defendant's birth certificate, defendant's high school diploma and pictures. The officer also discovered a quantity of cocaine concealed above the ceiling tiles in the bathroom in Room 319. Defendant stipulated that on 20 August 1997, 247.21 grams of cocaine were seized from Room 319 of the McDonald's Inn in Mecklenburg County.

[1] Defendant first argues the trial court's refusal to dismiss the charges against him for insufficient evidence was reversible error. In

ruling on a motion to dismiss, the trial court must 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). To withstand a motion to dismiss for insufficiency of the evidence, the State must present substantial evidence of each of the essential elements of the crime charged. *State v. Workman*, 309 N.C. 594, 598, 308 S.E.2d 264, 267 (1983). Substantial evidence means more than a scintilla. *State v. Thomas*, 65 N.C. App. 539, 541, 309 S.E.2d 564, 566 (1983). The jury must resolve conflicts and contradictions within the testimony. *State v. Thompson*, 37 N.C. App. 628, 636, 246 S.E.2d 827, 833 (1978).

Here, defendant was charged with trafficking in cocaine by possession. To withstand a motion to dismiss, then, the evidence viewed in the light most favorable to the State must have been substantial as to each of the following elements: that defendant (i) knowingly, (ii) possessed, (iii) 200 grams or more but less than 400 grams, (iv) of cocaine. N.C. Gen. Stat. § 90-95(h)(3)(b) (1997). Defendant disputes that the State put forth sufficient evidence to establish the possession element of the charge. Specifically, defendant asserts that he did not have actual possession of an illegal substance and his mere proximity to an illegal substance was insufficient to establish any evidence of constructive possession. We disagree.

An accused's possession of an illegal substance can be actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). There is no evidence of actual possession in this case; thus, the question becomes whether the State put forth sufficient evidence manifesting defendant's constructive possession. Constructive possession of a controlled substance exists where there is no actual personal dominion over the controlled substance, but there is an intent and capability to maintain control and dominion over it. *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). An inference of constructive possession arises when a defendant has exclusive control over the premises where the controlled substance is found. *Id. at* 569, 313 S.E.2d at 588-89. Such an inference may also arise where defendant's possession of the premises is nonexclusive, so long as other incriminating circumstances are shown to exist. *Id.*

A careful review of the record in this case indicates that the State presented more than a scintilla of evidence establishing that defendant had exclusive control over the premises which was sufficient to withstand a motion to dismiss. The State's evidence tended to show

that defendant rented the motel rooms and was the sole occupant of the rooms. Specifically, defendant retained the keys to both rooms and only defendant's personal belongings, including his birth certificate, two diplomas and a traffic citation, were seized from the rooms. None of the evidence indicated that defendant's possession of the rooms was non-exclusive, for instance, that other persons occupied the rooms during defendant's two-month stay. We therefore find sufficient evidence of defendant's exclusive control such that the trial court appropriately submitted the case to the jury.

[2] Defendant next brings forward three assignments of error challenging the trial court's refusal to give two requested jury instructions. First, defendant requested the court to instruct the jury that it could not infer guilt from defendant's mere presence at the scene. If a request is made for a specific instruction which is correct in law and supported by the evidence, the trial judge must give the instruction. *State v. Townsend*, 99 N.C. App. 534, 538, 393 S.E.2d 551, 553 (1990). The trial court, however, is not required to give a requested instruction in the exact language of the request, so long as the instruction is given in substance. *Id.*

In accordance with this rule, we held in *Townsend* that the trial court effectively fulfilled defendant's requested mere presence instruction, though not in the exact language of the request, where the jury was instructed that in order to convict, it must "find beyond a reasonable doubt that defendant, 'acting either by himself or acting together with other persons did possess cocaine and marijuana for the purpose of delivery and sale, and did operate a dwelling house for the purpose of selling the illegal substance[.]' " *Id.* at 538, 393 S.E.2d at 553-54. Likewise, the jury here was instructed as follows:

> [I]f you find from the evidence beyond a reasonable doubt, that on or about the alleged date, the Defendant knowingly possessed cocaine, and that the amount which he possessed was 200 grams or more but less than 400 grams of that substance, it would be your duty to return a verdict of guilty of trafficking in cocaine. However, if you do not so find or if you have a reasonable doubt as to either one or both of these things, then it would be your duty to return a verdict of not guilty.

Although the court refused defendant's request for a specific mere presence instruction here, as in *Townsend*, the court provided defendant's requested instruction in substance. We find no error in the court's choice.

Defendant also challenges the trial court's refusal to instruct the jury on actual and constructive possession. The trial court refused to use the labels "actual" and "constructive" to avoid confusion, and instead, instructed the jury as follows:

> [A] person possesses cocaine when he is aware of its presence, and has both the power and intent to control its disposition or use. I instruct you that if you find, beyond a reasonable doubt, that a substance was found in certain premises or on certain premises, and that the Defendant exercised control over those premises whether or not he owned them, this would be a circumstance from which you may but are not required to infer that the Defendant was aware of the presence of the substance, and had the power and intent to control its disposition or use.

Defendant concedes that the trial court provided his requested instruction in substance. We agree, in that the trial court provided an instruction which encompassed both actual and constructive possession without specifically labeling the distinction between "actual" and "constructive." Having provided defendant's request in substance, we find no error in the court's refusal to label the distinction between actual and constructive possession. *State v. Wells*, 27 N.C. App. 144, 145-46, 218 S.E.2d 225, 226-27 (1975).

[3] Defendant further argues the trial judge unduly emphasized its instruction on possession by clarifying the instruction to the jury three times. It is well-settled that the trial court is under an obligation to decide any legal questions and to instruct the jury on the law arising from the evidence presented at trial. *State v. Canipe*, 240 N.C. 60, 63, 81 S.E.2d 173, 176 (1954). Further, the purpose of an instruction to the jury is to clarify issues so that the jury can apply the law to the facts of the case. *State v. Cousin*, 292 N.C. 461, 464, 233 S.E.2d 554, 556 (1977). By repeating the jury instructions as requested, the trial judge was fulfilling his obligation to instruct and clarify any sources of confusion therein. We find that the trial judge responded to the jury's request for clarification fairly and accurately and the repetition did not prejudice defendant. Accordingly, defendant's assignments of error are dismissed.

No error.

Judges JOHN and McGEE concur.

LEXINGTON INSURANCE COMPANY, A/S/O SANBORN, INC. v. TIRES INTO RECYCLED ENERGY AND SUPPLIES, INC.

No. COA99-206

(Filed 21 December 1999)

Insurance— subrogation rights—landlord and tenant—lease governs liabilities

The trial court did not err in granting summary judgment in favor of defendant-tenant in a subrogation action to recover damages for a fire allegedly caused by defendant because: (1) the terms of the lease govern the liabilities of the parties where the insured is a landlord and the third party is a tenant; (2) the plain and unambiguous language of the lease between defendant and plaintiff's insured evidences the intent of each of the parties to relieve the other from all liability for damages otherwise covered by insurance, including liability for negligence; and (3) plaintiff-insurer could have no greater rights against defendant through subrogation than its insured.

Appeal by plaintiff from judgment entered 3 November 1998 by Judge Lester Martin in Forsyth County Superior Court. Heard in the Court of Appeals 25 October 1999.

Cozen and O'Connor, by T. David Higgins, Jr., for plaintiff-appellant.

Kilpatrick Stockton, LLP, by James H. Kelly, Jr., and Christopher C. Fox, for defendant-appellee.

MARTIN, Judge.

Lexington Insurance Company ("Lexington") brought this subrogation action against Tires Into Recycled Energy and Supplies, Inc., ("TIRES") to recover damages for a fire allegedly caused by TIRES, which damaged property leased to TIRES by Lexington's insured, Sanborn, Inc. ("Sanborn"). The lease from Sanborn to TIRES covered a commercial building located on Waughtown Street in Winston-Salem, North Carolina, and contained the following provision:

> 18. Waiver of Subrogation. Each party, notwithstanding any provision of this Lease otherwise permitting such recovery, hereby waives any rights of recovery against the other for loss or injury against which such party is protected by insurance, to the extent

> of the coverage provided by such insurance. Each insurance policy carried by either party with respect to the Leased Premises or the property of which they are a part which insures the interest of one party only, shall include provisions denying to the insurer acquisition by subrogation of any rights of recovery against the other party. The other party agrees to pay any additional resulting premium.

Lexington's policy issued to Sanborn, effective on the date of the loss, contained the following clause:

> I. Transfer of Rights of recovery against others to us
>
> If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to use to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to imperil them. **But you may waive your rights against another party in writing**:
>
> 1. Prior to a loss to your Covered Property or Covered Income.
>
> . . .

(emphasis added).

Lexington reimbursed Sanborn for the damages occasioned by the fire and filed this action against TIRES, asserting a right of subrogation against TIRES for negligently causing the fire. TIRES denied liability, and moved for summary judgment. The trial court granted summary judgment in favor of TIRES and Lexington appeals.

Lexington assigns error to the trial court's grant of summary judgment in favor of TIRES, arguing that the provisions of the lease agreement between Sanborn and TIRES were not sufficient to extinguish Lexington's subrogation rights against TIRES. We affirm.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). When the terms of a contract are at issue, contract language which is "plain and unambiguous on its face" may be interpreted as a matter of law. *Taha v.*

Thompson, 120 N.C. App. 697, 701, 463 S.E.2d 553, 556 (1995), *disc. review denied*, 344 N.C. 443, 476 S.E.2d 130 (1996).

As a general rule, upon payment of a loss under a policy of insurance the insurer is entitled to be subrogated to any right the insured may have against a third party who caused the loss. *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 828, 266 S.E.2d 18, 20, *disc. review denied*, 301 N.C. 86 (1980) (citing *Milwaukee Ins. Co. v. McLean Trucking Co.*, 256 N.C. 721, 125 S.E.2d 25 (1962)). The subrogee's rights are derivative, and if the insured has no right against a third party, neither does the insurer. Therefore, where the insured waives a right of recovery against a third party, the subrogee is bound by this waiver, and may not recover against the third party. Where the insured is a landlord and the third party is a tenant, the terms of the lease govern the liabilities of the parties.

The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. *Martin v. Ray Lackey Enterprises, Inc.*, 100 N.C. App. 349, 396 S.E.2d 327 (1990). The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E.2d 794 (1986). In general, therefore, parties may "bind themselves as they see fit" by a contract, unless the contract would violate the law or is contrary to public policy. *Hall v. Sinclair Refining Co.*, 242 N.C. 707, 709-710, 89 S.E.2d 396, 397-98 (1955). However, contracts which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed; any clause in a lease attempting to do so must show that this is the intent of the parties by clear and explicit language. *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185 (1953).

Citing *Winkler* and *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988), Lexington contends that any clause attempting to waive liability for negligence must contain clear and explicit language to that effect. In *Winkler*, the plaintiff owned a building in Boone, North Carolina which he leased to defendant for use as a motion picture theater. The lease contained provisions requiring the lessees to "deliver up and return possession of the premises to the lessors in as good order, repair and condition as at present, ordinary wear and tear excepted, and damage by fire or other casualty excepted" and to "make any and all repairs that may be necessary . . . excepting in case of destruction or damage by fire or

other casualty." *Winkler*, 238 N.C. at 592, 79 S.E.2d at 188. The building was damaged by fire as a result of the negligence of an employee of defendant Amusement Company and the plaintiff sued for damages caused by the fire. Defendant Amusement Company contended the foregoing provisions of the lease excused it from liability for damages by fire, no matter what the cause. The Supreme Court disagreed, holding, *inter alia*, that a contract will not be interpreted to relieve a party from liability for its own negligence unless there is clear and explicit language that such was the intent of the parties to the contract. *Id.* at 596, 79 S.E.2d 190. The language of the lease requiring the lessee to keep the building in good repair and to surrender it in good condition, excepting loss by fire, did not evidence a clear intention by the parties to relieve defendant Amusement Company of the consequences of its own negligence. *Id.*

In *William F. Freeman, Inc.*, the plaintiff tenant sued its landlord to recover for damages to its personal property caused by the landlord's negligence in repairing a roof. The lease between the parties required both the lessor and the lessee to insure their own property and required all of the insurance policies to include a waiver of subrogation against the other party. The landlord contended that the language of the lease inferred that the parties intended to waive personal liability for negligence. This Court rejected the contention, noting that the lease provisions dealt only with insurance and subrogation matters and did not contain the explicit waivers required by *Winkler*.

The present case is distinguishable from *Winkler* and *William F. Freeman, Inc.*; the lease in the present case contains an explicit waiver by each party of its right to recover against the other for any loss covered by insurance. In addition, Sanborn and TIRES agreed to include a subrogation waiver clause in any insurance policies to be purchased by either of them which covered the leased premises. In contrast, the parties to the lease in *Winkler* showed no such intent; the lease contained no provisions regarding waiver or subrogation. The lease in *Freeman* required the parties to insure only his or her own property, and the subrogation clause was included to ensure that each party would only be required to pay for damages to his own property; the *Freeman* lease contained no provision evidencing an intent by either party to release the other from personal liability for negligence.

In addition, Lexington included a clause in the insurance contract which it issued to Sanborn specifically permitting Sanborn to contract to release third parties from liability prior to the occurrence of

a covered loss. Presumably, the cost of including such a provision in the insurance contract was reflected in the amount of Sanborn's insurance premium.

In summary, we hold that the plain and unambiguous language of the lease between Sanborn and TIRES clearly and explicitly evidences the intent of each of the parties to relieve the other from all liability for damages otherwise covered by insurance, including liability for negligence. The policy issued by Lexington to Sanborn contained equally clear provisions permitting Sanborn to waive its rights against third parties. Because Lexington could have no greater rights against TIRES through subrogation than its insured, summary judgment dismissing its action must be affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

THOMAS E. LATIMER, PLAINTIFF v. DOROTHY B. LATIMER, DEFENDANT

No. COA99-183

(Filed 21 December 1999)

Process and Service— acceptance of service—back dated

The trial court properly set aside a judgment of divorce entered on 8 December where plaintiff filed the action on 3 November; the acceptance of service carried the date 4 November, creating a prima facie case that defendant accepted service on that date; and defendant presented unequivocal and convincing evidence that she did not sign the acceptance until 15 November and back dated it at the request of plaintiff. The court acted prior to the expiration of 30 days from service and was without jurisdiction to adjudicate the absolute divorce on 8 December.

Appeal by plaintiff from order filed 30 September 1998 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 16 November 1999.

Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff-appellant.

Glover & Petersen, P.A., by James R. Glover; and Murphy Chapman & Miller, PA, by Ronald L. Chapman, for defendant-appellee.

GREENE, Judge.

Thomas H. Latimer (Plaintiff) appeals the entry of an order granting Dorothy B. Latimer (Defendant)'s Rule 60(b) motion to set aside a judgment of absolute divorce filed on 8 December 1997.

The relevant facts show Plaintiff filed an action for absolute divorce on 3 November 1997, seeking a divorce from Defendant wife. On 4 November 1997, Plaintiff delivered to Defendant a copy of the complaint, a summons, and a separate document entitled "Acceptance of Service." The "Acceptance of Service" reads as follows:

> "I have received copies of the Summons and Complaint in the [3 November 1997 divorce action].
>
> This ____ day of November, 1997.
>
> ______________________
> Dorothy B. Latimer
> Defendant"

On 15 November 1997, Defendant delivered the summons and the "Acceptance of Service" to Plaintiff at his home, signed it in his presence, and inserted the date of 4 November 1997. In an affidavit submitted to the trial court, Defendant stated Plaintiff "told me to date the document as of the original date he had given [the documents] to me."

On 8 December 1997, the trial court entered a judgment of absolute divorce, severing the bonds of matrimony existing between Plaintiff and Defendant. On 12 December 1997, Defendant filed a Rule 60 motion to set aside the divorce judgment on the grounds, among others, that it was entered prior to the expiration of 30 days after service and, therefore, was void. On 30 September 1998, the trial court entered its order setting aside the 8 December 1997 divorce on the grounds it "was entered prior to the time permitted by law and the judgment is[, therefore,] void." In support of its order, the trial court found Defendant "entered the notation of acceptance of service and

signed the document on [15 November 1997]." The court concluded "[s]ervice upon the Defendant was obtained on the date of her signing the '[A]cceptance of [S]ervice,' [15 November 1997]."

The dispositive issue is whether a defendant may offer evidence to rebut the date of acceptance of summons shown on an "Acceptance of Service."

Rule 4 of the North Carolina Rules of Civil Procedure provides, in pertinent part:

> (j5) *Personal jurisdiction by acceptance of service.*—Any party personally, or through the persons provided in Rule 4(j), <u>may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof</u> on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

N.C.G.S. § 1A-1, Rule 4(j5) (Supp. 1998) (emphasis added).

In this case, there is no dispute Defendant accepted service of the summons and divorce complaint. She noted her acceptance with her signature on the "Acceptance of Service." The dispute, instead, concerns the date on which she accepted service. The "Acceptance of Service" indicates she signed it on 4 November 1997. She contends she actually signed the "Acceptance of Service" on 15 November 1997 and back dated it to 4 November, upon the request of Plaintiff.

A return of process, including an acceptance of service, "is strong or at least prima facie evidence of the facts stated therein," however, "it is not conclusive and may be rebutted or impeached" by clear, unequivocal, and convincing evidence. 72 C.J.S. *Process* §§ 85, 88 (1987); *see also Morton v. Insurance Co.*, 250 N.C. 722, 725, 110 S.E.2d 330, 332 (1959) (date summons bears is prima facie evidence of date of its issuance). "[T]he return may be attacked by the oral testimony of the defendant." 72 C.J.S. *Process* § 87.

In this case, 4 November 1997 is the date shown on the "Acceptance of Service," and, thus, a prima facie case is established that Defendant accepted service of the summons and complaint on that date. Defendant, however, presented unequivocal and convincing evidence she did not sign the "Acceptance of Service" until 15 November, and it was back dated at the request of her husband, the

Plaintiff.[1] The trial court entered findings consistent with this evidence and we are bound by those findings. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E.2d 787, 790 (1975). These findings support the conclusion that service occurred on 15 November 1997. N.C.G.S. § 1A-1, Rule 4 (j5) (acceptance of service occurs on date "Acceptance of Service" signed).

Because the service of the summons and complaint did not occur until 15 November 1997, the trial court was without jurisdiction to adjudicate the absolute divorce on 8 December 1997. N.C.G.S. § 1A-1, Rule 12(a)(1) (1990) (defendant has 30 days after service of complaint to file answer); *see Marketing Systems v. Realty Co.*, 277 N.C. 230, 234, 176 S.E.2d 775, 777 (1970) (trial court has no jurisdiction over defendant if not "brought into court in some way sanctioned by law"). Because the trial court did not have jurisdiction to adjudicate the absolute divorce on 8 December 1997, the judgment of absolute divorce was void and subject to being set aside pursuant to Rule 60(b)(4). *Id.* at 233, 176 S.E.2d at 777 (judgment entered without jurisdiction is void); *see Hyder v. Dergance*, 76 N.C. App. 317, 320, 332 S.E.2d 713, 715 (1985) (judgment is void if entered before expiration of time for filing of responsive pleading); N.C.G.S. § 1A-1, Rule 60(b)(4) (1990) (trial court may set aside void judgment). The order of the trial court setting aside the judgment of absolute divorce is affirmed. We have reviewed Plaintiff's other assignments of error and determine them to be unpersuasive.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

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1. Plaintiff contends in his brief to this Court that there is a dispute concerning the signing of the "Acceptance of Service," but there is no evidence in the record to support that contention. We do note the record makes references to appendices "B and C"; however, these items are not part of the record and, therefore, were not considered.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 DECEMBER 1999

Case	County	Disposition
BELVEDERE PROP. OWNERS ASS'N v. WOODRUFF No. 98-1418	Pender (98CVD0094)	Reversed and Remanded
BROOME v. CITY OF MT. HOLLY No. 99-203	Gaston (97CVS3482)	Reversed and Remanded
CARY v. BROWN No. 99-141	Onslow (98CVS2088)	Reversed and Remanded to the trial court for trial
COHEN v. COHEN No. 99-76	Wake (97CVD00366)	Affirmed in part, Vacated in part and Remanded
COVINGTON v. MOEN, INC. No. 99-213	Ind. Comm. (607410)	Affirmed in part, Vacated in part, and Remanded
ERICKSON v. CONGER No. 99-205	Onslow (92CVD290)	Dismissed
HALE v. MARTIN No. 99-362	Halifax (95CVD979)	Dismissed
HILLEN v. JONES No. 98-1532	Mecklenburg (96CVD15299)	Reversed and Remanded
IN RE GAYLOR No. 98-1522	Onslow (97J82)	Vacated in part; Reversed in part
KEPLEY v. SHELDON No. 98-1631	Mecklenburg (97CVS8848)	Affirmed
KOLBE v. N.C. DEP'T OF LABOR No. 99-72	Wake (96CVS10068)	Dismissed
LAWS v. LAWS No. 99-88	New Hanover (96CVD1141)	Affirmed
LYNCH & SONS, INC. v. CITY OF WINSTON-SALEM No. 99-110	Forsyth (97CVS2861)	Appeal dismissed and remanded
MASTROIANNI v. HARRIS No. 99-148	Wake (97CVS10024)	Affirmed
MOORESVILLE HOSP. v. N.C. DEP'T OF HUM. RES. No. 99-264	NCDHR (97DHR1209)	Affirmed

MORNINGSTAR v. BUNCOMBE COUNTY SCHOOLS No. 99-170	Ind. Comm. (861983)	Affirmed
MOSTELLER v. ALEX LEE, INC. No. 99-641	Ind. Comm. (574371)	Affirmed
MUGFORD v. MOFFETT No. 99-682	Mecklenburg (97CVS10994)	No Error
ROBERTS v. CITY OF WINSTON-SALEM No. 99-357	Ind. Comm. (537275)	Affirmed
STATE v. BIDGOOD No. 99-134	Mecklenburg (97CRS101597) (97CRS101600)	Reversed and Remanded
STATE v. CHANDLER No. 99-734	Randolph (95CRS11149)	Affirmed
STATE v. DAMERON No. 99-705	Gaston (98CRS13974) (98CRS13975) (98CRS13976) (98CRS27685)	No Error
STATE v. DAVIDSON No. 99-54	Mecklenburg (95CRS89863)	Dismissed
STATE v. DIAZ No. 99-519	Harnett (98CRS5439) (98CRS5440) (98CRS5441)	Appeal Dismissed
STATE v. DORSEY No. 98-1463	Wake (97CRS30248) (97CRS30249)	No Error
STATE v. FETHERSON No. 98-1460	Union (97CRS10832)	Remanded
STATE v. HARGRAVES No. 98-1305	Mecklenburg (97CRS35577)	No Error
STATE v. ISOM No. 99-595	Guilford (97CRS24128) (97CRS24129)	No Error
STATE v. LLOYD No. 99-135	Durham (96CRS22845)	No Error
STATE v. MASSEY No. 98-1339	Harnett (96CRS9561)	No Error

STATE v. McNEIL No. 99-23	Forsyth (98CRS28735) (98CRS28736) (98CRS31855)	No Error
STATE v. McQUEEN No. 99-684	Durham (97CRS15492)	No Error
STATE v. MELVIN No. 99-632	Pitt (96CRS8224) (96CRS8225) (96CRS8227)	No Error
STATE v. PARSONS No. 99-601	Randolph (98CRS2066)	No Error
STATE v. PATRICK No. 99-127	Wake (96CRS51231)	No Error
STATE v. PENSON No. 99-376	Moore (97CRS12236) (97CRS12237) (97CRS12238) (97CRS11989)	No Error
STATE v. QUICK No. 99-685	Guilford (98CRS1044) (96CRS78374)	Affirmed
STATE v. ROBINSON No. 99-852	Forsyth (98CRS17518) (98CRS21038) (98CRS33610) (98CRS33611)	No Error
STATE v. ROUZIER No. 99-485	Durham (97CRS23817)	No Error
STATE v. SHIPP No. 98-1509	Catawba (97CRS18385) (98CRS6790) (98CRS6791)	No Error
STATE v. SNIPES No. 99-39	Lee (98CRS1389)	No error as to appeal. Remanded for hearing on motion for appropriate relief
STATE v. TAYLOR No. 99-678	Craven (97CRS15450) (97CRS15845)	No Error
STATE v. TAYLOR No. 99-635	Forsyth (98CRS32123) (98CRS37351)	Reversed

STATE v. TRIMNAL No. 99-706	Gaston (98CRS7014) (98CRS7015) (97CRS37087)	No Error
STATE v. WEARING No. 98-1624	Durham (97CRS21500)	No Error
STC, INC. v. ROBINSON No. 98-1619	Mecklenburg (97CVS9141)	Reversed and Remanded
THOMAS v. HINESLEY No. 99-97	Randolph (98CVS726)	Affirmed
TRUCK & TRAILER SALES, INC. v. PETERBILT No. 99-28	Guilford (95CVS9278)	New Trial
VERNON v. LOWE No. 99-311	Rockingham (97CVS1661)	Appeal Dismissed
VITTITOE v. VITTITOE No. 99-277	Guilford (96CVD1249)	Dismissed in part; Affirmed in part
WALKER v. HAMLETT No. 98-1504	Alamance (98CVD818)	Reversed and Remanded
WALKER v. WALKER No. 99-233	Wake (94CVD2897)	Affirmed
WHITING v. PRICE No. 99-306	Cherokee (97CVS456)	Reversed
WILLIAMS v. LOHR No. 98-1639	Davidson (96CVS182)	Affirmed
WILLIAMS v. MERENDINO No. 99-591	Wake (96CVD04673)	Affirmed

STATE OF NORTH CAROLINA v. ALBERT LEE STEVENSON, JR.

No. COA98-1351

(Filed 30 December 1999)

1. Appeal and Error— preservation of issues—failure to object at trial

Although defendant contends the trial court committed reversible error in convicting him for robbery with a dangerous weapon and of being a habitual felon by allowing an officer to testify at trial that he had previously heard a broadcast for defendant's type of vehicle in reference to two armed robberies that had occurred that day and that the house where defendant was going was a drug house, defendant did not preserve this issue under N.C. R. App. P. 10(b)(1) because he failed to object at trial. Even if this issue was properly preserved, any alleged error was properly cured by the trial court's instruction to the jury that the testimony was received for the limited purpose of explaining what the officer did on the occasion and his subsequent conduct.

2. Evidence— "drug use" reputation of a place—relevant to show motive

Even though this case does not involve a drug charge, the trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by allowing the officer to testify that he had training in the investigation of drug offenses, had dealt with occupants of the house in question when investigating drug offenses, and had arrested folks that resided in the house for drug offenses, because this evidence was relevant to show defendant's motive to commit the robbery in order to get money to buy drugs. Even if the evidence was irrelevant to show motive, defendant has failed to show a reasonable probability that a different result would have been reached at trial if this testimony had not been admitted in light of the abundant evidence presented indicating his guilt.

3. Evidence— crack pipe, wallet, and identification cards—motive—identity—chain of custody

The trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by admitting into evidence a crack pipe, a wallet, and identification cards that were all found in the white Cadillac defendant had been driving just prior to his arrest because: (1) the possession of

a crack pipe coincides with the State's motive theory under N.C. R. Evid. 404(b) that defendant robbed the victim in order to obtain money for drugs; (2) the wallet and identification cards are relevant to identify defendant under N.C. R. Evid. 404(b) as the owner and/or person in control of the vehicle where these items were found; (3) admission of actual evidence is in the trial court's discretion, and any weak links in a chain of custody relate only to the weight to be given the evidence and not its admissibility; and (4) defendant failed to argue, and therefore has not shown, that the probative value of the evidence outweighed its prejudice to defendant.

4. Robbery— armed—dangerous weapon—sufficiency of evidence

The trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by refusing to dismiss the charges of armed robbery at the end of the State's evidence and at the end of all the evidence because viewing the evidence in the light most favorable to the State, the victim's testimony (that defendant approached her while holding a metal object towards her, that he demanded all the money in the store's cash register, and that she feared for her life and worried that defendant may kill her during the robbery) provides substantial evidence as to the element of a dangerous weapon being employed in a robbery whereby the life of the victim was endangered or threatened.

5. Appeal and Error— preservation of issues—failure to cite authority—failure to indicate prejudicial error

Although defendant claims the trial court erred in convicting him for robbery with a dangerous weapon and of being a habitual felon by admitting into evidence a certified copy of a 1973 plea to second-degree murder, defendant has failed to preserve this issue because he has not cited any authority as required by N.C. R. App. P. 28(b)(5) and he has failed to indicate any prejudicial error.

6. Appeal and Error— preservation of issues—failure to argue assignment of error

Although defendant claims the trial court erred in convicting him for robbery with a dangerous weapon and of being a violent habitual felon by admitting into evidence a certified true copy of a record of defendant's conviction in California for assault with intent to commit oral copulation, defendant failed to argue this assignment of error, and therefore, it is deemed abandoned.

7. Sentencing— habitual felon—attempt—substantially equivalent offense

The trial court did not err in defendant's convictions for robbery with a dangerous weapon and of being a violent habitual felon by ruling as a matter of law that defendant's prior conviction for assault with intent to commit oral copulation from California is a substantially equivalent offense to that of a Class A through E felony, making it a violent felony under N.C.G.S. § 14-7.7(b), even though defendant was only convicted of attempting to commit a felony.

8. Appeal and Error— preservation of issues—failure to argue assignment of error

Although defendant claims the trial court erred in convicting him for robbery with a dangerous weapon and of being a violent habitual felon by ruling the State must prove beyond a reasonable doubt that defendant was convicted of second-degree murder in Rowan County Superior Court and defendant pled guilty to the violent felony of assault with intent to commit a felony in California, defendant failed to argue this assignment of error, and therefore, it is deemed abandoned.

9. Sentencing— habitual felon—sufficiency of evidence

Although defendant claims the trial court erred in convicting him of robbery with a dangerous weapon and of being a violent habitual felon by ruling there is no additional requirement that the State prove his 1992 conviction for assault with intent to commit a felony was a violent felony and by ruling as a matter of law that said felony was a violent felony, the Court of Appeals did not need to reach this assignment of error in light of its holding that the trial court did not err in ruling as a matter of law that defendant's 1992 conviction in California was a violent felony.

10. Constitutional Law— double jeopardy—punishment for a violent habitual felon

The trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by ruling as a matter of law that the punishment for a violent habitual felon under N.C.G.S. §§ 14-7.7 through 14-7.12 is not double jeopardy because our Supreme Court has addressed this issue and ruled that our legislature has acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided.

Appeal by defendant from judgments entered 8 May 1998 by Judge Jerry Cash Martin in Rowan County Superior Court. Heard in the Court of Appeals 14 September 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General W. Richard Moore, for the State.

Davis Law Firm, by Robert M. Davis, for defendant-appellant.

HUNTER, Judge.

Albert Lee Stevenson, Jr. ("defendant") appeals guilty verdicts in his prosecution for robbery with a dangerous weapon and of being a violent habitual felon. We find no error.

The State's evidence at trial indicated that Melissa Horne ("Ms. Horne") was working at Granite Quarry Cleaners on 18 June 1997 at 1:00 p.m. at the time a male customer entered the shop. Ms. Horne testified that the customer laid some clothes on the counter and identified himself as "Stevenson" for the cleaning ticket. The customer thereupon became an assailant, as he came around the counter and told Ms. Horne that he wanted all the money while holding a sharp metal object towards her. Ms. Horne opened the cash register and the man took approximately $430.00. The assailant picked up his clothes and left. Ms. Horne locked the door and called 911.

Officer Sam Russell of the Salisbury Police Department testified that on that same day, he had gone to the Park Avenue area of Salisbury to meet with an individual who was going to do a survey of property the city was going to convert into a police district office. As he was on the surveyor's front porch, Officer Russell observed a white Cadillac traveling west on Park Avenue. He testified that he noticed the car because it fit the description of a vehicle which had been broadcast to the police force as being involved with two armed robberies which had occurred that same day. He testified that the car parked at 517 Park Avenue, a residence "that we had targeted as a drug house in that neighborhood." Officer Russell stated that he had made arrests of individuals residing there for drug offenses. He recognized the driver as Albert Stevenson because he "had had dealings with him in the past." After waiting for backup, Officer Russell and Officer Shue pulled their patrol cars in front of the residence, and as Officer Russell got out of his car, he observed the defendant running out of the back side of the house. A police dog proceeded to chase defendant, and went to the front porch of a home on Liberty Street.

As Officer Russell went to the front porch and Officer Shue went to the back, the defendant came onto the front porch. Officer Russell drew his weapon and ordered defendant on the ground. Defendant was then taken into custody. A search revealed that defendant had a bundle of money in his sock.

In the meantime, Officer Adams of the Salisbury Police Department came to Granite Quarry Cleaners and Ms. Horne gave him the cleaning ticket on which she had written the name Stevenson. He then took Ms. Horne to a store where she observed defendant in a Salisbury police car. Ms. Horne identified defendant as the assailant who had robbed her earlier that day.

The State's evidence at trial, regarding defendant's charge of being a violent habitual felon, was certified records indicating that defendant pled guilty and was convicted of second degree murder in Rowan County, North Carolina in 1973 and assault with intent to commit a felony in Los Angeles County, California in 1992.

[1] Defendant has presented twenty-three assignments of error to this Court. In his first assignment of error, defendant contends that the trial court committed reversible error in allowing Officer Sam Russell to testify at trial that he had previously heard a broadcast for defendant's type of vehicle in reference to two armed robberies that had occurred that day and that the house where the defendant was going was a "drug house." We note that defendant did not object at trial to Officer Russell's statement regarding the vehicle. N.C.R. App. P. 10(b)(1) provides as follows:

> *General.* In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. . . .

Defendant failed to preserve the question of admissibility of the officer's testimony as to the vehicle for appellate review required by this rule. It is, therefore, beyond our scope of review. We note, however, that the court did give an instruction to the jury that this testimony

> is not being received for the truth of the matter asserted within that statement or what was in the broadcast—may have been in the broadcast, but it is received for a limited purpose of explain-

> ing what Officer Russell did on the occasion to the extent that you find it does explain what the officer did on the occasion and explaining his conduct, and subsequent conduct, you may consider it, but you may not consider that statement otherwise.

Any alleged error, therefore, was cured by this instruction from the court.

[2] In his second and third assignments of error, defendant contends that the trial court committed reversible error in allowing Officer Sam Russell to testify that he had training in the investigation of drug offenses, had dealt with occupants of the house in question when investigating drug offenses, and had arrested "folks" that resided in the house for drug offenses. Defendant argues this testimony was not relevant to the crime at issue and therefore was inadmissible.

First, we note that the trial court instructed the jury as to Officer Russell's statement that the residence at 517 Park Avenue had been targeted as a "drug house." "[T]hat evidence is inadmissible and not competent evidence for your consideration. . . . [Y]ou are directed not to consider [this] statement in your deliberations in this matter." Later in the trial, however, the court overruled objections to the testimony that Officer Russell had training in drug investigation and had dealt with occupants of the house in such investigation and had arrested folks that resided in the house for drug offenses.

"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. Rule Evid. 401.

> Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Arnold, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973) (citations omitted). This Court has allowed evidence concerning the "drug use" reputation of a place when such evidence tended to show the intent of a defendant charged with feloniously and intentionally

acquiring possession of a controlled substance. *State v. Lee*, 51 N.C. App. 344, 349, 276 S.E.2d 501, 504-05 (1981). A defendant's motive is a fact of consequence to be considered, though the State is not required to prove it. *State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986). While the present case does not involve a drug charge, at trial, the State advanced the theory that defendant had committed robbery in order to get money to buy drugs. Therefore, evidence that defendant went to a place known for dealing drugs immediately after the robbery is relevant to show motive. The jury could infer that the money obtained in the robbery was to be used to purchase drugs. Therefore, this evidence was properly admitted into evidence.

Assuming *arguendo* that the evidence at issue was irrelevant to prove motive for the crime, defendant has failed to show a reasonable probability that a different result would have been reached at trial had this testimony not been admitted into evidence. Our Supreme Court has held:

> Trial errors not amounting to constitutional violations do not warrant awarding a new trial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." N.C.G.S. § 15A-1443. Erroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions, *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969); *State v. Rowland*, 263 N.C. 353, 139 S.E.2d 661 (1965), or where there is overwhelming evidence of defendant's guilt. *State v. Knight*, 282 N.C. 220, 192 S.E.2d 283 (1972); *State v. Cox*, 281 N.C. 275, 188 S.E.2d 356 (1972).

State v. Weldon, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985). Given the abundant competent evidence in the present case indicating the defendant's guilt, any alleged error of the trial court would have been harmless. Based on the foregoing, this assignment of error is overruled.

[3] In assignments of error four and five, defendant contends that the trial court committed error in allowing the State's exhibit 15, identified as a crack pipe; exhibit 19, identified as a wallet; and exhibit 20, identified as cards of identification, including defendant's driver's license and credit cards, into evidence. These items were found in the white Cadillac that defendant had been driving just prior to his arrest. At trial, defendant objected to their admission due to (1) relevance, (2) chain of custody, and (3) prejudicial nature.

As to relevance, we note that the State introduced the theory at trial that defendant had robbed the victim in order to obtain money for drugs. The possession of a crack pipe coincides with this argument as defendant would need a device used in consuming the drug he was intending to purchase. Therefore, we hold that the defendant having a crack pipe in his possession at the time he went to a residence with the reputation of drug dealing was relevant to establish motive. As to the wallet and defendant's driver's license and credit cards, we agree with the State that these would be relevant and admissible to identify the defendant as the owner and/or the person in control of the vehicle in which they were found.

As to defendant's argument regarding chain of custody weaknesses warranting the evidence inadmissible, we note that admission of actual evidence is at the trial court's discretion, and any weak links in a chain of custody relate only to the weight to be given the evidence and not to its admissibility. *State v. Stinnett*, 129 N.C. App. 192, 198, 497 S.E.2d 696, 700, *disc. review denied*, 348 N.C. 508, 510 S.E.2d 669, *appeal dismissed*, 1998 WL 646300, *cert. denied*, 525 U.S.—, 142 L. Ed. 2d 436 (1998).

As to the prejudicial nature of the crack pipe, we note that the relevant portion of Evidence Rule 404(b) states:

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

N.C.R. Evid. 404(b). Our Supreme Court has held that this rule is one of inclusion in that it is "subject to but *one exception* requiring [the] exclusion [of evidence] if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990), *appeal after remand*, 336 N.C. 412, 444 S.E.2d 431 (1994) (emphasis in original). We have previously held that the evidence in question was relevant to motive and identity. Defendant failed to argue and therefore has not shown that the trial court abused its discretion when it determined that the probative value of the evidence outweighed its prejudice to defendant. This Court will not reverse the trial court's ruling absent such a show-

ing. *State v. Rose*, 335 N.C. 301, 319-20, 439 S.E.2d 518, 528, *cert. denied* 512 U.S. 1246, 129 L. Ed. 2d 883 (1994). Accordingly, this assignment of error is overruled.

[4] In his sixth and seventh assignments of error, defendant contends the trial court committed reversible error by refusing to dismiss the charges of armed robbery at the end of the State's evidence and at the end of all the evidence. Defendant argues that the sole evidence that a dangerous weapon was employed in the crime was the statement of Ms. Horne that defendant "held a metal object towards me" and that the evidence was not sufficient to indicate that the victim's life was in fact endangered or threatened.

An armed robbery occurs when:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, ...

N.C. Gen. Stat. § 14-87(a) (1993). In ruling upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, which is entitled to every reasonable inference to be drawn therefrom. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). If there is "substantial evidence"—whether direct, circumstantial, or both—of each element of the offense charged and of the defendant being the perpetrator of the offense, the motion to dismiss should be denied. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

At trial, the State presented evidence that the defendant approached Ms. Horne, and while holding a metal object towards her, demanded all the money in the store's cash register. Ms. Horne testified that she feared for her life and that she worried that defendant may kill her during the robbery. We hold that this evidence is substantial as to the element of a dangerous weapon being employed in a robbery whereby the life of the victim was endangered or threatened. We therefore overrule this assignment of error, holding that the

trial court did not err in failing to dismiss the charge at the end of the State's evidence and all the evidence.

[5] In his eighth assignment of error, defendant contends that the trial court erred in allowing the State's exhibit 21, a certified copy of a plea to second degree murder in 1973 in Rowan County, North Carolina, into evidence, stating: "a plea must be accepted by the State as well as the Court before a Judgment can be entered." Defendant fails to cite any statute or caselaw in support of this assignment of error. "It is not the function of the appellate courts to search out possible errors which may be prejudicial to an appellant; it is an appellant's duty, acting within the rules of practice, to point out to the appellate court the precise error of which he complains." *Nye v. Development Co.*, 10 N.C. App. 676, 678, 179 S.E.2d 795, 796, *cert. denied*, 278 N.C. 702, 181 S.E.2d 603 (1971). "The body of the argument shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(5). Because defendant has not cited any authority and has failed to indicate any prejudicial error, we dismiss this assignment of error.

[6] Defendant next assigns error to the allowance of the State's exhibit 24, also known as exhibit V-1, into evidence. The court made the finding that exhibit 24 was a certified true copy of a record of defendant's conviction in Los Angeles County, California, of "assault with intent to commit a felony, that is, the assault on [female victim] with the intent to commit oral copulation." Defendant failed to argue this assignment of error and it is therefore deemed abandoned.

[7] In assignments of error ten and eleven, defendant assigns error to the trial court's ruling as a matter of law that assault with intent to commit oral copulation is a substantially equivalent offense to that of a Class A through E felony and is therefore a violent felony in North Carolina. Defendant argues that because he was only convicted of *attempting* to commit a felony, his conviction is not equivalent to a conviction of an A through E felony in this state. We disagree.

In 97 CRS 13928, defendant was charged as a violent habitual felon in violation of N.C. Gen. Stat. § 14-7.7. This statute provides, in part: "[a]ny person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon." N.C. Gen. Stat. § 14-7.7 (Cum. Supp. 1998). A violent felony is identified as:

(1) All Class A through E felonies.

(2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).

(3) Any offense committed in another jurisdiction substantially equivalent to the offenses set forth in subdivision (1) or (2).

N.C. Gen. Stat. § 14-7.7(b) (Cum. Supp. 1998). The two violent felonies defendant was charged with were second degree murder, to which he pled guilty in 1973 in Rowan County, North Carolina and assault with intent to commit oral copulation, to which he also pled guilty in 1992 in Los Angeles County, California.

Defendant's 1992 conviction in California, the subject of this assignment of error, is equivalent to a North Carolina conviction of an "attempt" to commit a second degree sexual offense. Defendant argues that in 1992, an attempt to commit second degree rape or a second degree sexual offense was classified as a Class H felony under N.C. Gen. Stat. § 14-27.6. However, this statute was repealed effective 1 October 1994. As pointed out in N.C. Gen. Stat. § 14-7.7, for purposes of the violent habitual statute, a violent felony can be one which is repealed or superseded, or occurred in another state, but is the present equivalent of a Class A through E felony. Also under present law:

> Unless a different classification is expressly stated, an *attempt* to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit. An attempt to commit a Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a Class I felony is a Class 1 misdemeanor, and an attempt to commit a Class 3 misdemeanor is a Class 3 misdemeanor.

N.C. Gen. Stat. § 14-2.5 (Cum. Supp. 1998) (emphasis added). Second degree sexual offense is presently classified as a Class C felony. N.C. Gen. Stat. § 14-27.5 (1993). Therefore, under N.C. Gen. Stat. § 14-2.5, the crime defendant was convicted of in 1992 is presently classified as a Class D felony. Based on the foregoing, we hold that the trial court did not err in its finding that defendant's 1992 conviction was equivalent to a Class A through E felony, and was therefore a violent felony under N.C. Gen. Stat. § 14-7.7(b).

[8] In assignment of error twelve, defendant assigns error to the trial court's ruling that the State must prove two things beyond a reasonable doubt: (1) that defendant was convicted of second degree murder in Rowan County Superior Court, and (2) defendant pled guilty to the violent felony of assault with intent to commit a felony that was committed on 31 May 1992 in California. Defendant failed to argue this assignment of error and it is therefore deemed abandoned.

[9] In his next assignment of error, defendant contends the trial court erred by ruling that there is no additional requirement that the State prove his 1992 conviction of assault with intent to commit a felony was a violent felony, and by ruling as a matter of law that said assault was a violent felony. We need not reach this assignment of error as we have held that the trial court did not err in ruling as a matter of law that defendant's 1992 conviction in California was a violent felony.

[10] Defendant, in assignments of error fourteen and fifteen, contends that the trial court erred by ruling as a matter of law that the punishment for a violent habitual felon is not double jeopardy, arguing that the violent habitual felon statute, N.C. Gen. Stat. § 14-7.7 through § 14-7.12 is unconstitutional on its face. Defendant also argues that the trial court erred in refusing to allow him to argue that conviction under this statute would be an additional punishment for the same offense. Our Supreme Court has addressed this issue and has ruled that "our legislature has acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided. The procedures set forth in N.C.G.S. § 14-7.1 to -7.6 likewise comport with the defendant's federal and state constitutional guarantees." *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985). This Court has held that the Supreme Court's reasoning in *Todd* regarding the habitual felon statute equally applies to N.C. Gen. Stat. § 14-7.7 through § 14-7.12, the violent habitual felon statute. *State v. Mason*, 126 N.C. App. 318, 324, 484 S.E.2d 818, 820 (1997). This assignment of error is therefore overruled.

We need not address defendants remaining assignments of error, all of which are based on the contention that the trial court erred in the classification of defendant's 1992 conviction as an A through E felony. We have ruled on that issue in addressing defendant's assignments of error ten and eleven, finding no error. Accordingly, we hold that defendant received a fair trial free of any prejudicial error.

No error.

Judges LEWIS and MARTIN concur.

VALERIE BOOKHOLT, PLAINTIFF v. ROBERT G. BOOKHOLT, DEFENDANT

No. COA99-175

(Filed 30 December 1999)

1. Divorce— alimony—amount—discretion of trial judge

The trial court did not err in awarding $2,400 per month of alimony even though the parties previously agreed that a $2,200 obligation would be sufficient for alimony pendente lite because: (1) the amount of alimony is in the sound discretion of the trial court; (2) the amount of alimony pendente lite to which the parties consent does not bind the trial court as to the amount of permanent alimony it must eventually award; and (3) the determination of what constitutes reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.

2. Divorce— alimony—duration—specific findings not required

The trial court did not err by failing to make findings relative to the duration of the alimony award because the action was filed on 16 July 1993, and N.C.G.S. § 50-16.3A provides that only actions filed on or after 1 October 1995 require specific findings relative to the duration of any alimony award.

3. Child Support, Custody, and Visitation— support—amount—discretion of trial judge

The trial court did not err by ordering $2,350 per month in child support when the prior consent order awarded $2,000 in temporary child support because the amount of temporary child support agreed to by the parties does not bind the trial court as to the amount of permanent child support.

4. Child Support, Custody, and Visitation— support—needs and expenses—discretion of trial judge

The trial court did not err in computing defendant-father's child support obligation based on the child's reasonable needs

and expenses of $3,407 per month because the determination of what constitutes reasonable needs and expenses is within the discretion of the trial judge, and he is not required to accept at face value the assertion of expenses offered by the litigants themselves.

5. Divorce— alimony and child support—attorney fees—sufficiency of findings—means to defray litigation expenses—good faith

In an action for alimony and child support, the trial court erred in awarding $4,889 in attorney fees under N.C.G.S. § 50-16.3 (now 50-16.4) and N.C.G.S. § 50-13.6 to plaintiff-wife because the trial court made insufficient findings regarding: (1) whether the dependent spouse has insufficient means to defray her litigation expenses based on both her disposble income and her separate estate; and (2) whether the party seeking attorney fees is an interested party acting in good faith.

6. Divorce— alimony and child support—attorney fees—comparison of separate estates—discretion of trial court

Although a comparison of separate estates is not required in determining the propriety of attorney fees under N.C.G.S. § 50-16.3 (now 50-16.4) and N.C.G.S. § 50-13.6 in an alimony and child support case, on remand the trial court may do so, if it chooses, to determine whether any necessary depletion of plaintiff-wife's estate would be reasonable.

7. Divorce— alimony—automatic termination—cohabitation—specific agreement between parties required

In the absence of a specific agreement between the parties, the trial court erred in including a provision in its alimony award that alimony could automatically terminate upon plaintiff-wife's cohabitation with someone of the opposite sex in the absence of explicit statutory authority because: (1) this action was filed on 16 July 1993, and the automatic termination of alimony provision for cohabitation under N.C.G.S. § 50-16.9(b) only applies to actions filed on or after 1 October 1995; (2) the only limited circumstances that automatically terminate alimony include the death of either spouse, remarriage of the dependent spouse, and reconciliation between spouses; (3) cohabitation alone cannot be grounds for modification of alimony, and therefore, the trial court should not be able to circumvent this limitation by inserting cohabitation as a prospective ground for termination; and (4) a

cohabitation provision is not analogous to an alimony award for a period of years terminable upon the occurrence of a certain event since our statutes specifically empower a trial judge to award alimony for a specific period of years and they do not confer the same power with respect to the occurrence of certain events, such as cohabitation.

Appeal by defendant and cross-appeal by plaintiff from order entered 28 July 1998 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 17 November 1999.

Casstevens, Hanner, Gunter & Gordon, P.A., by Mark D.N. Riopel and Robert P. Hanner, II, for plaintiff-cross-appellant.

Helms, Cannon, Hamel & Henderson, P.A., by Thomas R. Cannon and Christian R. Troy, for defendant-appellant.

LEWIS, Judge.

Defendant appeals from an order requiring him to pay $2400 per month in alimony, $2350 per month in child support, and $4889 in attorneys' fees. Plaintiff cross-appeals from that part of the order stating that alimony terminates should she ever cohabit with a person of the opposite sex.

Plaintiff and defendant married on 30 May 1970 and separated on 22 March 1993. The parties entered into a consent order on 7 December 1993 covering, among other things, the issues of alimony *pendente lite* and temporary child support. Pursuant to that consent order, defendant agreed to pay $2200 per month in alimony and $2000 per month in child support. A divorce decree was issued on 16 May 1994, and a consent order for equitable distribution was subsequently entered on 9 January 1995. The issues of permanent alimony and permanent child support were not addressed until the order that is the subject of this appeal. Other facts will be presented as necessary for the proper resolution of the issues raised by each party. We now turn to those issues.

[1] Defendant first assigns error with the trial court's alimony award. He does not take issue with plaintiff's *entitlement* to alimony, but rather takes issue with the *amount* the trial court ordered him to pay. Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless

there has been a manifest abuse of that discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). We find no such abuse of discretion here.

Defendant argues that, in ordering $2400 per month in alimony, the trial court failed to account for the prior consent order as to alimony *pendente lite*, in which both parties agreed that a $2200 monthly obligation would be sufficient. This argument is completely without merit, and defendant even admitted as much at oral argument. By definition, alimony *pendente lite* is only temporary in nature; it just means the amount of alimony to be paid "pending the final judgment of divorce." N.C. Gen. Stat. § 50-16.1(2) (repealed 1995). Its purpose is simply to help the dependent spouse subsist and maintain herself during the pendency of the divorce litigation. *Little v. Little*, 12 N.C. App. 353, 356, 183 S.E.2d 278, 280 (1971). Accordingly, the amount of alimony *pendente lite* to which the parties consent does not bind the trial court as to the amount of permanent alimony it must eventually award.

Defendant also argues that, in calculating the $2400 monthly award, the trial court erred in computing the needs and expenses of each party. In his financial affidavit submitted to the trial court, defendant listed $2100 in projected monthly housing costs to enable him to attain better housing. The trial court, however, considered these projections speculative and reduced this figure to $960.50 in finding defendant's total monthly needs and expenses to be $2823.35. Defendant maintains that this amounted to an abuse of the trial judge's discretion. We disagree. "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties. Here, the trial court apparently felt the $2100 in projected housing costs was unreasonable and then reduced that figure to an amount it felt was more reasonable. By doing so, we find no abuse in the exercise of its discretion.

Defendant also claims error in the trial court's calculations as to plaintiff's needs and expenses. In her financial affidavit, plaintiff listed her expenses as $1941.71 per month. The trial judge concluded that five of these expenses were unreasonable and, without making

any further findings, reduced plaintiff's figure by $625.49. Defendant argues that, even though the trial court's reduction ultimately benefited him, the trial court's calculations are "patently defective" absent appropriate findings to explain them. Again we disagree. As previously stated, the trial judge is not bound by the financial assertions of the parties and may resort to common sense and every-day experiences. By reducing some of plaintiff's expenses here, the trial court did not abuse its discretion.

[2] Defendant also argues that the alimony award is flawed because the trial court made no findings relative to the duration of the award, instead just mandating a lifetime award. Our statutes presently do require specific findings relative to the duration of any alimony award. N.C. Gen. Stat. § 50-16.3A(c) (1999). Significantly, however, this requirement only applies to actions filed on or after 1 October 1995. N.C. Gen. Stat. § 50-16.3A, Editor's Note (1999). This action was filed on 16 July 1993, pre-dating the present statute. The prior applicable version of the statute contained no requirement that there be findings relative to the duration of any alimony award. *See* N.C. Gen. Stat. § 50-16.5(a) (repealed 1995) ("Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."). Accordingly, the trial court did not err by making no findings to support its lifetime award.

[3] Next, defendant assigns error with the trial court's child support award. At the outset, we note that the parties' combined annual income exceeds $150,000. Accordingly, the North Carolina Child Support Guidelines do not apply, and any child support award is to be determined on a case-by-case basis. N.C. Child Support Guidelines, 1999 Ann. R. N.C., Commentary at 32. Defendant argues that, in ordering $2350 per month in child support, the trial court failed to account for the prior consent order as to temporary child support, in which both parties agreed that a $2000 monthly obligation would be sufficient. We reject this argument for the same reason that we rejected defendant's similar argument with respect to the alimony *pendente lite* consent order—the amount of temporary child support agreed to by the parties does not bind the trial court as to the amount of permanent child support it eventually awards.

[4] Defendant also asserts error in the trial judge's findings with respect to the child's needs and expenses. In computing defendant's

child support obligation, the trial court found the child to have reasonable needs and expenses of $3407 per month. In arriving at this figure, the trial court again did not accept all the projected expenses submitted by plaintiff, choosing to reduce those numbers by $466 without making any further findings. Although this reduction again benefited him, defendant argues that the award is nonetheless defective because the trial court did not make appropriate findings to justify this reduction. For the same reasons as we articulated earlier, this argument is without merit.

[5] Finally, defendant assigns error to the trial court's award of $4889 in attorneys' fees to plaintiff. We conclude that the trial court made insufficient findings relative to its award of attorneys' fees and therefore remand the matter to the trial court for further findings.

"[T]he purpose of the allowance of counsel fees is to enable the dependent spouse, *as litigant*, to meet the supporting spouse, *as litigant*, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel." *Williams v. Williams*, 299 N.C. 174, 190, 261 S.E.2d 849, 860 (1980). Accordingly, before an award of attorneys' fees in either a child support or alimony case is permissible, there must be a threshold finding that the dependent spouse has insufficient means to defray her litigation expenses. *See* N.C. Gen. Stat. § 50-13.6 (1999) (relating to child support); N.C. Gen. Stat. §§ 50-16.3, -16.4 (repealed 1995) (relating to alimony). In making this determination, the trial court should focus on both the disposable income of the dependent spouse and on her separate estate. *Van Every v. McGuire*, 348 N.C. 58, 62, 497 S.E.2d 689, 691 (1998). Here, plaintiff has a separate liquid estate of $88,000 from which she could pay her litigation expenses. The trial court, however, apparently failed to take this into account and instead just focused on her negative disposable income to justify the award of attorneys' fees. While the presence of a substantial separate estate does not automatically negate the dependent spouse's right to attorneys' fees, the trial court must still find that the use of her separate estate to pay her litigation expenses would amount to an unreasonable depletion of that estate before it awards her attorneys' fees. *Chused v. Chused*, 131 N.C. App. 668, 673, 508 S.E.2d 559, 563 (1998). The trial judge made no such finding here. Furthermore, before an award of attorneys' fees is warranted in an action involving child support, the trial judge is required to determine whether the party seeking attorneys' fees is an interested party acting in good faith. N.C. Gen. Stat. § 50-13.6 (1999). The trial court again made no such finding

here, and we are obligated to remand for that determination. *See Cox v. Cox*, 133 N.C. App. 221, 231, 515 S.E.2d 61, 66 (1999).

[6] We note that, in their briefs, the parties argue over whether a comparison of the separate estates is required in determining the propriety of attorneys' fees. Defendant contends that such a comparison is required, especially since he apparently has no separate estate here. Plaintiff, on the other hand, contends that no such comparison is necessary. Our Supreme Court recently clarified this issue in *Van Every v. McGuire*, 348 N.C. 58, 497 S.E.2d 689 (1998). Specifically, a trial judge is not required to compare the separate estates of both parties, but may do so under appropriate circumstances. *Id.* at 60, 497 S.E.2d at 690. Thus, on remand, the trial court may, if it so chooses, engage in a comparison of plaintiff's and defendant's separate estates to help it determine "whether any necessary depletion of [plaintiff's] estate by paying her own expenses would be reasonable or unreasonable." *Id.* at 62, 497 S.E.2d at 691.

[7] Having now considered all issues raised by defendant in his appeal, we move to plaintiff's cross-appeal. In her cross-appeal, plaintiff contests that portion of the trial court's order terminating her right to alimony should she ever cohabit with someone of the opposite sex. Our current statutes affirmatively state that cohabitation automatically terminates any alimony obligation. N.C. Gen. Stat. § 50-16.9(b) (1999). However, this statute only applies in actions filed on or after 1 October 1995. *Id.*, Editor's note. Because the instant action was filed 16 July 1993, the automatic termination provision in section 50-16.9(b) is not applicable here. No such cohabitation provision appeared in the pre-1995 version of the statute. We are thus left to decide whether the trial court could automatically terminate alimony upon cohabitation in the absence of explicit statutory authority. We hold that it could not.

Heretofore, alimony has been automatically terminable only in limited circumstances. The death of either spouse warrants automatic termination. *Hester v. Hester*, 239 N.C. 97, 100, 79 S.E.2d 248, 251 (1953). Likewise, remarriage of the dependent spouse automatically terminates the supporting spouse's alimony obligation. N.C. Gen. Stat. § 50-16.9(b) (amended 1995). And finally, reconciliation between the spouses is grounds for automatic termination. *O'Hara v. O'Hara*, 46 N.C. App. 819, 821, 266 S.E.2d 59, 59 (1980). We see no justification for extending these grounds to include cohabitation. We have previously held that, in a petition to modify alimony, cohabitation, standing alone, is not a sufficient change of circumstances to

warrant terminating the alimony obligation. *See Stallings v. Stallings*, 36 N.C. App. 643, 645, 244 S.E.2d 494, 495, *disc. review denied*, 295 N.C. 648, 248 S.E.2d 249 (1978). If cohabitation cannot be grounds for modification of alimony, then the trial judge should not be able to circumvent this limitation by simply inserting cohabitation as a *prospective* ground for termination.

Defendant analogizes this cohabitation provision to an alimony award for a period of years. He argues that, just as the trial court can terminate alimony upon a certain number of years, it should be able to terminate alimony upon the occurrence of a certain event, such as cohabitation. We find this analogy unpersuasive. Our alimony statutes specifically authorize alimony to be in lump sum or periodic payments. N.C. Gen. Stat. § 50-16.1(1) (repealed 1995). An alimony award for a specified period of years is one form of a lump sum payment. *Whitesell v. Whitesell*, 59 N.C. App. 552, 552, 297 S.E.2d 172, 173 (1982), *disc. review denied*, 307 N.C. 503, 299 S.E.2d 653 (1983). Thus, our statutes specifically empower a trial judge to award alimony for a specified period of years; they do not confer the same power with respect to the occurrence of certain events, such as cohabitation. Accordingly, we hold that, prior to the 1995 statutory amendments, the trial court had no authority to include a provision automatically terminating alimony upon cohabitation.

In passing, we feel obliged to clarify that our holding today in no way affects the ability of parties to include a termination-upon-cohabitation provision in *separation agreements*, whether or not specifically incorporated into a court order. Such provisions have previously been upheld by this Court, and we do not disturb these prior holdings. *See, e.g.*, *Condellone v. Condellone*, 129 N.C. App. 675, 686 n.2, 501 S.E.2d 690, 697 n.2, *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998); *Rehm v. Rehm*, 104 N.C. App. 490, 409 S.E.2d 723 (1991). Our holding today only restricts a trial court in cases filed before 1 October 1995 from including such a provision in alimony orders *in the absence of* a specific agreement between the parties.

In summary, we affirm the trial court's awards of $2400 per month in alimony and $2350 per month in child support. We vacate its order with respect to attorneys' fees and remand to the trial court for further findings. Finally, we vacate that portion of the trial court's order automatically terminating plaintiff's right to alimony upon cohabitation and remand for the entry of a new order without that provision.

Affirmed in part, vacated in part, and remanded.

Judges WYNN and MARTIN concur.

HENRY RANDALL REINNINGER, EMPLOYEE, PLAINTIFF v. PRESTIGE FABRICATORS, INC., EMPLOYER, KEY RISK MANAGEMENT SERVICES, CARRIER, DEFENDANTS

No. COA99-282

(Filed 30 December 1999)

1. Workers' Compensation— additional medical treatment—relation to original compensable injury—rebuttable presumption

In a case where plaintiff-employee requested additional medical treatment under N.C.G.S. § 97-25 for a back injury, the Industrial Commission's opinion must be remanded for a new determination of causation because it is unclear whether plaintiff was given the benefit of the rebuttable presumption that the treatment is directly related to the original compensable injury of 16 January 1995, and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury.

2. Workers' Compensation— credibility determination—deference to deputy commissioner

The Industrial Commission did not fail to perform its fact-finding function when it deferred to the credibility determination of the deputy commissioner concerning plaintiff-employee's alleged back injury because the Commission stated in its finding that the deputy commissioner found plaintiff was not credible, and then stated facts as noted by the deputy that tended to show plaintiff was not credible.

3. Workers' Compensation— company treating physician—private communications—exclusion of testimony not required

Although plaintiff-employee argues the testimony of Dr. Simpson, defendant-employer company's treating physician, should be excluded and not considered by the Industrial Commission based on alleged ex parte communications with the

employer, the Commission did not err in admitting the doctor's testimony because: (1) plaintiff has presented no evidence that the doctor engaged in any ex parte communications with defendants regarding his treatment of plaintiff, and it will not be assumed without supporting evidence; (2) any such communications would not only violate the rule of the Salaam case, but also the ethical standards of the doctor's profession; and (3) any alleged bias by the doctor as an employee of the employer goes to the credibility of his testimony.

4. **Workers' Compensation— company treating physician— knowledge not imputed to employer**

Even though the general rule is that the principal is charged with the knowledge of his agent, ex parte communications between the company physician and the company or the company's attorney in a workers' compensation case are not inferred or imputed when the agent has a reason or motive to withhold facts from his principal, such as the doctor's ethical obligation to withhold confidential communications of his patients.

Appeal by plaintiff from opinion and award filed 30 November 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 December 1999.

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

Teague, Rotenstreich and Stanaland, L.L.P., by Michael D. Holt, for defendant-appellants.

GREENE, Judge.

Henry Randall Reinninger (Plaintiff) appeals from a 30 November 1998 opinion and award of the North Carolina Industrial Commission (Commission) in favor of Prestige Fabricators, Inc. (Employer) and Key Risk Management Services (collectively, Defendants).

On 16 January 1995, Plaintiff was injured while working for Employer when he slipped and fell on a wet floor in Employer's break-room. As a result of this accident, Plaintiff and Employer entered into an agreement for compensation pursuant to North Carolina Industrial Commission Form 21. The agreement stated Plaintiff "sustained an injury by accident arising out of and in the

course of . . . employment [with Employer]" on 16 January 1995, and the accident resulted in "back pain." The agreement was approved by the Commission on 14 March 1995 pursuant to N.C. Gen. Stat. § 97-82. Plaintiff remained out of work from 17 January 1995 until 30 January 1995.

On 9 January 1997, Plaintiff requested a workers' compensation hearing on the ground Defendants refused to pay Plaintiff additional compensation pursuant to N.C. Gen. Stat. § 97-25 for the injury received from his 16 January 1995 compensable injury.

John Larry Simpson, M.D. (Dr. Simpson), medical and safety director for Klaussner Furniture Industries, the parent company of Employer, testified he treated Plaintiff following his 16 January 1995 injury. Plaintiff indicated he was experiencing pain in his left shoulder, posterior neck, low back, and upper hip area, and Dr. Simpson testified the "predominant symptoms deal[t] with left-sided neck, shoulder, [and] arm pain." When Dr. Simpson saw Plaintiff for a follow-up visit on 30 January 1995, Plaintiff did not report any pain in his low back. Dr. Simpson's records indicated he saw Plaintiff on 12 October 1995, and Plaintiff complained at that time of low back pain. Plaintiff told Dr. Simpson the pain began when he was lying on his sofa at home, felt a spasm, and "jumped up off the couch and felt a catch in his back."

Richard Albert Blase, D.C. (Dr. Blase), a doctor of chiropractic, testified he treated Plaintiff on 15 May 1996 for a low back condition. Plaintiff told Dr. Blase the condition "was a gradual onset of a duration of approximately three weeks" and the condition was not work-related. Dr. Blase testified Plaintiff's previous neck and shoulder pain did not relate to this lower back pain. He also testified, however, that Plaintiff's pain in 1996 could have been part of a "continuum of medical problems." His findings indicated Plaintiff was "not necessarily in poor spinal health but not in good spinal condition structurally."

On 26 February 1998, the Deputy Commissioner denied Plaintiff's section 97-25 compensation claim for medical treatment. Plaintiff appealed to the Commission.

On 30 November 1998, the Commission made the following pertinent findings of fact:

> 25. There is insufficient medical evidence from which to determine by its greater weight that [P]laintiff's absence from

work since May 1996 is causally related to [P]laintiff's compensable injuries of . . . 16 January 1995.

26. The evidence tends to show that any disability after May 1996 is related to an alleged injury in late April or May 1996. There is no Form 21 agreement wherein [D]efendants would have accepted the compensability of any such injury; accordingly, [P]laintiff is not entitled to a presumption of continuing disability and retains the burden of proving his disability claim.

27. . . . [T]he Deputy Commissioner found that she was unable to accept as credible [P]laintiff's allegations that he was, at the time of the hearing, disabled as the natural and direct result of his compensable injuries. This credibility determination was based in part on [P]laintiff's demeanor and in part on the medical records and other credible evidence of record. The [Commission] defers to this credibility determination. As the Deputy Commissioner noted, in October 1995 [P]laintiff maintained that his low back pain was not work related. He maintained this position again when he sought treatment in May 1996. He later changed his position and told his physicians, and testified, about another work-related incident in May 1996. If the low back pain was related to [the] compensable injury of . . . 16 January 1995, it would have become symptomatic before October 1995.

The Commission entered the following pertinent conclusions of law:

"1. Plaintiff's complaints of low back pain in October 1995, May 1996, and continuing did not result from [P]laintiff's injuries by accident on . . . 16 January 1995. . . .

. . . .

3. Plaintiff is not entitled to have [D]efendants provide medical treatment arising from [P]laintiff's lower back complaints . . . ."

The issues are whether: (I) Plaintiff had the burden of proving the back injury for which he requested additional medical treatment, pursuant to N.C. Gen. Stat. § 97-25, was causally related to his compensable injury of 16 January 1995; (II) the Commission failed to make credibility determinations and therefore failed to perform its fact-finding function; and (III) Employer engaged in *ex parte* communications with Dr. Simpson relating to his treatment of Plaintiff.

I

[1] Plaintiff argues the Commission erroneously placed on him the burden of proving the medical treatment he now seeks is causally related to his compensable 16 January 1995 injury. We agree.

Subsequent to the establishment of a compensable injury under the North Carolina Workers' Compensation Act, an employee may seek compensation under N.C. Gen. Stat. § 97-25 for additional medical treatment when such treatment "lessens the period of disability, effects a cure or gives relief." *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 541-42, 485 S.E.2d 867, 869 (1997) (citing *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986)). Any claim for additional medical compensation must be made within "two years after the employer's last payment of medical or indemnity compensation" unless the employee, prior to the expiration of the two-year period, files a claim for additional medical compensation, or the Commission orders additional medical compensation on its own motion. N.C.G.S. § 97-25.1 (Supp. 1998).

In an action for additional compensation for medical treatment, the medical treatment sought must be "directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). If additional medical treatment is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury. *Id.*

In this case, Plaintiff and Defendants entered into an agreement for compensation, pursuant to North Carolina Industrial Commission Form 21, for an injury sustained by Plaintiff on 16 January 1995. The agreement stated, in pertinent part, that Plaintiff "sustained an injury by accident arising out of and in the course of . . . employment [with Employer]" on 16 January 1995, and this accident resulted in "back pain." The agreement was approved by the Commission, pursuant to N.C. Gen. Stat. § 97-82, on 15 March 1995, and therefore constitutes an award of the Commission. N.C.G.S. § 97-82 (Supp. 1998); *Glenn v. McDonald's*, 109 N.C. App. 45, 48, 425 S.E.2d 727, 730 (1993).

In its 1998 opinion and award, the Commission found as fact that "[t]here is insufficient medical evidence from which to determine by its greater weight that [P]laintiff's absence from work since May 1996

is causally related to [P]laintiff's compensable injuries of . . . 16 January 1995." Although the findings are far from clear, they appear to indicate the Commission failed to give Plaintiff the benefit of the presumption that his medical treatment now sought was causally related to his 1995 compensable injury. The better practice in these section 97-25 hearings is for the Commission to clearly delineate in its opinion and award that it is giving Plaintiff the benefit of the *Parsons* presumption. Because Plaintiff was entitled to such a presumption, we remand this case to the Commission for a new determination of causation.

II

[2] Plaintiff contends the Commission failed to review the evidence and make credibility determinations and, therefore, failed to perform its fact-finding function. We disagree.

In an action for workers' compensation, the Commission is the ultimate fact finder. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998). While our courts have recognized that when the Commission reviews a cold record "the hearing officer is the best judge of the credibility of witnesses because he is a firsthand observer of witnesses," *Pollard v. Krispy Waffle*, 63 N.C. App. 354, 357, 304 S.E.2d 762, 764 (1983), the Commission is ultimately responsible for making its own determinations of credibility, *Adams*, 349 N.C. at 681, 509 S.E.2d at 413.

In this case, Defendants contend the Commission did not perform its fact-finding function under *Adams* when it deferred to the credibility determination of the Deputy Commissioner in the following finding of fact:

> [T]he Deputy Commissioner found that she was unable to accept as credible [P]laintiff's allegations that he was, at the time of the hearing, disabled as a natural and direct result of his compensable injuries. This credibility determination was based in part on [P]laintiff's demeanor and in part on the medical records and other credible evidence of record. The [Commission] defers to this credibility determination. *As the Deputy Commissioner noted*, in October 1995 [P]laintiff maintained that his low back pain was not work related. He maintained this position again when he sought treatment in May 1996. He later changed his position and told his physicians, and testified, about another work-related incident in May 1996. . . . (Emphasis added.)

Contrary to Plaintiff's contention, the Commission's finding demonstrates it did consider credibility when reviewing the facts of this case, and did not blindly defer to the credibility determination of the Deputy Commissioner. The Commission stated the Deputy Commissioner found Plaintiff not credible, and the Commission then stated facts, as "noted" by the Deputy Commissioner, tending to show Plaintiff was not credible. The Commission, therefore, properly performed its fact-finding function concerning the credibility of the witnesses.

III

[3] The essence of Plaintiff's final argument is that because Dr. Simpson is an employee of Employer, any knowledge gained by Dr. Simpson in his treatment of Plaintiff, a fellow employee, is imputed to Employer, and this necessarily violates the teaching of *Salaam v. N.C. Dept. of Transportation,* 122 N.C. App. 83, 468 S.E.2d 536 (1996), *disc. review dismissed,* 345 N.C. 494, 480 S.E.2d 51 (1997). It thus follows, Plaintiff contends, Dr. Simpson's testimony must be excluded and not considered by the Commission. We disagree.

In a workers' compensation case, a physician may not engage in *ex parte* communications with the defendant. *Id.* (citing *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (1990)). Plaintiff, however, has presented no evidence Dr. Simpson engaged in *ex parte* communications with Defendants regarding his treatment of Plaintiff. Any such communications would violate not only the rule of *Salaam,* but also the ethical standards of Dr. Simpson's profession, *see* American Medical Association, *Code of Medical Ethics* § 5.05 (1998-99) ("physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law"), and we will not assume, without supporting evidence, that Dr. Simpson has acted unethically, *see Jenkins v. Public Service Co. of N.C.,* 134 N.C. App. 405, 414-15, 518 S.E.2d 6, 11 (1999) (appellate court will not assume rehabilitation professional acted unethically). On this record, therefore, the Commission did not err in admitting Dr. Simpson's testimony.[1]

[4] Furthermore, we reject Plaintiff's contention that *ex parte* communications between the company physician and the company or the company's attorney are necessarily inferred. We acknowledge the

1. Any alleged bias by Dr. Simpson, as an employee of Employer, goes to the credibility of his testimony. *See Adams,* 349 N.C. at 680, 509 S.E.2d at 413 (" 'Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " (citation omitted)).

general rule that the principal is chargeable with the knowledge of his agent. 3 Am. Jur. 2d *Agency* § 281, at 784-85 (1986). When, however, the agent has a reason or motive to withhold facts from his principal, the "knowledge of the agent is not imputed to the principal." *Id.* § 290, at 794. In this case, Dr. Simpson has an ethical obligation to withhold the confidential communications of his patients and thus his knowledge of these communications and the treatment and diagnosis of his patients based on those communications are not imputed to Employer.

Vacated and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

FIRST UNION NATIONAL BANK, EXECUTOR OF THE ESTATE OF F. BERNARD INGOLD, PLAINTIFF v. FRANCES Y. INGOLD, PHOEBE INGOLD SPRATT, ALICE S. HERMAN, BARNEY M. SPRATT, DR. C. JEAN SPRATT, W. ANDREW SPRATT, INDIVIDUALLY AND AS GUARDIAN/CUSTODIAN OF THOMAS A. SPRATT (A MINOR), JENNIFER H. WARREN, DEFENDANTS

No. COA99-270

(Filed 30 December 1999)

Wills— general power of appointment—residuary clause—trust assets

Even though the general rule is that specific reference must be made to a power of appointment before the power may be exercised, the trial court erred in concluding decedent's will had no effect on the disposition of decedent's trust because the residuary clause of decedent's will exercised the general power of appointment reserved by him in the pertinent trust since: (1) a power of appointment upon which no restrictions are imposed is exercised by a residuary clause; (2) the will does not indicate any intent not to exercise the power of appointment reserved by the trust; and (3) the trust does not indicate that decedent was required to refer to the reserved power in order for it to be exercised.

Appeal by defendant Frances Y. Ingold from judgment entered 15 January 1999 by Judge Loto Greenlee Caviness in Catawba County Superior Court. Heard in the Court of Appeals 25 October 1999.

Tate, Young, Morphis, Bach & Taylor, by Wayne M. Bach and Kevin C. McIntosh, for plaintiff-appellee First Union National Bank.

Sigmon, Clark, Mackie, Hutton & Hanvey, P.A., by William R. Sigmon and Stephen L. Palmer, for defendant-appellant Frances Y. Ingold.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant-appellees Phoebe Ingold Spratt, Alice S. Herman, Barney M. Spratt, Dr. C. Jean Spratt, W. Andrew Spratt, Debbie Darling Spratt as guardian ad litem of Thomas A. Spratt (a minor), and Jennifer H. Warren.

Shirley H. Anthony, Guardian Ad Litem for the minor and unborn issue of defendant Phoebe Ingold Spratt, who did not otherwise have a guardian.

HUNTER, Judge.

Defendant Frances Y. Ingold ("appellant") appeals the judgment of superior court wherein it determined F. Bernard Ingold's ("decedent") last will and testament ("will") had no effect on the administration of a trust agreement ("Ingold Trust") executed by decedent. We reverse, concluding that a general power of appointment was reserved by decedent in the Ingold Trust and it was exercised by the residuary clause in his will.

The present action was instituted by First Union National Bank ("plaintiff") as executor of the decedent's estate seeking declaratory judgment under Article 26 of the General Statutes of North Carolina. Plaintiff alleged in its complaint that a trust executed by the decedent, when construed in conjunction with his will, created uncertainty as to the distribution of the trust assets. Appellant filed an answer also requesting construction of said documents, and requested that the court find that "the Last Will and Testament of F. Bernard Ingold [disposed] of the Ingold Trust Estate, thereby devising all the assets comprising said Trust Estate to Frances Y. Ingold." The remaining defendants filed a separate joint answer requesting that the court "enter judgment construing the trust agreement . . . according to its terms." The matter came on for hearing on 3 December 1998. On 15 January 1999, the court entered judgment wherein it stated that the decedent's trust should continue in force as if his will had no effect.

The evidence submitted to the court indicates that paragraph 2B of the Ingold Trust states in part:

> Upon the death of the Grantor without his having provided for disposition of the Trust Estate by will and contrary to the provisions of this Agreement, the net income of the Trust Estate shall be paid to his wife, Frances Y. Ingold, in quarterly installments.

Under the trial court's ruling, this section would remain in force and appellant would only receive the net income of the trust estate in quarterly installments. The residuary clause in decedent's will provides:

> I will, devise and bequeath all of my property of every kind, sort and description, both real and personal, unto my wife, Frances Y. Ingold, absolutely and in fee simple.

Appellant contends this devise exercised a power of appointment reserved by the decedent in paragraph 2B, resulting in the entire trust estate being devised to her. We agree.

The standard of review of a judgment rendered under the Declaratory Judgment Act is the same as in other cases. N.C. Gen. Stat. § 1-258 (1996). Thus, where a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed. *Insurance Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981). Therefore, a judgment supported by findings based on any competent evidence must be affirmed.

Under our statutory code:

> A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, *which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will;* and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be con-

> strued to include any personal estate, or any personal estate to which such description shall extend, as the case may be, *which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.*

N.C. Gen. Stat. § 31-43 (1999) (emphasis added). N.C. Gen. Stat. § 31-43 "is identical with § 27 of the English Wills Act of 1837 (7 Wm. IV & 1 Vict., Ch. 26)." *Trust Co. v. Hunt*, 267 N.C. 173, 178, 148 S.E.2d 41, 45 (1966). The effect of both § 27 of the English Wills Act and N.C. Gen. Stat. § 31-43

> is that a general devise or bequest shall be construed to include any real or personal property which the testator may have power to appoint *in any manner he may think proper* and shall operate as an execution of such power unless a contrary intention appears in the will. A power to appoint in any manner the donee may think proper is a power upon which no restrictions are imposed—a general power.

Trust Co. v. Hunt, 267 N.C. at 181, 148 S.E.2d at 46-47 (emphasis in original) (citation omitted). Citing N.C. Gen. Stat. § 31-43, this Court has stated: "In North Carolina and a minority of other states, a power of appointment upon which no restrictions are imposed is exercised by a residuary clause." *In the Matter of: First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 570, 335 S.E.2d 515, 517 (1985). It is uncontroverted that the decedent's will contained a residuary clause. Accordingly, our inquiry will focus on whether or not a general power of appointment is contained in paragraph 2B of the Ingold trust.

Appellees contend that paragraph 2B of the trust does not contain a power of appointment. Generally, a power of appointment is the power to dispose of property by deed or will. 62 Am. Jur. 2d *Powers* § 2 (1990). While "[t]he donor and donee of a power of appointment cannot be the same person, . . . it is not uncommon for a trust settlor to reserve to himself a power of appointment to be exercised by his own will at a later time." 62 Am. Jur. 2d *Powers* § 32 (footnotes omitted). Powers are ordinarily categorized as either general or special.

> General powers of appointment are those authorizing the donee of the power to appoint anyone, including himself or his estate, and his creditors, although the mere fact that a donee of a power

> is free to select the beneficiary does not make the power a general one, where it does not appear that he may exercise the power during his lifetime for his own benefit. A power of appointment is said to be general when there is no restriction as to its exercise (except as to manner), the persons in whose favor it is to be exercised, or the amounts to be given to such persons.
>
> . . .
>
> Special or limited powers of appointment are those in which the donee of the power is restricted to passing on the property to certain specified individuals, or to a specific class of individuals—other than himself or his estate—or to any beneficiaries except those specifically excluded, or in which the donee can exercise the power only for certain named purposes, or under certain conditions. Stated another way, a special power is one limited by excluding certain persons from taking under the power of disposition given the donee.

62 Am. Jur. 2d *Powers* § 11 (1990) (footnotes omitted). " 'A power is general where no restriction is imposed upon the donee as to the person or persons to whom he may appoint or the amount which each person shall receive.' " *Trust Co. v. Hunt*, 267 N.C. at 176, 148 S.E.2d at 43 (citations omitted). Under the laws of this state, a power of appointment may be created not only by express words, but also by implication of law and, further, no technical language need be used. *In Re Grady*, 33 N.C. App. 477, 480, 235 S.E.2d 425, 428 (1977). The polar star which must serve as the guide for determining whether certain language creates a power of appointment is the intent underlying the settlor's inclusion of such language in the document:

> "An instrument, such as a deed or will, creating a power of appointment is to be interpreted so as to ascertain the intention of the donor and to give it effect unless some rule of law prevents. Effect should, if possible, be given to every word or clause in the instrument, so long as they are not inconsistent with the general intent of the instrument as a whole." 41 Am. Jur., Powers, § 9, p. 812.

Howell v. Alexander, 3 N.C. App. 371, 376, 165 S.E.2d 256, 260 (1969).

In paragraph 2B of the Ingold Trust, the decedent in the present case specifically provided that he may appoint the entire trust estate by will and contrary to the trust provisions. The decedent imposed no

restrictions on this reserved power. Therefore, the power reserved by the decedent was a general power of appointment. Looking at the four corners of the document, it does not reveal any contrary intent. Paragraph 10 of the trust states:

> During his lifetime the Grantor may, by written instrument filed with the Trustee, revoke this trust in whole or in part upon paying the sums due to the Trustee for its services hereunder or may by testamentary disposition revoke said trust in whole or in part.

Thus, it is evident that the decedent specifically intended the trust to be revocable during his life or by testamentary disposition. The intent in this paragraph coincides with the intent to reserve a general power of appointment in paragraph 2B.

As stated earlier, a power of appointment upon which no restrictions are imposed is exercised by a residuary clause. *In the Matter of: First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. at 570, 335 S.E.2d at 517. The will does not indicate any intent not to exercise the power of appointment reserved by decedent in the Ingold Trust. Likewise, the Ingold Trust does not indicate that the decedent was required to refer to the power reserved in paragraph 2B in order for it to be exercised. Thus, the rule that "in order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made," *In the Matter of: First Citizens Bank & Trust Co.*, 77 N.C. App. at 571, 335 S.E.2d at 517, is inapplicable to the present case.

Based on the foregoing, we hold that the residuary clause of the decedent's will exercised the general power of appointment reserved by him in the Ingold Trust. Our review indicates that no competent evidence supports any other conclusion. Due to our holding, we need not reach appellant's second assignment of error.

Reversed and remanded.

Chief Judge EAGLES and Judge JOHN concur.

STATE OF NORTH CAROLINA v. WILLIAM JOSEPH FUSCO

No. COA99-130

(Filed 30 December 1999)

1. Obscenity— indecent exposure—testimony of victim not required

Even though one of the victims never testified at trial, the trial court did not err in failing to dismiss that indecent exposure charge on the basis that any testimony elicited on her behalf to substantiate the charge amounts to inadmissible hearsay because: (1) if defendant had any specific complaints with alleged hearsay statements purportedly made by that victim that were received into evidence, his proper avenue of appeal was to assign error to the trial court's admission of these statements; and (2) the victim's testimony was not even needed to substantiate the charge since the State only needed to show that defendant was exposing himself and that the victim was present during the exposure and could have seen had she looked.

2. Obscenity— indecent exposure—public place—creek embankment—use of property is key criterion

The trial court did not err in failing to dismiss both counts of indecent exposure on the basis that the creek embankment adjacent to one victim's backyard was not a "public place" under N.C.G.S. § 14-190.9(a) because use of the property, as opposed to its ownership, is the key criterion and the evidence establishes that the creek embankment was being used by the public.

3. Obscenity— indecent exposure—public place—accessability and viewability

The trial court did not err in an indecent exposure case by its instruction to the jury concerning the definition of "public place" even though its final part of the instruction focuses on public view whereas our Supreme Court's definition focuses on accessibility because: (1) if a place is open to the public for access, it is also open to the public's view; and (2) Black's Law Dictionary focuses on both accessibility and viewability in its definition of "public," and our courts have previously endorsed the use of this dictionary to define legal terms.

Appeal by defendant from judgment entered 7 October 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 8 December 1999.

Attorney General Michael F. Easley, by Assistant Attorney General V. Lori Fuller, for the State.

David S. Brannon for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 10 February 1998 session of Wake County District Court on two counts of indecent exposure, a class II misdemeanor. Judge Fred Morelock found him guilty on both counts, and defendant appealed to the Superior Court for a trial *de novo*. He was subsequently tried at the 7 October 1998 session of Wake County Superior Court. The jury returned a verdict of guilty as to both counts on 7 October 1998, and defendant now appeals.

The evidence at trial tended to show that, on 10 October 1997, Stephanie Dennis was at home eating lunch with her husband, Chris Dennis, and her mother, Elaine Davis. Mrs. Dennis and her mother both looked out the window and saw defendant lying on a creek embankment adjacent to their backyard. He had his robe open and was masturbating. Mr. Dennis then looked out the window and saw the same thing. Both Mr. and Mrs. Dennis testified that they saw defendant's genitalia. When Mr. Dennis ran out into the backyard to confront him, defendant left. Mr. Dennis then called the police. Defendant was subsequently charged with two counts of indecent exposure: (1) indecent exposure in the presence of Mrs. Dennis and (2) indecent exposure in the presence of Mrs. Davis. Mrs. Davis did not testify at trial; Mrs. Dennis did.

[1] Defendant first argues that the charge for indecent exposure in the presence of Mrs. Davis should have been dismissed because Mrs. Davis never testified. He argues that any testimony elicited on her behalf to substantiate the charge amounts to inadmissible hearsay. However, defendant has not assigned error to any particular testimony alleged to be hearsay. Rather, his complaint is that the entire charge against defendant should have been dismissed solely because Mrs. Davis did not testify. We find this argument to be without merit.

Defendant has not been able to cite us to any case law affirmatively requiring the complaining witness or victim to testify at trial.

None is cited because no such requirement exists. Countless scenarios exist in which the complaining witness or victim cannot testify, but the charges against a defendant have been allowed to proceed. Every murder case involves such a situation. A criminal assault case in which the victim is left comatose is another such situation. Accordingly, the mere fact that Mrs. Davis did not testify does not justify dismissal of the charge for indecent exposure in her presence. If defendant had any specific complaints with alleged hearsay statements purportedly made by Mrs. Davis being received into evidence, defendant's proper avenue of appeal was to assign error to the trial court's admission of these statements, not to the trial court's failure to dismiss the underlying charge itself.

Furthermore, we note that Mrs. Davis' testimony was not even needed to substantiate this charge. Indecent exposure involves exposing one's self "in the presence of" a person of the opposite sex. N.C. Gen. Stat. § 14-190.9(a) (amended 1998). The victim need not actually see what is being exposed. *State v. Fly*, 348 N.C. 556, 561, 501 S.E.2d 656, 659 (1998). Accordingly, the State was not required to produce evidence as to what Mrs. Davis actually saw; it only needed to show that defendant was exposing himself and that Mrs. Davis was present during this exposure and could have seen had she looked. *Id.* The testimony by both Mr. and Mrs. Dennis, as outlined above, established these requirements.

[2] Next, defendant contends that both counts against him should have been dismissed because the creek embankment was not a "public place," a requisite element of the offense. *See* N.C. Gen. Stat. § 14-190.9(a) (amended 1998). Again we disagree. For purposes of indecent exposure, our Supreme Court has defined "public place" as follows:

> "a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, *a place which is accessible to the public and visited by many persons.*"

State v. King, 268 N.C. 711, 711, 151 S.E.2d 566, 567 (1966) (per curiam) (emphasis added) (quoting *State v. Fenner*, 263 N.C. 694, 698, 140 S.E.2d 349, 352 (1965). This definition connotes that *use* of the property, as opposed to its ownership, is the key criterion. *Cf. State v. Streath*, 73 N.C. App. 546, 552, 327 S.E.2d 240, 244 (holding that the open parking lot of a business is a public place), *disc. review denied*,

313 N.C. 513, 329 S.E.2d 402 (1985). Here, the evidence established that the creek embankment was being used by the public. Children played on the creek bed frequently, nothing prevented any person from walking through the Dennis' backyard to get to the creek, and there were no signs of a "No Trespassing" nature posted anywhere along the creek. We therefore hold that this creek embankment was a "public place" for purposes of our indecent exposure statute.

[3] Finally, defendant assigns error with a portion of the trial court's instruction on the definition of "public place." Over defendant's objection, the trial court instructed the jury as follows:

> A public place means a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public. It's a place that is visited by many persons and to which the neighboring public may have resort. A public place is a place which is viewable from any location open to the view of the public at large.

(Tr. at 48). We note that the first two sentences of this instruction are taken directly from our Supreme Court's definition of "public place" in *King*, set out earlier. Defendant nonetheless contends that the trial court unlawfully expanded the Supreme Court's definition by adding the third sentence.

We conclude that the trial court's instructions represent an accurate statement of the law. Essentially, the only difference between the trial court's instruction and our Supreme Court's definition is that the final part of the instruction focuses on public view, whereas the final part of the Supreme Court's definition focuses on accessibility. Quite naturally, if a place is open to the public for access, it is also open to the public's view. Also of note, the definition of "public" in *Black's Law Dictionary* focuses on both accessibility and viewability. *See* Black's Law Dictionary 1242 (7th ed. 1999) ("A place open *or visible* to the public." (emphasis added)). Our courts have previously endorsed the use of *Black's Law Dictionary* to define legal terms. *See, e.g., State v. Fenner*, 263 N.C. 694, 701, 140 S.E.2d 349, 354 (1965). We thus find no error with the trial court's inclusion of a sentence focusing on viewability as part of its overall instruction on the meaning of "public place."

No error.

Judges WYNN and MARTIN concur.

NORTHFIELD DEVELOPMENT CO., INC., PLAINTIFF v. THE CITY OF BURLINGTON, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA99-64

(Filed 4 January 2000)

1. Zoning— manufactured homes overlay district—change in ownership of property—standing—not moot

In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court erred in dismissing plaintiff's arbitrary/capricious and N.C.G.S. § 160A-383.1 claims based on mootness and lack of standing, even though plaintiff no longer owns one of the pertinent parcels of land, because: (1) plaintiff was to receive an additional $126,280 if the City rezoned the property by 1 February 1998, thus constituting a specific personal and legal interest in the rezoning process; (2) the failure to rezone the property directly and adversely affected plaintiff; and (3) the property ownership changed before the filing of the complaint, the relief sought has not been granted, and the questions originally in controversy remain. Plaintiff's unreasonable, arbitrary, and capricious claims with respect to both parcels of land remain viable and are to be addressed on remand.

2. Zoning— manufactured homes overlay district—preclusion of use not shown

In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court did not err in dismissing plaintiff's N.C.G.S. § 160A-383.1 claims, based on allegations that the City has adopted or enforced zoning regulations precluding the use of manufactured homes in the City's entire zoning jurisdiction, because the City has approved two manufactured home overlay district petitions, thus permitting placement of manufactured homes within certain districts within the City's jurisdiction.

3. Zoning— manufactured homes overlay district—substantial presence—city not required to adopt

In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court did not err by dismiss-

ing plaintiff's N.C.G.S. § 160A-383.1 claims, based on allegations that the statute reveals a legislative intent that there be a substantial presence of manufactured homes within each municipality and the City's approval of only two of twelve manufactured home overlay district petitions does not constitute a substantial presence, because this statute does not require a city to adopt any manufactured home overlay district zoning.

4. Zoning— manufactured homes overlay district—council not obligated to approve petitions—council retains discretion

In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, even though the City's zoning code provides that manufactured home overlay district petitions are "permitted by right" in R-9 districts, the trial court did not err in dismissing plaintiff's N.C.G.S. § 160A-383.1 claims because the Council is not obligated to approve the petitions and retains the discretion to make the designation.

5. Zoning— manufactured home overlay district—deposition of mayor—legislative immunity

In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court's protective order with respect to plaintiff's request to take a deposition of the mayor of City is modified and affirmed in that: (1) the mayor cannot be compelled to testify about his actions, intentions, and motives with respect to the manufactured home overlay district petitions in this action or any other quasi-judicial or legislative matters addressed by the Council while the mayor served on that body based on legislative immunity; (2) he did not abandon that privilege when he spoke with the newspapers, as there is no explicit showing he intended to waive the privilege; and (3) the part of the order prohibiting any questioning of the mayor is reversed because the relevancy of those questions must be judged by the trial court.

Judge HUNTER concurring in part and dissenting in part in a separate opinion.

Appeal by plaintiff from an order and judgment dated 13 October 1998 and from an order dated 13 October 1998 by Judge J.B. Allen, Jr.

in Alamance County Superior Court. Heard in the Court of Appeals 19 October 1999.

Smith, James, Rowlett & Cohen, L.L.P., by J. David James, for plaintiff-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr. and John-Paul Schick; and City Attorney Robert M. Ward, for defendant-appellee.

GREENE, Judge.

Northfield Development Co., Inc. (Plaintiff) appeals the entry of an "Order and Judgment" granting the City of Burlington's (City) motion to dismiss four of the five claims asserted by Plaintiff. Plaintiff also appeals the entry of a protective order requested by City prohibiting Plaintiff from taking the deposition of City's mayor, Mr. Joe Barbour (Mayor Barbour).

Order and Judgment

Plaintiff's complaint, filed 10 November 1997, and amendment to the complaint assert claims arising out of City's denial of two separate requests by Plaintiff for Manufactured Home Overlay District (MHOD) zoning for two parcels of land.

With respect to the first MHOD request, the pleadings allege that on 29 January 1997, Plaintiff entered into an agreement to sell approximately 63.14 acres of land to Randolph Isley, Jr. (Isley) and Gordon Oliver (Oliver). The agreement to sell the property (Isley/Oliver property) was made contingent on City's approval of MHOD zoning to cover the Isley/Oliver property.

On 5 February 1997, an application was filed by Isley and Oliver to re-zone the Isley/Oliver property MHOD. The application was considered by the Burlington Planning and Zoning Commission (the Planning Board) at its 24 February 1997 meeting. Although the Planning Board's staff recommended the application be approved, the Planning Board voted seven-to-two to recommend to the Burlington City Council (the Council) that the application be denied. After the Planning Board voted to recommend a denial of the MHOD application, Isley, Oliver, and Plaintiff, on 15 March 1997, and again on 13 May 1997, amended the agreement for the sale of the Isley/Oliver property to remove the contingency that the property be zoned MHOD. The agreement, as amended, provided the purchase

price would be reduced from $6,000.00 per acre to $4,000.00 per acre, with the further condition that if the Isley/Oliver property was re-zoned MHOD by 1 February 1998, Isley and Oliver would pay Plaintiff an additional $2,000.00 per acre. The Isley/Oliver property was then transferred from Plaintiff to Isley and Oliver.

The Council declined to conduct a public hearing on Plaintiff's application. Plaintiff's complaint alleges: (1) the denial to hold a public hearing violated City's zoning regulations, thus, violating Plaintiff's due process rights under Article I, Section 19 of the North Carolina Constitution, because the denial was unreasonable, arbitrary, and capricious; (2) the failure to zone the Isley/Oliver property MHOD violated Plaintiff's due process rights, was unreasonable, arbitrary, and capricious, and thus violated Article I, Section 19 of the North Carolina Constitution; and (3) the failure to re-zone the Isley/Oliver property MHOD violated section 160A-383.1 of the North Carolina General Statutes. Plaintiff further alleges it had been damaged by Defendant's actions in the amount of $126,280.00, which represented the additional $2,000.00 per acre Plaintiff would have been paid if the Isley/Oliver property had been re-zoned to MHOD.

With respect to the second request for MHOD zoning, Plaintiff's complaint alleges that Plaintiff owns a tract of land, consisting of approximately 69 acres, situated at the corner of Blackwell Road and Hazel Drive (Blackwell property) in Alamance County. On 11 July 1997, Plaintiff filed an application to re-zone the Blackwell property to MHOD. The application was considered by the Planning Board at its 28 July 1997 meeting. The Planning Board voted to recommend to the Council that the application be denied. On 7 October 1997, the Council denied the application.

Plaintiff's complaint alleges City's refusal to re-zone the Blackwell property as a MHOD: (1) violated section 160A-383.1; and (2) was unreasonable, arbitrary, and capricious, thus violating Article I, Section 19 of the North Carolina Constitution.

In support of its section 160A-383.1 claim with respect to both tracts of land, Plaintiff alleges that since City enacted the use of MHODs, it had approved only 2 of 12 MHOD petitions and that no MHOD petitions had been approved since May of 1994. It further alleges section 160A-383.1 has been violated by City because the adoption and enforcement of the MHOD regulations "had the effect of excluding manufactured homes from [City's] zoning jurisdiction."

Plaintiff's complaint requests a declaration that City had violated N.C. Gen. Stat. § 160A-383.1, recovery of $126,280.00, and injunctive relief compelling Defendant to re-zone the Isley/Oliver property and the Blackwell property MHOD.

City's answer alleges Isley and Oliver were the applicants for MHOD zoning for the Isley/Oliver property, and the application identified Plaintiff as the owner of the property. City further alleges Isley and Oliver abandoned their application and, therefore, no hearing was required or conducted to "review the Planning Board's recommendation that the application be denied." The answer admits City had approved only 2 of 12 MHOD petitions but denies it had violated section 160A-383.1.

Plaintiff was permitted to incorporate and include the affidavit of Isley as an amendment to its complaint. In this affidavit, Isley stated, in pertinent part: (1) he and his partner, Oliver, filed the application seeking to have the Isley/Oliver property zoned MHOD; (2) following the Planning Board hearing, he and Oliver reached an agreement authorizing Plaintiff to appeal the Planning Board decision to the Council to seek the MHOD to cover the property; and (3) he did not withdraw his application for the MHOD to cover the Isley/Oliver property.

Plaintiff was also permitted to incorporate and include in its complaint the following provisions from Chapter 32 of the City Code, entitled "ZONING ORDINANCE": City Code, § 32.2R, entitled "Manufactured Housing Overlay District"; and City Code, § 32.9, entitled "TABLE OF PERMITTED USES."

Section 32.2R of City's Code provides, in pertinent part:

1. Purpose

> It is the purpose of this section to provide alternative, affordable housing opportunities by providing for the placement of manufactured housing within manufactured housing districts and/or subdivisions as defined within this ordinance. The Manufactured Housing Overlay District is established pursuant to Article 19, Section 160A-383.1(e) of the North Carolina General Statutes.

. . . .

3. Manufactured Housing Districts—Designation

   A. A Manufactured Housing Overlay District is hereby established as a district which may overlay R-6, R-9 and R-12 Residential Districts,[1] the extent and boundaries of which shall be shown on the official zoning map for the City of Burlington and its extraterritorial zoning jurisdiction. All uses permitted in the above residential districts, whether by right or Special Use Permit, shall be permitted within manufactured housing districts. A manufactured housing district shall consist of either:

      (1) a minimum of eight existing contiguous lots and a minimum of 65,000 square feet, excluding public street right-of-way; or,

      (2) a minimum of 95,000 square feet in a single contiguous area, excluding public street right-of-way.

   Manufactured housing districts and/or subdivisions established pursuant to this ordinance may contain a combination of manufactured housing, modular housing or conventional stick-built housing.

   B. Uses established within Manufactured Housing Overlay Districts shall conform with other regulatory provisions within this ordinance, including off-street parking and setback requirements. Additionally, all manufactured homes placed within Manufactured Housing Overlay Districts shall conform with the dimensional and siting requirements of this section.

   C. The Burlington City Council shall have the authority to designate, amend or repeal Manufactured Housing Overlay Districts and/or subdivisions. Requests regarding Manufactured Housing Overlay Districts shall be processed in accordance with the provisions of the Burlington Zoning Ordinance.

Burlington, N.C., Code § 32.2R (1989).

Section 32.9 of City's Code provides, in pertinent part, that MHODs "are permitted by right" in Residential Districts R-6, R-9 and R-12. Burlington, N.C., Code § 32.9 (1979). This section of the City

1. Although the record is not clear, the parties have briefed this case with the apparent understanding that the property in question is zoned as either R-6, R-9 or R-12. We, accordingly, do not see this as disputed in this case.

Code also provides that "[a]ll uses are subject to all sections of this chapter." *Id.*

On 5 August 1998, City moved to dismiss Plaintiff's Isley/Oliver property claims in their entirety, based on the allegation that Plaintiff did not have standing to pursue the claims because it had transferred the property to Isley and Oliver before this action was commenced. City also sought dismissal of both section 160A-383.1 claims.

The trial court dismissed all of Plaintiff's claims concerning the Isley/Oliver property on the ground Plaintiff had no standing to assert the claims and on the alternative ground that the claims were moot. The trial court "[i]n the alternative and in addition," dismissed both of Plaintiff's claims concerning City's alleged violations of section 160A-383.1.

Protective Order

On 30 June 1998, Plaintiff served Notice of Deposition seeking to depose Mayor Barbour on 20 July 1998. City resisted the taking of that deposition, and on 17 July 1998, served a motion for protective order requesting Plaintiff be prohibited from taking the deposition based on legislative immunity and/or lack of relevance.

Evidence was presented relating to the protective order showing that on 24 April 1997, Mayor Barbour was quoted in the local newspaper, regarding the MHOD re-zoning requests, as saying:

> "I just don't see the point in even having the (application process) if it's not ever going to be approved . . . . You're making people jump through a lot of hoops [if] they want to have one of these things approved."
>
> . . . .
>
> (Planning director) Bob Harkrader said . . . "that [if] that one was not approved, he couldn't think of any that would be approved[.]"

Mike Wilder, *Manufactured Homes Not Welcome in City? Developer Threatens Lawsuit; Most Recent Requests Denied by Council,* BURLINGTON TIMES-NEWS, April 24, 1997, at 1-A, 4-A. In another article discussing the Council's denial of a MHOD re-zoning application, Mayor Barbour was quoted as saying, "[t]he neighbors have been up here two or three times and they are tired of coming. . . . There was no way in the world this was going to pass, in my opinion." Michele

Besso, *Council Rejects Housing Plan*, ALAMANCE NEWS, May 6, 1998, at C2. In a subsequent article about the Council's decision to postpone its decision of whether to provide an extension of water to Haw River, an area outside of City's extraterritorial jurisdiction (ETJ), in order to ensure that an agreement with Haw River fit within City's existing policy not to serve areas beyond City's limits or ETJ, Mayor Barbour concurred with the Council's decision and was quoted as stating, "[o]therwise they could be surrounded by trailer parks." *Burlington Council Wants to be Sure Before Extending Another Water Line to Haw River*, ALAMANCE NEWS, May 21, 1998, at 7A.

The trial court entered a protective order prohibiting Plaintiff from deposing Mayor Barbour based on "legislative immunity and/or lack of relevance."

The issues are whether: (I) Plaintiff had standing to assert its claims concerning the Isley/Oliver property; (II) City violated section 160A-383.1 of the North Carolina General Statutes; and (III) Mayor Barbour is privileged from being deposed based on legislative immunity.

I

Standing

[1] Plaintiff argues it has standing to assert its claims relating to the Isley/Oliver property because it retains a pecuniary interest in the MHOD re-zoning question. We agree.

A party has standing to contest zoning and re-zoning decisions when he "has a specific personal and legal interest in the subject matter affected by the [zoning/re-zoning decision] and . . . is directly and adversely affected thereby." *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (declaratory judgment action seeking to invalidate a re-zoning ordinance).

In this case, although Plaintiff no longer owns the Isley/Oliver property, which is the subject of the re-zoning request, it was to receive an additional $126,280.00 if City re-zoned the property by 1 February 1998. This contractual pecuniary interest in the re-zoning process constitutes a "specific personal and legal interest" and the failure to re-zone the property "directly and adversely affected" Plaintiff. Plaintiff, therefore, has standing to contest the re-zoning denial. It is not material the re-zoning did not occur on or before 1 February 1998, the date set in the contract. The facts giving rise to

Plaintiff's claims all relate to actions of City on or before 1 February 1998, after a re-zoning request filed on 5 February 1997.

City also argues the Isley/Oliver claims are moot because Plaintiff does not own the property subject to the re-zoning request. We disagree. A case is moot if "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." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). In this case, the ownership of the property at the time the complaint was filed is simply not relevant to the mootness question. It would be a different matter if the property ownership changed after the filing of the action. *Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (case was moot when plaintiff transferred ownership of property after filing of complaint). In this case, the property ownership changed *before* the filing of the complaint, the relief sought has not been granted and, the questions originally in controversy remain in controversy.

It was, therefore, error for the trial court to dismiss Plaintiff's arbitrary/capricious and section 160A-383.1 claims based on mootness and lack of standing.[2]

II

Section 160A-383.1 Claims

[2] Plaintiff argues City has violated the provisions of section 160A-383.1, in particular sub-section (c), which provides that "[a] city may not adopt or enforce zoning regulations or other provisions which *have the effect of excluding manufactured homes from the entire zoning jurisdiction.*" N.C.G.S. § 160A-383.1(c) (1994) (emphasis added). We disagree.

The pleadings simply do not support the claim that City has adopted or enforced zoning regulations precluding the use of manufactured homes in City's "entire zoning jurisdiction." Indeed, Plaintiff alleges City has approved 2 MHOD petitions, thus permitting the placement of manufactured homes within certain districts within City's jurisdiction.

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2. We reject City's argument that *Messer* requires a different result. The Supreme Court dismissed, as moot, plaintiffs' claim contesting a re-zoning decision on the ground the original party had sold the property while the case was on appeal, even though plaintiffs had made a claim for damages. *Messer*, 346 N.C. at 260, 485 S.E.2d at 270. In *Messer*, however, there was no evidence of a contract between the seller and the buyer, as in the present case, that provided for an increased sales price contingent upon re-zoning.

[3] Plaintiff also contends section 160A-383.1 reveals a legislative intent that there be "a substantial presence of manufactured homes" within each municipality and the approval of only 2 of 12 MHOD petitions does not constitute a "substantial presence." Again, we disagree with Plaintiff's premise. Section 160A-383.1 does not require a city to adopt any MHOD zoning. N.C.G.S. § 160A-383.1(e) (city "may designate a manufactured home overlay district within a residential district"). The legislature has only mandated cities "*consider* allocating more residential land area for manufactured homes." N.C.G.S. § 160A-383.1(a) (emphasis added).

[4] Finally, Plaintiff argues City violated its own zoning regulations, promulgated pursuant to section 160A-383.1, in denying its MHOD petitions, in that section 32.9 of City Code provides MHODs are "permitted by right" in R-9 districts. We disagree. Although "permitted" or authorized in certain districts, Burlington, N.C., Code § 32.9, the Council is not obligated to approve a MHOD and retains the discretion to make the designation. Burlington, N.C., Code § 32.2R(3)(C).

Accordingly, the trial court correctly dismissed Plaintiff's section 160A-383.1 claims.

III

Protective Order

[5] Plaintiff argues Mayor Barbour is not entitled to a testimonial privilege, and, if he is, he has waived this privilege and should be required to appear for the taking of his deposition.

Individuals, including county commissioners and city council members, are entitled to absolute legislative immunity for "all actions taken 'in the sphere of legitimate legislative activity.' " *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 140 L. Ed. 2d 79, 88 (1998) (citations omitted); *see Vereen v. Holden*, 121 N.C. App. 779, 782, 468 S.E.2d 471, 474 (1996), *disc. review allowed and remanded*, 345 N.C. 646, 483 S.E.2d 719, *on remand*, 127 N.C. App. 205, 487 S.E.2d 822, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997). Zoning and re-zoning are legislative acts. *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986). Individuals, including county commissioners and city council members, are entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function. *Hoke v. Bd. of Medical Examiners of the State of N.C.*, 445 F. Supp. 1313, 1314 (W.D.N.C. 1978); 48A C.J.S. *Judges* §§ 88, 89 (1981) (rule of judicial

immunity applies to those performing quasi-judicial functions). These immunities shield the individual from the consequences of the litigation results and provide a testimonial privilege. *See Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996); *Schlitz v. Com. of Va.*, 854 F.2d 43, 46 (4th Cir. 1988), *overruled on other grounds by Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 303 (4th Cir. 1995); *see also Allred v. City of Raleigh*, 7 N.C. App. 602, 613, 173 S.E.2d 533, 540 (1970), *rev'd on other grounds*, 277 N.C. 530, 178 S.E.2d 432 (1971) (cross-examination of members of city council about the motives of decision to re-zone prohibited). These immunities or privileges can be waived, *see Burtnik*, 76 F.3d at 613, but only if there is an "explicit and unequivocal renunciation of the protection," *see United States v. Helstoski*, 442 U.S. 477, 491, 61 L. Ed. 2d 12, 24 (1979) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466 (1938)).

Legislative decisions are "those that affect the entire community because they set general policies that are applicable throughout the zoning ordinance." David W. Owens, *Legislative Zoning Decisions, Legal Aspects* 10 (2d ed. 1999) [hereinafter *Legislative Zoning Decisions*]; *Alexander v. Holden*, 66 F.3d 62, 66 (4th Cir. 1995) (citation omitted) (action is legislative if it involves " 'generalizations concerning a policy or state of affairs' and the 'establishment of a general policy' affecting the larger population"). Quasi-judicial "decisions involve the application of . . . policies to individual situations rather than the adoption of new policies." *Legislative Zoning Decisions*, at 10.

In this case, the initial decision by the Council to amend its zoning ordinance in 1989 to include MHODs was a legislative decision, because it established a general policy affecting the entire community of City. The decision of the Council to approve or deny Plaintiff's petition for MHODs for the Isley/Oliver and Blackwell properties was a quasi-judicial decision because it required application of the MHOD standards set out in City's zoning ordinance to individual situations. The decision to approve or reject MHOD petitions is most analogous to the decision to grant or deny variances or special use permits, which are quasi-judicial in nature. *Sherrill*, 81 N.C. App. at 373, 344 S.E.2d at 360.

Accordingly, Mayor Barbour is entitled to a quasi-judicial testimonial privilege and, thus, cannot be compelled to testify about his actions, intentions, and motives with respect to the MHOD petitions in this action or any other quasi-judicial or legislative matters

addressed by the Council while Mayor Barbour served on that body. Furthermore, he did not abandon that privilege when he spoke with the newspapers, as there is no explicit showing he intended to waive the privilege. Thus, to the extent Plaintiff seeks to examine Mayor Barbour about his actions, intentions, or motives with regard to Plaintiff's MHOD petitions or his actions, intentions, or motives with respect to any other quasi-judicial or legislative matters before the Council, the protective order of the trial court is affirmed. N.C.G.S. § 1A-1, Rule 26 (b)(1) (1990) (discovery limited to relevant matter which is not privileged). We, however, reverse the order of the trial court prohibiting *any* questioning of Mayor Barbour, as it would be premature to judge the need for such a protective order.[3]

In summary, the dismissal of Plaintiff's unreasonable, arbitrary, and capricious claims with respect to the Isley/Oliver property is reversed and remanded. In consequence of this reversal, Plaintiff's unreasonable, arbitrary, and capricious claims with respect to both the Isley/Oliver and Blackwell properties remain viable and are to be addressed on remand. The dismissals of the section 160A-383.1 claims are affirmed. The protective order with respect to Mayor Barbour is modified and affirmed.

Affirmed and modified in part, reversed in part and remanded.

Judge WALKER concurs.

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

Judge HUNTER concurring in part and dissenting in part in a separate opinion.

I respectfully dissent on the issue of dismissal of plaintiff's claims pursuant to N.C. Gen. Stat. § 160A-383.1. In the determination of whether a complaint is sufficient to survive a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), the question presented is

3. The trial court also granted City's protective order preventing Plaintiff from deposing Mayor Barbour because of lack of relevance. City argues that if Mayor Barbour cannot assert a privilege preventing Plaintiff from deposing him, the protective order was properly granted because the deposition sought irrelevant and inadmissible information. Since we hold Mayor Barbour possesses a legislative and quasi-judicial privilege, we do not address this issue. To the extent Plaintiff proceeds with the taking of Mayor Barbour's deposition, on matters unrelated to the legislative privilege, the relevancy of those questions must be judged by the trial court.

whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). "In ruling upon a Rule 12(b)(6) motion, the trial judge must treat the allegations of the complaint as admitted." *Id.*

I believe that plaintiff's allegations, treated as true, are sufficient to state a claim upon which relief may be granted under N.C. Gen. Stat. § 160A-383.1. The North Carolina General Assembly in 1987 passed legislation dealing with zoning regulations for manufactured housing, and it found and declared:

> [M]anufactured housing offers affordable housing opportunities for low and moderate income residents of this State who could not otherwise afford to own their own home. The General Assembly further finds that some local governments have adopted zoning regulations which severely restrict the placement of manufactured homes. It is the intent of the General Assembly in enacting this section that cities reexamine their land use practices to assure compliance with applicable statutes and case law, and consider allocating more residential land area for manufactured homes based upon local housing needs.

N.C. Gen. Stat. § 160A-383.1(a) (1994). It expressly prohibited cities from adopting or enforcing zoning regulations "which have the effect of excluding manufactured homes from the entire zoning jurisdiction." N.C. Gen. Stat. § 160A-383.1(c) (1994). The legislation allowed cities to adopt and enforce "appearance and dimensional criteria for manufactured homes." N.C. Gen. Stat. § 160A-383.1(d) (1994). It also provided:

> In accordance with the city's comprehensive plan and based on local housing needs, a city may designate a manufactured home overlay district within a residential district. Such overlay district may not consist of an individual lot or scattered lots, but shall consist of a defined area within which additional requirements or standards are placed upon manufactured homes.

N.C. Gen. Stat. § 160A-383.1(e) (1994).

The pleadings indicate that in 1989, pursuant to the foregoing legislation, the City of Burlington ("City") amended its zoning ordinance to provide for Manufactured Housing Overlay Districts ("MHODs"). Its purpose was to "provide alternative, affordable housing opportunities by providing for the placement of manufactured housing within manufactured housing districts and/or subdivisions as defined within this ordinance." Burlington, N.C., Code § 32.2R(1) (1989). Paragraph 3 of § 32.2R established a MHOD which "may overlay R-6, R-9 and R-12 Residential Districts." Burlington, N.C., Code § 32.2R(3) (1989). This ordinance states that MHODs and/or subdivisions established pursuant to it could contain a combination of manufactured housing, modular housing or conventional stick-built housing. The Table of Permitted Uses provides that MHODs are permitted by right in residential districts R-6, R-9 and R-12, and a special use permit is not necessary. Burlington, N.C., Code § 32.9 (1989).

The pleadings in the present case further indicate that since the foregoing amendment was adopted by the City in 1989, twelve petitions for MHODs which contain over 600 lots have been filed. Of those twelve, only two MHODs, one with two lots and one with ten lots, have been permitted. No MHODs have been allowed by the City since 1994.

The City argues that it is not required by N.C. Gen. Stat. § 160A-383.1 to adopt any MHODs in its zoning jurisdiction. Assuming *arguendo* this is correct, I note that the City did in fact amend its ordinance pursuant to N.C. Gen. Stat. § 160A-383.1 to permit MHODs as "a matter of right" in residential districts R-6, R-9 and R-12. Having done so, the City is at least required to treat MHOD petitions in the same manner as it would treat other petitions for uses permitted as of right in a particular district. The acts of the City as shown by the pleadings, taken as true, make me question particularly whether the City has actually established a MHOD in residential districts R-6, R-9 and R-12, since it appears by the facts alleged that any petition for the same is not permitted of right.

While there is no case law identifying what constitutes a violation of N.C. Gen. Stat. § 160A-383.1, I do not believe that the General Assembly intended for this statute to be complied with by the establishment of a MHOD by right in certain residential districts by ordinance and then failing to approve MHODs as a matter of right in those same districts. Approving two petitions with a total of twelve lots certainly should not give a city license to deny all further petitions under the guise of abiding by the intent and purpose of N.C. Gen. Stat.

§ 160A-383.1. Therefore, while I do not believe money damages are appropriate, I do believe the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief may be granted. The claim is based on N.C. Gen. Stat. § 160A-383.1, the facts pled are sufficient to make out a claim that the City has enforced its zoning regulations with the effect of excluding manufactured homes from its entire zoning jurisdiction at least since 1994, and no facts disclosed will necessarily defeat this claim. Therefore, at this point, I believe the plaintiff has shown that it is entitled to proceed in a declaratory judgment action. Accordingly, I would reverse the order of the trial court dismissing these claims.

STATE OF NORTH CAROLINA v. JOHN E. HUGHES

No. COA99-27

(Filed 4 January 2000)

Search and Seizure— investigatory stop—anonymous informant—predictions about future behavior—verified by officers—sufficient indicia of reliability

In a case where an anonymous caller provided information to the police that a dark-skinned Jamaican individual, weighing about 300 pounds, about 6 feet in height, approximately 25 years old, with a short haircut, clean cut, and wearing baggy pants, would be arriving on the weekend in Jacksonville on a bus from New York City about 5:30 p.m., either carrying no luggage or an overnight bag, traveling to North Topsail Beach by taxi or other prearranged transportation, and would possess cocaine and marijuana, the trial court erred in concluding the anonymous informant did not provide reliable information sufficient to justify an investigatory stop, and subsequently by granting defendant's motion to suppress the evidence of drugs, because significant aspects of the anonymous informant's predictions about the future behavior of defendant were verified by the detectives, and thus, exhibited sufficient indicia of reliability.

Judge TIMMONS-GOODSON dissenting.

Appeal by State from written order granting defendant's motion to suppress filed 10 December 1998 by Judge James E. Ragan, III, in

Onslow County Superior Court. Heard in the Court of Appeals 16 November 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart and Agency Legal Specialist Kathy Jean Moore, for the State.

Edward G. Bailey, for defendant-appellee.

GREENE, Judge.

The State, pursuant to N.C. Gen. Stat. § 15A-979(c), appeals from the trial court's pre-trial order granting a motion by John Elvis Hughes (Defendant) to suppress evidence.

The evidence shows that during the morning of 13 March 1998,[1] Steve Imhoff (Imhoff), a detective with the Jacksonville Police Department, was in the office of the head of Narcotics Division of the Onslow County Sheriff's Department, Captain Matthews (Matthews), when Matthews received a telephone call. After the telephone call, Matthews told Imhoff the details of the conversation he just had with a "confidential, reliable[] informant," who informed Matthews "that a person with [the] nickname Markie . . . , [a] dark-skinned Jamaican from New York [weighing] three hundred pounds or [more, who is] approximately [six foot to six foot and two inches in height and] approximately twenty to thirty years of age," would be arriving in Jacksonville with narcotics in his possession. Matthews stated this individual has a "short haircut, [is] clean cut, [and] wears bagg[y] pants." Further, Matthews told Imhoff this individual "comes on the weekend before dark, possibly [on the] 5:30 bus; sometimes takes a [taxi]cab, sometimes somebody picks him up. He would be [carrying] powder cocaine and marijuana[, but would not have any luggage] except maybe an overnight bag," and he would be on his way to "North Topsail" Beach.

Imhoff testified at the suppression hearing that he did not know Matthews' "confidential, reliable informant," had never used him before, did not know whether Matthews had ever used him before, or whether he was reliable. Imhoff testified he was relying on Matthews and "took it for granted" that Matthews had used the informant before.

1. We take judicial notice that 13 March 1998 was a Friday.

After receiving the information, Imhoff telephoned Devon Bryan (Bryan), a detective with the Jacksonville Police Department, and relayed the information given to him by Captain Matthews. Imhoff also took his notes taken from the conversation with Matthews and left them on Bryan's desk. Imhoff telephoned Detective Bryan later that day to make sure Bryan found the notes, to explain the situation in more detail, and to impress upon him the importance of going to the bus station. Imhoff told Bryan the described individual was supposed to be arriving on the 5:30 p.m. bus, but he may be early. Bryan testified he could not recall whether Imhoff provided him with a name of the described individual, he did not have a description of the clothes the individual would be wearing other than his pants would be "baggy," and he did not know the exact bus on which the individual would be traveling to the Jacksonville Trailways bus station.

After Imhoff's second telephone call, Bryan telephoned the Jacksonville Trailways bus station and was informed that one bus from New York had arrived earlier that day. Bryan was told the next arriving bus would be coming from Rocky Mount. Bryan could not recall whether he was notified this bus would be coming from New York, but he knew Rocky Mount is a common transit point from New York to Jacksonville. Bryan has had investigations where individuals have come to Jacksonville by bus from New York through cities other than Rocky Mount.

Bryan and his partner, Detective Jessie McKoy (McKoy), on 13 March 1998, drove to the bus station in a gray unmarked police van and waited for the bus from Rocky Mount, which arrived at 3:50 p.m. Once there, Bryan and McKoy were unable to see the passengers exiting the bus, because the bus door opened on the opposite side of the bus from where they were parked. Bryan and McKoy, however, were able to observe Defendant walk around from behind the bus after it arrived, and they had not observed Defendant in the bus station parking lot prior to the bus' arrival. According to Bryan, Defendant "matched the exact description" of the description of the man that Imhoff had given him, and he was carrying the same type of luggage as the described man.

Bryan and McKoy observed Defendant immediately walk to and enter a waiting taxicab. The taxicab exited the parking lot and drove south on Highway 17. Bryan and McKoy followed the taxicab to the intersection of Highway 17 and Georgetown Road. When Bryan noticed the taxicab would soon be leaving the Jacksonville city lim-

its, he and McKoy conducted a vehicle stop of the taxicab, utilizing the assistance of a marked police vehicle.

Imhoff testified in order to drive to Topsail Beach from Jacksonville one has to drive south on Highway 17 and that Georgetown Road is between the bus station and Topsail Beach. A vehicle traveling south on Highway 17 has to drive past the "Triangle area" in order to determine if it is going to Topsail Beach rather than Wilmington or Richlands. According to Imhoff, the taxicab in which Defendant was traveling was stopped before it had passed the "Triangle area," at a location approximately twenty miles from Topsail Beach.

After stopping the taxicab, Bryan informed Defendant he was a police officer and why he was stopping him, and asked Defendant to step out of the vehicle. Bryan also asked Defendant if he had any controlled substances in his possession and if he would consent to a search. According to Bryan, Defendant replied to Bryan's request to search him by saying "go ahead, I don't mind."

Bryan conducted a pat-down search of Defendant's person, searched the area where Defendant was sitting in the taxicab, and searched Defendant's travel bag. After searching the vehicle and the bag, Bryan asked Defendant to remove his shoes. The search of Defendant's shoes at the site of the traffic stop and a more thorough search at the Jacksonville Police Station revealed they contained marijuana weighing 342.1 grams and cocaine weighing 20.8 grams.

On 19 April 1998, Defendant was indicted for possession with intent to sell and deliver cocaine, possession with intent to sell and deliver marijuana, manufacturing cocaine, and manufacturing marijuana. Prior to trial, Defendant filed a motion to suppress the evidence seized from Defendant by Bryan.

A hearing was conducted by the trial court on Defendant's motion to suppress, and the trial court announced in open court that Defendant's motion would be allowed. The trial court subsequently entered a written order which embodied the granting of Defendant's motion to suppress, included findings of fact consistent with the evidence, and concluded the investigatory stop of Defendant was unreasonable, unlawful, and in violation of Defendant's Fourth Amendment rights.

The issue is whether the anonymous informant provided reliable information sufficient to justify the investigatory stop.[2]

"A police officer may conduct a brief investigatory stop of a vehicle, even though there is no probable cause for the stop, when justified by specific, articulable facts which would lead a police officer 'reasonably to conclude in light of his experience that criminal activity may be afoot.' " *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)). These facts "must yield the 'substantial possibility that criminal conduct has occurred, is occurring, or is about to occur' in order for an investigatory stop to be valid." *Id.* (citations omitted). The officer making the investigatory stop is entitled to rely on information received from other officers, known as collective knowledge, in determining if criminal activity has occurred, is occurring, or is about to occur. *Id.* at 371, 427 S.E.2d at 159. Officers are also entitled to rely on tips given to them by known informants who have previously provided reliable information, and this information may itself provide the reasonable suspicion necessary to justify the stop. *Adams v. Williams*, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617 (1972). As a general proposition, information provided to police by anonymous persons cannot constitute *the* basis for reasonable suspicion. *Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990). An anonymous tip can, however, provide reasonable suspicion if "significant aspects" of the tipster's predictions about the future behavior of a person are subsequently corroborated by the police. *Id.* at 332, 110 L. Ed. 2d at 310. This would provide reason to believe "not only that the [anonymous] caller was honest but also that he was well informed," thus revealing sufficient indicia of reliability to justify the stop. *Id.*

In this case, the anonymous caller[3] to Matthews provided information that a dark-skinned Jamaican individual, weighing about 300 pounds, about 6 feet in height, approximately 25 years old, with a short haircut, clean cut, and wearing baggy pants, would be arriving on the weekend in Jacksonville on a bus from New York City about 5:30 p.m., carrying either no luggage or an overnight bag, traveling to North Topsail Beach by taxi or other prearranged transportation, and would possess cocaine and marijuana.

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2. The State concedes there is not sufficient evidence in this case to support probable cause to arrest Defendant.

3. Although the informant is referred to in the evidence as "confidential" and "reliable," there is no evidence in this record to support that conclusion.

On Friday, 13 March 1998, the detectives went to the Jacksonville bus station and observed the 3:50 p.m. bus arriving from Rocky Mount, a common transit point from New York City. They observed an individual, walking from behind the bus, who "matched the exact description" provided by the anonymous caller. He was carrying a small hand bag and entered a taxicab, which drove south on Highway 17, in the general direction of North Topsail Beach.

Our review of this evidence convinces us that significant aspects of the anonymous informant's predictions about the future behavior of Defendant, properly relied on by Bryan and McKoy, under the collective knowledge rule, were verified by the detectives and, thus, exhibited sufficient indicia of reliability to justify the investigatory stop of Defendant. The trial court's conclusions, therefore, are not supported by its findings of fact. Accordingly, the trial court erred in granting Defendant's motion to suppress.

Reversed and remanded.

Judge WALKER concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

I respectfully dissent. While the majority frames the issue as "whether the anonymous informant provided reliable information sufficient to justify the investigatory stop[,]" the issue is in fact whether competent evidence supports the trial court's findings of fact and whether those findings sustain the conclusions of law.

The scope of appellate review of an order suppressing evidence is strictly limited. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). The role of this Court on appeal by the State of an order suppressing evidence is to determine whether the underlying findings of fact of the trial court are supported by competent evidence. *Id.* Factual findings which are supported by competent evidence are deemed binding on appeal. *Id.* Furthermore, this Court shall not disturb the trial court's conclusions of law where they are supported by the findings of fact. *Id.*

The trial court made the following pertinent findings of fact:

1. That on March 13, 1998, between 11:00 a.m. and 11:30 a.m., Captain Matthews of the Onslow County Sheriff's Depart-

ment, Narcotics Division, received a telephone call from a person described as a confidential, reliable, informant stating that an individual by the nickname "Markie" would be coming to Jacksonville with powder cocaine and marijuana in his possession.

2. That Captain Matthews, who was not present to testify in court, told Detective Steve Imhoff . . . that this individual is a dark-skinned Jamaican from New York who weighs over three hundred pounds and is approximately six foot, one inch tall or taller, between twenty or thirty years of age.

. . . .

4. That Detective Imhoff testified that he never talked to the informant, never worked with the informant, never knew the informant's identity, and did not have any knowledge of the informant's past history or reliability.

5. That the informant's information did not include:

(a) The time the bus would arrive in Jacksonville.

(b) The name of the individual on the bus.

(c) The color, type and style of clothing that the individual would be wearing.

(d) Where the contraband substances would be located on the individual's person or property.

(e) How this information was obtained by the informant.

(f) When this information was obtained by the informant.

. . . .

11. That upon contacting the bus station, Detective Bryan was informed that one bus from New York had already arrived in Jacksonville and he did not observe an individual who matched the description . . . .

12. That Detective Bryan and Detective McAvoy waited for another bus which was to arrive from Rocky Mount, North Carolina at approximately 3:50 p.m.

13. That Detective Bryan, an officer with six years of experience, testified that suspects in other unrelated investigations sometimes arrived from New York to Jacksonville via Rocky Mount, North Carolina.

14. That Detective Bryan also testified that suspects in other unrelated investigations sometimes arrive from New York to Jacksonville through cities other than Rocky Mount.

. . . .

16. That when the Rocky Mount bus arrived at approximately 3:50 p.m. Detective Bryan's undercover vehicle was parked in a position where he could not observe the passengers exiting the door of the bus. He did not see the defendant exit the bus.

. . . .

27. That the Detectives did not verify the following information prior to the vehicle stop:

(a) The defendant's name.

(b) The defendant's past criminal record, if any.

(c) The point of origination of defendant's bus.

. . . .

31. That at the time of the vehicle stop the defendant was not under arrest for any violation of law.

The above findings are based on competent evidence and are therefore binding on appeal. These findings, in turn, support the trial court's conclusion that the evidence should be suppressed and excluded from trial. Specifically, the trial court concluded as a matter of law:

1. That considering the totality of the circumstances, the information received by the detectives . . . did not contain specific and articulate facts which . . . reasonably justified the warrantless intrusion and the seizure of the defendant's person and property.

. . . .

3. That considering the totality of the circumstances, the information received by the detectives . . . could easily be associated with many travelers . . . .

. . . .

5. That the investigatory stop and the subsequent search and seizure of the defendant's person and property was unreasonable and unlawful and in violation of the defendant's rights . . . .

6. That the evidence seized as a result of these unreasonable warrantless searches . . . should be suppressed and excluded from evidence in the trial of these cases.

Because I believe the majority exceeded the scope of permissible appellate review and because I believe the competent evidence supports the court's findings of fact, which in turn sustain its conclusions of law, I respectfully dissent.

PAMELA (GREER) BIGGS, PLAINTIFF v. ROBERT GREER, III, DEFENDANT

No. COA98-1253

(Filed 18 January 2000)

1. Child Support, Custory, and Visitation— support—private schooling—findings

The trial court did not err by ordering defendant in a child support action to pay one-half of his children's prospective expenses for private schooling without a finding that such costs were necessary for the children's welfare or that he had the ability to pay where the court did not deviate from the Guidelines, but adjusted the Guideline amounts to account for the extraordinary expense of private schooling. Absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses.

2. Child Support, Custody, and Visitation— support—private school—tuition—retroactive

The trial court erred by ordering defendant to pay retroactive child support for private school tuition because this constituted child support reimbursement not based upon the Guidelines. In a retrospective increase of an existing child support order, the court must set out a conclusion of law that there was a substantial and material change of circumstances affecting the welfare of the child occasioned by a sudden emergency and there must be specific findings. The record in this case reflects no evidence which could support findings sustaining the conclusion that there existed a sudden and extraordinary emergency.

Appeal by defendant from order entered 19 March 1998, *nunc pro tunc* 3 October 1997, by Judge Kenneth C. Titus and Judge Carolyn D. Johnson in Durham County District Court. Heard in the Court of Appeals 19 May 1999.

Newsom, Graham, Hedrick and Kennon, P.A., by John R. Long, for plaintiff-appellee.

Rigsbee and Cotter, P.A., by William J. Cotter, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's order directing him to pay prospective and retroactive private school expenses. We affirm as to the former, but reverse the award of retroactive payments.

Relevant facts and procedural history include the following: Plaintiff and defendant married in 1973 and three children were born to the marriage. The parties separated on or about 17 December 1982, and Joshua and Kylah, the younger children (the children), remained in plaintiff's custody. Defendant subsequently commenced payment of child support through the Office of the Clerk of Superior Court in the amount of six hundred and twenty-five dollars ($625.00) per month.

On 29 September 1997, plaintiff filed a motion to increase defendant's child support payments, alleging increased medical and private secondary educational expenses for the children. The motion was heard before the Honorable Carolyn D. Johnson (Judge Johnson) 3 October 1997. At that time, both children attended Camelot Academy, a private secondary school, where Kylah, age seventeen, was an eleventh grader and Joshua, age nineteen, was a senior. Although Judge Johnson announced her ruling in open court following the hearing, she retired from the bench without entering a written order related thereto.

Thereafter, the Honorable Kenneth C. Titus (Judge Titus), based upon the recollections of counsel for plaintiff and defendant regarding the terms of Judge Johnson's decision, entered a written order (the Order) 19 March 1998, *nunc pro tunc* 3 October 1997. The Order included the following pertinent finding of fact:

> 13. The Court finds that the medical expenses and the [Camelot] school expenses are an extraordinary expense for the minor children.

The Order also contained the conclusion of law that there had been "a substantial and material change in circumstances warranting a modification of child support."

Based upon the foregoing, the trial court ordered in relevant part as follows:

> 2. The expenses incurred on behalf of the minor children . . . for extraordinary expenses, shall be paid at the rate of one hundred fifty dollars ($150.00) per month, thereby making the defendant's child support obligation seven hundred seventy-five dollars ($775.00) per month. However, said . . . []$150.00[] a month shall be credited to . . . extraordinary expenses, not child support.
>
> 3. The Court finds that the defendant is responsible for one-half of the educational expenses to date, and shall be responsible for one-half of the twenty-one thousand five hundred ninety-nine dollars ($21,599.00) and that ten thousand seven hundred ninety-nine dollars and fifty cents ($10,799.50) shall be paid to [plaintiff] who has paid all of said expenses.
>
> 4. Hereafter, each party shall equally be responsible for any and all school expenses relating to the minor children, and each party shall pay their share of expenses directly to . . . any school that the children are attending. . . .

Defendant timely appealed.

[1] Defendant first contends "there is no competent evidence in the record to support a finding that private school was necessary for the children's welfare." Defendant's argument presupposes that such a finding was required in order for the expense of private school to be classified as an "extraordinary expense" under the Child Support Guidelines, 1999 Ann. R. N.C. 32 (the Guidelines). We conclude defendant's first argument is unfounded.

Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a "determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Under

this standard of review, the trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Pursuant to N.C.G.S. § 50-13.4(c) (1995), a trial court is authorized to order support payments in such amount as meets the "reasonable needs of the child[ren] for health [and] education." G.S. § 50-13.4(c); *see Cauble v. Cauble*, 133 N.C. App. 390, 394, 515 S.E.2d 708, 711 (1999) ("ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the father [mother] to meet the needs") (citation omitted). To "compute the appropriate amount of child support," *Hammill v. Cusack*, 118 N.C. App. 82, 86, 453 S.E.2d 539, 542, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995) (citation omitted), the trial court must rely upon the Guidelines wherein presumptive amounts of child support are set forth, G.S. § 50-13.4(c).

If the trial court imposes the presumptive amount of child support under the Guidelines, it is

> not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support."

Browne v. Browne, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991) (citing G.S. § 50-13.4(c)). However, upon a party's request that the trial court deviate from the Guidelines, G.S. § 50-13.4(c), or the court's decision on its own initiative to deviate from the presumptive amounts, *see* Child Support Guidelines ("[t]he Court may deviate from the Guidelines in cases where application would be inequitable"), the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay, G.S. § 50-13.4(c).

Regarding treatment by the court of "extraordinary expenses," the Guidelines provide:

> F. Extraordinary Expenses. The Court may make adjustments for extraordinary expenses and order payments for such term and in such manner as the Court deems necessary. . . . Payments for such expenses shall be apportioned in the same manner as the basic child support obligation and ordered paid as the Court deems equitable.

> *Other extraordinary expenses* are added to the basic child support obligation. Other extraordinary expenses include:
>
> (1) Any expenses for attending any special or private elementary or secondary schools to meet the particular educational needs of the child(ren). . . .

Child Support Guidelines (emphasis added).

"[D]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court," *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). Based upon the Guideline language above, "the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses." *Id.* However, incorporation of such adjustments into a child support award does *not* constitute deviation from the Guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the Guidelines. *See* 29 Fam. L. Q. 775, 834 (1996) (citing *Mackins*, 114 N.C. App. at 548-50, 442 S.E.2d at 358-59, as holding that "court's order that defendant pay his share of costs of tutoring, orthodontics, psychologists, and summer camp was not a deviation, but rather a discretionary determination to adjust the guideline amount for extraordinary expenses"). In short, absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses.

In the case *sub judice*, defendant does not quarrel with the trial court's determination that private school expenses for the children constituted "extraordinary expenses." However, defendant points to language in the Guidelines to the effect that ordering of private schooling as an extraordinary expense is proper when the court "deems" the expense "necessary." Defendant extrapolates from this provision a requirement that the court specifically find such costs were "*necessary* for the children's welfare." Defendant's assertion is unfounded.

Initially, as noted above, the trial court was under no obligation to render findings of fact because it did not deviate from the presumptive Guidelines, but rather adjusted the Guideline amounts to account for the extraordinary expense of private schooling. *See* G.S. § 50-13.4(c) ("[i]f the court orders an amount other than the amount determined by application of the presumptive guidelines, the court

shall make findings of fact . . . that justify varying from the guidelines and the basis for the amount ordered"), and *Mackins*, 114 N.C. App. at 549, 442 S.E.2d at 359 (extraordinary expenses considered adjustment of presumptive Guideline amounts). In addition, the record contains no request by either party for a deviation from the Guidelines. G.S. § 50-13.4(c) ("*upon request of any party* [for a deviation from the Guidelines], the Court shall . . . find the facts relating to the reasonable needs of the child . . . and the relative ability of each parent to provide support" (emphasis added)). Finally, although the trial court was not required to set forth an explicit finding of fact that it "deemed" the children's private schooling expenses "necessary," we note the court remarked during the course of the hearing that, "considering the[] [children's] age[s]," the circumstance that both were behind in school and had experienced significant health problems "*necessitated* some—some special help in order to get them through school."

In addition, defendant's assertion that the children could have received necessary credits in public school is belied by the record which reveals neither child was making progress in public school, but instead progressively falling behind. Undisputed evidence indicated both children suffered numerous medical problems, including kidney surgery, reflux and stomach problems, headaches, and appendicitis, which prevented them from attending public school regularly. Plaintiff testified the children fell "about a year-and-a-half" behind in credits and grades, and that the "public school didn't—couldn't take the time to catch them up." Plaintiff also related that a public teacher attempted to help Joshua catch up while at home sick, but the child just "kept falling further behind" and finally reached the point where he would not be able to graduate.

Plaintiff thereupon enrolled the children in Camelot Academy (Camelot), a small private school that offered "special help" and individual attention, in order for them to obtain necessary graduation credits and to prepare for college. Further, as of the date of the hearing, Joshua was expected to graduate and Kylah had one year remaining at Camelot.

In short, the trial court did not err in failing to find as fact that private school expenses were "necessary" for the children's welfare. Further, under our abuse of discretion standard, *see White*, 312 N.C. at 777, 324 S.E.2d at 833, and in light of the children's failure in public school and defendant's acknowledgment that the private school expenses constituted "extraordinary expenses" under the Guidelines,

we cannot say that the trial court's "deeming," as opposed to finding as fact, those expenses to be "necessary" for the children's welfare, Child Support Guidelines, was "manifestly unsupported by reason," *White*, 312 N.C. at 777, 324 S.E.2d at 833. Accordingly, the trial court did not err in ordering defendant to pay one-half the children's prospective expenses for private schooling at Camelot.

Defendant next contends the trial court erred by neglecting to set out specific findings of fact relating to his relative ability to pay prospective child support. Again, the trial court was not required to make findings of fact related to the children's reasonable needs or defendant's ability to pay, because the Court did not deviate from the Guidelines in ordering extraordinary expenses and no party requested a deviation. *See Brooker v. Brooker*, 133 N.C. App. 285, 290, 515 S.E.2d 234, 238 (1999) (trial court "generally not" required to make findings of fact relating to reasonable needs of child or parent's ability to pay in setting support amount; such findings required only upon a party's request for deviation, or the trial court's determination to deviate from Guidelines).

[2] In his final argument, defendant challenges the trial court's award of retroactive child support for the children's private schooling. The trial court ordered defendant to reimburse plaintiff in the amount of $10,799.50, one-half the $21,599.00 in private educational expenses incurred on behalf of the children as of the hearing date. We conclude the instant record fails to sustain the court's retroactive award of increased child support.

The distinction between two types of retroactive support is pertinent *sub judice*. In the absence of an existing child support order, "[a]n amount of child support awarded prior to the date a party files a complaint therefor is properly classified as retroactive child support . . . and is not based on the presumptive Guidelines." *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 647-48, 507 S.E.2d 591, 595 (1998); *see Lawrence v. Tise*, 107 N.C. App. 140, 151, 419 S.E.2d 176, 183 (1992) (citations omitted) (absent deviation, Guidelines "conclusively presumed" to "meet the reasonable needs of the child," whereas "calculation of retroactive child support . . . focuses on the amount of monies actually expended"). Although prospective child support based upon the presumptive Guidelines requires no factual findings regarding the child's reasonable needs or the supporting parent's ability to pay, *see Brooker*, 133 N.C. App. at 290, 515 S.E.2d at 238, the trial court must set out specific findings of fact in a reimbursement award for retroactive support, *Sloan v. Sloan*, 87 N.C.

App. 392, 398, 360 S.E.2d 816, 821 (1987), so as to reflect the court's consideration of the "reasonably necessary [actual] expenditures [under G.S. § 50-13.4(c)] made on behalf of the child" as well as the "defendant's ability to pay during the period in the past for which retroactive support is sought," *Lukinoff*, 131 N.C. App. at 648, 507 S.E.2d at 596; *see Savani v. Savani*, 102 N.C. App. 496, 501-02, 403 S.E.2d 900, 903 (1991) (an award of reimbursement for past support must be supported by "specific factual findings," reflecting the trial court's consideration of "reasonably necessary" past expenditures made on behalf of the child and "defendant's ability to pay during the period in the past for which reimbursement is sought"), and *McCullough v. Johnson*, 118 N.C. App. 171, 172, 454 S.E.2d 697, 698 (1995) ("[f]indings in support of an award of retroactive child support must include the actual expenditures made on behalf of the child").

The second type of retroactive child support is that involved herein, *i.e.*, a retroactive increase in the amount provided in an *existing support order*. We note preliminarily that N.C.G.S. § 50-13.10 (1995), entitled "Past due child support vested; not subject to retroactive modification; entitled to full faith and credit," is not implicated herein. The instant case contains no allegation of past due child support under the existing order, but rather a motion to increase retroactively the child support amount provided in that order.

We reiterate that child support ordered as of the date a motion to increase is filed does not constitute retroactive support, *see Mackins*, 114 N.C. App. at 546-47, 442 S.E.2d at 357, and, if ordered in accordance with the Guidelines, requires no factual findings as to the child's reasonable needs or the supporting parent's ability to pay, *see Brooker*, 133 N.C. App. at 290, 515 S.E.2d at 238. However, child support reimbursement or child support governing a period prior to a motion to increase an existing child support order would constitute "retroactive child support and [would] not [be] based on the presumptive Guidelines." *Lukinoff*, 131 N.C. App. at 647-48, 507 S.E.2d at 595.

Motions for retroactive increases in child support orders have been accorded differing dispositions. *See* Emile F. Short, *Retrospective Increase in Allowance for Alimony, Separate Maintenance, or Support*, 52 A.L.R.3d 156 (1974). A number of jurisdictions have prohibited retroactive increases in child support orders or reimbursement for past expenditures in excess of ordered amounts, taking the view that the previous court order was "final" for the period of time

covered therein and that to allow a retroactive increase would be tantamount to setting aside the order subsequent to full performance thereof. *See, e.g.*, *Fainberg v. Rosen*, 278 A.2d 630, 633 (Md. Ct. Spec. App. 1971), and *Adair v. Superior Court*, 33 P.2d 995, 996-97 (Ariz. 1934). However, other courts have considered retrospective increases of existing orders as justified by the broad terms and humanitarian purposes of statutes according courts the power to modify child support orders. *See, e.g.*, *Crane v. Crane*, 170 S.W.2d 663, 665 (Tenn. Ct. App. 1942). Finally, certain courts have focused upon the child's usual status as a non-party to a support action, reasoning that the child's rights should not be measured or limited by provisions of an existing order and that the court thus retains the power to increase a previous order retroactively as the exigencies of the case may require. *See, e.g.*, *Wilson v. Wilson*, 56 A.2d 453, 456 (Me. 1947).

Our courts have not specifically addressed the issue, but careful reading of opinions from both this Court and our Supreme Court suggests that we are not aligned with those jurisdictions mandating *absolute* prohibition of retroactive increases in child support orders. Concerning retroactive increase by court order of a child support amount agreed to by the parties in a separation agreement, our Supreme Court stated that to

> order making [an] increased [child support] allowance retroactive . . . without evidence of some emergency situation that required the [past] expenditure[s] . . . is neither warranted in law nor equity.

Fuchs v. Fuchs, 260 N.C. 635, 641, 133 S.E.2d 487, 492 (1963). It therefore appears that, at a minimum, we have considered "some emergency situation that required the expenditure of sums in excess," *id.*, of the existing child support obligation to be necessary. *See cf. Harris v. Harris*, 415 S.E.2d 391, 392-93 (S.C. 1992) (statute governing modification of child support orders does not bar retroactive increase of child support order under "special circumstances").

Further, this Court, in a case involving the trial court's modification of an existing order retroactive to the date of filing of the motion to increase, concluded it was unnecessary therein to determine "whether a child support payment may be increased retroactively," *Mackins*, 114 N.C. App. at 543, 442 S.E.2d at 355, but stated that

> the law seems to be that a child support payment [orders] may not be retroactively increased without evidence of some emer-

gency situation that required the expenditure of sums in excess of the amount of child support paid.

Id.

Lastly, in *Vincent v. Vincent*, 38 N.C. App. 580, 248 S.E.2d 410 (1978), this Court, in discussing the issue raised therein, observed that

> [t]here are no North Carolina cases which directly hold that an alimony decree can be retroactively modified, although in *Fuchs* . . . , the court indicated that a retroactive increase in child support might be permitted in a sudden emergency.

Id. at 583, 248 S.E.2d at 412.

Construing the "indication," *id.*, in *Fuchs* together with the general principles governing modification of child support orders set forth in N.C.G.S. § 50-13.7(a) (1995) ("[a]n order . . . for support of a minor child may be modified . . . at any time, upon . . . a showing of *changed circumstances*") (emphasis added), we conclude that, as opposed to absolute prohibition, the more compelling public policy is to allow trial courts to retrospectively increase the amount of previously ordered child support. *See Ford v. Ford*, 100 Cal. Rptr. 817, 820-21 (Cal. App.3d 1972) (order increasing previous child support order so as to require payment of unanticipated medical and hospital care rendered on behalf of minor child constituted an exercise of court's reserved power to modify a child support order by reason of changed circumstances).

Notwithstanding, we emphatically caution that the trial court's authority to order such increases is strictly limited. Motions for retroactive reimbursements or increases in child support where there is an existing court order should be allowed but sparingly and only under the limited circumstance constituting a true sudden "emergency situation that required the expenditure of sums in excess," *Fuchs*, 260 N.C. at 641, 133 S.E.2d at 492, of the existing child support order.

Therefore, in the instance of a retrospective increase of an existing child support order, the trial court must set out a conclusion of law that there was a substantial and material "change[in] circumstances," G.S. § 50-13.7, affecting the welfare of the child and occasioned by "a sudden emergency," *Vincent*, 38 N.C. App. at 583, 248 S.E.2d at 412, so as to warrant such increase. In addition, the court's

conclusion of law must be sustained by "specific factual findings," *Savani*, 102 N.C. App. at 501-02, 403 S.E.2d at 903, based upon competent evidence, reflecting the following: 1) the actual amount disbursed by a party, *McCullough*, 118 N.C. App. at 172, 454 S.E.2d at 698, 2) within three years or less of the date of filing of the current motion, *Napowsa v. Langston*, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989), 3) towards reasonably necessary expenditures made on behalf of the child, *Sloan*, 87 N.C. App. at 398, 360 S.E.2d at 821, 4) in consequence of some extraordinary "sudden emergency," *Vincent*, 38 N.C. App. at 583, 248 S.E.2d at 412, situation requiring the outlay of sums in excess of the existing amount of ordered support, *Fuchs*, 260 N.C. at 641, 133 S.E.2d at 492. In addition, the findings must reflect 5) the ability to pay of the parent subject to the motion during the period for which increased support is sought. *Savani*, 102 N.C. App. at 502, 403 S.E.2d at 903.

Upon the foregoing necessary findings and conclusion of law, an existing child support order may be increased to provide retroactive reimbursement for "sudden emergency," *Vincent*, 38 N.C. App. at 583, 248 S.E.2d at 412, expenditures:

> (1) to the extent [one parent] paid [the ot]her's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before . . . the date [the parent seeking reimbursement] filed [that parent's] claim for child support.

Napowsa, 95 N.C. App. at 21, 381 S.E.2d at 886.

In the instant case, plaintiff tendered into evidence an "educational expenses" exhibit detailing tuition, fees, registration, tutoring and counseling costs of the children for the 1996-1997 and 1997-1998 Camelot school years. The expenses totaled $21,599.00, of which $21,199.00 had been paid solely by plaintiff. The trial court's findings denominated each child's physical and medical problems and further found that:

> 10. Both children have missed many days at school due to their medical problems. The children were failing in public school.
>
> . . . .
>
> 12. The plaintiff presented a list of educational expenses for both Kylah and Joshua Greer.

Based upon its findings, the court ruled:

3. The Court finds that the defendant is responsible for one-half of the educational expenses to date, and shall be responsible for one-half of the twenty-one thousand five hundred ninety-nine dollars ($21,599.00) and that ten thousand seven hundred ninety-nine dollars and fifty cents ($10,799.50) shall be paid to [plaintiff] who has paid all of said expenses.

We assume *arguendo* that the trial court's reference to actual expenditures by plaintiff over the one and one-half year period prior to filing of her complaint, and its findings reflecting such expenses were reasonably required for the children's welfare, satisfied the actual payment by one parent, *McCullough*, 118 N.C. App. at 172, 454 at 698, within "three years or less," *Napowsa*, 95 N.C. App. at 21, 381 S.E.2d at 886, of "reasonably necessary expenditures," *Lukinoff*, 131 N.C. App. at 648, 507 S.E.2d at 595, elements of an award of retroactive child support. However, the trial court's limited findings failed to set forth the existence of a "sudden emergency," *Vincent*, 38 N.C. App. at 583, 248 S.E.2d at 412, so unusual or extraordinary as to require plaintiff to expend sums in excess of defendant's existing support obligation. In addition, the court's order contained no findings reflective of defendant's ability to pay during the period the emergency expenses were allegedly incurred. *See Savani*, 102 N.C. App. at 501-02, 403 S.E.2d at 903, and *Tise*, 107 N.C. App. at 152, 419 S.E.2d at 184 ("[i]n determining the non-custodial parent's share of the custodial parent's reasonable actual expenditures in a retroactive support action, the trial court should consider the relative abilities of the parents to pay support (considering the estates, earnings, and the reasonable expenses of the parents) and any 'indirect support' made by either parent for the child during the period in question"(citations omitted)). The findings in the Order were thus insufficient to support the trial court's conclusion therein that "there ha[d] been a substantial and material change in circumstances warranting a modification" of the existing child support order.

In such circumstance, we have on an earlier occasion reversed the trial court's order and remanded the matter for further findings relative to retroactive child support. *See Lukinoff*, 131 N.C. App. at 649, 507 S.E.2d at 596 (matter "remand[ed] to the trial court for further findings relating to retroactive child support" where findings were "insufficient to support . . . conclusion" plaintiff should receive no reimbursement from defendant). In the case *sub judice*, however, the instant record reflects no competent evidence sufficient to support findings sustaining the conclusion of law that there

existed a "sudden," *Vincent*, 38 N.C. App. at 583, 248 S.E.2d at 412, extraordinary emergency constituting a substantial and material "change in circumstances," G.S. § 50-13.7, affecting the welfare of the minor children.

Plaintiff presented evidence that the children were first enrolled at the Academy in the summer of 1996, and had incurred educational expenses totaling $21,599.00 as of the 1997-1998 school year. Plaintiff paid $21,199.00 of the expenses from personal accounts, but delayed approximately one and one-half years following the children's initial enrollment at the Academy before filing her 29 September 1997 motion for an increase in child support seeking retroactive reimbursement of the expenditures.

Plaintiff's lengthy and unexplained delay in filing the motion strongly signifies the absence of an "emergency situation," *Fuchs*, 260 N.C. at 641, 133 S.E.2d at 492, and, in light of the entire record, compels the conclusion that any increased need for support developed over time commensurate with the children's lack of progress in public school. In any event, plaintiff failed to offer evidence explaining why she failed or was unable to seek reimbursement immediately upon, or shortly following, the children's 1996 enrollment at the Academy. *Cf. Ford*, 100 Cal. Rptr. at 821-22 (rejecting father's suggestion that mother made no showing that appendectomy performed on minor child was of such urgency that prior court order directing payment of medical and hospital costs could not have been obtained; court noted "primary concern" was welfare of child and that it was "absurd to suggest that when the child became ill the mother should have first consulted her attorney instead of her doctor"). More significantly, all the evidence reflected said enrollment not to be in the nature of an "sudden emergency," *Vincent*, 38 N.C. App. at 583, 248 S.E.2d at 412, but rather a circumstance which developed over a period of time. We therefore decline to remand this matter for additional findings regarding the trial court's order of retroactive child support, but instead simply reverse that award.

Affirmed in part; Reversed in part.

Judges TIMMONS-GOODSON and HUNTER concur.

JOHNSTON HEALTH CARE CENTER, L.L.C., PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE AND LIBERTY HEALTHCARE SERVICES, L.L.C., RESPONDENT-INTERVENOR-APPELLEE, HEALTHPRIME, INC., RESPONDENT-INTERVENOR

No. COA99-129

(Filed 18 January 2000)

1. **Hospitals and Other Medical Facilities— certificate of need—commitment of funds—sufficient application**

   Substantial evidence existed in the whole record to support the Department of Health and Human Services' findings that Liberty Services' application for a certificate of need for nursing facility beds provided evidence of funding source commitment which supported the conclusion that the application conformed with statutory criteria. The financial statements of the two principals of Liberty evidence an availability of funds.

2. **Hospitals and Other Medical Facilities— certificate of need—amendment of prehearing statement**

   A Department of Health and Human Services' decision to reverse an administrative law judge's denial of Liberty Services' motion to amend its prehearing statement in a certificate of need preceding was not arbitrary or capricious where Liberty Services had not been required to file a prehearing statement, the statement which it filed addressed only its own application, and summary judgment motions from the competing applicant had not been filed at that time.

3. **Hospitals and Other Medical Facilities— certificate of need—commitment of funds—insufficient application**

   There was substantial evidence in the record to support a Department of Health and Human Services' finding that Johnson Health Care's certificate of need application failed to comply with the statutory criteria of evidence of a funding source's ability and commitment to provide funds where Johnson's line of credit expired before the commencement of the proposed project, even though Johnson asserted in its brief that renewals in the bank's letter established a commitment.

Appeal by petitioner Johnston Health Care Center, L.L.C. from the final agency decision entered 24 July 1998 by the North Carolina

Department of Health and Human Services. Heard in the Court of Appeals 25 October 1999.

Parker, Poe, Adams & Bernstein L.L.P., by Renee J. Montgomery, for the petitioner-appellant.

Michael F. Easley, Attorney General, by Staci Tolliver Meyer, Assistant Attorney General and Melissa L. Trippe, Assistant Attorney General, for the respondent-appellee.

Poyner & Spruill, L.L.P., by William R. Shenton, for the respondent-intervenor-appellee.

WYNN, Judge.

Johnston Health Care Center, L.L.C. appeals from a final decision of the North Carolina Department of Health and Human Services awarding a Certificate of Need to Liberty Healthcare Services, L.L.C. and denying Johnston Center's Certificate of Need application. Our review of the whole record reveals substantial evidence to support the Department of Health and Human Services' award. We, therefore, affirm the award.

The 1997 State Medical Facilities Plan established a need for one hundred additional nursing facility beds for the year 2000 in Johnston County. In response, Johnston Center and Liberty Services filed Certificate of Need applications to develop and operate a one hundred bed nursing facility in Benson, North Carolina.

Upon considering the two applications, the Department of Health and Human Services[1] found that Johnston Center's application conformed with all applicable statutory and regulatory review criteria. Additionally, the Department of Health and Human Services found that Liberty Services' application conformed at least conditionally with all applicable statutory and regulatory review criteria, but imposed several conditions on its approval of Liberty Services' application. One of those imposing conditions provided that:

> Liberty Healthcare Services, L.L.C. shall provide the Certificate of Need Section with the correspondence from an appropriate official who is fiscally responsible for the funds to be used for the development of the project documenting that $691,362.00 is available and committed for the capital needs and that $185,000.00 is

1. Formerly the Department of Human Resources. N.C. Gen. Stat. § 143B-138.1 (1998 Cum. Supp.).

> available and committed for start-up and initial operating expenses.

This condition related to, *inter alia*, Liberty Services' compliance with the requisite financial feasibility under N.C. Gen. Stat. § 131E-183(a)(5)—"criterion 5."

The Department of Health and Human Services made a comparative analysis of the two applications in its findings and concluded that Liberty Services' application was superior to Johnston Center's application. The Department of Health and Human Services further found that upon Liberty Services' compliance with the imposed conditions, its application was the most effective alternative proposal in the review.

On 27 August 1997, Johnston Center petitioned for a contested case hearing with the Office of Administrative Hearings to contest the award of a Certificate of Need to Liberty Services. Thereafter, on 3 September 1997, the Administrative Law Judge ordered each party to file a prehearing statement.

By order dated 30 September 1997, the Administrative Law Judge allowed Liberty Services to intervene as a party "for all purposes" in the contested case. Although no additional pleadings were ordered by the Administrative Law Judge, Liberty Services filed an initial prehearing statement which indicated that:

> LIBERTY will present evidence to show that its application conformed or conformed as conditional, with each applicable review criterion, and that the [Certificate of Need] Section acted within its authority and jurisdiction, correctly, properly, reasonably, and lawfully in reviewing these applications and making its decision to approve LIBERTY.

On 13 February 1998, Johnston Center moved for summary judgment on the basis that because Liberty Services failed to provide sufficient documentation establishing a commitment of funds by the funding sources, its application did not as a matter of law conform with criterion 5. Following an evidentiary hearing, the Administrative Law Judge issued a recommended decision granting Johnston Center's motion and finding that Liberty Services' application did not contain any evidence of the commitment to provide the funds by the funding person as required by criterion 5.

Subsequently, Johnston Center moved for summary judgment in its favor on the grounds that there was no genuine issue of material fact regarding the Department of Health and Human Services' determination that Johnston Center's application conformed with applicable statutory and regulatory criteria.

Liberty Services responded by moving to amend its initial prehearing statement to include claims that the Department of Health and Human Services erred in finding that Johnston Center's application conformed with all statutory and regulatory criteria. And Liberty Services moved for summary judgment against Johnston Center on the grounds that Johnston Center's application failed to comply with criterion 5.

At the hearing on the motions, the Administrative Law Judge denied Liberty Services' motion to amend its prehearing statement on the basis that Liberty Services' motion was untimely and that the amendment would "substantially prejudice" Johnston Center. Thereafter, the Administrative Law Judge heard arguments, found that Johnston Center's application was consistent with all review criteria, granted Johnston Center's summary judgment motion, and recommended that the Department of Health and Human Services award a Certificate of Need to Johnston Center. Alternatively, the Administrative Law Judge issued a recommended decision contingent upon the reversal on appeal of his order denying Liberty Services' motion to amend. In the contingent recommended decision, the Administrative Law Judge recommended granting summary judgment in favor of Liberty Services based on Johnston Center's noncompliance with criterion 5.

The final agency decision reversed the Administrative Law Judge's denial of Liberty Services' motion to amend its prehearing statement and adopted the Administrative Law Judge's contingent recommended decision finding that Liberty Services' application was consistent with all plans, standards and criteria, and was comparatively superior to the other applicants.

This appeal followed.

I. SCOPE OF JUDICIAL REVIEW

Before addressing the merits of Johnston Center's appeal, we must determine the appropriate standard of judicial review presented in the case *sub judice*. *See Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 578, 281 S.E.2d 24, 28 (1981) (holding that in present-

ing appeals from an administrative decision to the judicial branch, it is essential for the parties to present their contentions as to the applicable scope of review, and further the reviewing court should make clear the review under which it proceeds).

The North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 et seq., governs both trial and appellate court review of administrative agency decisions. *See Eury v. North Carolina Employment Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383 (1994). Under 150B-51(b),

> . . . the 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 petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decision are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon lawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51 (1995). Although this statute "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. North Carolina Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 118 (1994); *see also State ex rel. Utilities Comm'n v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981) (stating that the "nature of the contended error dictates the applicable scope of review").

If the petitioner argues that the agency's decision was not supported by the evidence or that the decision was arbitrary or capricious, the reviewing court must apply the "whole record test". *See Retirement Villages, Inc. v. North Carolina Dep't of Human Resources*, 124 N.C. App. 495, 498, 477 S.E.2d 697, 699 (1996). In applying the whole record test, the reviewing court is required " 'to

examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence.' " *In re Meads*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (quoting *Rector v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991)). Thus, under the whole record test, "an agency's ruling should only be reversed if it is not supported by substantial evidence." *Retirement Villages, Inc.*, 124 N.C. App. at 498, 477 S.E.2d at 699. " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *In re Meads*, 349 N.C. at 663, 509 S.E.2d at 170 (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)).

Further, the whole record test requires the reviewing court to consider both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached. *See id.* at 663, 509 S.E.2d at 170. But the test does not allow the reviewing court to replace the agency's judgment, " 'even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* (quoting *Thomas v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

In the instant case, Johnston Center contends that several of the Department of Health and Human Services' findings were unsupported by the evidence in the record and were arbitrary or capricious. Therefore, we apply the whole record test in reviewing this matter.

II. LIBERTY SERVICES' COMPLIANCE WITH CRITERION 5

[1] Johnston Center first contends that because Liberty Services failed to provide sufficient evidence that it had committed funds for the proposed project, the Department of Health and Human Services erred in finding that Liberty Services' application as submitted complied with all applicable criteria.

Under N.C. Gen. Stat. § 131E-183, the Department of Health and Human Services "shall review all applications utilizing the criteria outlined in [the statute] and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." One such criteria is criterion 5 which provides that:

> 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.

N.C. Gen. Stat. § 131E-183(a)(5) (1994).

In the instant case, Liberty Services' application projected the capital costs for the proposed project to be $3,131,810.00 with projected additional working capital costs of $185,000.00 to meet the start-up and initial operating expenses. Liberty Services' application anticipated that $2,505,448.00 would be funded by a bank loan, $626,362.00 would be funded by owner's equity, and $185,000.00 would be funded by the "unrestricted cash of the proponent." In effect, Liberty Services intended for $811,362.00—comprised of the amount allotted for owner's equity plus the amount allotted for unrestricted cash—to be supplied by John A. McNeill, Jr. and Ronald B. McNeill, the officers and owners of Liberty Services.

As this Court held in *Retirement Villages, Inc.*, 124 N.C. App. at 499, 477 S.E.2d at 699, criterion 5 does not preclude a Certificate of Need applicant from relying on the financial resources of another entity for its funding. However, "in cases where the project is to be funded other than by the [Certificate of Need] applicants, the application must contain evidence of a commitment to provide the funds by the funding entity." *Id.* Without a commitment, an applicant cannot adequately demonstrate availability of funds or the requisite financial feasibility. *See id.* Thus, we must determine whether there is sufficient evidence in the record to support a finding that Liberty Services' proposed funding sources—John McNeill, Jr. and Ronald McNeill—committed to supplying the funds at issue in this case—a total amount of $811,362.00.

The Department of Health and Human Services found that Liberty Services' application contained the following information pertaining to Liberty Services' commitment to finance the proposed project:

> a. A certification page, executed by John A. McNeill, Jr., President of Liberty, which included a sworn statement that: 'The applicant will materially comply with the representations made in its application in its development of the project and the offering of the service pursuant to G.S. 131E-181(b);' and 'The information included in this application and all attachments is correct to the best of my knowledge and belief and it is my intent to carry out the proposed project as described' . . . .

> b. Identification of Liberty's owners as John A. McNeill, Jr. and Ronald B. McNeill and Liberty's officers as John A. McNeill Jr., President, and Ronald B. McNeill, Secretary/Treasurer . . . .
>
> c. A total capital cost projection of $3,131,810, of which a total of $2,505,448 was to be paid through a conventional loan and $626,362 paid by owner's equity; and a total working capital need projection of $185,000.00 ($45,000 start-up expenses + $140,000 initial operating expenses), to be funded by owner's equity . . . .
>
> d. Financial statements of two principals of Liberty, John A. McNeill and Ronald B. McNeill, and their respective spouses. . . . .
>
> e. A letter from Stewart E. Smith, Assistant Vice President of Wachovia Bank of North Carolina, NA, in which Mr. Smith certified that he had examined the financial positions of the principals of Liberty, John A. McNeill and Ronald B. McNeill and they have adequate finances to support the construction and permanent financing for the proposed facility; Mr. Smith further stated Wachovia has a long standing personal relationship with the Messrs. McNeill, and that Wachovia would consider financing $2,505,448 or 80% of the total construction cost of the project . . . .
>
> f. A letter from Ronald McNeill, Vice President and [Chief Financial Officer] of Liberty, certifying that the principals of Liberty have sufficient funds to provide for the required equity and start up operating capital for the development of the project . . . .

While this evidence sufficiently shows the *ability* of the funding sources to provide the funds for the proposed project, it falls short of establishing a *commitment* by the McNeills to provide the funds at issue. A commitment is defined as "[a]n agreement to do something in the future, [especially] to assume a financial obligation". BLACK'S LAW DICTIONARY 267 (7th ed.1999). The aforementioned evidence, alone, does not establish an agreement on the part of the McNeills to provide the funds for the proposed project.

But the whole record before us contains additional evidence that reveals both an ability and a commitment by the funding sources to provide the relevant funds. The record contains financial statements which showed that John McNeill and his wife Deborah McNeill had an estimated net worth in excess of $18 million and Ronald McNeill and his wife Cynthia McNeill had an estimated net worth of $30 mil-

lion. Even though Liberty Services' application did not include commitment letters from the spouses of John McNeill and Ronald McNeill, the submitted financial statements demonstrated an ability by both John McNeill and Ronald McNeill separate and apart from their wives to provide an amount of $811,362.00 for capital and start-up operating expenses.

For instance, the financial statements of John and Deborah McNeill contained investments totaling $14,615,675.00 which included $3,534,002.00 in marketable securities. Similarly, the financial statements of Ronald and Cynthia McNeill contained $1,640,336.00 in stocks and bonds, and cash on hand totaling $99,455.00.

Under N.C. Gen. Stat. § 41-2.2,

> (a) . . . shares of corporate stock or investment securities may be owned by any parties as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.
>
> (b)(1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares of securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either party the interest of the decedent shall pass to the surviving party.

N.C. Gen. Stat. § 41-2.2 (1996).

In the instant case, the record contains no evidence as to whether the aforementioned assets were owned through joint tenancies with the right of survivorship. However, the absence of this evidence does not preclude us from finding that John and Ronald McNeill were empowered to sell one-half of their interests in those assets. *See Bullman v. Edney*, 232 N.C. 465, 61 S.E.2d 338 (1950) (holding that one who owns an undivided interest in chattel may sell such interest and thereby render the buyer a tenant in common with other co-owners); *see also Woolard v. Smith*, 244 N.C. 489, 94 S.E.2d 466 (1956) (a joint tenancy may be terminated by sale by one of the joint tenants); 20 Am. Jur.2d Cotenancy and Joint Ownership § 7 (1995) (joint tenants "are seised of the entire estate for the purposes of tenure and survivorship but of only an undivided part or interest for the purpose of forfeiture or immediate alienation"). Since John and Ronald McNeill were empowered to sell one-half of their interests in

the aforementioned assets, the financial statements evidence an availability of funds by both McNeills separate and apart from their spouses.

In addition to the financial statements, the letters submitted by Wachovia Bank of North Carolina, NA and Ronald McNeill further supported the McNeills' ability to provide the funds at issue.

As to the funding sources' commitment, the record contained a certification page signed by John McNeill, Jr. stating that it is "my intent to carry out the proposed project as described." Although he signed the certification page in his official capacity as President of Liberty Services, this factor alone does not preclude a finding that McNeill made a personal commitment to provide funds. *See Industrial Air, Inc. v. Bryant*, 23 N.C. App. 281, 285, 209 S.E.2d 306, 309 (1974) (stating that the "intent of the parties as revealed in the transaction as a whole, and not the signatures alone, determines liability for a contract").

Here, the record contains an affidavit of John McNeill, Jr. stating, *inter alia*, that:

> 7. Ron and I agreed to submit [the] financial statements in the application because we understood the need to demonstrate the availability of funds for the owner's projected equity contribution to the project; and as indicated by my certification of the application, we each were committed to providing all funds needed to build and operate the nursing home if it was approved.

Taken together, John McNeill's affidavit and the signed certification page show a commitment by the McNeills to provide funds.

Furthermore, Section 8.1 of Liberty Services' Operating Agreement provides further support of the McNeills' commitment. This section requires John McNeill, Jr. and Ronald McNeill, as members of Liberty Services, to make capital contributions whenever called upon by a vote of a majority-in-interest

Therefore, substantial evidence exists in the whole record to support the Department of Health and Human Services' findings that Liberty Services' application provided evidence of the funding sources' commitment which supported its conclusion that Liberty Services' application conformed with criterion 5.

Since the Department of Health and Human Services properly concluded that Liberty Services' application, as submitted, suf-

ficiently complied with all criteria, we need not address Johnston Center's assignment of error challenging the Department of Health and Human Services' conditional approval of Liberty Services' application.

III. LIBERTY SERVICES' MOTION TO AMEND

[2] Johnston Center next argues that the Department of Health and Human Services' reversal of the Administrative Law Judge's denial of Liberty Services' motion to amend its prehearing statement was arbitrary or capricious. We disagree.

A decision by an administrative agency "is arbitrary and capricious if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decision-making." *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988). As explained by our Supreme Court:

> The 'arbitrary or capricious' standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate any course of reasoning and the exercise of judgment . . . .'

Act-Up Triangle v. Comm'n for Health Services of N.C., 345 N.C. 699, 707, 483 S.E.2d 388, 393 (citations omitted) (1997).

Under 26 NCAC 3.0104,

> [t]he administrative law judge may serve all parties with an Order for Prehearing Statements together with, or after service of, the Notice of the Contested Case Filing and Assignment. The parties thus served shall, within 30 days of service file the requested statements setting out the party's present position on the following:
>
> (1) The nature of the proceeding and the issues to be resolved;
>
> (2) A brief statement of the facts and reasons supporting the party's position on each matter in dispute;
>
> (3) A list of proposed witnesses with a brief description of his or her proposed testimony;

(4) A description of what discovery, if any, the party will seek to conduct prior to the contested case hearing and an estimate of the time needed to complete discover;

(5) Venue consideration;

(6) Estimations of the length of the hearing;

(7) The name, address, and telephone number of the party's attorney, if any; and

(8) Other special matters.

Here, the Administrative Law Judge ordered the prehearing statements on 3 September 1997. However, Liberty Services did not intervene in the matter until 30 September 1997. At that time, the Administrative Law Judge did not file any orders requesting additional prehearing statements. Thus, although Liberty Services filed a prehearing statement, it was not required to do so.

Moreover, when Liberty Services filed its initial prehearing statement, Johnston Center had not filed its summary judgment motions. The only action taken by Johnston Center was the filing of its petition for a contested case. As a result, Liberty Services' prehearing statement that the Department of Health and Human Services "acted within its authority and jurisdiction, correctly, properly, reasonably, and lawfully in reviewing these applications and making its decision to approve Liberty" was made in response to Johnston Center's challenge to the Department of Health and Human Services' approval of Liberty Services' application. In fact, the prehearing statement only addressed Liberty Services' position on its own application. Given the fact that Johnston Center's summary judgment motions had not been filed when Liberty Services' prehearing statement was filed, Liberty Services' failure to address its position on Johnston Center's application was not unreasonable.

Hence, we conclude that the Department of Health and Human Services' decision to reverse the Administrative Law Judge's denial of Liberty Services' motion to amend its prehearing statement was not arbitrary or capricious.

IV. JOHNSTON CENTER'S COMPLIANCE WITH CRITERION 5

[3] Finally, Johnston Center asserts that the Department of Health and Human Services' finding that its application failed to comply with

criterion 5 was unsupported by the evidence in the record, and was arbitrary or capricious. Specifically, Johnston Center argues that its application established the availability and commitment of funds required under criterion 5.

As previously stated, criterion 5 requires evidence of both a funding source's ability and commitment to provide the funds for the proposed project. *See Retirement Villages, Inc.*, 124 N.C. App. at 499, 477 S.E.2d at 699.

In the instant case, Johnston Center's application proposed total estimated start-up expenses of $100,000.00 and total estimated initial-operating expenses of $1,388,667.00. Johnston Center's application also stated that it would finance $285,000.00 of this total "working capital" through a $500,000.00 personal line of credit that its principal, James R. Smith, had with Central Fidelity Bank of Virginia. In fact, Mr. Smith's line of credit from the bank was Johnston Center's sole source of financing for this portion of its projected working capital costs.

As supporting documentation for Mr. Smith's line of credit, Johnston Center submitted a letter from Central Fidelity National Bank committing the bank to providing a line of credit to Mr. Smith. The letter provided that the line of credit would expire on 30 September 1997. However, Johnston Center's application contained a timetable for the proposed project which scheduled the commencement of construction of the project no sooner than October 1997 and scheduled the opening of the facility no sooner than December 1998. Therefore, Mr. Smith's line of credit expired before the commencement of the proposed project.

In response, Johnston Center asserts in its brief that the renewals in the bank's letter to Mr. Smith established a commitment by the bank to provide the portion of the working capital at issue. Nonetheless, the fact that the commitment letter expired constitutes substantial evidence in the record to support the Department of Health and Human Services' finding that Johnston Center's application failed to establish the availability and commitment of funds required under criterion 5.

Having determined that the record contains substantial evidence to show that Johnston Center's application failed to comply with criterion 5, we need not address Johnston Center's assignment of error contending that because its Certificate of Need application was con-

sistent with all applicable criteria, Johnston Center was entitled to the Certificate of Need award.

Affirmed.

Judges LEWIS and MARTIN concur.

DANIEL M. HLASNICK AND DARLENE HLASNICK, PLAINTIFFS v. FEDERATED MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANTS

No. COA99-103

(Filed 18 January 2000)

1. **Insurance— automobile—underinsured motorist coverage—rejection form**

The trial court did not err in a declaratory judgment action to determine insurance coverage arising from an automobile accident by finding that plaintiffs were entitled to $50,000 in underinsured motorist coverage from defendant Federated Mutual where plaintiff argued that the underinsured coverage equals the limits of liability coverage when a mandatory selection/rejection form is not completed. Federated was not required to use the Rate Bureau's selection/rejection form and the rejection was not required to be in writing because Federated's was a fleet policy which was not under the jurisdiction of the Rate Bureau. Although it would be preferable for the form to contain a written unambiguous rejection, Federated's form meets the bare requirements.

2. **Insurance— automobile—underinsured motorist coverage—two-tiered**

A two-tiered underinsured motorist policy which provided $50,000 of coverage to most employees of an automobile dealership and $500,000 in coverage to directors, officers, partners, or owners did not contravene the purpose of the Motor Vehicle Safety and Responsibility Act. Nothing in the Act requires all those covered under the policy to be insured at identical levels of coverage and the coverage here met the statutory minimum requirements for all employees.

3. Insurance— automobile—underinsured motorist coverage—definition of company officer

The general manager of an automobile dealership was not entitled to underinsured motorist coverage as an officer under a policy which provided coverage in one amount for most employees and in a greater amount for officers.

4. Insurance— automobile—underinsured motorist coverage—primary and excess

The trial court erred in a declaratory judgment action to determine underinsured motorist coverage by finding that defendant State Farm's policy provided primary coverage where there was no dispute that an automobile dealership owned the automobile, its policy (Federated) provided primary coverage for any automobile its insured owned, and the driver's policy (State Farm) stated that it would be only an excess provider with respect to a vehicle that its policyholder did not own. There was no need to consider the class into which the insured fell or to prorate coverage because the "other insurance" clauses in this case were not repugnant and could be read harmoniously. Limiting language relied upon by Federated did not apply because it referred to coverage "on the same basis," which was not the case here.

Appeal by plaintiffs and defendant State Farm Mutual Automobile Insurance Company from judgment entered 3 November 1998 by Judge B. Craig Ellis in Wake County Superior Court. Heard in the Court of Appeals 21 October 1999.

Thompson, Smyth & Cioffi, L.L.P., by Theodore B. Smyth, and Michaels & Jones, by Gregory M. Martin, for plaintiff-appellants.

DeBank & Honeycutt, by Douglas F. DeBank, for defendant-appellant State Farm Mutual Automobile Insurance Company.

Teague, Campbell, Dennis & Gorham, L.L.P., by Mallory A. Taylor, for defendant-appellee Federated Mutual Insurance Company.

EDMUNDS, Judge.

Plaintiff Daniel M. Hlasnick (Mr. Hlasnick) was general manager at RPM Lincoln-Mercury, LLC (RPM), an automobile dealership in

Durham, North Carolina. On 18 August 1996, Hlasnick was operating a Dodge pick-up truck owned by the dealership when he was involved in an accident with Norman M. Smith (Smith). At the time of the accident, Mr. Hlasnick was running a personal errand; his wife (Mrs. Hlasnick) was a passenger in the truck and is the second plaintiff in this action. Plaintiffs brought suit against Smith for negligence in a separate action unrelated to this appeal. The parties filed this declaratory judgment action to determine the underinsured motorist coverage available to plaintiffs beyond the $25,000/$50,000 limits of Smith's insurance policy, which already has been tendered to plaintiffs in exhaustion of Smith's policy limits.

Three other insurance policies are pertinent to this appeal. The first is a commercial auto policy issued by defendant Federated Mutual Insurance Company (Federated Mutual) to RPM, which insured the pick-up truck Mr. Hlasnick was driving at the time of the accident. This policy establishes two tiers of underinsured motorist coverage, providing $50,000 in coverage to most employees of the dealership, while providing $500,000 in coverage to "any director, officer, partner or owner" of RPM. The other two policies involved in this dispute are personal auto policies issued to Mr. and Mrs. Hlasnick by defendant State Farm Mutual Auto Insurance Company (State Farm). Each of these policies provides underinsured motorist coverage of $100,000 per person and $300,000 per accident.

The trial court denied plaintiffs' motion for summary judgment and granted defendant Federated Mutual's motion for summary judgment, finding that plaintiffs were entitled to a total of $50,000 in underinsured motorist coverage under Federated Mutual's two-tiered policy. The court further found that the coverage provided by State Farm was primary and that the coverage provided by Federated Mutual was excess. Plaintiffs and defendant State Farm appeal. We affirm the trial court's finding as to plaintiffs' coverage under Federated Mutual's policy but reverse the trial court's determination that State Farm's coverage was primary.

I.

[1] Plaintiffs first contend the trial court erred in finding that "[p]laintiffs are entitled to a total of $50,000 in underinsured motorist coverage from Defendant Federated Mutual Insurance Company . . . ." As a result of this determination, the trial court denied plaintiffs' motion for summary judgment and granted Federated Mutual's motion for summary judgment. 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 trial court found facts from proper evidence sufficient to support its ruling on a summary judgment motion, *see J.M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 423-24, 324 S.E.2d 909, 912 (1985), we review the record in the light most favorable to the non-moving party, *see Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "A trial court's grant of summary judgment is fully reviewable by this Court because the trial court rules only on questions of law." *Metropolitan Prop. and Casualty Ins. Co. v. Lindquist*, 120 N.C. App. 847, 849, 463 S.E.2d 574, 575 (1995) (citation omitted).

Plaintiffs first argue that under the Motor Vehicle Safety and Financial Responsibility Act of 1953 (the Act), N.C. Gen. Stat. §§ 20-279.1 to 20.279.39 (1993), when a mandatory selection/rejection form is not completed, the underinsured motorist coverage provided by the carrier equals the limits of its liability coverage under the policy. The Act, which includes provisions for underinsured motorist coverage, "is a remedial statute which must be liberally construed in order to achieve the 'beneficial purpose intended by its enactment.' " *Hedrickson v. Lee*, 119 N.C. App. 444, 449, 459 S.E.2d 275, 278 (1995) (citation omitted). The Act's purpose is to protect innocent victims "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 Act's provisions "are 'written' into every automobile liability policy as a matter of law, and, when the terms of [a] policy conflict with the statute, the provisions of the statute will prevail." *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977) (citations omitted).

The parties do not dispute that Federated Mutual is required to provide some amount of underinsured motorist coverage under this policy. However, they disagree as to whether N.C. Gen. Stat. § 20-279.21(b)(4) (1993) requires Federated Mutual to use a form promulgated by the North Carolina Rate Bureau (Rate Bureau) when it offers an insured the opportunity to select or reject underinsured motorist coverage. The statute reads in pertinent part:

> 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 cover-

> age limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. . . . The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.
>
> Rejection of or selection of different coverage limits for underinsured motorist coverage *for policies under the jurisdiction of the North Carolina Rate Bureau* shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added).

Federated Mutual argues that its insurance policy was not under the jurisdiction of the Rate Bureau, and therefore, it was not required to use the Rate Bureau's selection/rejection form. We agree. Section 58-36-1(1) provides, in pertinent part, that the Rate Bureau's jurisdiction over automobile insurance covers

> theft of and physical damage to private passenger (nonfleet) motor vehicles as the same are defined under Article 40 of this Chapter; for liability insurance *for such motor vehicles*, automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of such liability insurance . . . .

N.C. Gen. Stat. § 58-36-1(1) (1994) (emphasis added). A "nonfleet" motor vehicle "means a motor vehicle not eligible for classification as a fleet vehicle for the reason that the motor vehicle is one of four or less motor vehicles owned or hired under a long-term contract by the policy named insured." N.C. Gen. Stat. § 58-40-10(2) (1994). There is no dispute that Federated Mutual's policy insured more than four vehicles; therefore, the policy is a fleet policy.

Before its amendment in 1991, section 20-279.21(b)(4) required that Rate Bureau forms be used for selecting or rejecting underinsured motorist coverage; there was no exception for vehicles that were not under the jurisdiction of the Rate Bureau. However, we interpret the policies in accordance with the wording of the statute in effect at the time the policies were issued, *see White v. Mote*, 270 N.C.

544, 555, 155 S.E.2d 75, 82 (1967); therefore, authority cited by plaintiffs that interprets the section as worded prior to its amendment is not controlling. Federated Mutual's policy provided coverage from 1 February 1996 to 1 February 1997, well after the amendment became effective. Because the plain language of the statute does not require Federated Mutual to use the Rate Bureau's selection/rejection form, Federated Mutual permissibly used its own form for selection or rejection of underinsured motorist coverage.

Plaintiffs point out that the form used here contained no written notice to the insured of the option to reject underinsured coverage and consequently is deficient. However, the statute requires that rejection be in writing only when the policy is under Rate Bureau jurisdiction. *See* N.C. Gen. Stat. § 20-279.21(b)(4). *But see Sanders v. American Spirit Insurance Co.*, 135 N.C. App. 178, 519 S.E.2d 323 (1999) (where written policy required, no variation permitted from form promulgated by Rate Bureau and approved by Commissioner of Insurance). Here, the insurer provided notice in writing of the option to select underinsured motorist coverage. An insured's rejection of the coverage can be inferred from the insured's failure to select such coverage. Although it would be preferable if the form contained a written provision allowing an insured unambiguously to reject such coverage, the form used by Federated Mutual nevertheless meets the bare statutory requirements.

[2] Plaintiffs next argue that, even if Federated Mutual was not required to use a Rate Bureau form, Federated Mutual's two-tiered coverage contravened the purpose of the Act. The underinsured motorist provision in Federated Mutual's policy permitted the insured to select different levels of coverage for different classes of covered individuals. RPM selected coverage in the amount of $500,000 for "any director, officer, partner or owner of the named insured" and his or her qualified family member, and coverage in the amount of $50,000 for any other qualified person. Federated Mutual concedes that the policy provides underinsured motorist coverage for plaintiffs, but only in the amount of $50,000.

The Act provides a floor of underinsured coverage that insurers must provide. Section 20-279.21(b)(4) mandates that coverage for underinsured motorists may not "be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5." N.C. Gen. Stat. § 20-279.21(b)(4). Section 20-279.5 provides in pertinent part:

> [I]f the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident . . . .

N.C. Gen. Stat. § 20-279.5 (1993). An insured named in the policy has the freedom to reject all underinsured motorist coverage or to select different coverage limits as long as the limits are within the statutory minimum. *See* N.C. Gen. Stat. § 20-279.21(b)(4). Nothing in the Act requires all those covered under the policy to be insured at identical levels of coverage. An insurance policy is a contract, and its terms govern the rights of the parties. *See Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). The insurer and insured are free to bargain over premiums and coverage, as occurred in the case at bar. The coverage selected by RPM met the statutory minimum requirements for all employees and exceeded the statutory minimum for some. As long as the statutory requirements are met, we can see no reason either in the Act or in public policy to prevent an insured from obtaining underinsured motorist coverage in excess of the statutory minimum for employees it considers particularly valuable.

[3] Plaintiffs argue in the alternative that, if the two-tiered coverage is valid, Mr. Hlasnick is an "officer" of RPM under the uninsured and underinsured motorist provisions of Federated Mutual's policy and is therefore entitled to the increased coverage. The policy reads in pertinent part:

> In consideration of the premium charged, the limit for Uninsured and Underinsured Motorists Coverage as provided by your policy is modified as follows:
>
> 1. For any director, officer, partner or owner of the named insured and his or her "family member" who qualify as an "insured" under the WHO IS INSURED provision of the Uninsured and Underinsured Motorists Coverage attached to this policy, the limit of insurance shall be as follows:
>
> $ 500,000 Limit of Insurance
>
> 2. For any other person qualifying as an "insured" under the WHO IS AN INSURED provision of the applicable coverage, the limit

shown below shall apply. If no limit is shown below, no coverage is afforded to any other person.

$ 50,000 Limit of Insurance

Our Supreme Court has discussed the general principles of construction applicable to disputed terms in an insurance policy:

> Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods v. Insurance Co., 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978). "An insurance policy is to be construed as a whole . . . ." *Chavis v. Southern Life Ins. Co.*, 76 N.C. App. 481, 484, 333 S.E.2d 559, 562 (1985) (citation omitted).

Plaintiffs concede that Mr. Hlasnick is not a director, partner, or owner of RPM, but contend that his duties as general manager make him an officer of the company. Federated Mutual's policy does not provide a definition of the term "officer." However, reviewing the policy as a whole, we find that the parties did not intend for Mr. Hlasnick to be considered an officer. In that section of the policy dealing with "Garage Coverage," employees are grouped into one of three categories. Class I employees include:

> 1a—Proprietors, partners and officers active in the business; salespersons and general managers who are furnished a covered "auto" or drive a covered "auto" to and from work; any other employee who is furnished a covered "auto" or whose principal duties involve the operation of "autos".

1b—Salespersons and general managers who are not furnished a covered "auto" and do not drive a covered "auto" to and from work.

1c—All other employees.

The policy's differentiation between "proprietors, partners and officers" and "salespersons and general managers" indicates to us that, for the purposes of coverage, the parties did not consider a general manager to be an "officer" within the terms of the policy. Therefore, Mr. Hlasnick was not entitled to coverage as an officer. This assignment of error is overruled.

II.

[4] State Farm contends the trial court erred in finding that the "underinsured motorist coverage provided to Plaintiffs by Defendant State Farm Mutual Automobile Insurance Company is primary and the . . . underinsured motorist coverage provided to Plaintiffs by Defendant Federated Mutual Insurance Company is excess." No provision of N.C. Gen. Stat. §§ 20-279.21 to 20-279.39 "expressly establishes a statutory priority of payment among different insurance policies." *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 510, 369 S.E.2d 386, 388 (1988). State Farm insured the two personal vehicles belonging to plaintiffs. Neither of these vehicles was involved in the accident in which plaintiffs were injured; instead, Mr. Hlasnick was driving a car owned by RPM. RPM insured all its cars through defendant Federated Mutual. "To determine who is the primary carrier and who is the excess carrier, if any, we must examine the 'Other Insurance' clauses in the competing policies." *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 608, 461 S.E.2d 317, 323 (1995) (citation omitted), *superseded by statute on other grounds as stated in N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 468 S.E.2d 584 (1996).

The State Farm policy included a section labeled "Other Insurance," which provides, "any insurance we [(State Farm)] provide with respect *to a vehicle you do not own shall be excess over any other collectible insurance.*" (Emphasis added.) The Federated Mutual policy issued to RPM contains an "Other Insurance" provision in the general liability portion of its contract. The Federated Mutual policy reads, in pertinent part: "For any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance."

Reading these "other insurance" provisions together leads us to conclude that the trial court erred when it found State Farm to be the primary carrier for underinsured motorist coverage. State Farm's policy explicitly stated that it would be only an excess provider with respect to a vehicle that its policyholder did not own. By contrast, Federated Mutual's policy provided that it would provide primary coverage for any automobile its insured owned. There is no dispute that RPM owned the truck involved in the collision; consequently, Federated Mutual is the primary carrier.

Federated Mutual nevertheless points out that its policy also contains the following additional language in its "Other Insurance" section:

> When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

However, this provision is inapplicable because State Farm did not provide underinsured motorist coverage "on the same basis" as Federated Mutual. Federated Mutual's coverage is based upon RPM's ownership of the vehicle driven by Mr. Hlasnick; State Farm's coverage is based upon a policy maintained by Mr. Hlasnick for his personal vehicles.

We reached a similar result in *Bowser v. Williams*, 108 N.C. App. 8, 422 S.E.2d 355 (1992), *overruled on other grounds by McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998), where Bowser was killed in an accident while driving a truck owned by his employer. The employer's truck was insured under a Continental Insurance Company policy that provided underinsured motorist coverage. Bowser was covered by a personal insurance policy issued by Horace Mann Insurance Company that also provided underinsured motorist coverage. The Continental policy contained an "Other Insurance" clause, which made its liability coverage primary; however, if other coverage was available "on the same basis," the policy provided pro rata or proportional coverage. Bowser's personal policy contained a clause that stated: "*[A]ny insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.*" *Bowser*, 108 N.C. App. at 15, 422 S.E.2d at 359. We held that, under these facts, the Continental insurance pol-

icy of the truck owner provided primary coverage, and the Horace Mann policy, held by Bowser personally, provided excess coverage. *See id.* at 16, 422 S.E.2d at 360.

Finally, Federated Mutual, relying on the analysis found in *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991), maintains that determination of the primary and excess carrier depends upon the class of insured in which plaintiff falls under each policy.

> "N.C. Gen. Stat. [§] 20-279.21(b)(3) establishes two 'classes' of 'persons insured': (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle."

Id. at 143, 400 S.E.2d at 47 (quoting *Crowder v. N.C. Farm Bureau Mut. Ins.* Co., 79 N.C. App. 551, 554, 340 S.E.2d 127, 129 (1986)). However, *Smith* provides little guidance for the case at bar. In *Smith*, there were two policies. The insureds were in the same class under both policies, the term "you" in each policy referred to the same individual, and the policies contained identical "other insurance" provisions. By contrast, plaintiffs here are second-class insureds under Federated Mutual's policy, but are first-class insureds under State Farm's policy; the term "you" in the different policies refers to different individuals; and the "other insurance" provisions in the policies are not identical. "The liability of each company must be determined by the terms of its own policy . . . ." *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 346, 152 S.E.2d 436, 440 (1967). Where an insured is in the same class under two policies and the "other insurance" clauses in the policies are mutually repugnant, the claims will be prorated. *See N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452 (1997); *Hilliard*, 90 N.C. App. 507, 369 S.E.2d 386. However, there is no need to consider the class into which an insured falls or to prorate coverage where, as here, the "other insurance" clauses are not mutually repugnant, but may be read together harmoniously. *See Iodice v. Jones*, 133 N.C. App. 76, 79 n.3, 514 S.E.2d 291, 293 n.3 (1999). "A construction which will give a fair meaning to both terms as used in the 'other insurance' clauses is preferable to finding repugnancy." *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 204, 192 S.E.2d 113, 121 (1972). We therefore conclude that the trial court erred in finding that State Farm's policy provided primary coverage. We remand for a finding on this issue consistent with this opinion.

III.

In light of recent holdings of our Supreme Court, plaintiffs have properly abandoned their argument that a separate umbrella policy issued by Federated Mutual would provide underinsured motorist coverage. *See Progressive American Ins. Co. v. Vasquez*, 129 N.C. App. 742, 502 S.E.2d 10 (1998), *rev'd*, 350 N.C. 386, 515 S.E.2d 8 (1999); *Piazza v. Little*, 129 N.C. App. 77, 497 S.E.2d 429 (1998), *rev'd*, 350 N.C. 585, 515 S.E.2d 219 (1999).

Affirmed in part, reversed in part, and remanded.

Judges WYNN and HORTON concur.

GLADYS BROWN, PLAINTIFF v. CARROLL M. BROWN, DEFENDANT

No. COA98-1412

(Filed 18 January 2000)

Divorce— equitable distribution—deceased plaintiff

The trial court erred in an equitable distribution action by denying the motion of the administratrix of plaintiff's estate to be substituted and by dismissing the action. An action for equitable distribution does not abate at the death of the parties if they were separated as required by N.C.G.S. § 50-21.

Judge LEWIS dissenting.

Appeal by plaintiff from an order entered 6 August 1998 by Judge Melissa Magee in Gaston County District Court. Heard in the Court of Appeals 25 August 1999.

Henry L. Fowler, III for plaintiff-appellant.

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

HUNTER, Judge.

The administratrix of the estate of Gladys Brown ("plaintiff"), Marsha T. Russell ("Brown administratrix"), made a motion in the trial court to be substituted for plaintiff in the present action for equi-

table distribution, a divorce from bed and board, alimony *pendente lite* and permanent alimony. The trial court denied the motion on the basis that each cause of action brought by plaintiff abated upon her death. We reverse as to the equitable distribution action, holding that it vests at the time of separation and thereafter does not abate upon the death of one of the parties.

First, we note that plaintiff was deceased at the time the notice of appeal was filed in her name. Since only a party aggrieved may appeal and the Brown administratrix was denied her motion to be substituted for plaintiff, we treat this appeal as a petition for writ of certiorari and allow it for the purpose of reviewing the order of the trial court.

The record reveals that plaintiff and defendant were married on 24 March 1976. On 5 December 1997, plaintiff filed a complaint in which she sought equitable distribution and collateral related relief, a divorce from bed and board, alimony *pendente lite* and permanent alimony. Plaintiff died on 9 January 1998. The Brown administratrix made a motion on 19 February 1998 to be substituted for plaintiff in this matter. In its order of 6 August 1998, the trial court determined that the parties had separated on 29 November 1997 and that each claim filed by plaintiff in the present action abated and did not survive her death because "any relief sought could not be enjoyed, and for each granting it would be nugatory after death; within the meaning of N.C.G.S. § 28A-18-1(B)(3)." The trial court thereupon denied the motion to be substituted for plaintiff and dismissed each claim.

Plaintiff first contends that the trial court committed reversible error by dismissing the claim for equitable distribution. We agree.

When enacted in 1981, N.C. Gen. Stat. § 50-21 provided:

> Upon application of a party to an action for divorce, an equitable distribution of property shall follow a decree of absolute divorce. A party may file a cross action for equitable distribution in a suit for an absolute divorce, or may file a separate action instituted for the purpose of securing an order of equitable distribution, ... The equitable distribution *may not precede* a decree of absolute divorce. . . .

N.C. Gen. Stat. § 50-21 (Cum. Supp. 1981) (emphasis added). This statute was amended three times prior to 1995, wherein exceptions were added to the rule that an equitable distribution judgment could

only be entered following a divorce decree. Then in 1995, our legislature amended this section by completely deleting this rule, so that it now provides in pertinent part:

> (a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed, *either as a separate civil action, or together with any other action* brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (Cum. Supp. 1998) (emphasis added). This section makes it clear that a divorce action or any other action is not now a prerequisite to the filing of an equitable distribution action. Because a claim for equitable distribution may proceed on its own at any time after a married couple separates, we conclude that a divorce decree is not necessary for a judgment in an equitable distribution action. The legislature had also previously amended N.C. Gen. Stat. § 50-20(k) to change the time of vesting of equitable distribution rights from the time of filing for divorce to the time of separation. By these two amendments, it is clear that our legislature gave equitable distribution actions total independence to proceed on their own without reliance on the outcome of related divorce actions.

As to whether an equitable distribution action survives the death of a party, this Court previously stated:

> [s]ince death itself dissolves the marital status and accomplishes the chief purpose for which the action is brought, there is no longer a marital status upon which a final decree of divorce may operate. The jurisdiction of the court to proceed with the action is terminated. The marital status of the parties is the same as if the suit had never been begun.

Caldwell v. Caldwell, 93 N.C. App. 740, 742, 379 S.E.2d 271, 272, *disc. review denied*, 325 N.C. 270, 384 S.E.2d 513 (1989) (quoting 1 R. Lee, *North Carolina Family Law* § 48 (4th ed. 1979)). This Court went on to hold:

> Since there is no longer a marital status upon which a final decree of divorce may operate, there can also be no basis upon which a judgment of equitable distribution could be rendered. Except for a consent judgment, which may be entered at any time during the pendency of the action, G.S. sec. 50-21(a), an equitable distribution of property *shall follow* a decree of absolute divorce.

> Plaintiff's death, therefore, rendered both the action for divorce and equitable distribution moot.

Id. at 743, 379 S.E.2d at 273 (citations omitted) (emphasis in original). *Caldwell* was decided prior to the 1995 amendment to N.C. Gen. Stat. § 50-21, thus its reasoning is outdated. Under our current statutes, a party's death does not automatically render an equitable distribution action moot. This Court has held that equitable distribution is a property right, and that the statute establishing equitable distribution

> does not grant a party a right in any particular property, [but] it does create a right to an equitable portion of that which the court determines to be marital property. Once a trial court enters a judgment of divorce, a claimant cannot be divested of the right to equitable distribution, and, therefore, his claim survives his death.

Tucker v. Miller, 113 N.C. App. 785, 788, 440 S.E.2d 315, 317 (1994) (citations omitted). As with *Caldwell*, when the *Tucker* decision was handed down, N.C. Gen. Stat. § 50-21(a) required that a decree of absolute divorce be entered prior to the entry of judgment in an equitable distribution case. Because this requirement has been deleted, the proposition in *Tucker* that a decedent cannot be divested of the right to equitable distribution after a divorce decree has been entered has been expanded. A claimant now cannot be divested of the right to equitable distribution after the parties have separated, regardless of whether or not they divorce.

N.C. Gen. Stat. § 50-20(k) presently provides: "The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation." N.C. Gen. Stat. § 50-20(k) (Cum. Supp. 1998). While the death of a married party abates a divorce action, this Court has stated that death does not abate an action brought against a spouse for adjudication of property rights:

> It is true that "death of a party terminates only the action as one for divorce and *does not necessarily prevent it from being revived and continued insofar as it seeks an adjudication of property rights between the parties.*" 1 R. Lee, *supra*, at 253; *see also* 2A W. Nelson, Divorce and Annulment § 21.10, at 307 (2d ed. 1961) ("death abates a [divorce] proceeding . . . , and is usually ground for its dismissal; but it does not do so to the extent that

> property rights or interests are involved"); 27A C.J.S. *Divorce* § 188, at 783 (1959) ("Where an appeal is prosecuted from a decree or judgment denying a divorce, and while the appeal is pending one of the parties dies, the appeal will usually be dismissed, unless property rights are involved . . . .").

Elmore v. Elmore, 67 N.C. App. 661, 667, 313 S.E.2d 904, 908 (1984) (emphasis added). The authority to enforce a deceased individual's property rights passes to the legal representative of his estate upon his death. *Carnahan v. Reed*, 53 N.C. App. 589, 281 S.E.2d 408 (1981). "No action abates by reason of the death of a party if the cause of action survives." N.C.R. Civ. P. 25(a). Under the foregoing precedent, the legal representative of the claimant's estate has authority to enforce an equitable distribution action. The claimant's heirs or devisees could enjoy the relief sought as the decedent's share of the marital property would be distributed to them. Consequently, the relief sought will not be nugatory after the claimant's death and the action does not abate under N.C. Gen. Stat. § 28A-18-1, which states:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> (1) Causes of action for libel and for slander, except slander of title;
>
> (2) Causes of action for false imprisonment;
>
> (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C. Gen. Stat. § 28A-18-1 (1984).

Our General Assembly, by its amendments, has provided that if a decedent has separated and made a claim for equitable distribution, her rights in the action are vested. Based on the abovementioned authority, we hold that an action for equitable distribution does not abate at the death of one of the parties if they were separated as required by N.C. Gen. Stat. § 50-21. The decedent is entitled to have the equitable distribution action continue after her death in order for

her share of the marital property to be determined and distributed to her heirs or devisees. Although the equitable distribution action may delay the administration of the decedent's estate, many estates are delayed while legal controversies are determined. Also, such a delay would be preferable to the decedent's loss of the right to have her share of the marital property available to distribute to her heirs or devisees at her death. If an equitable distribution action abated at a party's death, and the marital property consisted of property which the surviving spouse held title to individually, the surviving spouse would take all of the marital property even if the decedent had provided in her will that none of her estate would go to the surviving spouse. Under our holding, an equitable distribution action survives, and the heirs or devisees of the decedent would take the decedent's share of the marital property.

The trial court in the present case made the finding that the plaintiff had filed a claim for equitable distribution and that the parties had separated prior to her death. Accordingly, the order of the trial court wherein it (1) denied the motion of the administratrix of the estate of plaintiff to be substituted in the equitable distribution action, and (2) dismissed the action is reversed. We remand this case to the trial tribunal for entry of an order allowing the substitution of the Brown administratrix in plaintiff's equitable distribution action and for further proceedings consistent with this opinion.

Reversed and remanded.

Judge MARTIN concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent.

The majority concludes that a couple's property may be equitably distributed upon separation, even where there is no possibility that the parties will ever obtain a divorce. I do not believe that this holding comports with either the intent or the spirit of the statutory provisions relevant to this case.

In support of its conclusion that an equitable distribution action can be entered, even where a spouse has died and there is no possibility of divorce, the majority first points to the 1995 revision to G.S.

50-21(a), which deleted the requirement that an absolute divorce precede equitable distribution. However, the revision included no explicit indication that equitable distribution actions were given an existence wholly independent of the related divorce action; in fact, there was no reference to the significance of this amendment at all. When viewed in the context of this section's placement within Chapter 50 and a 1992 amendment to this section, however, it seems more logical to interpret G.S. 50-21(a) as contemplating that a divorce will necessarily follow an equitable distribution order.

G.S. 50-21(a) is placed within Chapter 50 of the North Carolina General Statutes. If G.S. 50-21(a), entitled "Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay," is analyzed without any consideration of its placement within the statute, the majority's conclusion that this section allows an equitable distribution action without any possibility of divorce may seem tenable. However, I believe it is important to consider that G.S. 50-21(a) is codified within the chapter of the North Carolina General Statutes entitled, "Divorce and Alimony," and is included under Article 1, entitled, "Divorce, Alimony, and Child Support, Generally." Further, the preceding section is entitled "Distribution by court of marital and divisible property *upon divorce*." N.C. Gen. Stat. § 50-20 (1999) (emphasis added). When G.S. 50-21(a) is viewed in this context, it is clear that the legislature contemplated that a divorce necessarily would follow an equitable distribution order.

In addition to the 1995 amendment referenced by the majority, a 1992 amendment was also made that I feel is necessary to a full understanding of the current provision. As the majority states, the original version of G.S. 50-21(a) established that under no circumstance would an equitable distribution of property occur before a decree of divorce. The section was amended in 1992, however, and added the following italicized language:

> A judgment for an equitable distribution shall not be entered prior to entry of a decree of absolute divorce, except for a consent judgment, which may be entered at any time during the pendency of the *action, or except if the parties have been separated for at least six months and they consent, in a pleading or other writing filed with the court, to an equitable distribution trial prior to the entry of the decree for absolute divorce.*

N.C. Gen. Stat. § 50-21(a) (amended 1995) (emphasis added). This 1992 amendment, which allows an equitable distribution of property

to precede a divorce when the parties have been separated for six months, illustrates the legislature's intent to amend the *timing* of the equitable distribution order, and not to make the related divorce unnecessary to the equitable distribution action. By then amending the section in 1995 to allow an equitable distribution to precede an entry of divorce without regard to the date of separation, it cannot logically be concluded that the legislature intended to give actions for equitable distribution an existence wholly independent of and unnecessary to the related divorce action. Instead, when viewed in this light, the legislature's amendments illustrate that equitable distribution of property remains incidental to an entry of divorce.

When placed in its proper context, I believe it becomes apparent that an action for equitable distribution is closely related to an action for divorce, and the two actions do not exist independently with any long-term significance. Indeed, it is well-settled that where one party to a divorce action dies prior to entry of a decree, the marital relationship between the parties no longer exists and the action for divorce abates. *Caldwell v. Caldwell*, 93 N.C. App. 740, 742, 379 S.E.2d 271, 272 (citing *Elmore v. Elmore*, 67 N.C. App. 661, 668, 313 S.E.2d 904, 909 (1984), *disc. review denied*, 325 N.C. 270, 384 S.E.2d 513 (1989). Without the entry of a decree of divorce, an indispensable facet of the equitable distribution process outlined by our statutes, plaintiff's action for equitable distribution should necessarily abate. The 1995 amendment to G.S. 50-21(a) is best understood as solely altering the *time* in which an order for equitable distribution may be granted *in relation* to the divorce decree, and not the effect one has on the other's existence. As such, I believe that the majority's conclusion that an equitable distribution order exists wholly independent of the related divorce action is incorrect.

Given this analysis of G.S. 50-21(a), I believe that the 1995 amendment did not eliminate the reasoning behind our decision in *Caldwell v. Caldwell*, as the majority concludes. I would therefore hold that plaintiff's death here terminated her marital status, thereby causing her action for divorce and equitable distribution to abate.

The majority also points to G.S. 50-20(k) to establish that equitable distribution actions may proceed independently of an entry of a divorce decree. G.S. 50-20(k) provides that the rights of the parties to an equitable distribution of property vest at the time of the parties' separation. It must be taken into consideration that this section was enacted when equitable distribution was prohibited until a divorce decree had been entered. Further, this section does not create any

vested rights in particular property, but merely creates a right to equitable distribution of the property. *Wilson v. Wilson*, 73 N.C. App. 96, 99, 325 S.E.2d 668, 670, *disc. rev. denied*, 314 N.C. 121, 332 S.E.2d 490 (1985). With this in mind, to interpret the purpose of this section as allowing rights in specific property to vest without any possibility of divorce is an incorrect interpretation of the statute.

Admittedly, G.S. 50-21(a) does not clarify this issue. I believe the relevant statutes must be viewed in the context in which they were created in order to follow the logical intent of the legislature. When this is done, there is a more logical conclusion. Otherwise, a couple could separate, have property equitably distributed and live out their lives without any prospect of divorce. I do not believe our legislature intended this result.

As the majority points out, there may be practical dilemmas that arise with holding that an action for equitable distribution abates in this case; however, practical dilemmas also arise if equitable distribution survives in this case. For instance, when a spouse in a divorce action dies prior to the entry of a decree and the equitable distribution action abates, the decedent's property must be distributed in accordance with estate law. The spouse in this case died intestate. If the equitable distribution action survives, no provision bars the surviving spouse's right to intestate succession merely because an equitable distribution order has been entered. *See generally* N.C. Gen. Stat. §§ 29-13 to -15, 31A-1 (1999). Our inheritance laws are neither restrained nor revoked by equitable distribution. The likely result of entering an equitable distribution order and subsequently administering the property in accordance with the Intestate Succession Act, N.C. Gen. Stat. §§ 29-1 to -30 (1999), would be redistribution, to the surviving spouse, of the marital property which the court ordered equitably distributed. Application under this statutory scheme, however, would be radically changed where a divorce had been granted.

Similar problems may arise if a spouse to an equitable distribution action dies testate prior to an entry of a divorce decree. If the equitable distribution action survives, no provision bars execution of the decedent's will after the court equitably divides the marital property. *See generally* N.C. Gen. Stat. §§ 31-5.1 to -5.6 (1999). If this is the case, probate must wait until the equitable distribution order is final and any caveat proceedings or dissent or election upon dissent are necessarily restrained. In the case that the deceased spouse's will devises property to the surviving spouse, execution of the will would

result in redistribution, to the surviving spouse, of some or all of the marital property equitably distributed. These problems do not arise where a party dies after a divorce has been granted, since divorce revokes the provisions in a will in favor of the surviving spouse. N.C. Gen. Stat. § 31-5.4. Distributing property pursuant to either the law of wills or the Intestate Succession Act after an equitable distribution order has been entered without a divorce would almost certainly trivialize the effort and resources put into entering the equitable distribution order.

Since I would hold that the action for equitable distribution abated in this case, it would be unnecessary to address plaintiff's remaining arguments.

STEPHEN D. McCULLOUGH, PLAINTIFF v. BRANCH BANKING & TRUST CO., INC., DEFENDANT

No. COA99-149

(Filed 18 January 2000)

1. Disabilities— Equal Employment Practices Act—definition of handicap—alcoholism

The trial court did not err in an employment termination case by instructing the jury that the term "handicapped" has been defined to exclude active alcoholism or in its definition of active alcoholism. Reading other statutes relating to the same subject with the Equal Employment Practices Act, N.C.G.S. § 143-422.2, "handicap" as used in the Act includes alcoholism but not active alcoholism and, using the common and ordinary meaning, an "active alcoholic" is an alcoholic who is currently engaged in the use of alcohol or was in the immediate past.

2. Employer and Employee— bonus—termination

The trial court did not err in an action arising from an employment termination by denying plaintiff's request for instructions regarding plaintiff's claim for an unpaid wage bonus. Although there was no notification to plaintiff that termination of his employment could result in forfeiture of his bonus, the decision to require forfeiture of the bonus did not constitute a change in the benefits plan and no notice was required.

3. Venue— change—convenience of witnesses—motion after answer

The trial court did not err by considering a motion for change of venue filed after the answer where the motion was based on the convenience of the witnesses.

Appeal by plaintiff from order allowing defendant's motion for change of venue filed 15 July 1994 by Judge Narley L. Cashwell in Wake County Superior Court, from oral order from the bench on 5 September 1997 denying plaintiff's motion for a directed verdict, from order denying plaintiff's motion for a new trial filed 18 December 1997, from order allowing defendant's motion for costs filed 18 December 1997, from order denying plaintiff's first and second motions to compel defendant to pay plaintiff's expert reasonable fee for traveling to and from his deposition filed 18 December 1997, and from jury instructions given at trial, by Judge G.K. Butterfield, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 16 November 1999.

Robert J. Willis, for plaintiff-appellant.

Constangy, Brooks & Smith, LLC, by Edward Katze and Timothy R. Newton, and Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellee.

GREENE, Judge.

Stephen D. McCullough (Plaintiff) appeals a jury verdict and final judgment in favor of Branch Banking & Trust Company, Inc. (Defendant) finding Defendant did not wrongfully terminate the employment of Plaintiff and Defendant did not fail to pay Plaintiff a wage bonus established for the work of Plaintiff and other employees of Defendant. Plaintiff also appeals a 15 July 1994 order transferring venue from Wake County to Wilson County and an 18 December 1997 order denying him a new trial.

Wrongful Termination Claim

The evidence reveals Plaintiff was hired by Defendant in June 1986 with an agreement that either party could terminate the relationship "for any reason, whenever either chooses to do so." Although none of his co-workers observed him under the influence of alcohol while at work throughout his employment with Defendant, Plaintiff regularly abused alcohol, frequently used marijuana, occasionally

arrived at work with a hangover, and had trouble getting to work on time. Plaintiff testified, however, that his substance abuse did not interfere with his job performance. In 1986 and 1987, Plaintiff was charged with public intoxication twice and was arrested and charged three times for Driving While Impaired (DWI) in Wake, Durham, and Wilson Counties. The Wilson County DWI arrest, on 4 December 1987, also resulted in Plaintiff being arrested for Driving While License Revoked.

Defendant learned of the Wilson County arrest through a newspaper article in The Wilson Daily Times. Consequently, Plaintiff was counseled by his supervisor Rodney Hughes (Hughes) and told Defendant's medical plan would pay expenses for counseling and rehabilitation, leave would be available for rehabilitation, to seek help now while he recognized his problem, and Defendant would help him overcome his problem. Hughes stressed that Defendant would not tolerate a future occurrence of Plaintiff's alcohol related problems, and if another occurred, Plaintiff would be terminated.

Plaintiff was ultimately convicted of DWI for both the Durham and Wilson County arrests. His driver's license was permanently revoked, and he had to serve seven days in jail. Plaintiff concealed his jail term and his other arrests, and Defendant did not learn of Plaintiff's jail term or his driver's license permanent revocation until Plaintiff's termination.

On 20 October 1990, Plaintiff was arrested for DWI and Driving While License Permanently Revoked in Wake Forest, North Carolina. Plaintiff gave the arresting officer Horace Macon (Macon) a Florida driver's license, because he was permanently banned from driving in this State. In connection with these charges, Plaintiff appeared for a hearing at the Department of Motor Vehicles (DMV) in February 1991. Plaintiff told the DMV hearing officer he lived at a Florida address, and his attorney told the DMV hearing officer Plaintiff had been living in Florida for the past three years and was in North Carolina visiting his girlfriend.

As a result of these events, Macon, who was present at the DMV hearing, contacted Billy Montague (Montague), then Human Resources Director for Defendant, to verify Plaintiff's employment in North Carolina. During this conversation, Macon told Montague what had transpired at the DMV hearing. Following his conversation with Macon, Montague contacted Hughes and Hughes' superior Scott Reed (Reed) and conducted his own investigation into Plaintiff's criminal

record. This investigation uncovered Plaintiff's DWI arrests and his driver's license permanent revocation. Montague was concerned about Plaintiff's trustworthiness and whether the surety bond required by law on all bank employees would terminate for Plaintiff, because the bond under which Plaintiff was covered would terminate as to any employee whenever the bank "learns of any dishonest or fraudulent act committed by such person at any time, whether in the employment of the insured or otherwise . . . ."

On 12 March 1991, Defendant notified Plaintiff he was terminated effective 13 March 1991. Plaintiff filed this action in November of 1993 alleging Defendant wrongfully discharged him on the basis of his handicap, his alcoholism, in violation of the public policy of North Carolina as set forth in N.C. Gen. Stat. 143-422.2.

Over Plaintiff's objection, the trial court instructed the jury, concerning Plaintiff's wrongful termination claim in pertinent part that:

> [D]efendant was not entitled to terminate [P]laintiff if to do so violated public policy. A public policy violation would occur if a person is terminated from employment substantially because of a qualifying handicap when the person is capable of performing the essential functions of the job, with or without reasonable accommodation.
>
> In order to prevail on this First Issue, []the [P]laintiff must prove . . . the following three things:[] . . . .
>
> First, that the [P]laintiff was handicapped by reason of being an alcohol dependent person.
>
> Now, ladies and gentlemen, the term "handicapped" is defined to mean any person who has a physical or mental impairment which substantially limits one or more major life activities.
>
> []The term "physical or mental impairment" has been defined to exclude active alcoholism, or drug addiction, or both.[] . . . .

Following the previous instruction, Plaintiff requested and the trial court rejected the following instruction to the jury. " 'Physical or mental behavior that is directly caused by or a direct manifestation of a particular physical or mental impairment should be considered to be a part of that handicap.' "

Over Plaintiff's objection, the trial court further instructed the jury in pertinent part:

> []In making the determination as to whether the [P]laintiff was handicapped, I instruct you that the handicap law expressly excludes individuals who are active alcoholics. Thus, a person who is an active alcoholic is not handicapped under North Carolina law.
>
> Now, you may evaluate a variety of factors in determining whether [P]laintiff was an active alcoholic at the time of his termination . . . .
>
> I instruct you, however, that if the evidence presented shows that the [P]laintiff, given his admission of alcohol[ism], was using alcohol at the time of his termination, you may find that the [P]laintiff was an active alcoholic.
>
> The term "using alcohol" is not intended to be limited to the use of alcohol within a matter of days or weeks before the [P]laintiff's discharge. Rather, the terms appl[y] to the use of alcohol that has occurred recently enough to indicate that an individual is actively engaged in the use of alcohol. Or, the use of alcohol is an ongoing problem.[]
>
> An alcoholic employee who is using alcohol in a periodic fashion during the weeks and months prior to his termination is an active alcoholic.[]

Wage Bonus Claim

In 1990, Plaintiff convinced Defendant to start an incentive program for the overnight funding function he and two other employees operated for Defendant. In 1990, Plaintiff was paid his bonus at the end of the 1990 plan year after 28 November 1990. At the end of the 1990 plan year, Hughes advised Plaintiff the 1990 incentive compensation plan for the overnight funding would be renewed for the 1991 plan year. The 1991 plan year began on 29 November 1990. Hughes advised Plaintiff the standard or method for calculating the amount and share of the bonus Plaintiff would divide with his team would remain the same as in 1990.

Plaintiff was not advised his right to receive this 1991 incentive compensation was subject to forfeiture on any grounds or conditioned on his tenure with Defendant, however, he testified Hughes "hadn't decided what to do [about the paying of the bonus] if

somebody leaves" before the end of the plan year. Plaintiff's employment with Defendant was terminated 13 March 1991, and he did not receive a bonus for the 1991 plan year. Plaintiff's complaint seeks payment of the unpaid wage bonus from Defendant under N.C. Gen. Stat. 95-25.22.

The trial court instructed the jury in pertinent part as follows:

> The Fifth Issue in this case reads as follows:
>
> "Did [D]efendant fail to pay the [P]laintiff a wage bonus established for the work of the [P]laintiff and other employees from November 28, 1990 to March 1, 1991?"
>
> On this Fifth Issue, the burden of proof is on the [P]laintiff. The [P]laintiff must prove, by the greater weight of the evidence, that [he] was entitled to a wage bonus at the time of his termination from employment.
>
> Whether [P]laintiff was entitled to a bonus at the time of his termination depends upon the terms of the [D]efendant's bonus plan which existed at the time of the [P]laintiff's termination. . . .
>
> If you find that under the [D]efendant's bonus plan, the [P]laintiff was entitled to a bonus at the time of his termination, you must answer this Fifth Issue "yes" in favor of the [P]laintiff.
>
> If, on the other hand, you fail to so find, then you will answer the Fifth Issue "no" in favor of the [D]efendant.

Plaintiff requested and the trial court rejected the following instruction to the jury regarding Plaintiff's wage bonus claim.

> "Under North Carolina law, the terms of the Defendant's bonus plan which existed at the time of the Plaintiff's termination do <u>not</u> include terms which provided for the loss or forfeiture of that bonus if certain events did or did not occur <u>unless</u> those terms were disclosed to the Plaintiff in writing by <u>either</u> providing him with a copy of those terms before the Plaintiff earned any part of that bonus <u>or</u> by [posting] those terms in a place accessible to the Plaintiff."

Change of Venue

After filing its answer, Defendant filed a motion to change venue, pursuant to section 1-83(2), based on the convenience of the wit-

nesses. In support of the motion, Defendant submitted an affidavit showing that all of the acts complained of occurred in Wilson County and the managers of Defendant and most of the witnesses lived in Wilson County. The trial court allowed the motion and transferred the case from Wake County to Wilson County.

It should noted that Plaintiff's assignments of error numbers 1, 4, 6, 10, 13 and 16 are deemed abandoned, because they are not presented and discussed in Plaintiff's brief. N.C.R. App. P 28(a).

The issues are whether: (I) the definition of a "handicapped person" given in section 168A-3(4) is properly used to determine the legislative intent of a "handicap" within the meaning of section 143-422.2; if so, (II) the jury instructions given by the trial court are consistent with the section 168A-3(4) definition; (III) the trial court erred in instructing the jury concerning Plaintiff's wage bonus claim; and (IV) the trial court erred in hearing and allowing Defendant's motion for change of venue.

Wrongful Termination

At-will employees may be terminated for no reason or for arbitrary or irrational reasons, but they may not be terminated for an " 'unlawful reason or purpose that contravenes public policy.' " *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (citation omitted). The State's "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).

Plaintiff, acknowledging he is an at-will employee, argues his termination of employment was in violation of this State's public policy prohibiting discrimination on account of a person's handicap or disability. Plaintiff specifically contends his termination was in consequence of his alcoholism[1] and alcoholism qualifies as a handicap within the meaning of section 143-422.2.

I

[1] The Equal Employment Practices Act of North Carolina (the Employment Act) provides in pertinent part:

---

1. There is no dispute among the parties that Plaintiff is an alcoholic.

> "It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of . . . handicap . . . ."

N.C.G.S. § 143-422.2 (1999). The Employment Act does not define "handicap" and therein lies the basis for the dispute in this case. Plaintiff points to the federal Vocational Rehabilitation Act (Rehabilitation Act) which excludes from its definition of an "individual with a disability" alcoholics "whose current use of alcohol prevents such individual from performing the duties of the job in question." 29 U.S.C. § 706 (8)(C)(v) (1994). Defendant directs our attention to the North Carolina Handicapped Persons Protection Act (Handicapped Act) which specifically excludes "active alcoholism" from the definition of a handicapped person. N.C.G.S. § 168A-3(4)(a)(iii)(B) (1995).[2]

In determining our legislature's intent of the meaning of "handicap" as used in the Employment Act, it is appropriate to consider other North Carolina statutes which relate to the same subject matter, although enacted at different times. *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984). If related to the same subject matter, the statutes "must be construed together in order to ascertain [the] legislative intent." *Id.*[3]

The Employment Act, enacted in 1977, protects the rights and opportunities of persons to "seek, obtain and hold employment without discrimination or abridgement on account of . . . handicap." N.C.G.S. § 143-422.2. The Handicapped Act, enacted in 1985, encourages all handicapped persons "to engage in remunerative employment" and finds that "the practice of discrimination based upon a handicapping condition is contrary to the public interest and to the principles of freedom and equality of opportunity." N.C.G.S. § 168A-2 (1995).[4] These statutes, although enacted at different times,

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2. Effective 1 October 1999, subsections (4) and (5) of section 168-3 were recodified as subsections (7a) and (1), respectively, and the terms "[p]erson with a disability" and "disabling condition" were substituted for "handicapped person" and "handicapping condition," respectively.

3. In so holding, we reject Plaintiff's argument that our construction of the word "handicap" within the meaning of section 143-422.2 should be controlled or guided by the Rehabilitation Act.

4. Effective 1 October 1999, the terms "persons with disabilities" was substituted for "handicapped people" and "disabling" was substituted for "handicapping" for actions filed on or after that date under section 168A-1 through 168A-12.

relate to the same subject matter, employment discrimination against handicapped persons, and, thus, must be construed together to ascertain legislative intent.[5] Reading these statutes *in pari materia*, "handicap" as used in the Employment Act includes alcoholism but not "active alcoholism."[6] The trial court, thus, correctly instructed the jury that "the term 'handicapped' . . . has been defined to exclude active alcoholism."[7]

II

"Active alcoholism" is not defined in the Handicapped Act or any other North Carolina statute. Having no statutory definition, not having acquired a technical meaning, and a different meaning not being apparent from the statute, the phrase "active alcoholism" must be construed in accordance with its common and ordinary meaning, *Supply Co. v. Motor Lodge*, 277 N.C. 312, 319, 177 S.E.2d 392, 396 (1970), which can be gained from dictionaries, *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Dictionaries define "active" to include "[e]ngaged in activity; participating," *American Heritage College Dictionary* 13 (3d ed. 1997), and "alcoholism" is defined as "a dependence on alcohol" and "a chronic disease . . . caused by the excessive and habitual consumption of alcohol," *id.* at 32. Thus, an "active alcoholic" is an alcoholic who is currently engaged in the use of alcohol or was in the immediate past engaged in the use of alcohol.

In this case, the trial court instructed the jury that an "active alcoholic" employee is an alcoholic who was "using alcohol in a periodic fashion during the weeks and months prior to his termination." This

5. Additionally, "[w]here . . . one statute deals with a particular situation in detail, while another statute deals with it in general and comprehensive terms, the particular statute will be construed as controlling absent a clear legislative intent to the contrary." *Merrit v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988); *see also* 82 C.J.S. *Statutes* § 369, at 839 (1953). Because the Handicapped Act specifically provides that "active alcoholics" are excluded from the definition of "handicapped people," that Act controls over the general language of the Employment Act.

6. "Handicapped person" is defined in the Handicapped Act to mean "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." N.C.G.S. § 168A-3(4). Physical and mental impairment is defined to exclude "active alcoholism." *Id.*

7. The trial court also did not err in refusing to give the instructions requested by Plaintiff on this issue, as they were not "correct in law." *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995).

instruction is sufficiently consistent with the definition of "active alcoholism" herein approved and, therefore, does not constitute error. *See Barnard v. Rowland*, 132 N.C. App. 416, 427, 512 S.E.2d 458, 466 (1999) (trial court must instruct on the law of the case).

Wage Bonus Claim

III

[2] North Carolina's Wage and Hour Act, section 95-25.13, provides in pertinent part:

> Every employer shall:
>
> . . . .
>
> (3) Notify its employees, in writing or through a posted notice maintained in a place accessible to its employees, of <u>any changes</u> in promised wages prior to the time of such changes except that wages may be retroactively increased without the prior notice required by this subsection . . . .

N.C.G.S. § 95-25.13(3) (1999) (emphasis added). We have construed this statute to permit an employer to make changes in an employee's benefits, but the change applies only to those benefits accruing after written notice is given the employee or notice is posted in a place accessible to the employees. *Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 207-08, *disc. review denied*, 314 N.C. 542, 335 S.E.2d 316 (1985), *overruled on other grounds by J&B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987). Employees who have not been properly notified of changes in their benefits "are not subject to loss or forfeiture" of those benefits. N.C.G.S. § 95-25.7 (1999).

Plaintiff argues the trial court erred in its jury instructions because it failed to inform the jury Plaintiff was entitled to receive his bonus unless he was notified of the forfeiture provisions prior to the accrual of the bonus. Defendant argues forfeiture notification under section 95-25.13 is required only when there occurs a change in an employee benefit. In this case, Defendant contends, no change occurred in Plaintiff's bonus plan because an employee's entitlement to the bonus had not been determined if their employment ceased before the end of the plan year.

The evidence in this record provides details of how the bonus would be computed in a plan year. There is no evidence, however, on

the issue of entitlement to the bonus if employment was terminated before the expiration of the plan year. Plaintiff's employment was terminated before the end of the plan year and Defendant refused to pay any bonus. Although there was no notification to Plaintiff that termination of his employment could result in forfeiture of his bonus, the decision to require forfeiture of the bonus did not constitute a change in the plan, therefore, no notice was required. Accordingly, the trial court did not err in denying Plaintiff's request for instructions.

Change of Venue

IV

[3] Plaintiff finally argues the trial court erred in allowing Defendant's motion for change of venue because the motion was filed after the answer was filed. Although motions for change of venue based on improper venue, pursuant to section 1A-1, Rule 12(b)(3), must be filed prior to or with the answer, motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), must be filed after the answer is filed. *Construction Co. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360 (1979). Defendant's motion in this case was based on the convenience of the witnesses and, thus, was properly filed. The trial court, therefore, did not err as a matter of law in considering the motion and Plaintiff has shown no abuse of discretion in the trial court's decision to allow the motion. *Id.*

We have carefully reviewed Plaintiff's other assignments of error and arguments and determine them to be unpersuasive.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

[136 N.C. App. 351 (2000)]

PATRICIA HARDIN, EMPLOYEE, PLAINTIFF-APPELLANT v. MOTOR PANELS, INC., EMPLOYER, DEFENDANT-APPELLEE, AND SELF-INSURED (KEY RISK MGMT.), CARRIER, DEFENDANT-APPELLEES

No. COA98-1587

(Filed 18 January 2000)

1. Workers' Compensation— causation—carpal tunnel syndrome

The Industrial Commission did not err in a workers' compensation action by not finding that plaintiff's employment with defendant caused her carpal tunnel syndrome; while plaintiff's treating doctors stated that typing is a known cause for carpal tunnel, competent evidence shows that her job was not a significant contributing factor.

2. Workers' Compensation— causation—standard

The Industrial Commission applied the correct standard in determining causation in a carpal tunnel workers' compensation action by requiring that the employment have significantly contributed to or have been a significant causal factor in the disease's development.

3. Workers' Compensation— occupational disease—diagnosis prior to leaving employment

The Industrial Commission did not err in a workers' compensation action by not considering evidence which showed that plaintiff was diagnosed with an occupational disease prior to leaving defendant's employment where plaintiff failed to demonstrate a causal connection between her disability and employment. The doctor's records relied upon by plaintiff show only a notation that he suspected that the overuse/repetition injury was connected to her employment; the suspicion of a doctor is insufficient proof of causation.

4. Workers' Compensation— last injurious exposure—carpal tunnel

The evidence in a workers' compensation action supported the Industrial Commission's finding that plaintiff was last injuriously exposed to carpal tunnel syndrome while working with subsequent employers.

Appeal by plaintiff from opinion and award entered 2 October 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 October 1999.

Frederick R. Stann for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas Page, for defendant-appellees.

McGEE, Judge.

This case arises from a workers' compensation claim for carpal tunnel syndrome caused by "repetitive motion work" during plaintiff Patricia Hardin's employment with defendant Motor Panels, Inc.

An opinion and award was entered by a deputy commissioner on 29 October 1997 denying plaintiff's claim because "[p]laintiff's last injurious exposure to the risk of developing or augmenting carpal tunnel syndrome occurred subsequent to her employment with defendant-employer." Plaintiff appealed to the Full Commission. The Commission found as a fact that plaintiff was employed by defendant from October 1988 to April 1993. Her duties included typing reports and correspondence, clerical support, and data entry. She worked approximately eight to ten hours a day. Plaintiff received positive reviews for the quality of her work during the first three years of her employment with defendant. However, in December 1992, she received a negative performance appraisal. Plaintiff presented her letter of resignation to defendant on 15 April 1993 to avoid being terminated for deterioration in the quality of her work. The Commission found that after her resignation, plaintiff applied for and received unemployment benefits totaling $5,125. The Commission also noted that to apply for unemployment compensation a person must be capable of working.

The Commission found that plaintiff was examined by Dr. Robert Jones on 26 April 1993 for complaints of hand and wrist numbness. Dr. Jones diagnosed plaintiff as suffering from overuse tendinitis of the arms. Plaintiff was seen by Dr. Stephen J. Naso, Jr. on 7 May 1993. Dr. Naso determined that plaintiff had negative Tinel's and Phalen's signs. As a result, Dr. Naso diagnosed plaintiff as having tendinitis and released her with limited work restrictions.

The Commission further found that in November 1993, plaintiff began working at Belk department store as a layaway clerk, where she handled packages and ran a cash register. Her duties at Belk aggravated her symptoms of pain and swelling in her hands, and she quit that job after approximately three weeks. Plaintiff next obtained employment as a cashier for Burger King, where she took orders, ran

a cash register, and bagged items. Her duties as a cashier also aggravated her symptoms, and she resigned after three months. Plaintiff next worked as a home health aide for Communication Network Consultants and left that position due to an aggravation of her symptoms as well. Finally, plaintiff was employed at Petro World in September 1995 as a clerk for two weeks. She left her job because of swelling, numbness, and pain in her hands.

The Commission further found that plaintiff sought treatment from Dr. Leonel P. Limonte, a neurosurgeon, on 22 August 1994. Dr. Limonte found that plaintiff had carpal tunnel syndrome. Dr. Limonte referred plaintiff to Dr. Emmett H. Dyer, a neurosurgeon, in June 1995, to evaluate the possibility of surgery. On 21 June 1995, Dr. Dyer performed a bilateral median nerve release. Plaintiff was released without restrictions in July 1995.

The Commission determined that "[p]laintiff has not proven by a preponderance of the competent, credible evidence of record that her job at defendant-employer caused her carpal tunnel syndrome." Furthermore, the Commission found that "[p]laintiff's work subsequent to her resignation from defendant-employer augmented her symptoms of pain, swelling and numbness in her hands and led to the development of carpal tunnel syndrome after she left her employment as a typist."

The Commission determined that "[p]laintiff was last injuriously exposed to carpal tunnel syndrome while working with employers subsequent to defendant-employer." Finally, the Commission found that the "record does not support a finding that plaintiff's employment with defendant-employer significantly contributed to her carpal tunnel syndrome." Therefore, on 2 October 1998, the Commission upheld the opinion and award of the deputy commissioner. Plaintiff appeals.

Our Court, when reviewing an opinion and award of the Industrial Commission, is limited to two questions: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether those findings of fact support the Commission's conclusions of law. *Locklear v. Stedman Corp.*, 131 N.C. App. 389, 393, 508 S.E.2d 795, 797 (1998) (citation omitted). The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. *Id.*

Under N.C. Gen. Stat. § 97-57 (1991), an employer is liable to an employee for an occupational disease if the employee demonstrates that she (1) suffers from a compensable occupational disease and (2) was last injuriously exposed to the hazards of such disease while employed by defendant. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362-63 (1983). An occupational disease does not become compensable unless it causes incapacity for work. *Caulder v. Waverly Mills*, 314 N.C. 70, 75, 331 S.E.2d 646, 649 (1985).

The employee seeking workers' compensation benefits bears the burden of proving every element of compensability. *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993) (citation omitted). The degree of proof required of a claimant under the Act is the "greater weight" or "preponderance" of the evidence. *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996).

I.

[1] Plaintiff argues that the Commission erred in failing to find that employment with defendant caused her carpal tunnel syndrome. We disagree.

To establish a right to workers' compensation benefits for an occupational disease under N.C. Gen. Stat. § 97-53(13) (1991), the employee must show: (1) the disease is characteristic of individuals engaged in the particular trade or occupation in which the claimant is engaged; (2) the disease is not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there is a causal relationship between the disease and the claimant's employment. *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365 (citations omitted). The third element of the test is satisfied if the employment "significantly contributed to, or was a significant causal factor in, the disease's development." *Id.* at 101, 301 S.E.2d at 369-70. For the employment to constitute a "significant contributing" factor, the employee must show that without it the occupational disease "would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Baker v. City of Sanford*, 120 N.C. App. 783, 788, 463 S.E.2d 559, 563 (1995) (citation omitted), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996).

Plaintiff was unable to prove that her employment with defendant was a significant contributing cause of her carpal tunnel syndrome.

While her treating doctors did state that typing is a known cause for carpal tunnel syndrome, competent evidence shows that her job was not a significant contributing factor in plaintiff's case.

Plaintiff's diagnosing physician/neurosurgeon was unable to connect plaintiff's carpal tunnel syndrome to her employment with defendant. During direct and cross-examination, Dr. Dyer could not say that plaintiff's former employment with defendant was a significant contributing factor in the development of her carpal tunnel syndrome. Dr. Dyer responded to plaintiff's counsel in the following manner:

> Q. Do you feel comfortable in finding that her work as a typist, as I've defined it to be, in my words, a significant contributing factor, according to my definition?
>
> MR. PAGE: Objection.
>
> THE WITNESS: My opinion would be that it was a contributing factor, and the degree of contribution that her work made I'm not able to say.

Although it is not necessary for doctors to use the exact wording of "significantly contribut[ing]," there must be some indication of the degree of contribution such as "more likely than not" to meet the *Rutledge* test. *Locklear*, 131 N.C. App. at 394, 508 S.E.2d at 798. Here, Dr. Dyer opined only that plaintiff's work as a typist was a "contributing factor" but was unable to specify a degree of contribution.

Plaintiff relies in part on Dr. Naso's testimony that her employment with defendant was a significant contributing factor in the development of her tendinitis. However, Dr. Naso did not testify that her employment was a significant contributing factor to her carpal tunnel syndrome. While Dr. Naso did testify that tendinitis could develop into carpal tunnel syndrome, he also testified that when he examined plaintiff in May 1993, her tendinitis was resolving. Dr. Naso never testified that plaintiff's carpal tunnel syndrome was related to her job with defendant or to the tendinitis. Absent mere conjecture, plaintiff failed to produce any evidence by Dr. Naso relating plaintiff's symptoms at the time he examined her to carpal tunnel syndrome.

Plaintiff argues that Dr. Limonte's testimony provides competent, credible evidence of medical causation. Assuming, *arguendo*, plaintiff's argument is correct, this Court has stated that "the opinion of

the Industrial Commission . . . is conclusive on this Court if it is supported by *any* competent evidence . . . and can only be set aside if there is a complete lack of competent evidence." *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993) (citations omitted) (emphasis added). The testimony of both Dr. Dyer and Dr. Naso supports the Commission's findings and conclusions and satisfies this Court's standard of review.

The competent, credible, medical evidence of record in this matter fails to establish a causal relationship between plaintiff's employment with defendant and her carpal tunnel syndrome. Neither Dr. Dyer nor Dr. Naso testified that plaintiff's job with defendant was a significant contributing factor to the development of her later diagnosed carpal tunnel syndrome. As a result, plaintiff failed to meet all of the requirements of compensable occupational disease, as set forth in the *Rutledge* case. Competent evidence does exist to support the Commission's findings of fact and those findings support its conclusion of law in denying plaintiff benefits. Accordingly, we affirm the decision of the Commission.

II.

[2] Plaintiff argues that the Commission erred by applying "the wrong standard in its determination of causation by implicitly requiring that the plaintiff's employment be the sole cause of her occupational disease." We disagree. The Commission found that "[t]he majority of the competent, credible evidence of record does not support a finding that plaintiff's employment with defendant-employer *significantly contributed* to her carpal tunnel syndrome." (Emphasis added). The standard employed by the Commission met the third element of the *Rutledge* test requiring a determination that the employment "*significantly contributed to*, or was a significant causal factor in, the disease's development." *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369-70 (emphasis added). Therefore, we find no error.

III.

[3] Plaintiff further argues that the Commission erred in its failure to consider evidence which showed that plaintiff was diagnosed with an occupational disease prior to her leaving defendant's employment. We disagree.

Plaintiff bears the burden of proving by the preponderance of the competent, credible evidence that her disability is causally related to her employment with defendant. *Phillips*, 120 N.C. App. at 541-42, 463

S.E.2d at 261. The Commission must weigh this evidence and make specific findings of fact. Our Court may not disturb these findings if there is competent evidence to support them, even if there is contrary evidence. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). Plaintiff failed to prove by the preponderance of the competent, credible evidence that she was diagnosed with an occupational disease prior to her resignation, which would have demonstrated a causal connection between her disability and employment.

In fact, plaintiff never mentioned to defendant any problems with her hands until after she left her position with defendant. Plaintiff claims that she was discharged from her employment with defendant after she was diagnosed with an occupational disease. However, she did not notify defendant of any problems with her hands until she suspected that she would be discharged. She claimed stress, pressure in the office, and an overwhelming workload caused her poor performance, but never mentioned any problem with her hands. It was due to her continuing poor performance that the decision was made on the morning of 14 April 1993 to terminate her employment. The testimony of Wanda Neal, Human Resource Manager for defendant, under questioning by defendant's counsel shows that during the meeting of April 15 plaintiff did not indicate that her problems at work were related to her hands:

Q: Were any specifics discussed in that meeting regarding any deficiencies in her work?

A. The accuracy of her work was in question, as far as her typing. She had to redo over and over again because of mistakes that were made in typing, and that was the main problem was the accuracy of it.

Q. During this meeting, did she indicate to you that the reason she was having problems was because of pain in her hands?

A. No, sir.

Plaintiff also claims that Dr. Wilson diagnosed her with an occupational disease prior to her discharge. However, Dr. Wilson's records only show a notation that he suspected the overuse/repetitive motion injury was connected to her employment. For there to be a causal connection between the disease and claimant's employment, the employment must significantly contribute to or be a significant causal factor in the development of the disease. *Rutledge*, 308 N.C. at 101,

301 S.E.2d at 369-70. Beyond this one notation, there is no evidence that Dr. Wilson found her employment to be a significant contributing factor to her injury. The suspicion of a doctor is insufficient proof of causation. *Phillips*, 120 N.C. App. at 542, 463 S.E.2d at 262 (evidence is insufficient if it is mere conjecture, surmise, or speculation).

Based on Neal's testimony and *Phillips*, the Commission did not err in finding that plaintiff was not diagnosed with an occupational disease before her resignation from employment with defendant.

IV.

[4] Plaintiff argues that the Commission erred in concluding that plaintiff was last injuriously exposed to the risk of developing carpal tunnel syndrome subsequent to her employment with defendant. We disagree.

Assuming a causal link is established between plaintiff's carpal tunnel syndrome and her employment, plaintiff must still prove the last injurious exposure to the hazards of the disease occurred during the course of employment with defendant. *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 363. Our Supreme Court has interpreted N.C. Gen. Stat. § 97-57 as a recognition by the General Assembly that "occupational diseases often develop slowly over long periods of time after exposures to offending substances at successive places of employment," and therefore, we "take the breakdown practically where it occurs—with the last injurious exposure." *Id.* (citation omitted). Only the employer in whose employment claimant was last injuriously exposed to the hazards of the disease is liable for any disability resulting from the occupational disease. *Jones v. Beaunit Corp.*, 72 N.C. App. 351, 353, 324 S.E.2d 624, 625 (1985).

The statutory term "last injuriously exposed" has been defined as "an exposure which proximately augment[s] the disease *to any extent, however slight.*" *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362 (emphasis added). Exposure to substances which can cause an occupational disease can be so slight quantitatively that it could not in itself have produced the disease. *Caulder*, 314 N.C. at 70, 331 S.E.2d at 646.

In *Caulder*, our Supreme Court awarded an employee full compensation for total disability when he was exposed to dust which worsened the obstructive lung disease he had already contracted. *Id.* The Court found that the dust, despite not being known to cause obstructive lung disease, is a substance to which workers in factories

have greater exposure than does the public generally, and that this exposure contributed to his lung condition, at least to a slight degree. *Id.* The *Caulder* Court required only the minimal showing that there was more exposure to dust in the workplace than in the public generally, and that such exposure aggravated a pre-existing condition to any degree, however slight. *Id.*

As defendant argues, like the claimant in *Caulder*, plaintiff suffered injurious exposure while employed in positions subsequent to her employment with defendant. After her resignation from defendant, plaintiff held a variety of other jobs. She was employed at Belk in its layaway department. She next worked for three months as a cashier for Burger King. Afterward, she worked as a home health aide for Communication Network Consultants. Finally, she worked as a clerk at Petro World. Plaintiff worked with her hands in all these jobs, running a cash register, bagging and handling merchandise. Plaintiff admitted under questioning by the deputy commissioner that carpal tunnel syndrome symptoms were aggravated, however slight, by her subsequent jobs:

Q. You testified that you had the same symptoms in 1993 that you've had in 1995 and that you have today; is that not correct?

A. Yes. I didn't go to them looking for medicals until '95.

Q. Why did you go in '95?

A. Because the problem had gotten to the point that I couldn't use my hands any more for much of anything.

Q. You testified it's remained constant; haven't you?

A. That is correct. But there was—I mean, you know, over the three years, yeah. There was some increase in pain, some increase overall that length of time. You know, it had to get a little bit worse.

Furthermore, the medical evidence in the record shows an objective change in plaintiff's symptoms after working at subsequent jobs. Plaintiff testified that she did not seek medical treatment for her symptoms between May 1993 and August 1994. Dr. Naso testified that when he examined plaintiff in May 1993, she had negative Tinel's and Phalen's signs. However, when she was examined by Dr. Limonte in August 1994, fifteen months after her resignation from defendant and after her jobs as a clerk at Belk, a cashier at Burger King, a home

health aide for Communication Network Consultants, and a clerk at Petro World, she had positive bilateral Tinel's and Phalen's signs.

Consequently, the Commission did not err in finding plaintiff was last injuriously exposed to carpal tunnel syndrome while working with her subsequent employers. The evidence in this case support the findings of the Commission. *See Agee v. Thomasville Furniture Products*, 119 N.C. App. 77, 82, 457 S.E.2d 886, 889, (1995), *aff'd*, 342 N.C. 641, 466 S.E.2d 277 (1996).

Affirmed.

Judges LEWIS and JOHN concur.

NORTH CAROLINA PROPERTY TAX COMMISSION FROM JACKSON COUNTY IN THE MATTER OF THE APPEAL OF: WHITESIDE ESTATES, INC.

No. COA99-334

(Filed 18 January 2000)

1. Taxation— property—qualification as forestland—standing—aggrieved taxpayer

The Property Tax Commission did not err in denying Whiteside's motion to dismiss the initial appeal to the County Board by a private citizen, who owned a small interest in a piece of property in Jackson County, based on lack of standing to contest the preferential assessment of Whiteside's property as forestland under N.C.G.S. § 105-277.6 because: (1) the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of his property or the property of others under N.C.G.S. § 105-322(g)(2) if the taxpayer is in some way aggrieved by that valuation; and (2) the private citizen in this case was adversely affected, or aggrieved, by the undervaluation of Whiteside's property since other property owners in Jackson County would bear a disproportionate share of the tax burden.

2. Taxation— property—qualification as forestland—challenge of tax listing

A private citizen could contest the preferential tax assessment of Whiteside's property as forestland after the listing period

had expired because this case involves an appeal from a decision of the board of equalization and review instead of an exemption decision made by a county assessor, and Whiteside would not have benefitted from being notified to file a new exemption application since both the County Board and Property Tax Commission found that the property did not meet the requirements for present-use classification as forestland under N.C.G.S. § 105-277.6.

3. Taxation— property—qualification as forestland—due process—notice

The Property Tax Commission did not violate Whiteside's due process rights by failing to notify it of the initial proceeding before the Jackson County Board when a private citizen appeared in support of his challenge to the present-use classification of the Whiteside property as forestland, and by failing to make an "intelligible transcript" of the proceeding, because: (1) N.C.G.S. § 105-322(d) only requires the County Board to keep "accurate minutes of the actions"; (2) the County Board properly followed statutory procedures by notifying Whiteside of its proposed action and giving Whiteside the opportunity to have a full hearing before the County Board; (3) the hearing before the County Board was a de novo hearing, which satisfied Whiteside's due process rights to notice and hearing, N.C.G.S. § 105-322(g)(2); and (4) Whiteside had the right to subpoena the private citizen to the hearing before the County Board and cross-examine him under N.C.G.S. § 105-322(g)(2)(c).

4. Taxation— property—qualification as forestland—findings of fact—sufficiency

The Property Tax Commission did not err in finding as fact that Whiteside was not actively engaged in the commercial growing of trees under a sound management program pursuant to N.C.G.S. § 105-277.2(2), which would have qualified its property for taxation at present-use value, because this finding is supported by competent, material, and substantial evidence of record, and it is the Commission's duty to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.

Appeal by Taxpayer from Final Decision of the North Carolina Property Tax Commission on 20 November 1998. Heard in the Court of Appeals 9 December 1999.

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

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker, for Jackson County appellee.

HORTON, Judge.

Whiteside Estates, Inc. (Whiteside), is a North Carolina family corporation which owns a 227-acre tract of land near Cashiers in Jackson County, North Carolina. The primary purpose of the corporation, as described in its charter, is the purchase and sale of real estate. All of the stock in Whiteside is owned by the Young family. O.E. Young, Jr., and his wife, Mary Lu Young (the senior Youngs), are the majority stockholders in Whiteside, holding 51% of its stock. The senior Youngs are residents of Florida, who usually spend six months of the year at their home in Jackson County. During their yearly stay in North Carolina, they participate in the operation of a real estate business in Highlands. The senior Youngs also own an adjoining tract of about 250 acres. That adjoining tract is the subject of a separate appeal from the Property Tax Commission, which appeal was decided by a separate opinion filed this date.

The minority interest in Whiteside, a total of 49% of the outstanding stock, is held by the five children of the senior Youngs. Four of the Young children live outside North Carolina, but one son, John David Young, works in Highlands and lives in a home on the property.

John David Young is generally responsible for maintaining the Young property in Jackson County. A 15-acre lake is located near the center of the property. Whiteside recently reconstructed the dam which impounds the lake at a cost of $110,000.00. The water from the lake is not used to irrigate the trees which grow on the property. The home in which the senior Youngs live when they are in North Carolina has a view of the lake. There are two subdivisions with a total of 20 home sites located on the property. During 1994 and 1995, following widespread destruction to standing trees on the property caused by Hurricane Opal, Whiteside contracted with a logger from South Carolina to cut and remove timber from about 100 acres of its tract,

receiving some $14,000.00 in revenues. In 1996, Whiteside received income from water fees, road fees and a cable agreement. It incurred expenses related to the operation and management of the two subdivisions on the property.

Before 1997, the subject property was assessed for tax purposes in the amount of $102,800.00, under present-use value status, forestry classification. In April 1997, C.E. Russell, a Jackson County taxpayer, filed an appeal with the Jackson County Board of Equalization and Review (County Board) challenging the present-use classification of the property owned by Whiteside. As a result, the County Board determined that Whiteside's property did not meet the present-use value requirements for 1997, and notified Whiteside of its right to a hearing. The County Board conducted a hearing at the request of Whiteside, but determined that the Whiteside property should be assessed for tax purposes at its fair market value of $719,400.00. Whiteside then appealed to the Property Tax Commission, which heard its appeal in Asheville on 25 August 1998. Whiteside moved to dismiss Mr. Russell's initial appeal to the County Board, contending that Russell had no standing to challenge the listing, assessment or appraisal of the Whiteside property, and further contending that its right to due process was violated by the procedure. The Property Tax Commission denied the motion.

After considering the evidence presented by Whiteside, the Property Tax Commission granted the motion of Jackson County to dismiss Whiteside's appeal, on the grounds that Whiteside had not carried its burden of showing that the land was actively engaged in the commercial growing of trees. By its Final Order, the Property Tax Commission affirmed the County Board's decision to deny present-use value classification to the Whiteside property, and to assign a market value of $719,400.00 to the property. Whiteside appealed.

Whiteside contends the Commission erred (I) in denying its motion to dismiss the initial appeal to the County Board filed by Russell, and (II) in concluding that Whiteside failed to show that the property in question is forestland which was part of a forest unit actively engaged in the commercial growing of trees under a sound management program. Jackson County cross-assigns error to the failure of the Property Tax Commission to find and conclude that Whiteside failed to show that its owners are farmers actively engaged in the principal business of tree farming.

I.

[1] In support of its motion to dismiss, Whiteside contends that C.E. Russell, a private citizen, had no standing to challenge the assessment on Whiteside's property unless Russell shows that he was "aggrieved" in some respect by the valuation of Whiteside's property. It was agreed by the parties that Russell owned a small interest in a piece of property in Jackson County located some miles away from the Whiteside property, that the property in which Russell had an interest was not in the forest use classification, and that Russell's interest was as a general taxpayer in Jackson County.

In 1973, North Carolina joined a majority of our sister states by enacting legislation which permitted preferential assessment of property used for agricultural, forest and horticultural purposes. The legislation, which was substantially amended in 1975, is found in N.C. Gen. Stat. §§ 105-277.2 through -277.7 (1999). *See W.R. Company v. Property Tax Comm.*, 48 N.C. App. 245, 257, 269 S.E.2d 636, 643 (1980), *disc. review denied*, 301 N.C. 727, 276 S.E.2d 287 (1981). The owner of agricultural, forest or horticultural lands may apply to have the lands appraised at their present-use value, a value lower than the market value of the property. In order to qualify for such preferential treatment, however, the lands must be maintained in a "sound management program" which is defined as "[a] program of production designed to obtain the greatest net return from the land consistent with its conservation and long-term improvement." N.C. Gen. Stat. § 105-277.2(6). "This provision may disqualify a weekend or hobby farmer or speculator who does not maintain these lands in a 'sound management program.' " *W.R. Company*, 48 N.C. App. at 257, 269 S.E.2d at 643. Here, Whiteside submitted a Forest Management Plan in 1976. The plan was approved by Jackson County, and the Whiteside property was given a present-use classification as forestland. It appears from the record that the forestland classification was not reviewed until 1997, when Russell complained to the County Board about the present-use classification of Whiteside's land. Whiteside argues that Russell had no standing to take such action. We disagree.

N.C. Gen. Stat. § 105-322(g)(2) provides in pertinent part that "[o]n request, the board of equalization and review shall hear *any taxpayer* who owns or controls property taxable in the county with respect to the listing or appraisal of his property *or the property of others*." *Id.* (1999) (emphasis added). In *In re King*, 281 N.C. 533, 189

S.E.2d 158 (1972), urban property owners in Nash County questioned the assessment of farm land within the County, contending that the farm property was undervalued for tax purposes. The State Board of Assessment, predecessor of the Property Tax Commission, found that the rural property was undervalued for tax purposes and ordered a revaluation. The superior court affirmed the decision of the Board of Assessment. Our Supreme Court affirmed the decision, pointing out that property is required to be valued "at its true value" for tax purposes. The Supreme Court explained that

> [t]he purpose of the statutory requirement that all property be appraised at its true value in money is to assure, as far as practicable, a distribution of the burden of taxation in proportion to the true values of the respective taxpayers' property holdings, whether they be rural or urban. It is the duty of the County Board of Equalization and Review, when so requested, to hear any taxpayer owning taxable property in the county with respect to the valuation of his property or of the property of others and to eliminate unlawful discriminations in the valuations of all properties in the county. G.S. 105-327(g). If such taxpayer is aggrieved by the order of the County Board of Equalization and Review, he may appeal to the State Board of Assessment. G.S. 105-329.

Id. at 539, 189 S.E.2d at 161.

In discussing *King* and related cases, our Supreme Court held in *Brock v. Property Tax Comm.*, 290 N.C. 731, 228 S.E.2d 254 (1976), that, "[w]hen examined with respect to the statutes in effect at the time these cases were decided and with respect to the facts of each case, it is clear that the Court permits a property owner to contest the valuation on the 'property of others' only where he is in some way aggrieved by that valuation." *Brock*, 290 N.C. at 740, 228 S.E.2d at 260. Although Whiteside relies heavily on *Brock* in support of its position that Russell had no standing to question the assessed value of Whiteside's property, *Brock* is clearly distinguishable from the case before us. *Brock* involved a number of taxpayers who sought to challenge the valuation of *all* farm property in Jones County, contending that all farm property in the County was valued in excess of its fair market value by at least 25 percent. The Jones County Board of Equalization and Review denied the request, and Brock and 10 other taxpayers appealed to the Property Tax Commission. Thereafter, Brock forwarded the names of 99 other Jones County taxpayers to the Property Tax Commission, asking that they be listed as appel-

lants. The Property Tax Commission dismissed the appeal as to the 99 additional taxpayers, stating that the 99 persons did not even appeal to the Jones County Board and had no standing to appeal to the Property Tax Commission.

Our Supreme Court agreed that the 99 taxpayers listed by Mr. Brock in a letter to the Property Tax Commission were not entitled to join the appeal "en route," so that the appeal was properly dismissed as to them. In language pertinent to the case before us, the Supreme Court held that a property owner who contests the valuation on the property of others must be "aggrieved" in some way by that valuation. *Id.* Since there was no such showing in *Brock*, the purported appeal by the 99 additional Jones County taxpayers was properly dismissed. In *Brock*, the original plaintiffs were not aggrieved by the fact that the property of other Jones County taxpayers was <u>over</u>valued for tax purposes. In the case before us, however, Russell complained that the property of Whiteside was <u>under</u>valued, with the result that other property owners in Jackson County would bear a disproportionate share of the tax burden. Thus, Russell was adversely affected, or aggrieved, by the alleged undervaluation of Whiteside's property and had standing to appeal to the Jackson County Board for a revaluation of Whiteside's property.

[2] Whiteside also contends that a tax listing cannot be challenged after the listing period has expired, and cites the case of *In Re Appeal of Church of the Creator*, 102 N.C. App. 507, 402 S.E.2d 874 (1991) in support of his contention. Our decision in *Church of the Creator* does not support Whiteside's argument. In *Church of the Creator*, we held that the county assessor, in revoking the tax-exempt status of a property owner, violated the procedures set forth in the North Carolina Machinery Act. The assessor was entitled to challenge the tax listing, but could do so only by requiring the taxpayer to refile an application for exemption during the listing period.

> Respondent's assessor purported to remove petitioner from tax exempt status on 14 February 1989, and gave it 30 days to correct its alleged deficiencies or appeal. The Commission held that there is no authority in the Act for such an action. We agree. A county assessor has the power to challenge an exemption once granted by requiring the taxpayer to file a new application if he or she perceives that one of the changes in the property listed in the statute has occurred. Under the plain language of the statute, the application for exemption must be made during the listing period. The Commission reasoned that the county therefore is required

> to notify the taxpayer before the listing period that such an application will be required for the coming tax year. This did not take place in this case.

Id. at 510, 402 S.E.2d at 876. The case before us involves an appeal from a decision of the Jackson County Board of Equalization and Review, not an exemption decision made by a county assessor as in *Church of the Creator*. Further, Whiteside would not have benefitted from being notified to file a new exemption application, since both the County Board and Property Tax Commission found that it did not meet the requirements for present-use classification as forestland.

[3] Whiteside further contends that it was denied due process because it was not notified of the initial proceeding before the Jackson County Board, when Russell appeared in support of his challenge to the present-use classification of the Whiteside property. Whiteside also argues that there was no "intelligible transcript" made of the initial proceeding before the County Board. The applicable statutes only require, however, that "accurate minutes of the actions" of the County Board be kept. N.C. Gen. Stat. § 105-322(d). The Jackson County Board also properly followed statutory procedures by notifying Whiteside of its proposed action and giving Whiteside the opportunity to have a full hearing before the County Board. The hearing before the County Board was a *de novo* hearing, which satisfied Whiteside's due process rights to notice and a hearing. N.C. Gen. Stat. § 105-322(g)(2). Although Whiteside complains that it was not allowed to confront Russell, Whiteside had the right to subpoena Russell to the hearing before the County Board and cross-examine him. *See* N.C. Gen. Stat. § 105-322(g)(2)(c). The provisions for hearings and appeals set out in our Machinery Act do not violate established principles of due process. We are sensitive to Whiteside's argument that those statutory provisions allowed the County Board to make its initial decision at a hearing of which Whiteside was given no notice. Whether that procedure should be amended, however, is a matter for legislative consideration.

II.

[4] Whiteside next contends the Commission erred in finding as fact that it was not actively engaged in the commercial growing of trees under a sound management program pursuant to N.C. Gen. Stat. § 105-277.2(2). North Carolina law provides that forestland is eligible for taxation at present-use value provided certain conditions

are met. *See* N.C. Gen. Stat. §§ 105-277.3(a)(3) and -277.4(a). Forestland is defined as "[l]and that is a part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program." N.C. Gen. Stat. § 105-277.2(2). The statute defines "sound management program" as a "program of production designed to obtain the greatest net return from the land consistent with its conservation and long-term improvement." N.C. Gen. Stat. § 105-277.2(6).

After hearing all the evidence on those issues, the Commission found, among other things, that

> 5. The subject property is not actively engaged in the commercial growing of trees under a sound management program. Mr. J. David Young, witness for the Taxpayer, who lives at one of the subdivisions located at the subject property, testified that he manages the property for the family corporation. He stated that there are two subdivisions located on the subject property one of which consists of eight home sites, and the other consists of twelve sites. Considering his testimony, he manages the property by overseeing the maintenance of the subdivisions as well as negotiating the sales of the subdivision lots. He testified that the last subdivision lot sale occurred in 1983.
>
> 6. The subject property is not part of a forest unit that is actively engaged in the commercial production of trees under a sound management plan. Further testimony by Mr. J. David Young, established that only one sale of timber had occurred on the subject property when in 1995 a South Carolina logger timbered approximately 100 acres and paid $14,000.00 for the timber. He further testified that some thinning work had been done on the property by his brother and a neighbor, named Mr. Woods. The only other witness for the Taxpayer was Mr. O.E. Young, Jr. He testified that his mother bought the subject property in 1940 or 1941, and that he and his spouse acquired a one-half undivided interest in the property in 1953. He also testified that in the 1920s the quality timber on the subject property was cut and the timber that remained was pulpwood only which had no real value. In Mr. Young's opinion, it was not economically feasible to harvest the timber on the subject property.

In its brief, Whiteside recites evidence it presented to the Commission in support of its contention that it was actively engaged in the commercial growing of trees under a sound management pro-

gram. However, "[i]t is the Commission's duty 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.' " *In Re the Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 164, 484 S.E.2d 450, 451 (1997) (quoting *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981)).

In *Church*, we explained judicial review of a decision of the Property Tax Commission sitting as the State Board of Equalization and Review:

> Our review is governed by N.C. Gen. Stat. § 105-345.2, which states that a final decision of the Property Tax Commission may be reversed or modified if appellant's substantial rights have been prejudiced because the Commission's findings, conclusions, inferences, 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.

Church, 102 N.C. App. at 509, 402 S.E.2d at 875 (emphasis added). We have carefully examined the record, and find that the Commission's findings of fact are supported by competent, material, and substantial evidence of record. We are bound by those findings, which in turn support the conclusion of law that the property of Whiteside was not actively engaged in the commercial growing of trees under a sound management program.

In light of our decision, we need not reach the cross-assignment of error raised by Jackson County.

Affirmed.

Judges McGEE and EDMUNDS concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. IRIS M. TILLEY, INDIVIDUALLY AND AS TRUSTEE FOR TILLEY SIX TRUST AND T.T. FARMS TRUST AND HUSBAND, THOMAS TILLEY; AND VIRGINIA MORTGAGE COMPANY, DEFENDANTS

No. COA99-319

(Filed 18 January 2000)

1. Eminent Domain— condemnation—amount of property affected—pretrial issue—subject matter jurisdiction not involved

Although defendants contend the jury verdict must be voided in this land condemnation case based on the trial court not having subject matter jurisdiction since plaintiff's Declaration of Taking did not correctly list the requisite entire tract affected, the real issue defendants are arguing involves the amount of affected property, and that issue should have been resolved before trial under N.C.G.S. § 136-108.

2. Eminent Domain— condemnation—calculation of value—experts not limited by statutory formula

Although the trial court erred in a land condemnation case by requiring defendants' expert real estate appraiser to calculate the value of the 1.25-acre tract taken according to the strict formula set under N.C.G.S. § 136-112(1) since that statute only speaks to the exclusive measure of damages to be used by the "commissioners, jury or judge," it was not prejudicial error since defendants have not shown a different result likely would have occurred absent the error, given the facts that: (1) the expert was permitted to complete his calculations during a recess and his calculations in no way changed his ultimate appraisal value of the 1.25-acre tract; and (2) the cross-examination of the expert's appraisal of the unaffected tract completed during the recess did not affect his credibility with respect to the valuation of the land actually condemned.

3. Eminent Domain— condemnation—evidence—comparable sales after taking—exclusion not required

Although the trial court abused its discretion in excluding evidence of two voluntary 1997 sales of the property, on the basis that they occurred after the date of taking, when our courts have only required that the similar sales not be too remote in time from the date of the taking and nowhere has there been a requirement that the sales also be prior to the taking, defendants were not

prejudiced because defendants' expert was adequately able to support his appraisal opinion through the three other sales and the addition of the two 1997 sales would not have bolstered his opinion in such a way that a different result would have likely occurred.

4. Eminent Domain— condemnation—amount of property affected—pretrial issue—map

Although defendants assign error in a land condemnation case to the trial court's jury instruction that the map used by the parties at trial accurately reflected the entire tract affected by the taking when the map included both the Northern and Southern Tracts, and defendants maintain that only the Southern Tract was actually affected by the taking, this argument is dismissed because the issue of what constitutes the entire tract affected should have been resolved before trial under N.C.G.S. § 136-108.

5. Eminent Domain— condemnation—calculation of value—jurors limited by statutory formula

Even though defendant contends in a land condemnation case that the jury should have been permitted to use the pre-taking and post-taking fair market values of the 2.99-acre Southern Tract since the 23.99-acre Northern Tract remained unaffected, the trial court did not err by instructing the jury to value the 1.25-acre tract taken by calculating the difference between the pre-taking and post-taking fair market values of the entire 26.98-acre tract because N.C.G.S. § 136-112(1) provides a specific formula that must be used by juries in assessing the value of any land taken, using the entire tract affected.

6. Eminent Domain— jury instructions—substantial damages—descriptive term

The trial court did not improperly influence the jurors in a land condemnation case by telling them, as part of its instructions, that defendants were seeking "substantial" damages because as used in the instructions, "substantial" is purely descriptive in nature and does not carry with it the negative connotation defendants suggest.

Appeal by defendants from judgment entered 6 July 1998 by Judge David Q. LaBarre in Chatham County Superior Court. Heard in the Court of Appeals 8 December 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Emmett B. Haywood, for plaintiff-appellee.

Iris M. Tilley for defendant-appellant Iris M. Tilley and Thomas E. Tilley for defendant-appellants Thomas E. Tilley, Tilley Six Trust, T.T. Farms, and Virginia Mortgage Company.

LEWIS, Judge.

This cases arises from a land condemnation hearing in which plaintiff sought to take a portion of defendants' property in order to widen a part of Highway 15-501 in Chatham County. Defendants appeal from a verdict in which the jury awarded them $13,500 as just compensation for the taking.

Defendants own a 26.98-acre tract of land in Chatham County. Russett Road, a private road built for the University of North Carolina Center for Autistic Children, traverses this tract, separating it into a 23.99-acre northern tract ("the Northern Tract") and a 2.99-acre southern tract ("the Southern Tract"). On 4 November 1996, plaintiff filed a Declaration of Taking, seeking to condemn a portion of defendants' property for highway construction. The Declaration of Taking described the tract affected by the taking as the entire 26.98-acre tract; it described the area to be actually taken as a 1.25-acre portion of the Southern Tract. The Northern Tract was to remain unaffected.

After extensive discovery, the trial court entered a pre-trial order on 9 June 1998 that contained many of the parties' pre-trial stipulations. One such stipulation stated:

The only issue in this case will read as follows:

> "What sum are the defendants entitled to recover from the plaintiff, Department of Transportation, as just compensation for the appropriation of a portion of their property for highway purposes on November 4, 1996?"

The matter then proceeded to trial before a jury for a determination of that issue. At trial, plaintiff submitted the testimony of two expert real estate appraisers. John McCracken valued the 1.25-acre tract at $13,500. Lindsay Dean appraised it at $7525. Defendants submitted two valuations. Their expert appraiser, William Richardson, appraised the land at $180,800. Defendant Thomas Tilley, based upon

his own experience and knowledge of the property, then testified that the tract was worth $180,000. On 12 June 1998, the jury returned a verdict awarding defendants $13,500. Defendants now appeal.

[1] Defendants first argue that the jury verdict must be voided because the trial court did not have subject matter jurisdiction in this action. Specifically, they contend that plaintiff's Declaration of Taking was inherently flawed in its description of the property to be affected by the taking such that the trial court never acquired jurisdiction over the property plaintiff was seeking to condemn.

To fully understand defendants' argument, we must first outline the relevant pleading requirements for any Declaration of Taking filed by the Department of Transportation. Among other things, such Declaration must include:

> (2) A description of the *entire tract or tracts affected* by said taking sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

N.C. Gen. Stat. § 136-103 (amended 1998) (emphasis added). Defendants argue that, because the 23.99-acre Northern Tract was not affected by the taking, the "entire tract or tracts affected" here was just the 2.99-acre Southern Tract. Because plaintiff's Declaration of Taking did not correctly list the requisite entire tract affected, defendants maintain that the trial court did not have subject matter jurisdiction over the property to be taken. We find this argument to be contrived and without merit. "A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which the action in question belongs." *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978). Our legislature has expressly conferred jurisdiction over condemnation matters on our superior courts. N.C. Gen. Stat. § 136-103(a) (amended 1998). As this action was instituted in Chatham County Superior Court, the trial court did have jurisdiction over the subject matter here.

In reality, defendants are contesting the propriety of the pleadings, not the propriety of the court's jurisdiction. In particular, defendants are alleging that the "entire tract or tracts affected" here is just the Southern Tract, not the entire 26.98-acre tract. This issue

should have been litigated, if at all, *before* trial. A condemnation hearing should proceed to trial only after all issues other than that of just compensation have been resolved—"[a] controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding." *Light Company v. Creasman*, 262 N.C. 390, 397, 137 S.E.2d 497, 502 (1964). Our legislature has specifically provided a mechanism for resolving disputes over issues other than just compensation. *See* N.C. Gen. Stat. § 136-108 (1999). The fact that a trial court's determination as to any of these other issues is immediately appealable, *see Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), reinforces the notion that our courts want all issues to be resolved *before* the matter of just compensation is even addressed. Here, defendants failed to avail themselves of the mechanism provided in section 136-108, and instead specifically stipulated that only the matter of just compensation remained for resolution at trial. We will not reward this failure on appeal.

It is quite apparent to this Court that defendants have couched their argument in terms of subject matter jurisdiction in order to circumvent their pre-trial stipulation. Defendants correctly point out that subject matter jurisdiction cannot be consented to or stipulated to. *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). But defendants' stipulation here had nothing to do with subject matter jurisdiction; it had to do with the issues to be resolved at trial. Defendants will not be allowed to create an issue of subject matter jurisdiction merely by phrasing it as one. The issue defendants are arguing involves the amount of affected property. As previously stated, this issue must be resolved before trial and will not be entertained on appeal from a verdict as to just compensation.

[2] Next, defendants argue that the trial court erred by requiring their expert appraiser to calculate the value of the 1.25-acre tract taken according to the strict formula set out by our legislature in N.C. Gen. Stat. § 136-112(1). In appraising the property taken, Mr. Richardson testified that he compared the fair market value of the Southern Tract before the taking with the fair market value of the Southern Tract after the taking to arrive at a difference of $180,800. He testified that he did not attempt to value the Northern Tract because it was unaffected by the taking. Plaintiff thereafter objected to his testimony as incompetent because he did not follow the statutory formula. That formula provides:

The following shall be the measure of damages to be followed *by the commissioners, jury or judge* who determines the issue of damages:

(1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the *entire tract* immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C. Gen. Stat. § 136-112 (1999) (emphasis added). Because Mr. Richardson only valued a portion of the entire 26.98-acre tract (namely the Southern Tract), the trial court instructed him to reappraise the property according to the statutory formula. A fifteen-minute recess was then taken so that he could value the Northern Tract and add it to his calculations. He did so, and then continued his testimony to the jury pursuant to the statutory formula. By requiring Mr. Richardson to follow the strict statutory formula, we conclude the trial court erred. Nonetheless, we hold that the error resulted in no prejudice to defendants.

Expert witnesses, including real estate appraisers, must be given wide latitude in formulating and explaining their opinions as to value. *Power Co. v. Ham House, Inc.*, 43 N.C. App. 308, 312, 258 S.E.2d 815, 819 (1979). An expert is not restricted to any one specific measure or calculation. *See Board of Transportation v. Jones*, 297 N.C. 436, 439, 255 S.E.2d 185, 187 (1979) (listing three acceptable formulas). Section 136-112(1) does specify only one permissible calculation for the jury to use. Significantly, however, that section speaks only to the exclusive measure of damages to be used by the "commissioners, jury or judge"; in no way does it seek to restrict *expert real estate appraisers* to one particular method of ascertaining the fair market value of the property taken. *Id.* at 438, 255 S.E.2d at 187. Thus, "[i]n situations where elements of the property, such as the [Northern Tract] here, will remain constant in value despite the taking, expert appraisers will not have to include that value in their computations in order for their testimony to be competent." *Ham House*, 43 N.C. App. at 313, 258 S.E.2d at 819. After all, "[t]he logical consequence of assuming that only the [2.99] acre area was affected is that the diminution in its value will necessarily equal the diminution in value of the 'entire tract.' " *Guilford County v. Kane*, 114 N.C. App. 243, 246, 441 S.E.2d

556, 557 (1994). Accordingly, the trial court should not have required Mr. Richardson to re-appraise the 1.25-acre tract according to the restrictive formula outlined in the statute.

Despite the trial court's erroneous demand, we do not feel defendant is entitled to a new trial. In order to receive a new trial on appeal, defendants must not only show error, but must show that they were prejudiced as a result. *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730 (1981). In order to establish prejudice, defendants must demonstrate "that a different result would have likely ensued had the error not occurred." *Id.* Defendants have not met that burden here.

In his original testimony, Mr. Richardson explained to the jury that he did not take into account the Northern Tract because its value remained unaffected by the taking. After the trial court required him to take that tract into account, a recess was given so that he could value the Northern Tract. After the recess, he explained to the jury his amended calculations, but again pointed out that the resultant value of the 1.25-acre tract was still the same, regardless of his appraisal value as to the Northern Tract. Given that he was permitted to complete his calculations and that his calculations in no way changed his ultimate appraisal value of the 1.25-acre tract, we do not believe defendants have shown that a different result would have likely occurred absent the error.

We do note that, on cross-examination, plaintiff's counsel attempted to undermine Mr. Richardson's credibility by pointing out that his appraisal of the Northern Tract was only done during the fifteen-minute recess. Absent the trial court's error, of course, such cross-examination would not have been possible since Mr. Richardson should not have been required to appraise the unaffected Northern Tract in the first place. Although this cross-examination may have impugned Mr. Richardson's credibility with respect to his specific valuation of the Northern Tract, we do not believe it damaged his credibility with respect to the ultimate issue in this case—the valuation of the land actually condemned.

[3] In another assignment of error, defendants contest the exclusion of certain testimony by Mr. Richardson regarding two purportedly comparable real estate sales. In appraising the property taken, Mr. Richardson looked at five voluntary sales of similar property. These sales occurred on 30 September 1994, 19 May 1996, 17 November 1996, 5 September 1997, and sometime in November of 1997. Plaintiff

sought to exclude all testimony regarding the two sales from 1997 solely because they occurred after the date of taking. The trial court agreed and limited Mr. Richardson's testimony to the three other sales.

When the value of property is directly at issue, voluntary sales of property similar in nature, location, and condition to the land involved in the suit are admissible as circumstantial evidence of the condemned land's value, so long as the voluntary sales are not too remote in time. *Power Co. v. Winebarger*, 300 N.C. 57, 65, 265 S.E.2d 227, 232 (1980). Whether the properties are sufficiently similar is a matter within the sound discretion of the trial court. *City of Winston-Salem v. Cooper*, 315 N.C. 702, 711, 340 S.E.2d 366, 372 (1972). We conclude that the trial court abused its discretion here because it excluded the two 1997 sales solely because they occurred after the date of taking.

Plaintiff contends, and the trial court apparently agreed, that any voluntary sales occurring after the date of taking, such as the two 1997 sales here, are *per se* excludable. We disagree with plaintiff's stringent interpretation of the law in this State. Our courts have only required that the similar sales not be too remote in time from the date of the taking; nowhere have we affirmatively required that the sales also be prior to the taking. Plaintiff nonetheless relies on the following language from our Supreme Court to support its interpretation:

> It is the rule in this State that the price paid at voluntary sales of land, similar in nature, location, and condition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the *prior sale* was not too remote in time.

State v. Johnson, 282 N.C. 1, 21, 191 S.E.2d 641, 655 (1972) (emphasis added). We conclude that plaintiff's reliance on the "prior sale" language is misguided. A careful reading of *Johnson* reveals that our Supreme Court intended to attribute no significance to the word "prior." In *Johnson*, three purportedly comparable sales were used to assess the value of condemned land. *Id.* at 8, 191 S.E.2d at 649. One of these sales occurred after the date of taking. *Id.* Ultimately, however, the Supreme Court did not exclude this sale because it post-dated the taking, instead excluding it because it was sold to a prospective condemnor and thus was not truly a voluntary sale. *Id.* at 23, 191 S.E.2d at 656. Had our Supreme Court intended the "prior sale" language to affirmatively establish a requirement that all comparable sales must pre-date the taking, it surely would have used that

requirement to exclude the one post-taking sale there. Accordingly, we conclude that there is no affirmative requirement that any comparable sales must occur prior in time to the taking. By excluding the two 1997 sales solely on those grounds, the trial court erred.

Notwithstanding the erroneous exclusion of these two sales, we again discern no prejudice to defendants. We conclude that Mr. Richardson was adequately able to support his appraisal opinion through the three other sales. The addition of the two 1997 sales would not have bolstered his opinion in such a way that a different result would have likely occurred.

[4] Next, defendants assign error to the trial court's jury instruction. In its instruction, the trial court explained to the jury that the map used by the parties at trial accurately reflected the entire tract affected by the taking. That map included both the Northern and Southern Tracts. Defendants maintain that, because only the Southern Tract was actually affected by the taking, only it constituted the entire tract affected. As such, they contend that the trial court should not have referred to the entire map in its instructions, but just the 2.99-acre Southern Tract. We dismiss this argument for the same reasons we dismissed defendants' first argument. The issue of what constitutes the entire tract affected should have been resolved before trial through the procedures outlined in section 136-108. By not availing themselves of these procedures and instead stipulating that only the issue of just compensation remained for trial, defendants will not be allowed to come forward now and suggest that only the Southern Tract constituted the entire tract affected by the taking.

[5] Defendants also argue that the trial court erred by instructing the jury to value the 1.25-acre tract taken by calculating the difference between the pre- and post-taking fair market values of the entire 26.98-acre tract. Defendants contend that, because the Northern Tract remained unaffected, the jury should have been permitted to just use the pre- and post-taking fair market values of the 2.99-acre Southern Tract. Again, we reject this argument. As articulated earlier, our legislature has outlined a specific formula that must be used by juries in assessing the value of any land taken. That formula requires differentiating the pre- and post-taking fair market values of the *entire tract* affected. N.C. Gen. Stat. § 136-112(1) (1999). Accordingly, the trial court instructed the jury properly on the formula it was to use.

[6] Finally, defendants contend that the trial court improperly influenced the jurors by telling them, as part of its instructions, that

defendants were seeking "substantial" damages. Specifically, the trial court told the jury:

> On this issue [of the condemned property's value] the defendants and the plaintiff have different positions. The defendants contend that you should answer this issue *in a substantial sum* and have presented evidence which tends to show that the value of the entire tract immediately prior to the taking was $305,000, while the value of the remainder immediately after the taking was $125,000.

(Tr. at 276-77) (emphasis added). We fail to see any error in merely including the term "substantial" in the instruction. As used here, "substantial" is purely descriptive in nature and does not carry with it the negative connotation defendants would have us believe. Accordingly, we reject defendants' final argument.

No prejudicial error.

Judges WYNN and MARTIN concur.

RICHARD BROWN AND PAULINE BROWN, INDIVIDUALLY, AND RICHARD BROWN IN HIS CAPACITY AS THE GUARDIAN AD LITEM FOR TIFFANY C. BROWN, PLAINTIFFS v. LORESSA G. LIFFORD, ROY SLADE, AND HENRY LEON WATKINS D/B/A "TOWN CLOWN ICE CREAM," DEFENDANTS

No. COA99-99

(Filed 18 January 2000)

Judgments— default—entry set aside—good cause shown

The trial court erred in a personal injury case by denying defendant-Watkins's motion to set aside entry of default for good cause shown under N.C.G.S. § 1A-1, Rule 55(d) because defendant made numerous contacts with his insurance agent and was assured that the insurance company was handling the case; defendant did everything that could reasonably have been required to demonstrate diligent attention to the case; it does not appear from the record that plaintiffs suffered harm by virtue of the delay; and there is the possibility that plaintiff will suffer injustice by being unable to defend the action.

Judge WYNN dissenting.

Appeal by defendant Watkins from order entered 17 March 1997 by Judge Stafford G. Bullock and judgment entered 23 September 1998 by Judge Steve A. Balog in Caswell County Superior Court. Heard in the Court of Appeals 21 October 1999.

Donaldson & Black, P.A., by Jeffrey K. Peraldo, for plaintiff-appellees.

Burton & Sue, L.L.P., by Gary K. Sue and James D. Secor, III, for defendant-appellant Henry Leon Watkins d/b/a Town Clown Ice Cream.

EDMUNDS, Judge.

Defendant Henry Leon Watkins (Watkins) d/b/a Town Clown Ice Cream appeals the trial court's denial of his motion to set aside entry of default and the resulting default judgment. We reverse.

Defendant Watkins owned a modified truck from which he sold ice cream. On 16 May 1993, Watkins parked his truck across the street from the home of Tiffany C. Brown, the minor child of plaintiffs Richard and Pauline Brown. After purchasing ice cream, Tiffany began to cross the street to return home when she was struck by an automobile owned by defendant Roy Slade and driven by defendant Loressa G. Lifford. On 15 May 1996, plaintiffs brought suit against all three defendants, alleging that Lifford negligently operated the automobile that hit Tiffany, that Lifford's negligence should be imputed to Slade, and that Watkins negligently parked his truck in a hazardous manner.

On or about 22 March 1995, prior to filing a complaint, counsel for plaintiffs notified Watkins of the suit and requested that he advise his insurance carrier of plaintiffs' intention to pursue a personal injury claim. On 3 April 1995, Watkins forwarded a copy of the letter along with personal correspondence to Harris Insurance Agency. The agent assured Watkins that the company would handle the matter. On that same date, Watkins mailed to plaintiffs' counsel a letter containing the name and address of his insurance company and agent.

After an extended period without response from defendant's insurer, on 26 August 1995, plaintiffs' counsel wrote the insurance carrier and requested an opportunity to discuss the claim with a representative. When plaintiffs' counsel received no response, on 13 September 1995, he sent a second letter to the insurer, directed to the

attention of the company vice president. The 13 September letter requested a response within twenty-four hours and threatened to file suit if there was no reply. On 14 September 1995, an insurance company representative contacted plaintiffs' counsel and denied coverage for the claim. Plaintiffs' counsel conveyed this information to Watkins on 14 September 1995 and again on 3 January 1996.

Plaintiffs filed a complaint on 15 May 1996. Defendants Lifford and Slade filed a timely answer to plaintiffs' complaint, and, thereafter, the suit against them was voluntarily dismissed. When Watkins was timely served, he hand-delivered the suit papers to his agent, who again assured Watkins the company would handle the claim. However, neither the agent nor the insurance company took any action, and on 24 June 1996, the clerk of court recorded an entry of default pursuant to N.C. Gen. Stat. § 1A-1, Rule 55 (1990) (amended effective Oct. 1, 1998). On 27 June 1996, plaintiffs' counsel informed Watkins of the order. Watkins again advised his insurance agent of this latest development, and his agent again advised that the company would handle the matter. When the company remained inert, Watkins hired counsel, who on 18 October 1996 filed a Notice of Appearance and a Motion to Set Aside the Entry of Default. The trial court denied the motion on 26 March 1997.

Watkins appealed the entry of default, and the trial court stayed the action pending the outcome of the appeal. On 3 March 1998, this Court dismissed the appeal as interlocutory, and on 27 August 1998, plaintiffs filed a Motion for Entry of Final Judgment by Default. The matter came for hearing on 8 September 1998. The court granted the motion and awarded plaintiffs $22,296.15 for the cost of medical treatment and $125,000.00 for pain and suffering. Watkins appeals.

Watkins contends the trial court erred in denying his motion to set aside the entry of default against him. An entry of default may be set aside "[f]or good cause shown." N.C. Gen. Stat. § 1A-1, Rule 55(d). We have acknowledged the difficulty of fashioning general rules to cover the granting of such motions:

> [w]hat constitutes "good cause" depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly "where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant."

Peebles v. Moore, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980) (quoting *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970) (citation omitted)), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981). This standard is less stringent than the showing of "mistake, inadvertence, or excusable neglect" necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990). *Bailey v. Gooding*, 60 N.C. App. 459, 462, 299 S.E.2d 267, 269 (1984).

A trial court's determination of "good cause" to set aside an entry of default will not be disturbed on appeal absent an abuse of discretion. *See Byrd v. Mortenson*, 308 N.C. 536, 302 S.E.2d 809 (1993). In reviewing a trial court's decision regarding motions to set aside entries of default, we consider the following factors: "(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896-97 (1987). However, "[i]nasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Peebles*, 48 N.C. App. at 504-05, 269 S.E.2d at 698 (citation omitted).

Bearing these principles in mind, we turn to analogous cases reviewed by this Court. In *Whaley*, 10 N.C. App. 109, 177 S.E.2d 735, the defendant to a negligence action provided the complaint to his insurance agent, who assured the defendant that the insurer would handle the suit. After three weeks, the defendant checked again with his agent and was again assured the insurer was handling the claim. However, when no answer was filed on the defendant's behalf, the plaintiff moved for and was granted entry of default. The defendant then moved to set aside the entry of default. The trial court granted the defendant's motion, and the plaintiff appealed. We affirmed the trial court's setting aside of the entry of default, holding: "In the present case the facts are sufficient to warrant a conclusion by the trial judge that the defendant has shown good cause for his failure to file an answer." *Id.* at 112, 177 S.E.2d at 737.

In *Peebles*, 48 N.C. App. 497, 269 S.E.2d 694, the plaintiff filed suit against the defendant, who forwarded the documents to his insurance carrier. However, when the carrier misplaced the file, the answer was filed seven days late. The trial court denied the defendant's motion to set aside entry of default. We reversed, holding:

> [D]efendant's failure timely to file his answer was due to an inadvertence on the part of defendant's insurer, and not due to any fault of his own. It further appears that defense counsel promptly filed an answer upon discovering that a mistake had been made.
>
> Although such inadvertence may not be excusable, we believe that the circumstances of this case support a showing of sufficient cause to set aside entry of default. We find that the delay in answer did not prejudice plaintiff, and it appears that allowing default here would do an injustice to defendant.

Id. at 507, 269 S.E.2d at 700.

In *Automotive Equipment*, 87 N.C. App. 606, 361 S.E.2d 895, the defendant in a breach of contract action telephoned his attorney upon being served to discuss the complaint. Counsel agreed to handle the matter and said he would prepare an answer. The defendant and his counsel discussed the case a second time after the attorney reviewed the complaint. However, due to a family emergency, defendant's counsel failed to file a responsive pleading. The clerk of court made an entry of default. The defendant moved to have the entry of default set aside, which the trial court granted. The plaintiff appealed to superior court, which reinstated entry of default and entered judgment for the plaintiff. The defendant appealed, and we reversed, holding that the defendant's diligence in conferring with counsel about the case was sufficient to keep the attorney's negligence from being imputed to him. The defendant's show of good cause justified setting aside the entry of default.

However, there have been cases in which we have affirmed the trial court's denial of a motion to set aside an entry of default. In *Howell v. Haliburton*, 22 N.C. App. 40, 205 S.E.2d 617 (1974), the defendant on 28 August 1972 advised the insurer that a suit had been filed against him and mailed the insurer a copy of the complaint. The insurer took no action, and there was no further contact between the defendant and the insurer until 3 May 1973, when plaintiff's counsel notified the defendant of the entry of default. This Court affirmed entry of default, noting in particular the lack of attention paid to the suit by the defendant for in excess of eight months after being notified of the plaintiff's claim.

> Such continued inattention distinguishes the instant case from the situations presented in *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E.2d 735, and in *Hubbard v. Lumley*, [17 N.C. App. 649, 195

> S.E.2d 330 (1973)]. When the trial court exercises its discretion in considering a motion to set aside an entry of default, it is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law. At the same time, however, it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity.

Id. at 42, 205 S.E.2d at 619.

Similarly, in *Bailey*, 60 N.C. App. 459, 299 S.E.2d 267, we affirmed the denial of the defendants' motion to set aside entry of default, stating:

> Defendants' answer was filed four months after expiration of the time allowed for filing [their] answer and more than one month after default was entered. There is nothing in the record to indicate what actions defendants took during this time to defend the case other than to deliver the suit papers to the insurance carrier. Continued inattention by a defendant in a lawsuit does not constitute good cause to set aside an entry of default.

Id. at 465, 299 S.E.2d at 271 (citation omitted). Other facts cited by the Court in support of its decision were that:

> [insurance company agent] had not contacted plaintiffs' attorney for more than one month prior to the entry of default and had retained counsel to defend in the case during that time. At no other time prior to entry of default had contact between [agent] and plaintiffs' attorney ceased for such a lengthy period of time. These facts belie [agent's] assertion that he was continuing to negotiate with plaintiffs' attorney at the time of entry of default.

Id.

These cases, all with similar or analogous facts, indicate that we find the degree of attention or inattention shown by the defendant to be a particularly compelling factor. We have been amenable to allowing claims to be litigated where a defendant not only referred the claim to his or her insurer, but also continued to monitor the case. In contrast, where a defendant merely passed the case to the insurance company but took no further action, we have been far less receptive to a contention that an entry of default was inappropriate.

Applying the factors set forth in *Automotive Equipment* to the case at bar, we note that defendant made numerous contacts with his

insurance agent and was assured at every turn that the insurance company was handling the case. Defendant did everything that could reasonably have been required to demonstrate diligent attention to the case. Additionally, although plaintiffs showed commendable restraint in attempting to resolve the case before resorting to a motion for default, it does not appear from the record that plaintiffs suffered harm by virtue of the delay. Finally, there is the possibility that defendant will suffer injustice by being unable to defend the action. We therefore hold that the trial court erred in failing to set aside the entry of default.

Because we find error in the trial court's denial of defendant's motion to set aside entry of default, we need not reach defendant's remaining arguments. The final judgment of default is therefore reversed, and this case is remanded to the trial court for further proceedings.

Reversed and remanded.

Judge HORTON concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

In this appeal, the majority concludes that because the defendant in this case was unable to make his insurer act in a timely fashion, he has shown "good cause" for not timely answering a complaint against him. I disagree and certify by dissent the following issue for our Supreme Court to consider upon appeal of right: *May a defendant excuse his failure to timely answer a complaint by showing that he relied on his insurer to act on his behalf?*

A motion to set aside an entry of default judgment is addressed to the sound discretion of the trial judge and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of discretion. *See Coulbourn Lumber Company v. Grizzard*, 51 N.C. App. 561, 563, 277 S.E.2d 95, 96 (1981). A ruling by the trial court on a discretionary matter should not be reversed unless the decision was arbitrary or lacked any basis in reason. And a "discretionary ruling by the trial judge should not be disturbed on appeal unless the appellate court is convinced . . . that the ruling probably amounted to a substantial miscarriage of justice." *Boyd v. L.G.*

DeWitt Trucking Co., 103 N.C. App. 396, 406, 405 S.E.2d 914, 921, *review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991).

The present action was brought against the insured, not his insurer. If the insurer failed to timely fulfill an obligation that it owed to its insured, then the insured may have a separate cause of action against the insurer for damages that may arise from that failure. But that cause of action should not affect the action brought only against the insured. So any "mistake, inadvertence or excusable neglect" by the insurer may give rise to a complaint by the insured against his insurer, but the action against the insured should be unaffected by an insurer's failure to cooperate with its insured. Thus, I would find that the trial court did not abuse his discretion in not setting aside the default judgment against the defendant.

Since our Courts have never directly addressed this issue, I certify by dissent this issue to our Supreme Court for a definitive pronouncement. N.C. Gen. Stat. § 7A-30(2) (1995).

STATE OF NORTH CAROLINA v. TERRY EUGENE WOODS

No. COA98-1564

(Filed 18 January 2000)

1. Drugs— tax on seized narcotics—effect of Fourth Circuit decision—prior panel decision binding

Even though the Fourth Circuit held that the North Carolina Drug Tax constitutes criminal punishment and defendant claims his double jeopardy rights will be violated if there is further prosecution against him in this case based on the Department of Revenue's prior collection of unpaid taxes on seized drugs under N.C.G.S. §§ 105-113.105 through 105-113.113, the trial court did not err in denying defendant's motion to dismiss the charges of possession of marijuana, maintenance of a building for the purpose of keeping marijuana, possession of marijuana with intent to sell or deliver, and possession of drug paraphernalia, because: (1) with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State; and (2) another North Carolina Court of Appeals panel previously upheld assessment and collection of the

Drug Tax against a challenge under the double jeopardy clause, and this panel is bound by the prior decision of another panel addressing the same issue when there has been no modification by our Supreme Court.

2. Search and Seizure— warrantless search—permissible scope of search exceeded

Even though the officers' warrantless entries into defendant's residence did not violate the Fourth Amendment since the security alarm was sounding at the time officers arrived, the back door of the residence was ajar, and a cursory inspection revealed a recently broken window, the trial court erred in denying defendant's motion to suppress evidence of marijuana and $44,890 cash based on the ensuing search and seizure violating the permissible scope of searches: (1) the marijuana seized from the chest of drawers was not properly seized under the plain view doctrine; (2) the search of the chair and kitchen cabinet was unreasonable considering the burglar alarm was sounding the entire time and the officers would have had to believe the intruder had taken time to stuff a small child into the cabinet and place a chair in front of the cabinet before exiting; and (3) the money in the bottom of the chair was only discovered because the officer moved it to search the cabinet.

3. Search and Seizure— warrant—tainted evidence

Even though the officers' prior warrantless entries into defendant's residence did not violate the Fourth Amendment since the security alarm was sounding at the time officers arrived, the back door of the residence was ajar, and a cursory inspection revealed a recently broken window, the officers' ensuing search violated the permissible scope, and the trial court erred in denying defendant's motion to suppress the additional evidence the officers obtained pursuant to a warrant because the illegally discovered marijuana and cash obtained during the warrantless search comprised more than a minor portion of the evidence establishing probable cause for the warrant, and thus, the fruits obtained pursuant to the search under the warrant are inadmissible.

Appeal by defendant from judgment entered 5 March 1998 by Judge Henry W. Hight, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 6 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Joy Anita Jones, for the State.

Harrison, North, Cooke & Landreth, by A. Wayne Harrison, for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 2 March 1998 session of Alamance County Superior Court on charges of possession of marijuana, maintenance of a building for the purpose of keeping marijuana, possession of marijuana with intent to sell or deliver and possession of drug paraphernalia. The jury found defendant guilty on all charges. Defendant was sentenced as an habitual felon, receiving three active terms of eighty to one hundred five months imprisonment and a term of one hundred twenty days, to be served consecutively. Defendant appeals, making four arguments.

The State's evidence tended to show the following. On 7 August 1997 at 10:12 p.m., Deputy Sheriff David Barr of the Alamance County Sheriff's Department was dispatched to investigate an alarm sounding at defendant's residence, a double-wide mobile home located in Alamance County. Upon arrival, Officer Barr heard the alarm and observed that the rear door of defendant's residence was open. He announced his presence, identifying himself as a deputy with the Alamance County Sheriff's Department and requesting any person inside to exit the residence. Hearing no response, Officer Barr drew his handgun and with his flashlight entered the open door, continuing to announce his presence and identity. Officer Barr conducted a "cursory" visual search for potential victims or perpetrators within. He noticed several closed doors, but proceeded down an open hallway, entering the kitchen-living room area. In the kitchen, Officer Barr observed that many of the appliance doors were open and frozen food was sitting out on the counters. He looked over the living room and seeing no one, entered the master bedroom, where he saw a broken window with shattered glass and a concrete block laying on the floor. About then, Detective Brian Allen with the Alamance County Sheriff's Department arrived and Officer Barr briefed him on the situation and showed him the broken window.

The officers re-entered the residence to conduct a more thorough search than Officer Barr's initial inspection. Officer Barr testified that the two officers were "searching for persons, either injured or suspects or the owners of the house," and therefore "searched in every

bedroom and every area that was large enough to conceal a human being." (Tr. at 19). In the master bedroom they opened a drawer inside a standing chest which was approximately fifteen to twenty inches deep, twenty-five to thirty inches in length and eighteen inches wide. In this drawer, the officers discovered a bag of green vegetable matter and radioed for narcotics officers to come to the scene.

In the kitchen-living room area, they noticed two double-door cabinets, which Officer Barr estimated to be thirty-four inches tall and forty-eight inches wide. While attempting to open the doors to the cabinet, Officer Barr moved a chair and heard a noise beneath it. His flashlight revealed a tear on the bottom of the chair and a bag inside appearing to contain money. Officer Barr then opened the cabinet door, but found nothing.

At this point, the officers secured the residence to prevent entry or exit. At about 1:40 a.m. they obtained a search warrant and searched the entire residence. It was determined that the green vegetable matter in the chest of drawers was marijuana, and the bag beneath the chair contained $44,890. The search pursuant to the warrant revealed the following: two small bags of marijuana, a grocery bag containing marijuana, sandwich bags and rolling papers, a twelve-gauge shotgun, over $40,000 discovered throughout the residence, a white cardboard box containing fourteen vials of a white powder substance labeled "come back," used as an adulterant in the conversion of powdered cocaine to crack cocaine, and an electronic digital gram scale. All of this evidence was admitted in evidence at trial over defendant's objection.

[1] Defendant assigns as error the denial of his motion to dismiss, alleging that prosecution in this case was barred under the principle of double jeopardy. Defendant bases his claim of double jeopardy on the North Carolina Department of Revenue's collection of unpaid taxes on the seized drugs pursuant to the North Carolina Controlled Substance Tax Act, N.C. Gen. Stat. §§ 105-113.105 through 105-113.113 (1995) ("Drug Tax") in addition to prosecution against him in this case. Defendant was assessed $3271.28 and paid a portion of that amount on 12 August 1997, prior to the scheduled trial date.

Defendant contends the trial court's ruling must be reversed pursuant to *Lynn v. West*, 134 F.3d 582, 593-94 (4th Cir.), *cert. denied*, 525 U.S. 813, 142 L. Ed. 2d 36 (1998), where the Fourth Circuit held that the North Carolina Drug Tax constitutes criminal punishment. The

State asserts the trial court correctly denied defendant's motion to dismiss under *State v. Adams*, 132 N.C. App. 819, 513 S.E.2d 588, 589, *disc. rev. denied*, 350 N.C. 836, — S.E.2d —, *cert. denied*, — U.S. —, 145 L. Ed. 2d 414 (1999), where a panel of this Court upheld assessment and collection of the Drug Tax against a challenge under the Double Jeopardy Clause. As we noted in *Adams*, with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State. *Id.* Absent modification by our Supreme Court, a panel of this Court is bound by the prior decision of another panel addressing the same issue. *Id.* Accordingly, we are bound by our decision in *Adams* and defendant's assignment of error based on double jeopardy fails.

[2] Defendant next contends that the officers' warrantless entries into his residence violated the Fourth Amendment. Further, defendant argues that even if the officers' entries were permissible, the trial court improperly denied his motion to suppress all of the evidence seized on 8 August 1997, because the ensuing search and seizure violated the permissible scope of searches pursuant to the Fourth Amendment.

The Fourth Amendment grants individuals the right to be secure against unreasonable searches and seizures. *Mincey v. Arizona*, 437 U.S. 385, 390, 57 L. Ed. 2d 290, 298 (1978). The warrant requirement, imposed on government agents or officers who seek to enter for the purpose of search, seizure or arrest, is a principal protection against unreasonable intrusions into private dwellings. *Welsh v. Wisconsin*, 466 U.S. 740, 748, 80 L. Ed. 2d 732, 742 (1984). Under the general rule, a warrant supported by probable cause is required before a search is considered reasonable. *Trupiano v. United States*, 334 U.S. 699, 92 L. Ed. 1663 (1948). The warrant requirement is "subject only to a few specifically established and well-delineated exceptions," *Katz v. United* States, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967). The State argues that the "exigent circumstances" exception is applicable here.

The exigent circumstances exception has been extended to various circumstances where law enforcement officers are responding to an emergency, *Warden v. Hayden*, 387 U.S. 294, 298, 18 L. Ed. 2d 782, 787 (1967), and there is a "compelling need for official action and no time to secure a warrant," *Michigan v. Tyler*, 436 U.S. 499, 509, 56 L. Ed. 2d 486, 498 (1978). Where, for example, officers believe that persons are on the premises in need of immediate aid,

Mincey v. Arizona, 437 U.S. at 392, 57 L. Ed. 2d at 300, or where there is a need "to protect or preserve life or avoid serious injury," *id.* at 392-93, 57 L. Ed. 2d at 300, the Supreme Court has held that a warrantless search does not violate the Fourth Amendment. To justify a warrantless entry of a residence, there must be both probable cause and exigent circumstances which would warrant an exception to the warrant requirement. *State v. Wallace*, 111 N.C. App. 581, 586, 433 S.E.2d 238, 241 (1993). The burden generally rests on the State to prove the existence of exigent circumstances. *Chimel v. California*, 395 U.S. 752, 762, 23 L. Ed. 2d 685, 693 (1969).

Until now, we have not considered whether under the exigent circumstances exception to the warrant requirement of the Fourth Amendment law enforcement officers may enter a home without a warrant for the purpose of investigating a probable burglary. The United States Fourth Circuit, however, has considered whether an officer's warrantless entry into defendant's storage unit in response to indications of burglary violated the Fourth Amendment. *United States v. Dart*, 747 F.2d 263 (4th Cir. 1984). In *Dart*, defendant rented a storage unit located in a complex of storage units. *Id.* at 265. After receiving report of a break-in, an officer arrived at the complex and noted sawed-off locks and open doors on approximately ten units. Observing that the lock on defendant's unit was sawed off and the door was ajar, the officer entered the storage unit to determine whether any burglars remained. *Id.* at 265-66. Inside, the officer found no burglars, but instead uncovered several weapons beneath a blanket. *Id.* at 266. The *Dart* court held that the officer's initial warrantless entry did not violate the Fourth Amendment, since the complex had clearly been burglarized and the officer had reason to believe that the perpetrators could still be on the premises. *Id.* at 267.

State and federal courts in other jurisdictions generally agree that where an officer reasonably believes that a burglary is in progress or has been recently committed, a warrantless entry of a private residence to ascertain whether the intruder is within or there are people in need of assistance does not offend the Fourth Amendment. *See, e.g.*, *In re Forfeiture of $176,598*, 505 N.W.2d 201 (1993) (allowing warrantless entry under the exigent circumstances doctrine when officers responded to a residential alarm sounding at night and upon arrival discovered that a window on the residence was broken and the security bars were pushed away and a lug wrench, a bar, and a skull cap was on the ground beneath the window); *see also United*

States v. Valles-Valencia, 811 F.2d 1232, 1236 (9th Cir.), *amended on other grounds*, 823 F.2d 381 (9th Cir. 1987); *Reardon v. Wroan*, 811 F.2d 1025, 1029-30 (7th Cir. 1987); *United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir. 1982), *adopted in relevant part*, 710 F.2d 431 (8th Cir. 1983); *Carroll v. State*, 646 A.2d 376, 380-81 (Md. 1994) (citing *United States v. Johnson*, 9 F.3d 506, 509-10 (6th Cir. 1993)).

Here, we find that the officers' warrantless entries into defendant's residence did not violate the Fourth Amendment. The security alarm was sounding at the time Officer Barr arrived, and the back door to the residence was ajar. A cursory inspection revealed a recently broken window. It was clear an uninvited entry had been made at the residence and the officers had reason to believe that intruders or victims could still be on the premises. We conclude that both probable cause and exigent circumstances existed which justified the officers' warrantless entries.

But just because officers can justifiably enter a dwelling, that does not give them free rein in their search of the dwelling. The question becomes whether the scope of the ensuing searches was permissible. The searches here involved three separate pieces of furniture: a chest of drawers, a chair and a cabinet. The search of the chest of drawers will be analyzed separately from the search of the chair and cabinet.

We begin with the chest of drawers. We find that *Mincey v. Arizona* is dispositive as to the invalidity of the officers' search of the chest here. *Mincey* established that officers performing a search during the course of "legitimate emergency activities" may seize evidence of crime that is "in plain view." *Mincey*, 437 U.S. at 393, 57 L. Ed. 2d at 300. The marijuana seized from the cabinet here was not properly seized under the plain view doctrine.

The *Mincey* Court ruled that a lawful search for a killer at a homicide scene could not be extended to include opening dresser drawers and closed containers. *Id.* at 393, 57 L. Ed. 2d at 300. The Fourth Circuit has extended this prohibition of general intensive searches to a burglary investigation. *Dart*, 747 F.2d at 268-69. We find this interpretation to be persuasive. Indeed, the circumstances favoring a legitimate search in this case were substantially weaker than those in *Mincey*. *See also United States v. Presler*, 610 F.2d 1206, 1211 (4th Cir. 1979) (officers' search pursuant to burglary investigation held violative of Fourth Amendment under *Mincey*). In *Mincey*, the residence searched was the scene of a recent murder. Here, the officers

had no reason to believe that a murder had been committed on the premises. If the search in *Mincey* of drawers and closed containers could not be justified on those facts, the search of the chest of drawers here must be held to violate the Fourth Amendment proscription against unreasonable searches.

Next we turn to the search of the chair and kitchen cabinet. The *Mincey* Court recognized that the scope of a warrantless search must be " 'strictly circumscribed by the exigencies which justify its initiation.' " 437 U.S. at 393, 57 L. Ed. 2d at 300 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26, 20 L. Ed. 2d 889, 908, (1968)). Thus, the ensuing search is reasonable under the circumstances only in so far as it furthers the stated purpose for entering. *United States v. Moss*, 963 F.2d 673, 679 (4th Cir. 1992). The exigency which justified the entry here was the officers' belief that either intruders or victims could have been on the premises. Accordingly, the search must have been confined to areas that could have concealed a body.

At best, only a small child could have fit into this cabinet. Furthermore, a chair was in front of the cabinet. Thus, to justify their search of this cabinet, the officers would have had to believe the intruder had taken time to stuff a small child into the cabinet and place a chair in front of the cabinet before exiting the dwelling. We find such belief to be unreasonable—especially considering that the burglar alarm was sounding the entire time. The chair was moved to enable the officer to search the cabinet and in so doing the money in its bottom was discovered. Thus, the search of the cabinet here exceeded the permissible scope of the officers' search, as did the search of the chair.

We conclude that the officers' warrantless searches of the chest of drawers, chair and cabinet did not comport with the defined exceptions to the warrant requirement. Failure to obtain a warrant before searching any of these items, therefore, clearly violated defendant's constitutional rights. Evidence obtained by unlawful activity by the State may not be admitted in evidence absent some valid means, independent of the wrongdoing, through which the evidence would have been discovered. *State v. Moore*, 275 N.C. 141, 146, 166 S.E.2d 53, 57 (1969) (citing *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1960)). Finding no independent source through which this evidence would have been discovered, we conclude that neither the marijuana nor the $44,890 was admissible. The marijuana is contraband and the money may well be subject to no taxes and the subject of legitimate earnings.

[3] The remaining evidence in this case was seized pursuant to a warrant. Possession of the warrant, however, did not legitimate this search. A warrant issued on the basis of tainted evidence is invalid. *Dart*, 747 F.2d at 270 (citing *United States v. Langley*, 466 F.2d 27 (6th Cir. 1972) (holding that where tainted information comprises more than a "very minor portion" of that found in an affidavit supporting a search warrant, the warrant must be held invalid). Because the illegally discovered marijuana and cash comprised more than a minor portion of the evidence establishing probable cause, we conclude that the fruits obtained pursuant to the search under the warrant here were not admissible. Accordingly, the trial court improperly denied defendant's motion to suppress all of the evidence seized from defendant's residence on 8 August 1997.

In light of our holding as to the motion to suppress, we need not address defendant's remaining assignments of error.

Vacated and remanded.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. REGINALD SHERWOOD GRADY

No. COA98-1192

(Filed 18 January 2000)

1. Indictment and Information— address—correction—unnecessary to set out offense—no misleading of charge by substitution

The trial court did not err by allowing the State's pre-evidentiary motion to amend a count of the indictment charging keeping and maintaining a dwelling for the use of a controlled substance to the correct address of 929 Dollard Town Road, instead of 919 Dollard Town Road, because: (1) specific designation of the address of the dwelling at issue was unnecessary to set out the offense of maintaining a dwelling under N.C.G.S. § 90-108(a)(7); (2) the amendment did not substantially alter the charge set forth in the indictment; and (3) defendant could not have been misled or surprised as to the nature of the charges against him by this substitution.

2. Criminal Law— controlled substances—keeping and maintaining a dwelling—continuous offense—separate convictions

Although assignment of error may not be argued and then supplemented with a request for "partial" Anders review, the Court of Appeals exercised its discretionary power pursuant to Rule 2 to consider defendant's pro se argument concerning undercover purchases of drugs made by the same officer at the same dwelling and concluded this case must be remanded because two convictions of keeping and maintaining a dwelling for purposes related to use, storage, or sale of controlled substances under N.C.G.S. § 90-108(a)(7) violates the constitutional prohibition against double jeopardy since the offense is a continuing offense.

Appeal by defendant from judgments entered 16 April 1998 by Judge Quentin T. Sumner in Wayne County Superior Court. Heard in the Court of Appeals 19 August 1999.

Michael F. Easley, Attorney General, by Thomas B. Wood, Assistant Attorney General, for the State.

Adrian M. Lapas for defendant-appellant.

Reginald S. Grady, defendant-appellant, pro se.

EDMUNDS, Judge.

Defendant appeals judgments entered upon convictions by a jury of trafficking in cocaine by possession; trafficking in cocaine by selling; and two counts respectively of possession with intent to sell and deliver a controlled substance, sale of a controlled substance, and keeping and maintaining a dwelling for the use of a controlled substance (maintaining a dwelling). While the record on appeal contains nine assignments of error, defendant's counsel has advanced but one in his appellate brief, *see* N.C. R. App. P. 28(a), (b)(5) (assignments of error not set forth in appellant's brief deemed abandoned), requesting this Court to otherwise conduct an independent review pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), for possible prejudicial error. For reasons set out in detail below, we elect to exercise our discretion and consider this appeal pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 2 ("[t]o prevent manifest injustice to a party . . . appellate [court] may . . . suspend or vary the requirements . . . of any of [the appellate] rules").

The State's evidence at trial showed the following: On 22 July 1997, Officer Donald Richard-Smith (Officer Richard-Smith) of the Wilson Police Department, was assigned to work undercover operations with the Goldsboro-Wayne County Drug Squad. Officer Richard-Smith accompanied a confidential informant to a trailer at 929 Dollard Town Road in Goldsboro and purchased eight pieces of crack cocaine from a man named "Reggie," identified as defendant, for $200.00. Officer Richard-Smith subsequently purchased crack cocaine from defendant at the same address on 14 August 1997 and 22 August 1997. A certified forensic chemist determined the weight of the cocaine purchased on the three occasions respectively to be 1.8 grams, 12.7 grams, and 37.6 grams.

Defendant was convicted on all charges and sentenced to consecutive prison terms of thirty-five to forty-two months on each trafficking offense, eleven to fourteen months on each possession and sale offense, and eight to ten months on each maintaining a dwelling offense. Defendant timely appealed.

[1] In his single argument asserting error, counsel for defendant contends the trial court improperly allowed the State to amend Count III of the indictment. The indictment erroneously alleged in Count III that the address of the dwelling where controlled substances were maintained was "919 Dollard Town Road," when the correct address was "929 Dollard Town Road," as recited in Count VIII of the indictment. Over defendant's objection, the trial court permitted Count III to be amended to reflect the correct address of 929 Dollard Town Road. We conclude the trial court committed no prejudicial error in its ruling.

"A bill of indictment may not be amended," N.C. Gen. Stat. § 15A-923(e) (1999), and is considered to have been amended if there is "any change in the indictment which would *substantially* alter the charge set forth in the indictment," *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478 (1978) (emphasis added). Thus, while " 'the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense,' " *State v. Simmons*, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817 (1982) (citation omitted), a non-essential variance is not fatal to the charged offense, *see State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). Moreover, if an indictment contains an averment unnecessary to charge the offense, such averment may be disregarded as inconsequential sur-

plusage. *See State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982).

Section 90-108 provides that it shall be unlawful for any person

> [t]o knowingly *keep or maintain* any store, shop, warehouse, dwelling house, building . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

N.C. Gen. Stat. § 90-108(a)(7) (1997) (emphasis added).

We first observe that specific designation of the address of the dwelling at issue was unnecessary to set out the offense of maintaining a dwelling in either Count III or Count VIII of the instant indictment. *See State v. Ruffin*, 90 N.C. App. 705, 708, 370 S.E.2d 275, 276 (1988) (holding that " 'variance between the allegations in the indictment and [the] proof at trial,' [is] not fatal[] so long as the location of the offense is not an element of the crime") (citation omitted). The statutory recitation of the elements of maintaining a dwelling contains no provision requiring delineation of the location of the dwelling as an element of the offense. *See id.* at 708, 370 S.E.2d at 277 (stating that although the breaking and entering of a dwelling house constitute elements of first-degree burglary, "location of the offense" is not an element of that crime). The amendment allowed by the trial court thus did not affect an averment necessary to charge the offense of maintaining a dwelling, *see Lewis*, 58 N.C. App. at 354, 293 S.E.2d at 642, and did not "substantially alter the charge set forth in the indictment," *Carrington*, 35 N.C. App. at 58, 240 S.E.2d at 478.

Further, defendant could not have been misled or surprised as to the nature of the charges against him by substitution in Count III of the indictment of 929 Dollard Town Road for 919 Dollard Town Road where Count VIII in the same indictment correctly designated 929 Dollard Town Road. By means of the amendment prior to the presentation of any evidence, defendant was accorded sufficient notice of the typographical error in Count III and of the proper address to be alleged therein. *See State v. Sisk*, 123 N.C. App. 361, 365, 473 S.E.2d 348, 351 (1996), *aff'd in part, review dismissed in part*, 345 N.C. 749, 483 S.E.2d 440 (1997); *State v. Bailey*, 97 N.C. App. 472, 475-76, 389 S.E.2d 131, 133 (1990); *State v. Marshall*, 92 N.C. App. 398, 401-02, 374 S.E.2d 874, 875-76 (1988).

In sum, the amendment in the case at bar did not substantially alter the charge; defendant was not surprised or deprived of notice of the offense. Therefore, the trial court did not err in allowing the State's pre-evidentiary motion to amend Count III of the indictment to read 929 Dollard Town Road rather than 919 Dollard Town Road.

[2] As noted above, although defendant's counsel presented argument on a single assignment of error, he also requested this Court to conduct, pursuant to *Anders*, a "full examination of the record on appeal for possible prejudicial error . . . to determine whether any justiciable issue has been overlooked." Counsel acknowledged he was "unable to identify any additional issues with sufficient merit to support meaningful argument for relief on appeal." *Anders* applies only where "counsel finds his case to be wholly frivolous, after a conscientious examination," and submits to the appellate court a brief, "referring to anything in the record that might arguably support the appeal," with the request that the court conduct an independent review to ascertain possible prejudice. *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. In addition, counsel must advise the defendant that he or she has the right to file written arguments with the appeals court, and counsel must provide the defendant with any necessary documents. *See State v. Dayberry*, 131 N.C. App. 406, 408, 507 S.E.2d 587, 589 (1998).

The combination of an argued assignment of error coupled with a request for review pursuant to *Anders* presents an inconsistent and effectively hybrid appeal that is improper and subject to dismissal by this Court. An *Anders* brief is based on the "conclusion that the appeal is *wholly* frivolous," *State v. Kinch*, 314 N.C. 99, 102, 331 S.E.2d 665, 666 (1985) (emphasis added), and that there are no issues suitable to assign as error. Accordingly, assignments of error may not be argued and then supplemented with a request for "partial" *Anders* review. Such a procedure is improper and fails to provide a basis for this Court to conduct an independent examination pursuant to *Anders*. A case may be presented either under the purview of *Anders* as containing *no* apparent issue for appeal or as a case involving one or more issues suitable for appellate review; logically and procedurally, it cannot be brought forward on appeal as both. Although defendant's appeal is thus subject to dismissal, we have elected to exercise our discretion and consider it pursuant to Rule 2.

In the case *sub judice*, defendant's counsel informed defendant by letter dated 17 November 1998 that in counsel's opinion, save for the amendment to Count III of the indictment, there was no error in

defendant's trial and that defendant had the right to file his own arguments with this Court pursuant to *Anders*. Enclosed in the letter were copies of the transcript, the record on appeal, defense counsel's brief, and the State's brief. On 19 February 1999, defendant filed written *pro se* arguments with this Court.

Defendant had no reason to know that the appeal procedure followed by his counsel would be disapproved of by this Court. In accordance with the letter counsel sent him, defendant submitted a *pro se* brief to this Court. We will therefore also consider this *pro se* brief pursuant to Rule 2. We conclude that defendant has raised a meritorious issue.

Defendant was convicted of two counts of keeping and maintaining a dwelling for the use of a controlled substance, in violation of N.C. Gen. Stat. § 90-108(a)(7). Both counts involved undercover purchases made by the same officer at the same dwelling. One offense occurred on 22 July 1997 and the other on 22 August 1997. There was also a third buy for which defendant was not charged. Defendant was convicted of both counts, and consecutive sentences were imposed.

Use of the words "keep or maintain any . . . dwelling house . . . or any place whatever," implies a process of indefinite duration, indicating that the General Assembly intended that a violation of this statute be a continuing offense. *See State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 29-30 (1994). Whether this offense is "continuing" or not is an issue of first impression in North Carolina. Although we previously have upheld convictions for multiple counts of maintaining a dwelling to keep or sell a controlled substance, the issue of the propriety of charging multiple counts was never raised. *See State v. Sanders*, 95 N.C. App. 56, 381 S.E.2d 827 (1989). Because this Court is only bound by decisions actually resolving issues raised by the parties to the appeal, *see Smith v. Nationwide Mutual Ins. Co.*, 97 N.C. App. 363, 370, 388 S.E.2d 624, 629 (1990), *rev'd on other grounds*, 328 N.C. 139, 400 S.E.2d 44 (1991); *cf. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), the duplicitous nature of multiple charges of maintaining a dwelling remains open.

Our Supreme Court has defined a continuing offense as a "breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Johnson*, 212 N.C. 566, 570, 194 S.E. 319, 322 (1937). The evidence presented in this

case showed a continuous, ongoing, and uninterrupted course of action involving this particular dwelling.

North Carolina appellate courts have held that analogous activities are continuing offenses. *See State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981) (illegal possession is a continuing offense beginning at receipt and continuing until divestment); *Johnson*, 212 N.C. 566, 194 S.E.2d 319 (willful failure to support child constitutes continuing offense); *State v. White*, 127 N.C. App. 565, 492 S.E.2d 48 (1997) (kidnaping is single continuing offense, lasting from time of initial confinement until victim regains free will); *State v. Fink*, 92 N.C. App. 523, 375 S.E.2d 303 (1989) (conspiracy continues until conspiracy is accomplished or abandoned). Likewise, other jurisdictions have held that statutes similar to section 90-108(a)(7) imply continuity of action. *See Dawson v. State*, 894 P.2d 672 (Alaska Ct. App. 1995); *People v. Vera*, 82 Cal. Rptr. 2d 128 (Cal. Ct. App. 1999); *Diaz v. State*, 740 A.2d 81 (Md. Ct. App. 1999). Moreover, if maintaining a dwelling were not a continuing offense, the State would be free, as we noted in *White*, to "divide a single act . . . into as many counts . . . as the prosecutor could devise." *White*, 127 N.C. App. at 570, 492 S.E.2d at 51. The dearth of reported North Carolina cases involving more than one count of maintaining a dwelling suggests that district attorneys tacitly recognize that the offense is ongoing and accordingly exercise restraint in drafting indictments.

There is no evidence indicating a termination and subsequent resumption of drug trafficking at this dwelling; to the contrary, the evidence shows that drugs were readily available there on request throughout the investigation. Because the offense is a continuing offense, we hold that two convictions of the statute forbidding the keeping and maintaining of a dwelling for purposes related to use, storage, or sale of controlled substances violates the constitutional prohibition against double jeopardy, *see* U.S. Const. amend. V; N.C. Const. art. 1, § 19, and remand the case to the trial court with instructions to vacate one of the convictions for maintaining a dwelling and to hold a new sentencing hearing.

Finally, we note our review of the remaining assignments of error set forth in the record on appeal or asserted in defendant's *pro se* brief reveals no other issue comprising prejudicial error.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and JOHN concur.

BRUCE COLE, EMPLOYEE/PLAINTIFF v. TRIANGLE BRICK, EMPLOYER/DEFENDANT, AND AETNA INSURANCE COMPANY, CARRIER/DEFENDANT

No. COA98-1188

(Filed 18 January 2000)

1. Workers' Compensation— employer credit—private disability insurance policy—reduction for attorney fees

The Industrial Commission did not abuse its discretion in a workers' compensation case by reducing defendant-employer's credit by twenty-five percent for payments made under a private disability insurance policy fully funded by defendant Triangle Brick in order to provide plaintiff an award of attorney fees because a previous panel of the Court of Appeals has already upheld this same issue in a different case and subsequent panels are bound by that precedent since it has not been overturned by a higher court.

2. Workers' Compensation— attorney fees—amount—discretion of Commission

The Industrial Commission did not abuse its discretion by modifying the deputy commissioner's original award of attorney fees based on only part of plaintiff's total workers' compensation award, while the Full Commission granted plaintiff's request that attorney fees be calculated on the total award, because the award was within the Full Commission's authority to approve fee payments pursuant to N.C.G.S. § 97-90(c).

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 20 April 1998. Heard in the Court of Appeals 19 August 1999.

Lore & McClearen, by R. Edwin McClearen, for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by Virginia G. Adams, for defendants-appellants.

JOHN, Judge.

Defendants appeal an Opinion and Award of the North Carolina Industrial Commission (the Commission) reducing by twenty-five percent defendants' credit for payments made under a disability

insurance policy fully funded by defendant Triangle Brick (Triangle). We affirm the Commission.

Pertinent facts and procedural history include the following: Plaintiff Bruce Cole's "history of intermittent lower back problems" was aggravated by the demands of his position with Triangle. While working, plaintiff reinjured his lower back 25 November 1994 and 31 March 1995, and subsequently filed a workers' compensation claim. During pendency of the claim, plaintiff received long-term disability payments from Paul Revere Insurance Company (the Revere payments) under a policy fully funded by Triangle (the Revere policy) from 31 March 1995 until 1 April 1997.

Plaintiff's claim was disputed by defendant Aetna Insurance Company, Triangle's insurer. Following a 25 September 1996 hearing, the Deputy Commissioner issued an Opinion and Award generally favorable to plaintiff on 22 April 1997. The case was subsequently reviewed on appeal by the Full Commission which entered a modified Opinion and Award 20 April 1998. The Commission in the main affirmed the Deputy Commissioner's earlier decision, but modified portions thereof related to awarding of a credit to defendants and of counsel fees to plaintiff.

[1] In its Opinion and Award, the Commission concluded as a matter of law that:

> 3. Defendant-employer shall receive a credit for the private, fully employer-funded benefits paid to plaintiff through Paul Revere Insurance Company, less twenty-five percent attorneys fees to be paid to the [plaintiff's counsel] for collecting reimbursement of the same from the worker's compensation carrier.

The Commission thereupon ordered:

> 2. Plaintiff's request that attorneys fees be calculated on the total award and allowing the defendants a credit for payments made after March 31, 1995 through a fully employer-funded private disability policy, less a twenty-five percent attorney's fee to be paid to [plaintiff's counsel] . . . is HEREBY ALLOWED.
>
> 3. Defendant-employer shall receive a credit for the fully employer-funded private disability benefits paid to plaintiff, less a twenty-five percent attorney's fee to be paid to [plaintiff's counsel] . . . . The weekly difference between what was paid to plaintiff and what was owed to plaintiff of $84.00 a week shall

> be paid to plaintiff in a lump sum subject to the attorneys fees approved below.
>
> 4. A reasonable attorney's fee of twenty-five percent of the total compensation awarded to plaintiff after March 31, 1995 . . . is approved for plaintiff's counsel and shall be paid as follows: twenty-five percent of the dollar for dollar credit allowed the defendant from and after March 31, 1995 shall be paid to the plaintiff's counsel for so long as the defendants claim a credit for benefits paid the plaintiff from a fully employer-funded private disability insurance policy; thereafter, twenty-five percent of any compensation paid by the workers' compensation carrier to the plaintiff shall be deducted and paid directly to counsel for the plaintiff.
>
> Defendants timely appealed, assigning error to the
>
> Full Commission's Conclusions of Law 3 and Awards 2, 3, and 4 on the grounds that the reduction of defendants' credit by 25% to provide plaintiff's counsel additional fees is not supported by law.

N.C.G.S. § 97-42 (Supp. 1998)[1] governs allocation of credit for payments made under private disability plans such as the Revere policy.

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. . . .

G.S. § 97-42.

Defendants cite *Evans v. AT&T Technologies*, 332 N.C. 78, 418 S.E.2d 503 (1992) as precluding reduction by the Commission of defendants' credit for the Revere payments. However, we believe the instant case is controlled by our decision in *Church v. Baxter Travenol Laboratories*, 104 N.C. App. 411, 409 S.E.2d 715 (1991). As in the case *sub judice*, the Commission in *Church* credited the employer for amounts paid the employee under a disability insurance plan, but reduced that credit by twenty-five percent "to fund [plaintiff's] attorney's fees." *Id.* at 416, 409 S.E.2d at 718. In upholding the Commission, the Court noted that G.S. § 97-42

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1. G.S. § 97-42 was amended effective 1 September 1994 and applicable to all claims pending on or filed after that date. 1993 N.C. Sess. Laws (Reg. Sess., 1994) ch. 579, §§ 3.7, 11.1. No amendments have been enacted since.

> dictates that any payments made by an employer to the injured employee during the period of her disability which were not due and payable when made, may, *subject to the approval* of the Industrial Commission, be deducted from the amount to be paid as workers' compensation. . . .
>
> . . . .
>
> The Commission's award in its discretion of a 75% credit to defendant for payments made through its private insurer and the award of the remaining 25% to plaintiff to fund attorney's fees based upon the full workers' compensation award is well within the Commission's discretionary authority. . . .

Id. at 416, 409 S.E.2d at 717-18.

Where a panel of this Court "has decided the same issue, albeit in a different case, a subsequent panel is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Since the identical issue, *i.e.*, reduction of defendants' credit by 25% to provide counsel fees, is presented herein, we are bound by *Church* unless that decision has been overruled.

In that regard, defendants maintain that the decision of our Supreme Court in *Evans* implicitly overruled *Church*. We conclude otherwise.

At issue, *inter alia*, in *Evans* was the method of calculating an employer's credit for payments made to an employee under a disability plan, the employer claiming "dollar-for-dollar credit" and the employee a "week-for-week credit." *Evans*, 332 N.C. at 81-83, 418 S.E.2d at 506. The Court adopted the former approach, holding that "*all* payments made by an employer on account of its employee's disability," not due and payable within the meaning of G.S. § 97-42 when made, "*may* be deducted from the employee's workers' compensation award." *Id.* at 83, 418 S.E.2d at 507 (second emphasis added).

The discretionary nature of the credit was highlighted throughout the opinion: "*subject to approval by the Industrial Commission*," payments "not due and payable when made may be deducted from the employee's workers' compensation award." *Id.* (emphasis added); *see also id.* at 86, 418 S.E.2d at 509 ("[w]e conclude that the ordinary meaning of the language of [G.S. § 97-42] allows an employer, *subject to Commission approval*, to receive a full dollar-for-dollar credit")

(emphasis added); *id.* at 88, 418 S.E.2d at 509-10 ("the statute must be interpreted to mean that the amount of the deduction to which an employer, *subject to the approval of the Commission*, is entitled under [G.S. § 97-42] is the amount of the gross before-tax payments") (emphasis added).

Accordingly, *Evans* stands for the proposition that all payments by employers to employees under a disability insurance policy, not due and payable when made, qualify for credit to the employer under G.S. § 97-42; however, the full amount of credit may be reduced in the discretion of the Commission. *See id.* at 85, 418 S.E.2d at 508 ("subject to the Commission's approval, employers [must receive full] credit under [G.S. § 97-42] for all payments made under a voluntary sickness and accident disability plan . . . so long as such payments were not 'due and payable when made' "); *see also Foster v. Western-Electric Co.*, 320 N.C. 113, 116, 357 S.E.2d 670, 672 (1987) (payments not due and payable when made "remain within the purview of [G.S. § 97-42, which section] . . . cannot be read to exclude deduction of the payments" made pursuant to a proper disability insurance plan); and *Church*, 104 N.C. App. at 416, 409 S.E.2d at 717 ("*Foster* recognized that the Commission must not make a complete denial of the credit to the employer").

In both *Church* and the case *sub judice*, the Commission acknowledged the full extent of the employer's payments under a disability insurance plan, but elected, in its discretion, to reduce the allowable credit in order to provide plaintiff an award of counsel fees. By contrast, in *Evans* and *Foster*, also relied upon by defendants, awards were reversed which failed to recognize the full extent of payments made under a disability plan. *See Evans*, 332 N.C. at 83, 418 S.E.2d at 506 (Court of Appeals credit on "week-for-week" basis failed to take into account full measure of payments made to employee); *Foster*, 320 N.C. at 116-17, 357 S.E.2d at 672 (Commission and Court of Appeals misinterpreted law by excluding payments not due and payable when made from eligibility for credit under G.S. § 97-42). *Church* therefore has not been overruled by *Evans* and this Court is bound by its precedent. *Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

[2] However, defendants contend that "[e]ven if *Church* is controlling . . . the Full Commission abused its discretion" by modifying the Deputy Commissioner's original award, thereby further "reducing the defendants' credit." The Deputy Commissioner based his award of attorney's fees on only part of plaintiff's total workers' compensation

award, while the Full Commission granted "[p]laintiff's request that attorneys fees be calculated on the total award." We perceive no abuse of discretion by the Commission.

In *Church*, this Court observed that

> [t]he Commission's award in its discretion of a 75% credit to defendant for payments made through its private insurer and the award of the remaining 25% to plaintiff to fund attorney's fees based upon the *full workers' compensation award* is well within the Commission's discretionary authority . . . and the award was within the Commission's authority to approve fee payments pursuant to [N.C.G.S. § 97-90(c) (Supp. 1998)[2]].

Church, 104 N.C. App. at 416-17, 409 S.E.2d at 718 (emphasis added).

G.S. § 97-90(c) states that

> [i]f an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the . . . Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the . . . Commission shall approve it at the time of rendering decision.

The record on appeal in the instant case contains no copy of a fee award filed with the Commission. However, the Commission's Opinion and Award provides that "[p]laintiff's *request* that attorneys fees be calculated [as twenty-five percent of] the total award . . . is HEREBY ALLOWED" (emphasis added), thus suggesting approval of a fee agreement was indeed sought from the Commission.

Further, the Opinion and Award also directs that a "*reasonable* attorney's fee of twenty-five percent of the total compensation awarded to plaintiff . . . is approved" (emphasis added), indicating the Commission determined a fee agreement for twenty-five percent of the total award was "not . . . unreasonable" pursuant to G.S. § 97-90(c). As in *Church*, "the award was within the Commission's authority to approve fee payments pursuant to G.S. [§] 97-90(c)," *Church*, 104 N.C. App. at 416-17, 409 S.E.2d at 718, and did not constitute an abuse of discretion.

Finally, we decline to address several issues raised by the plaintiff in his appellate brief that were neither assigned as cross-

2. G.S. § 97-90(c) was amended effective 5 July 1994. 1993 N.C. Sess. Laws (Reg. Sess., 1994) ch. 579, §§ 9.1, 11.1. No subsequent amendments have been enacted.

assignments of error nor raised in the proceedings below. *See* N.C.R. App. P. 10(a),(d) and 28(c) (scope of appellate review limited "to a consideration of those assignments of error set out in the record on appeal;" without taking an appeal, "appellee may cross-assign as error any action or omission of the trial court . . . properly preserved for appellate review;" without taking an appeal, "appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d)").

Affirmed.

Judges WYNN and EDMUNDS concur.

SUSAN POPE HOWELL; AND BRANCH FUNERAL HOMES, INC., PLAINTIFF-APPELLANTS v. FARIS SYKES; AND WATSON N. SHERROD, JR., EXECUTOR OF THE ESTATE OF SUSAN H. BRANCH, DEFENDANT-APPELLEES

No. COA98-1465

(Filed 18 January 2000)

Wills— stock—charge upon shares—continuing payment for life—intent of testatrix

In order to give effect to testatrix's intent, the trial court did not err in granting summary judgment in favor of defendant Sykes and declaring that the language of article three of testatrix's will imposes a charge upon any shares of stock of plaintiff Branch Funeral Homes taken by plaintiff Howell thereunder for continuing payment to defendant Sykes for the remainder of his natural life of the amount of the annual salary he was receiving from plaintiff Branch Funeral Homes and of the amount of life insurance premiums upon his life, because testatrix made her bequest of stock to plaintiff Howell "subject to" her oral agreement with defendant Sykes.

Appeal by plaintiffs from judgment entered 18 September 1998 by Judge Quentin T. Sumner in Halifax County Superior Court. Heard in the Court of Appeals 14 September 1999.

Nicholls & Crampton, P.A., by W. Sidney Aldridge, for plaintiff-appellant Branch Funeral Homes, Inc.

Kilpatrick Stockton, by Carl W. Hibbert, for plaintiff-appellant, Susan Howell.

Poyner & Spruill, L.L.P., by Charles T. Lane and Gregory S. Camp, for defendant-appellee Faris Sykes.

MARTIN, Judge.

Susan H. Branch died on 30 September 1995, leaving a will which was admitted to probate in Halifax County, North Carolina. Watson N. Sherrod, Jr., qualified as executor under the will. At the time of her death, Mrs. Branch was the owner of all of the outstanding shares of stock of Branch Funeral Homes, Inc., (BFHI), a corporation which operated funeral homes in Enfield, Roanoke Rapids and Scotland Neck. On 30 September 1995, Faris Sykes, Jr., was employed by BFHI as manager of funeral home operations.

The primary beneficiaries of Mrs. Branch's will were her nieces, Susan Pope Howell and Dayne Carlton Howell. Mrs. Branch devised several parcels of real estate used by BFHI, as well as several other parcels of real estate, to Susan Howell; she devised a farm and several houses, apartments and lots to Dayne Carlton Howell. In Article Three of her will, Mrs. Branch provided:

> I hereby will, give, bequeath and devise to my niece, Susan Pope Howell, all shares of stock in Branch Funeral Homes, Inc., subject to the oral agreement made by me with Faris Sykes, Jr., as follows: That the said Branch Funeral Homes, Inc. shall pay unto Faris Sykes, Jr., for the remainder of his natural life, the amount of annual salary he is currently receiving at the time of my death, and the amount of life insurance premiums upon his life which are currently being paid at the time of my death. This devise in this Article is subject to compliance with the aforesaid agreement.

By Article Nine of the will, Mrs. Branch bequeathed Dayne Carlton Howell stock and securities in Sprint United Telephone and Telegraph Company in an amount equal to $650,000 in value, and, in Article Ten, directed that the remainder, if any, of her Sprint United Telephone stock be given to the two nieces in equal shares. After making other specific devises and bequests to family members, friends, employees, and her church, Mrs. Branch provided, in Article Sixteen, that her

residuary estate be divided equally between Susan Howell and Dayne Carlton Howell.

Susan Howell and BFHI brought this action seeking a declaratory judgment pursuant to G.S. § 1-253 *et seq.* determining their rights under Article Three of the will. Plaintiffs contended the language making the bequest subject to the requirement that BFHI pay a salary and benefits to Faris Sykes, Jr., is unenforceable and void, and that Susan Howell should receive the stock of BFHI free of any charge, encumbrance or condition. Defendants answered, joining in the prayer for a declaratory judgment; defendant Sykes contended the language of Article Three created a legacy in his favor and a charge upon the shares of stock bequeathed to Susan Howell.

The trial court granted summary judgment in favor of defendant Sykes, declaring that the language of Article Three:

> imposes a charge upon any shares of stock of Plaintiff Branch Funeral Homes, Inc. taken by Plaintiff Susan Pope Howell thereunder for the continuing payment to Defendant Faris Sykes, for the remainder of his natural life, of the amount of the annual salary he was receiving from [Plaintiff] Branch Funeral Homes, Inc. at the time of the death of Susan H. Branch on September 30, 1995, and of the amount of life insurance premiums upon his life which were being paid at the time of the death of Susan H. Branch on September 30, 1995.

Plaintiffs appealed.

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). There are no disputed issues of material fact in this case, plaintiffs' assignments of error to the entry of summary judgment in favor of defendant Sykes are based upon issues of law, rather than the existence of any genuine issues of material fact. Thus, this case is an appropriate one for application of Rule 56. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971) (summary judgment rule applicable where controversy involves only a question of law arising on undisputed facts); *Early v. Bowen*, 116 N.C. App. 206, 447 S.E.2d 167 (1994), *disc. review denied*, 339 N.C. 611, 454 S.E.2d 249 (1995) (summary judgment is appropriate in a declaratory judgment action

where no facts are in dispute and a party is entitled to judgment as a matter of law).

In interpreting the will provision at issue in this case, as in construing any will, the primary duty of the court is to determine the intent of the testatrix and to give effect to that intent if it is not in contravention of established law or public policy. *Joyner v. Duncan*, 299 N.C. 565, 264 S.E.2d 76 (1980); *Early v. Bowen*, *supra*. The intent of the testatrix is determined from a consideration of the entire instrument, *id.;* and the court should search for a meaning which would uphold the will in its entirety, rather than one which would nullify any part of the will or bequest, if such a meaning is consistent with the law and the intent of the testatrix. *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E.2d 327 (1950). Where a devise or bequest would be invalid or unlawful under one construction, but would be valid under a different interpretation, the latter must prevail because it is presumed the testatrix intended a valid disposition of her property. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963).

A consideration of Mrs. Branch's will in its entirety clearly reveals her intent in providing for the disposition of her estate. The primary objects of her bounty were her two nieces, Susan Howell and Dayne Carlton Howell, and she intended to provide for them on essentially equal terms. In addition, she made provisions for other relatives, friends, her church, for her personal employees, and for those employees of BFHI who had been so employed for more than 180 days at the time of her death. Consistent with these provisions, it is obvious that by the language contained in Article Three of her will, Mrs. Branch intended to provide support for defendant Sykes for the remainder of his life and to fasten such support to the bequest of stock in BFHI to plaintiff Howell. Thus, the issue for decision is whether Mrs. Branch's intent, as clearly expressed in Article III, may be given effect without contravening law or public policy.

Plaintiffs vigorously argue the condition placed upon the bequest of BFHI stock is unlawful and violates public policy because it requires BFHI to pay Sykes, even though he is no longer employed, and the corporation receives no benefit in return for the payment. Citing well-established statutory and decisional law, plaintiffs contend that to satisfy the condition, Susan Howell, as the sole shareholder and presumably a director of BFHI, must vote to cause the corporation to make the payments to Sykes and, in so doing, violate her fiduciary duty as a director to act in the best interests of the corporation and its creditors. *See* N.C. Gen. Stat. § 55-8-30 (General

Standards for Directors); *Underwood v. Stafford*, 270 N.C. 700, 155 S.E.2d 211 (1967); *McIver v. Young Hardware Co.*, 144 N.C. 478, 57 S.E. 169 (1907); *Meiselman v. Meiselman*, 58 N.C. App. 758, 295 S.E.2d 249 (1982), *modified and affirmed*, 309 N.C. 279, 307 S.E.2d 551 (1983) (directors occupy fiduciary relation in respect to shareholders and creditors).

Plaintiffs also argue that the condition of payment to Sykes is not a valid condition subsequent, a breach of which would defeat the devise, (1) because it does not contain a clear and unambiguous expression of termination of the devise upon a breach of the condition, *see Station Associates, Inc. v. Dare County*, 350 N.C. 367, 513 S.E.2d 789, *reh'g denied*, 350 N.C. 600, — S.E.2d — (1999), and (2) because the condition is contrary to law and public policy for the reasons previously argued. Conditions subsequent are not favored and are strictly construed; there must be clear and unambiguous indication of intent of forfeiture of the estate granted upon a breach of the condition. *See Lassiter v. Jones*, 215 N.C. 298, 1 S.E.2d 845 (1939); *Hall v. Quinn*, 190 N.C. 326, 130 S.E. 18 (1925). We need not decide whether the language used by Mrs. Branch was sufficient to create a valid condition subsequent, however, because the trial court did not interpret Article Three as such and made no order that the bequest of stock to Susan Howell would be forfeited in the event she failed to make the required payments to Sykes.

Plaintiffs' arguments with respect to a potential conflict between the duties owed by Susan Howell and other directors to BHFI and its creditors, and the obligation to cause the corporation to make payments to Sykes in accordance with Article Three, would have merit had the trial court interpreted Article Three to require that BFHI provide lifetime support and benefits to Sykes, as such an interpretation would have placed an impermissible restraint upon BFHI's directors and would be arguably *ultra vires*. *See Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A.2d 295 (1952). (corporation's voluntary payments for past services to former employee, which it had no legal duty to pay, were *ultra vires* and illegal). However, in this case, the trial court imposed no such duty upon BFHI and, following the rule that a court should search for a meaning which would give effect to, rather than nullify, the intent of the testator, construed Article Three as "impos[ing] a charge" upon the shares bequeathed to Susan Howell for the payments to Sykes.

"The question of a charge usually arises where the testator devises property to one who, under the terms of the will, is directed

to make payments to, or to support, another." Wiggins, *Wills and Administration of Estates in North Carolina*, (2d Ed.) § 142. "A provision in a will that a devisee shall support a named person is perfectly reasonable and consistent with the policy of the law, and is constantly upheld." *Moore v. Tilley*, 15 N.C. App. 378, 381, 190 S.E.2d 243, 246, *cert. denied*, 282 N.C. 153, 191 S.E.2d 758 (1972). In most cases, such provisions for support are construed as constituting an equitable charge upon the property with the property standing as security for the support provision. *Id.* We believe such a construction is particularly apt where there is no clear provision for forfeiture in the event of noncompliance.

In ascertaining the testatrix's intent, it is permissible for the trial court to supply, or even reject, words or phrases used in the will in order to effectuate that intent. *Entwistle v. Covington*, 250 N.C. 315, 108 S.E.2d 603 (1959); *Coppedge v. Coppedge*, 234 N.C. 173, 66 S.E.2d 777, *reh'g denied*, 234 N.C. 747, 67 S.E.2d 463 (1951). "In performing the office of construction, the Court may reject, supply or transpose words and phrases in order to ascertain the correct meaning and to prevent the real intention of the testator from being rendered aborted by his inept use of language." *Sutton v. Quinerly*, 231 N.C. 669, 679, 58 S.E.2d 709, 715-16 (1950) (quoting *Gordon v. Ehringhaus*, 190 N.C. 147, 150, 129 S.E. 187, 189 (1925)). In Article Three of her will, Mrs. Branch recited that she had made an oral agreement with Sykes that BFHI would pay his salary and insurance premium, and that her devise of the corporation's stock was subject to compliance with that agreement. As the sole shareholder of BFHI, it is apparent that Mrs. Branch considered herself and the corporation to be the same, and that the corporation's obligation of support for Sykes as agreed to by her was her obligation as well. She made her bequest of stock to Susan Howell "subject to" her agreement, clearly indicating her intent that the stock stand as security for the obligation. In order to give effect to her clear intent, it was appropriate for the trial court to construe the language as imposing upon Susan Howell, as sole shareholder of BFHI as a result of the bequest, the same obligation of support as Mrs. Branch had imposed upon herself. Thus, the provision is properly construed as a charge upon the shares taken by Susan Howell to make the required payments, and Sykes would be entitled to enforce his rights to such payments against the shares in the event of nonpayment.

The judgment of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. DAVID DEESE

No. COA99-74

(Filed 18 January 2000)

1. Confessions and Incriminating Statements— second-degree murder—motion to suppress

The trial court did not err in a second-degree murder case by denying defendant's motions to suppress his 2 August 1995 and 7 August 1995 statements to law enforcement officers because the officers were not required to give defendant Miranda warnings since defendant was not in custody on either occasion when he made the statements, and the statements were voluntarily and knowingly made, as evidenced by the facts that: (1) defendant was permitted to arrange the first interview at a time convenient to him and at his request, and the officers provided transportation from his residence to the courthouse and back; (2) defendant was told on both occasions that he was not under arrest, that he was free to leave at anytime, and that he would be driven home upon request; (3) defendant was not restrained in any manner and he was left alone in an open room during the first interview; (4) defendant was neither coerced nor threatened; and (5) defendant was cooperative at all times, demonstrating for the officers the manner in which the victim was killed and even agreeing at one point to wear a wire in an unsuccessful attempt to elicit incriminating statement from two co-participants.

2. Evidence— prior bad acts—State witness—juvenile adjudication—fair determination of guilt or innocence

The trial court did not abuse its discretion in a second-degree murder case by excluding evidence of a State witness's prior bad acts concerning her juvenile adjudication of guilt of involuntary manslaughter in South Carolina, even though defendant sought to use it to impeach the witness, because the trial court concluded that defendant had not satisfied the court that the admission of

this evidence was necessary to a fair determination of defendant's guilt or innocence under N.C.G.S. § 8C-1, Rule 609.

3. Evidence— prior bad acts—State witness—cutting victim after alcohol and drug use—not sufficiently similar

The trial court did not abuse its discretion in a second-degree murder case by excluding evidence of a State witness's prior bad acts concerning an incident in which the witness and her brother had cut a third person with a broken bottle, even though defendant sought to use it under N.C.G.S. § 8C-1, Rule 404(b) to show a common plan or scheme in order to point to the witness as the perpetrator rather than defendant, because: (1) evidence offered to show the guilt of someone other than defendant must, to be relevant, do more than create an inference; (2) there were no similarities shown or contended by defendant, other than the occurrence of a cutting after an episode of alcohol and drug use at which the witness was present; and (3) defendant's own statements acknowledge his presence at the scene of the crime and corroborate the witness's testimony that she remained inside the car and had no involvement in the attack.

4. Appeal and Error— preservation of issues—constitutional issues—failure to raise in trial court

Although defendant in a second-degree murder case contends the trial court's exclusion of evidence violated his Sixth Amendment right to confront his accusers and present a defense, this constitutional argument is not considered because it was neither asserted nor determined in the trial court.

On writ of certiorari to review the judgment entered 28 March 1996 by Judge William C. Gore, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 17 November 1999.

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

Nora Henry Hargrove for defendant-appellant.

MARTIN, Judge.

On 28 March 1996, defendant was convicted of second degree murder in connection with the death of Carolyn Ruth Clarida on 10 July 1995. He gave notice of appeal from the judgment entered upon his conviction but his right to appeal was lost by the failure of his

then counsel to timely perfect the appeal. We allowed his petition for writ of certiorari pursuant to N.C.R. App. P. 21 by order dated 25 August 1998 and his present counsel was subsequently appointed.

Briefly summarized, the State's evidence at trial tended to show that on the evening of 10 July 1995, defendant, Ms. Clarida, Katrina Jackson, Jimmy Carlson, Tom Reaves, and Reaves' stepson, Billy, were at Reaves' home drinking liquor and beer and smoking crack cocaine. During the course of the evening, Carlson and defendant sought sex from Ms. Clarida; she refused their requests. The group left Reaves' house, with Reaves driving, and went to a convenience store to get more beer. Reaves then drove to an area known as the Big Bay where he stopped the car. Reaves, Carlson, defendant, and Ms. Clarida got out of the car. The men continued their efforts to have sex with Ms. Clarida. When she continued to refuse, Carlson, Reaves, and defendant began pulling at her clothes, touching her body, slapping her, and kicking her. Katrina Jackson, who had remained in the car, testified that Ms. Clarida was asking for help, but Ms. Jackson did not help her because she was afraid. Ms. Jackson testified that Reaves got a knife out of the car, that both Carlson and defendant stabbed Ms. Clarida, and that Reaves cut her throat. While she was still moaning, the three men threw her toward the woods into a ditch. The men got into the car, where Ms. Jackson pretended to be "drunk asleep;" she noticed blood on Reaves and defendant. The group returned to Reaves' house. Ms. Clarida's body was discovered by a truck driver the following afternoon. A medical examiner testified the cause of her death was the wound to her neck, although there were seven potentially fatal wounds to her body.

On 2 August 1995, defendant was interviewed by Agents West, Warner and Williams of the State Bureau of Investigation. Defendant, who was not under arrest at the time, gave a statement in which he acknowledged having seen Reaves and Carlson hitting and stabbing Ms. Clarida, but he denied having taken part in the attack. He was returned to his home by Agent Warner after the interview.

On 7 August 1995, Agents Warner and Williams interviewed defendant again and he gave a second statement in which he indicated that Reaves had cut Ms. Clarida's throat while Carlson held her. He accompanied the officers to the crime scene and demonstrated how Ms. Clarida had been killed. The agents took defendant home after the interview. A warrant for his arrest was issued on 9 August 1995.

Defendant offered evidence of alibi, as well as evidence that other persons had motives to kill Ms. Clarida, including her husband, Wellish Clarida, and her boyfriend, Terry Garrell, who was the father of two of her children. In addition, defendant offered the testimony of several truck drivers who had driven along the road where Ms. Clarida's body was found, but had not seen the body earlier in the day when they had passed the place where it was found. He also offered medical testimony with respect to the condition of Ms. Clarida's body when it was found, suggesting that it had been moved from one place to another before it was found.

Defendant brings forward assignments of error relating to the denial of his motions to suppress his 2 August 1995 and 7 August 1995 statements and the trial court's exclusion of evidence of prior bad acts by the State's witness, Katrina Jackson. The remaining assignments of error set forth in the record on appeal are deemed abandoned, as they are neither presented nor discussed in defendant's brief. N.C.R. App. P. 28(a), 28(b)(5). We find no error.

I.

[1] Prior to trial, defendant filed a motion to suppress, *inter alia*, evidence of the statements which he made to law enforcement officers on 2 August 1995 and 7 August 1995. He assigns error to the denial of the motion and to the admission of the statements into evidence, arguing he was not advised of his constitutional rights against self-incrimination and to counsel, as explained by the United States Supreme Court in the landmark decision of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). It is well-established that *Miranda* warnings are required only where a defendant is subjected to a custodial interrogation. *State v. McNeill*, 349 N.C. 634, 509 S.E.2d 415 (1998), *cert. denied*, 120 S.Ct. 102 (1999).

After hearing evidence upon defendant's motion to suppress, the trial court made extensive findings of fact which included findings that defendant was initially approached by a Columbus County detective on the evening of 2 August 1995 at a grocery store in Tabor City and was told that officers wished to speak with him in connection with a murder investigation. Defendant agreed to speak with the officers but requested to do so at a later time if the officers would pick him up at his house after he took his groceries home. The detective related the information to SBI Agents West, Warner and Williams, who went to defendant's residence later that evening. Defendant

accompanied the agents to the Tabor City courthouse. He was told that he was not under arrest, that he was free to leave at any time, and that he would be returned to his home. At one point during the interview, the agents left the interview room to use the bathroom, leaving the defendant alone with the door open. After the agents had completed their business with defendant, he was taken to his home.

On 7 August, the officers went to defendant's residence and requested to speak with him further about the investigation. He was told that he was not under arrest, and he agreed to accompany the officers to the Tabor City police station and then to the scene of the crime. The officers returned defendant to his home after approximately two hours.

From those findings, the trial court concluded the officers were not required to give defendant *Miranda* warnings because defendant was not in custody on either occasion when he made the statements to the officers. The trial court further concluded the statements were voluntarily and knowingly made.

A trial court's findings of fact made after a *voir dire* hearing are conclusive on appeal if the findings are supported by competent evidence in the record, even if there is conflicting evidence which would support contrary findings. *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992). Whether a defendant is in custody for the purposes of *Miranda* is, however, a legal question which is fully reviewable on appeal. *Id.*; *State v. Hall*, 131 N.C. App. 427, 508 S.E.2d 8 (1998), *affirmed*, 350 N.C. 303, 513 S.E.2d 561 (1999).

The test for whether a person is in custody for *Miranda* purposes is whether, under the facts and circumstances then existing, "a reasonable person in the suspect's position would feel free to leave or compelled to stay." *McNeill* at 644, 509 S.E.2d at 421; *Torres* at 525, 412 S.E.2d at 24; *State v. Campbell*, 133 N.C. App. 531, 536, 515 S.E.2d 732, 736, *disc. review denied*, 351 N.C. 111, — S.E.2d — (1999). "Miranda warnings are not required simply because the questioning takes place in the police station or other 'coercive environment' or because the questioned person is one whom the police suspect of criminal activity." *Campbell*, 133 N.C. App. at 536, 515 S.E.2d at 736 (citing *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed.2d 714, (1977)).

In this case, defendant was permitted to arrange the first interview at a time convenient to him; at his request, the officers provided

transportation from his residence to the courthouse and back. Defendant was told on both occasions that he was not under arrest, that he was free to leave at any time, and that he would be driven home upon request. He was not restrained in any manner; in fact, he was left alone in an open room during the first interview. He was neither coerced nor threatened. Defendant was cooperative at all times, demonstrating for the officers the manner in which the victim was killed and even agreeing at one point to wear a body wire in an unsuccessful attempt to elicit incriminating statements from Reaves and Carlson. Considering the totality of the circumstances, we agree with the trial court's conclusion that defendant was not in custody on either occasion when he made statements to law enforcement officers and we find no error in the denial of his motion to suppress those statements. *See State v. Martin*, 294 N.C. 702, 242 S.E.2d 762 (1978); *State v. Blackman*, 93 N.C. App. 207, 377 S.E.2d 290 (1989).

II.

[2] The State filed a pre-trial motion *in limine* to prohibit defendant from cross-examining the State's witness, Katrina Jackson, concerning her juvenile adjudication of guilt of involuntary manslaughter in South Carolina, or from presenting other evidence with respect to the adjudication. The trial court allowed the motion and defendant assigns error.

At trial, defendant contended the evidence was admissible pursuant to Rule 609 to impeach Ms. Jackson's credibility, though he argued, in addition, that the fact that both victims died as a result of stab wounds somehow rendered the evidence relevant. G.S. § 8C-1, Rule 609, as effective at the time of defendant's trial, provided in pertinent part:

> (a) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination of thereafter.
>
> . . .
>
> (d) Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to

> attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

N.C. Gen. Stat. § 8C-1, Rule 609(a) and (d). The decision whether the "evidence is necessary for a fair determination of the issue of guilt or innocence" is within the sound discretion of the trial court. *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989). After hearing the motion in limine in this case, the trial court concluded that defendant had not satisfied the court that the admission of evidence concerning Ms. Jackson's juvenile adjudication of involuntary manslaughter was necessary to a fair determination of defendant's guilt or innocence, essentially a determination that the evidence was not relevant. Defendant has shown no abuse of discretion in the trial court's ruling to exclude irrelevant evidence, and we find none.

[3] Subsequently, during his cross-examination of Ms. Jackson, defendant again sought to question her with respect to the juvenile adjudication and, in addition, with respect to an incident in which Ms. Jackson and her brother had cut a third person with a broken bottle. Defendant argued the evidence was relevant, pursuant to G.S. § 8C-1, Rule 404(b), to show "a common plan or scheme . . . [to] get a knife or bottle, or whatever, and cut somebody after drinking and drugs are involved," in order to show that Katrina Jackson was the perpetrator rather than defendant. In his brief, defendant continues to argue the evidence was relevant to show that someone other than defendant, perhaps even Ms. Jackson, had committed the offense.

Evidence offered to show the guilt of someone other than the defendant must, to be relevant, do more than create an inference; it must point directly to the guilt of the other party. *State v. Hamilton*, 351 N.C. 14, 519 S.E.2d 514 (1999). Where such evidence is offered to show the identity of the perpetrator, the *modus operandi* must be similar enough to make it likely that the same person committed both crimes. *Id.* Here, there were no similarities shown or contended by defendant other than the occurrence of a cutting after an episode of alcohol and drug use at which Katrina Jackson was present, creating no more than a very speculative inference of Ms. Jackson's involvement in the attack upon Ms. Clarida. Moreover, defendant's own statements acknowledge his presence at the scene of the crime and corroborate Ms. Jackson's testimony that she remained inside the car and had no involvement in the attack. Thus, we find no abuse of discretion in the trial court's exclusion of the evidence.

[4] Finally, defendant argues the trial court's exclusion of the evidence violated his Sixth Amendment right to confront his accusers and present a defense. We do not consider his constitutional argument because it was neither asserted nor determined in the trial court. *State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999); *State v. Duncan*, 75 N.C. App. 38, 330 S.E.2d 481, *disc. review denied*, 314 N.C. 544, 335 S.E.2d 317 (1985).

Defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WYNN concur.

NANCY ELIZABETH BROWNING, PLAINTIFF v. ERIC LANDERS HELFF, DEFENDANT

No. COA98-1298

(Filed 18 January 2000)

Child Support, Custody, and Visitation— visitation—modification—cohabitation

A child visitation order was remanded for further findings where the court modified defendant's visitation privileges upon findings that he was residing with a person of the opposite gender to whom he was not married, but did not make findings as to the effect upon the welfare of the children.

Appeal by defendant from judgment entered 7 July 1998 by Judge Anne B. Salisbury in Wake County District Court. Heard in the Court of Appeals 4 October 1999.

Edward P. Hausle, P.A., for plaintiff appellee.

Brady, Schilawski & Ingram, P.L.L.C., by Michael F. Schilawski for defendant appellant.

TIMMONS-GOODSON, Judge.

Eric Landers Helff ("defendant") and Nancy Elizabeth Browning ("plaintiff") were married and had two children, ages five and seven,

at the time of the hearing in issue. The parties separated in January of 1996 and divorced in May of 1997. Defendant appeals from an order by the trial court modifying his child visitation privileges. Specifically, the trial court ordered that "Defendant shall not have any person of the opposite gender, not related by blood or marriage, staying with him after midnight when the minor children are in his physical custody and control, whether at his residence or at any other location."

On 12 March 1997, the parties tendered a Memorandum of Order ("Memorandum") to the Wake County District Court which outlined the terms of their separation. The Memorandum was entered as the final order on 15 January 1998, *nunc pro tunc* to 12 March 1997. In pertinent part, the Memorandum stated that "Plaintiff and Defendant shall share the joint legal care, custody and control of the minor children" and that "the Plaintiff shall have the primary physical custody of said minor children, subject to the Defendant's rights of reasonable visitation." On the face of the Memorandum, the parties crossed out a provision which stated, "The parties agree not to cohabitate with members of the opposite sex to whom they are not related while the children are in their home."

Subsequently, plaintiff filed a Motion in the Cause seeking modification of defendant's visitation privileges. Plaintiff alleged a substantial change of circumstances had occurred since the entry of the Memorandum. Specifically, plaintiff contended she had discovered that defendant "resides with a person of the opposite gender to whom he is not related by blood or marriage[,]" and that "[t]he minor children should not be exposed to the Defendant's cohabitation with a person of the opposite sex during periods of visitation."

Plaintiff's Motion in the Cause was heard on 20 April 1998. Plaintiff's evidence at the hearing tended to show the following. The parties' minor children told plaintiff that Karen Barone lived at defendant's home and slept with defendant. Plaintiff took the minor children to a minister who talked to the children about "morals, God's rules about how people should live their life [sic], and that . . . we are supposed to live by certain rules and honor the sanctity of marriage, honor God." According to plaintiff's testimony, her son stated that "when he gets scared at night, he can't go into daddy's room because he's afraid to wake [Karen Barone] up . . . that he thinks daddy is doing something wrong. And he doesn't know who's who in the bed." Plaintiff also testified that the five year-old child "understood the concept of people living together who aren't married."

Defendant's evidence at the hearing tended to show the following. Karen Barone began living in defendant's home in September of 1997 and resides there on a full-time basis. The children are aware that defendant and Karen Barone share a bedroom and the children may have seen them in bed together once or twice. Karen Barone is a good friend to the children and is involved in every part of their lives. Plaintiff admitted that it was possible that the five year-old child's statements, as reported by plaintiff in court, had been influenced by his visit with the preacher. When asked whether the children had a good relationship with defendant, plaintiff replied, "As far as I know." The children are doing well in school and have adjusted to the separation and divorce of their parents.

The trial court made the following pertinent Findings of Fact:

> 4. There has been a substantial change of circumstances since the entry of the Memorandum of Order in that the Defendant has resided since approximately September 19, 1997 with a person of the opposite gender to whom he is not related by blood or marriage, which is in violation of North Carolina Law, while the children were present in his residence staying overnight.
>
> 5. The Plaintiff's communication with her minister and his communication with the parties' minor children concerning the Defendant's adulterous actions was inappropriate and may have put the Defendant in a negative light with his children.

Based on these Findings of Fact, the trial court made the following pertinent Conclusions of Law:

> 2. The Plaintiff is entitled to an order prohibiting the Defendant from having any person of the opposite gender, not related by blood or marriage, staying with him after midnight when the minor children are in his physical custody and control, whether at his residence or at any other location.
>
> . . .
>
> 5. This Order is in the best interest of the parties and the parties' minor children. . . .
>
> 6. The cohabitation of the Defendant with a person of the opposite sex to whom he is not related by blood or marriage is a violation of North Carolina General Statute Sec. 14-184 "Fornication and Adultery." The court has the authority to appropriately condition the terms of the Defendant's custody/visitation with the minor children to protect them from exposure to such activity which is a misdemeanor in the State of North Carolina.

The trial court thereafter granted plaintiff's motion in the cause and ordered that "Defendant shall not have any person of the opposite gender, not related by blood or marriage, staying with him after midnight when the minor children are in his physical custody and control, whether at his residence or at any other location." Defendant appeals.

The dispositive issue on appeal is whether the trial court erred in modifying defendant's visitation privileges.

Defendant argues that the trial court erred in modifying his visitation privileges because the court failed to find a substantial change in circumstances affecting the welfare of the minor children since the entry of the preexisting order. We agree.

In cases involving child custody, the trial court is vested with broad discretion. *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). Matters of custody expressly include visitation rights. N.C. Gen. Stat. § 50A-2(2) (1989); *See also Beck v. Beck*, 64 N.C. App. 89, 306 S.E.2d 580 (1983). The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion. *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). Findings of fact by a trial court must be supported by substantial evidence. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985). A trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987). However, the trial court's conclusions of law are reviewable *de novo*. *Wright*, 72 N.C. App. 449, 325 S.E.2d 493.

A court order for custody of a minor child "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." N.C. Gen. Stat. § 50-13.7(a) (1995). According to our Supreme Court, a custody order may not be modified until the moving party shows there has been a substantial change in circumstances affecting the welfare of the minor child. *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). The required change in circumstances need not have adverse effects on the child. *Id.* "[A] showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Id.* at 620, 501 S.E.2d at 900. Once the moving party has shown a substantial change in circumstances affecting the welfare of the minor child, the

trial court must determine whether a change in custody is in the best interest of the child. *Id.* at 619, 501 S.E.2d at 899. "The welfare of the child has always been the polar star which guides courts in awarding custody." *Id.* (citing *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)).

In the present case, an initial custody and visitation determination was made when the parties entered into a Memorandum of Order effective 12 March 1997. Plaintiff sought to modify the visitation by filing a Motion in the Cause. Therefore, plaintiff had the burden to prove that a substantial change in circumstances occurred since 12 March 1997 and that the changed circumstances affected the welfare of the children in some manner.

The following evidence of changed circumstances affecting the welfare of the children was presented at the hearing. An unrelated adult female has resided in defendant's residence since September 1997. By defendant's admission, defendant and the unrelated female sleep in the same bed and the children may have seen them in bed together on one or more occasions. Defendant testified that Karen Barone is "involved in every part of [the children's] lives." According to plaintiff's testimony, her son stated that "when he gets scared at night, he can't go into daddy's room because he's afraid to wake [Karen Barone] up . . . that he thinks daddy is doing something wrong. And he doesn't know who's who in the bed." We conclude that there was competent evidence to support the trial court's finding that "[t]here has been a substantial change of circumstances since the entry of the Memorandum of Order in that the Defendant has resided since approximately September 19, 1997 with a person of the opposite gender to whom he is not related by blood or marriage[.]"

However, the trial court failed to make any finding of fact regarding any effect the change of circumstances may have had on the welfare of the children. "[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child[.]" *Id.* at 618-19, 501 S.E.2d at 899 (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)). In Finding of Fact Number 4, the trial court states that the children "were present in [defendant's] residence staying overnight" while defendant was residing with a person of the opposite gender to whom he is not related. The fact that the children were present, however, cannot be construed as a finding that the children's welfare was affected. This is especially true in light of the fact that the parties crossed out a pro-

vision on the face of the Memorandum which stated: "The parties agree not to cohabitate with members of the opposite sex to whom they are not related while the children are in their home." Similarly, the trial court's observation in Finding of Fact Number 4 that defendant's conduct "is in violation of North Carolina Law" fails to establish that the children's welfare was affected by the change of circumstances.

In the present case, the trial court only partially discharged its duty in finding that a change in circumstances occurred without also finding whether plaintiff had met her burden of showing the effect, if any, of such change upon the welfare of the children. It is the effect on the children upon which the trial court must focus in determining whether to modify custody. Since the trial court made no such determination in this case, it was not empowered to reopen the custody issue and determine what was in the best interest of the children. Accordingly, the order of the trial court is vacated and remanded for a determination with findings of fact of how, if at all, the substantial change of circumstances affected the welfare of the minor children.

Vacated and remanded for further findings of fact.

Chief Judge EAGLES and Judge MARTIN concur.

PIEDMONT TRIAD REGIONAL WATER AUTHORITY, PLAINTIFF v. SUMNER HILLS INCORPORATED, AND DENMARK GOLF SERVICES, INC., DEFENDANTS

No. COA98-1610

(Filed 18 January 2000)

Eminent Domain— size of taking—three determinations required

In a case arising from plaintiff's exercise of its power of eminent domain under N.C.G.S. § 162-6 for construction of a water supply lake, the trial court's attempt to limit plaintiff's decision to condemn an entire 145-acre tract of land owned by defendant is reversed and remanded because: (1) the trial court improperly treated the "of little value" language in N.C.G.S. § 40A-7 as a threshold determination which must be met before consideration

of the requirements of the three subsections in that statute; and (2) plaintiffs need to provide additional evidence to show all three determinations in N.C.G.S. § 40A-7 were met in order for the trial court to conduct its abuse of discretion determination.

Appeal by plaintiff from order entered 26 October 1998 by Judge C. Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 22 September 1999.

Adams, Kleemeier, Hagan, Hannah & Fouts, by M. Jay Devaney, for plaintiff-appellant.

Hill, Evans, Duncan, Jordan & Davis, by R. Thompson Wright, for defendant-appellee, Sumner Hills Incorporated.

LEWIS, Judge.

This case arises from the exercise of the power of eminent domain by plaintiff, Piedmont Triad Regional Water Authority ("Authority"). Plaintiff appeals from an order limiting its decision to condemn an entire 145-acre tract of land owned by defendant Sumner Hills Incorporated ("Sumner Hills"). It has been stipulated that defendant Denmark Golf Services, the lessee of the property, has no interest in the issues raised on appeal.

Plaintiff is a public authority organized under N.C. Gen. Stat. § 162A-3.1, which has been granted the power of eminent domain pursuant to N.C. Gen. Stat. § 162A-6. The Authority is constructing a water supply lake, known as the Randleman Dam and Lake Water Supply Project ("Project"), in Guilford and Randolph Counties. Sumner Hills is the owner of a 145-acre tract located at Hickory Creek Road, Sumner Township, Guilford County ("Property"), and has used the Property for over twenty years as an eighteen-hole golf course. A portion of the Property is bordered by Reddick Creek, which feeds into the Randleman Dam Lake. The Authority sought to condemn the entire Property for construction of the water supply lake associated with the Project.

Since it could not obtain the property by negotiated conveyance, by resolution dated 7 October 1997, the Authority instituted a proceeding under Chapter 40A of the North Carolina General Statutes to condemn the entire Property. The Authority made the following determinations in its Resolution which purported to justify a taking of the entire 145 acres:

(a) a partial taking of the above-described land would substantially destroy the economic value or utility of the remainder; or that

(b) an economy in the expenditure of public funds will be promoted by taking the entire parcel; or that

(c) the interest of the public will be best served by acquiring the entire parcel.

On 24 February 1998, the Authority filed a Complaint, Declaration of Taking and Notice of Deposit under N.C. Gen. Stat. § 40A-41 in Guilford County Superior Court against defendants and a Memorandum of Action pursuant to section 40A-43. The Memorandum of Action included that the public purpose of the taking was "to protect the public health, to provide the public with an adequate and sound public water supply and to meet the public water supply needs of the jurisdictions served by the plaintiff, specifically the construction of the [Project]." In its answer, Sumner Hills alleged that only a portion of the Property was actually required for public use, and that the Authority should be required to condemn only that portion of the Property required for the stated public purpose. Because an issue other than just compensation existed, specifically the amount of land that could be condemned, the Authority then sought a judicial determination as to the amount of land it could acquire pursuant to N.C. Gen. Stat. § 40A-47.

After a hearing the trial court entered an order on 26 October 1998 determining that the Authority lacked the power to condemn the entire tract of Property under section 40A-7, and instead was authorized to condemn only 48 acres of the 145-acre tract. The Authority appeals from this order.

Chapter 40A of the North Carolina General Statutes provides the exclusive condemnation procedures to be used by all local public condemnors. N.C. Gen. Stat. § 40A-1 (1984). As an authority created under the provisions of Article 1 of Chapter 162A, the Authority here constitutes a public condemnor within the meaning of Chapter 40A. N.C. Gen. Stat. § 40A-3(c)(8) (1984). Authorities given the power of eminent domain may take property only for a public purpose. *City of Charlotte v.* Cook, 348 N.C. 222, 225, 498 S.E.2d 605, 607-08 (1998). Once the public purpose is established, the question of the extent of such a taking is left to the discretion of the Authority. *City of Burlington v. Isley Place Condominium Assn.*, 105 N.C. App. 713,

714, 414 S.E.2d 385, 386 (1992). Section 40A-7 sets forth the guidelines the Authority must follow in order to determine the extent of the Property it may condemn within its discretion. So long as the Authority has followed these statutory guidelines, the Authority's decision to condemn a parcel of land is subject to an abuse of discretion standard. *City of Charlotte*, 348 N.C. at 225, 498 S.E.2d at 608. On appeal, the parties raise an issue of first impression regarding the proper construction of section 40A-7 and an issue as to whether sufficient evidence was before the trial court to make a determination under section 40A-7.

The relevant portions of section 40A-7 are as follows:

> (a) When the proposed project requires condemnation of only a portion of a parcel of land leaving a remainder of such shape, size or condition that it is of little value, a condemnor may acquire the entire parcel by purchase or condemnation. If the remainder is to be condemned the petition filed under the provisions of G.S. 40A-20 or the complaint filed under the provisions of G.S. 40A-41 shall include:
>
> (1) A determination by the condemnor that a partial taking of the land would substantially destroy the economic value or utility of the remainder; or
>
> (2) A determination by the condemnor that an economy in the expenditure of public funds will be promoted by taking the entire parcel; or
>
> (3) A determination by the condemnor that the interest of the public will be best served by acquiring the entire parcel.

When interpreting the meaning of a statute, we must look to the language of the statute itself. *Sara Lee Corporation v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (1999). When a public condemnor wishes to condemn an entire parcel of land, even though the project clearly does not necessitate acquisition of the entire parcel, it must meet the requirements of section 40A-7. This section sets forth three determinations in subsections (1), (2) and (3), one of which must be met to authorize the Authority's condemnation of the entire parcel.

In construing this section, the trial court treated the "of little value" language in section 40A-7(a) as a threshold determination

which must be met before consideration of the requirements in subsections (1), (2) and (3). The court therefore made a determination as to whether the purportedly remaining parcel was of "such shape, size or condition that it is of little value [such that] a condemnor may acquire the entire parcel by purchase or condemnation" before it reached consideration of subsections (1), (2) and (3). In its complaint, however, the Authority did not treat the "of little value" language in section 40A-7(a) as a threshold determination. It made its first inquiry the consideration of the three provisions listed under that section. We agree with the Authority's construction of section 40A-7, in that the "of little value" language in section 40A-7(a) does not establish a threshold determination, making consideration of subsections (1), (2) and (3) the first inquiry under that section.

Section 40A-7 sets forth the allegations which must be included in the Authority's complaint in order to condemn an entire tract of land when the project requires condemnation of only a parcel. N.C. Gen. Stat. 40A-7(a). In conformance with the common law standard, subsections (1), (2) and (3) establish the guidelines surrounding the Authority's discretion to determine the amount of land to be condemned. Given that the purpose of section 40A-7 is to set forth the allegations necessary for the Authority's complaint, it would be illogical to require a threshold determination that the remainder is "of little value" in order to condemn the property. Such a construction would present a question of law that would have to be resolved before the Authority would be permitted to file a complaint under section 40A-7. Reading this question of law into the statute would essentially override the common law discretionary right of the Authority in a condemnation action. There is no indication in the statute of the legislature's intent to override this common law discretionary right.

Furthermore, we feel that the phrase "of little value" is so subjective that our legislature could not have possibly intended it to be a threshold determination. One can only imagine the endless meanings "of little value" may take on when applied to various tracts of land. Because the statute neither defines "of little value," nor provides any guidance were we to construe it as a threshold determination, we conclude that the "of little value" language is a mere introduction to the more specific determinations in subsections (1), (2) and (3). Because the trial court did not consider the determinations in subsections (1), (2) and (3), we remand for further consideration on this issue.

We emphasize that the Authority's discretion in this decision is subject to review by the trial court under an abuse of discretion standard. *City of Charlotte*, 348 N.C. at 225, 498 S.E.2d at 608. We note, then, that the trial court must have before it competent evidence to ascertain whether the Authority exercised its discretion appropriately. Our review of the record before us reveals only conclusory assertions of the Authority in which it merely stated in its Resolution that all three of the determinations in section 40A-7 were met. On remand, additional evidence is necessary to conduct a sufficient review of these determinations under the abuse of discretion standard.

We reverse the trial court's order and remand to the Guilford County Superior Court for proceedings consistent with this opinion.

Reversed and Remanded.

Judges JOHN and McGEE concur.

NATHENIA LITTLE, MATTIE BROADWAY, AND SARAH RANKIN, PLAINTIFFS v. E.S. ATKINSON, JEFFREY CLARK, PHIL FIRRANTELLO, AND CITY OF GASTONIA, DEFENDANTS

No. COA99-52

(Filed 18 January 2000)

1. **Cities and Towns— public duty doctrine—police officers—special duty exception inapplicable**

   The trial court did not err in concluding the "special duty" exception does not preclude application of the public duty doctrine to plaintiffs' claims for infliction of emotional distress and gross negligence against the City of Gastonia and three of its police officers because: (1) plaintiffs' allegations do not indicate a promise that any kind of protection would be afforded plaintiffs; and (2) plaintiffs neither alleged that they relied to their detriment on any statements made by the officers, nor that there was a causal relationship between any such reliance and their injuries.

2. Cities and Towns— public duty doctrine—police officers—gross negligence claims barred—no allegation of intentional tort

The trial court did not err in granting defendants' 12(b)(6) motion to dismiss plaintiffs' civil action alleging infliction of emotional distress and gross negligence against the City of Gastonia and three of its police officers based on the public duty doctrine because: (1) the doctrine bars claims of gross negligence; (2) the conduct complained of in this case does not rise to the level of an intentional tort that would allow the infliction of an emotional distress claim to survive; and (3) plaintiffs have used identical conduct on the part of defendants to support both their claims, and thus, have failed to allege any type of calculated conduct which would establish the element of intent in a claim for intentional infliction of emotional distress.

Appeal by plaintiffs from order entered 3 November 1998 by Judge James L. Baker, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 20 October 1999.

F. William Powers for the plaintiff-appellants.

Frank B. Aycock, III for the defendant-appellees.

LEWIS, Judge.

Plaintiffs brought this civil action on 5 June 1998, alleging "infliction of emotional distress" and "gross negligence" claims against the City of Gastonia and three of its employees, officers of the Gastonia Police Department. On 3 November 1998, the trial court granted defendants' 12(b)(6) motion to dismiss all claims based on the public duty doctrine. As such, our review must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

Mildred "Della" Tyson mysteriously disappeared in July 1996. Plaintiff Nathenia Little is the daughter of Ms. Tyson, and plaintiffs Mattie Broadway and Sarah Rankin are the sisters of Ms. Tyson. Plaintiffs allege that after viewing television reports regarding the discovery of human remains in Crowder Mountain Park in Gastonia, North Carolina, they contacted the Gastonia Police Department. Officers Jeffrey Clark and Phil Firrantello informed plaintiffs that

they had positively identified the human remains to be those of Ms. Tyson. Officer E.S. Atkinson advised Ms. Rankin that "[w]e checked the whole area within one-hundred square feet of where [Ms. Tyson] was found," that "[w]e turned over every leaf, one by one," and that "[w]e used a metal detector and really went over it with a fine[-]toothed comb." Plaintiffs requested permission from Officer Atkinson to enter the area where the remains were found to plant flowers. Officer Atkinson further advised plaintiffs that the police department would mark the place where the body was found with tape. He stated he checked the area the day before, just to be sure it was clear.

On 27 March 1997, plaintiffs visited the site where Ms. Tyson's remains were discovered and found within the crime scene area the remains of human hair and scalp, a "pony tail," a glass bead headdress and ten isolated bones. Plaintiffs collected the remains and gave them to Officer Atkinson; he returned them to plaintiffs stating, "We're not even sure if these are human bones or her bones." Plaintiffs alleged that they believed the remains to be human and belonging to Ms. Tyson.

The public duty doctrine becomes an issue when the allegations of the complaint involve the exercise of defendants' police powers as a municipality. *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 337, 511 S.E.2d 41, 45, *cert. denied*, 350 N.C. 851, — S.E.2d — (1999). The doctrine is a common law rule which provides that a municipality and its agents ordinarily act for the benefit of the general public when exercising police powers, and thus, there is no liability for failure to furnish police protection to specific individuals. *Sinning v. Clark*, 119 N.C. App. 515, 518, 459 S.E.2d 71, 73 (1995). This policy acknowledges the limited resources of law enforcement and works against judicial imposition of an overwhelming burden of liability. *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991). The doctrine ceases to apply, however, when the conduct alleged rises to the level of intentional tort. *Clark v. Red Bird Cab* Co., 114 N.C. App. 400, 406, 442 S.E.2d 75, 79, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

The public duty doctrine is not a protective cape against any governmental liability. Two generally recognized exceptions to the doctrine exist: first, where a special relationship exists between the injured party and the police, and second, " '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.' " *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)). These exceptions are to be narrowly applied. *Sinning*, 119 N.C. App. at 519, 459 S.E.2d at 74.

[1] Plaintiffs argue that the "special duty" exception precludes application of the public duty doctrine to the claims alleged here. The "special duty" exception to the public duty doctrine "is a very narrow one; it should be applied only when the promise, reliance, and causation are manifestly present." *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902. To make out a prima facie case under 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 v. City of Shelby*, 133 N.C. App. 408, 412-13, 515 S.E.2d 722, 725 (1999) (citing *Derwort v. Polk County*, 129 N.C. App. 789, 793-94, 501 S.E.2d 379, 382 (1998)).

Plaintiffs have not alleged any set of facts which, even if taken as true, establish a special duty owed to plaintiffs by defendants. Plaintiffs' complaint alleged that Officer Atkinson "advised" plaintiffs that the police did the following: "checked the whole area within one-hundred square feet of where [Ms. Tyson] was found," "turned over every leaf, one by one," "used a metal detector and really went over it with a fine toothed comb" and checked the area the day before, "just to be sure the area [was] clear." In our opinion, these allegations do not indicate a promise that any kind of protection would be afforded plaintiffs, let alone the requisite "overt" promise of protection to establish a special duty. Further, plaintiffs neither alleged that they relied to their detriment on any statements made by the officers, nor that there was a causal relation between any such reliance and their injuries. Because plaintiffs have failed to make out a prima facie case, the special duty exception cannot be a basis for liability in this case. *Cf. Davis v. Messer*, 119 N.C. App. 44, 56, 457 S.E.2d 902, 910 (holding the following allegations stated a claim for relief under the special duty exception: "the Town . . . promised it would provide fire-fighting assistance and protection; the promised protection never arrived; and plaintiffs relied upon the promise to respond to the fire as their exclusive source of aid, resulting in the complete destruction of their home"), *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

Plaintiffs do not assert that their case falls within the "special relationship" exception and we will not address it.

[2] Having determined that neither exception applies in this case, we must next determine which of plaintiffs' claims the public duty doctrine precludes. Plaintiffs have alleged two claims: infliction of emotional distress and gross negligence. It is clear that the doctrine bars claims of gross negligence, *Clark*, 114 N.C. App. at 406, 442 S.E.2d at 79, thus, plaintiffs' second claim for gross negligence was properly dismissed. Plaintiffs contend, however, that their claim for "infliction of emotional distress" stated a claim for an intentional tort, and should survive application of the public duty doctrine. As noted above, conduct rising to the level of an intentional tort survives application of the public duty doctrine. *Clark*, 114 N.C. App. at 406, 442 S.E.2d at 79. We conclude, however, that the conduct complained of here does not rise to the level of an intentional tort, and plaintiffs' claim for infliction of emotional distress was properly dismissed.

"[W]here the same factual allegations are used to support both allegations of negligent conduct and conduct described as 'wanton,' 'wilful,' and 'reckless,' the public duty doctrine supports a dismissal of the complaint." *Simmons v. City of Hickory*, 126 N.C. App. 821, 825, 487 S.E.2d 583, 586 (1997) (quoting *Clark*, 114 N.C. App. at 406, 442, 825 S.E.2d at 79). In *Simmons*, this Court held that the public duty doctrine barred a claim for intentional infliction of emotional distress where, to support that claim, plaintiffs alleged substantially the same conduct used to support the claim of negligence against defendants. *Id.* at 825-26, 487 S.E.2d at 587. Likewise, plaintiffs here have used identical conduct on the part of defendants to support both their claim of gross negligence and their claim for infliction of emotional distress. In doing so, plaintiffs have failed to allege any type of calculated conduct on the part of defendants directed at the plaintiffs which would establish the element of intent in a claim for intentional infliction of emotional distress. *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 63, 370 S.E.2d 695, 700 (1988). We therefore conclude the conduct alleged by plaintiffs to support their claim for infliction of emotional distress does not rise to the level of an intentional tort, and consequently, the public duty doctrine bars this claim as well. Accordingly, the trial court properly dismissed all of plaintiffs' claims on the basis of the public duty doctrine.

Affirmed.

Judges JOHN and McGEE concur.

CHARLES ALLEN MONTGOMERY AND JANICE STEWART MONTGOMERY OVERBY, PLAINTIFFS-APPELLANTS v. KAREN CUMMINGS MONTGOMERY, DEFENDANT-APPELLEE

No. COA99-315

(Filed 18 January 2000)

Child Custody, Support, and Visitation— visitation—grandparents—denied—intact family

Even though plaintiff-paternal grandparents sought visitation rights of their grandchild under N.C.G.S. § 50-13.1(a) based on the theory that the child was not living in an "intact family" since the child's father is deceased and the parents were separated at the time of his death, the trial court did not err in dismissing this action because: (1) an "intact family" is not limited to situations where both natural parents are living with their children; (2) a single parent living with his or her child is an "intact family"; and (3) a grandchild who is living with her natural mother is living in an "intact family."

Appeal by plaintiffs from judgment entered 28 January 1999 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 8 December 1999.

Peebles & Schramm, by John J. Schramm, Jr. and Erin L. Williams for the plaintiffs-appellants.

K. Clay Dawson, P.A., by Kenneth Clayton Dawson for the defendant-appellee.

WYNN, Judge.

N.C. Gen. Stat. § 50-13.1(a) (1995) permits grandparents to seek visitation with their grandchildren when there is no ongoing custody proceeding and the children are not living in an "intact family". *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995). In this case, paternal grandparents appeal to us to hold that since their son is deceased and had separated from his wife before his death, the child of that couple who continues to live with her mother does not live in an "intact family". Following this Court's holding in *Fisher v. Gaydon*, 124 N.C. App. 442, 477 S.E.2d 251 (1996), we find that the child lives in an "intact family" and therefore, we uphold the trial court's dismissal of the grandparents' visitation action.

On 5 April 1996, a daughter was born to the marriage of Karen Cummings Montgomery and Michael Allen Montgomery. Approxi-

mately two years later, on 20 June 1998, the child's father was killed in a highway accident. At the time of his death, the child's parents were living separate and apart. Thereafter, the minor child resided with her mother.

Concerned that they were being denied, without cause, visitation with the minor child, the natural paternal grandparents of the child brought the present action. But the trial court dismissed that action under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The paternal grandparents now appeal to this Court.

At common law, grandparents had no standing to sue for visitation of their grandchildren. *See Shackleford v. Casey*, 268 N.C. 349, 352, 150 S.E.2d 513, 515 (1966) (stating that as "a general rule at common law and under our decisions, parents have the legal right to the custody of their infant children. This natural and substantive right the courts may not lightly disregard."); *see also Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716 (1977) (superseded by N.C. Gen. Stat. § 50-13.1(a)) (stating that so "long as parents retain custody of their minor children, they retain the prerogative to determine with whom their children shall associate"); *Brotheron v. Boothe*, 250 S.E.2d 36 (W.Va. 1978) (superseded by W.Va.Code, 48-2B-1); *Lo Presti v. Lo Presti*, 355 N.E.2d 372 (N.Y. 1976); *Pier v. Bolles*, 596 N.W.2d 1, 4 (Neb. 1999) (stating that at under the common law, "grandparents lacked any legal right to visitation and communication with their grandchildren if such visitation was forbidden by the parents"); *In re Welfare of R.A.N.*, 435 N.W.2d 71 (Minn. App. 1989)

In modern times, however, states have recognized such a right under limited circumstances. *See e.g.*, W.VA. Code § 48-2B-1 et seq. (1998); N.Y. DRL § 72 (1996); NEB. Rev. Stat. §§ 43-1801, 43-1802, 43-1803 (1998); IND. Code § 31-17-5-1 et seq. (1997); MINN. Stat. § 257.022, subd. 2a (1998). North Carolina joined the movement towards recognizing the right of grandparents to seek visitation in limited circumstances by enacting N.C. Gen. Stat. §§ 50-13.2(b1), 50-13.2A, 50-13.5(j) and 50-13.1(a). *See McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749.

First, N.C.G.S. § 50-13.2(b1) states that "[a]n *order for custody of a minor child* may provide visitation rights for any grandparent of the child as the court in its discretion deems appropriate". N.C.G.S. § 50-13.2(b1) (1995) (emphasis added); *see also Penland v. Harris*,

135 N.C. App. 359, 361, 520 S.E.2d 105, 106 (1999); *Fisher*, 124 N.C. App. at 444, 477 S.E.2d at 252.

Second, N.C.G.S. § 50-13.2A, entitles a grandparent to seek visitation when the child is "*adopted by a stepparent or a relative of the child* where a substantial relationship exists between the grandparent and the child." N.C.G.S. § 50-13.2A (1995) (emphasis added).

Third, N.C.G.S. § 50-13.5(j) entitles a grandparent to seek visitation "[i]n any action in which the *custody of a minor child has been determined*, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7". N.C.G.S. § 50-13.5(j) (1995) (emphasis added); *see also Penland*, 135 N.C. App. at 361, 520 S.E.2d at 106; *Fisher*, 124 N.C. App. at 444, 477 S.E.2d at 252.

Finally, N.C.G.S. § 50-13.1(a) entitles a grandparent to "institute an action or proceeding for custody" of their grandchild. N.C.G.S. § 50-13.1(a). However, as articulated by our Supreme Court in *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750, grandparents are not entitled to seek visitation under N.C.G.S. § 50-13.1(a) when there is no ongoing custody proceeding and the grandchild's family is intact.

The paternal grandparents in this case acknowledge that they have no standing under either N.C.G.S. § 50-13.2(b1) or N.C.G.S. § 50-13.5(j) because there has been no custody action concerning their grandchild. Moreover, although the paternal grandparents' complaint alleged that they were entitled to visitation rights with their granddaughter under N.C.G.S § 50-13.2, it is clear that N.C.G.S. § 50-13.2A does not apply because the grandchild has not been "adopted by a stepparent or a relative of the child". Consequently, the grandparents only argue in this appeal that they have standing to seek visitation under N.C.G.S. § 50-13.1(a). We, therefore, limit our discussion to that statute.

In *Fisher*, this Court noted that "under the broad grant of section 50-13.1(a), grandparents have standing to seek visitation with their grandchildren when those children are not living in a *McIntyre* 'intact family'." *See Fisher*, 124 N.C. App. at 444, 477 S.E.2d at 253. When the grandparents in this cased filed their action, their grandchild resided with her mother. The grandparents contend that since their son—the child's father—is deceased and the parents were separated at the time of his death, the child was not living in an "intact family." We must disagree.

In *Fisher*, this Court held that an "intact family" is not limited to situations where both natural parents are living with their children. *See id.* at 445, 477 S.E.2d at 253. In fact, "a single parent living with his or her child is an 'intact family' within the meaning of *McIntyre.*" *Id. Fisher* controls in the case *sub judice*; accordingly, we are bound to hold that the grandchild who is living with her natural mother is living in an "intact family." Since the child lived in an "intact family" at the time of this action, the grandparents may not seek visitation rights under N.C.G.S. § 50-13.1(a). We, therefore, uphold the trial court's dismissal of the grandparents' action for visitation.

Affirmed.

Judges LEWIS and MARTIN concur.

SOPHIE B. REID, PLAINTIFF v. PERRY L. DIXON, DEFENDANT

No. COA99-159

(Filed 18 January 2000)

Child Support, Custody, and Visitation— support—paternity test—not required—parentage previously determined under law

Since an Alaskan decree had adjudged defendant-North Carolina resident to be the father of the subject child, the trial court's order requiring the parties to submit to paternity testing is reversed because North Carolina's enactment of the Uniform Interstate Family Support Act (UIFSA) does not allow a party whose parentage of a child has been previously determined under law to plead nonparentage as a defense in a proceeding to enforce the payment of child support. N.C.G.S. § 52C-3-314.

Appeal by the State on behalf of plaintiff from orders entered 13 August 1998 by Judge Wendy Enochs and 27 October 1998 by Judge Donald L. Boone in District Court, Guilford County. Heard in the Court of Appeals 3 January 2000.

Michael F. Easley, Attorney General, by Susana E. Honeywell, Associate Attorney General, and Gerald K. Robbins, Assistant Attorney General, for the State.

No brief was filed by the defendant-appellee.

WYNN, Judge.

Under North Carolina's enactment of the Uniform Interstate Family Support Act (UIFSA), a party whose parentage of a child has been previously determined under law may not plead nonparentage as a defense in a proceeding to enforce the payment of child support. N.C. Gen. Stat. § 52C-1 et seq. (1995). In the case at bar, although an Alaskan decree had adjudged the defendant to be the father of the subject child, our trial court allowed him to plead the defense of nonparentage in a UIFSA proceeding to enforce his child support obligation. Since our law does not condone a nonparentage defense in a UIFSA proceeding, we reverse the trial court's order requiring the parties to submit to paternity testing.

In 1994, Perry L. Dixon admitted in an Alaskan court to being the father of a child born to Sophie B. Reid. That court adjudged him to be the father of the child on 25 January 1995.

Mr. Dixon moved to North Carolina and in April 1998, the State of Alaska petitioned North Carolina under UIFSA to establish an order for child support, support for a prior period, and medical coverage. Mr. Dixon answered that petition by denying paternity of the child and requesting an order for paternity tests. In response, the North Carolina trial court ordered the taking of the paternity tests and further ordered that the registration of child support be placed in the inactive file until the State of North Carolina allowed the blood tests to be performed. This Court took review of this matter by granting a writ of certiorari and staying the trial court's order pending the outcome of this appeal.

Our General Assembly enacted UIFSA to provide a uniform method for handling interstate child support obligations. *See Welsher v. Rager*, 127 N.C. App. 521, 491 S.E.2d 661 (1997). The Act governs situations where another State seeks to enforce a child support order in North Carolina. N.C. Gen. Stat. § 52C-3-301 (1995).

N.C. Gen. Stat. § 52C-6-607 (1995) provides a number of defenses to the establishment or enforcement of a registered child support order; however, the defense of nonparentage is not listed among the

defenses. Indeed, Chapter 52C explicitly prohibits the defense of nonparentage when paternity has previously been established by a legal proceeding.

> A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this Chapter.

N.C. Gen. Stat. § 52C-3-314 (1995). This rule is unambiguous; when paternity has been previously established, a party cannot later plead nonparentage as a defense in a UIFSA proceeding. Further, the official comment to this section states that "this section mandates that a parentage decree rendered by another tribunal is not subject to collateral attack in a UIFSA proceeding."

Under the plain language of Chapter 52C, Mr. Dixon may not now assert the defense of nonparentage in this UIFSA proceeding because his paternity has already been established by another legal proceeding. *Accord, State v. Hanson*, 725 So.2d 514 (La. Ct. App. 1998) (holding that Louisiana's enactment of UIFSA prevented the defendant from asserting a paternity defense since his paternity had already been established by an Iowa court); *Beyer v. Metze*, 482 S.E.2d 789 (S.C. Ct. App. 1997) (holding that South Carolina's enactment of UIFSA prevented the defendant from asserting the defense of nonparentage since an Ohio family court had already determined paternity); *Villanueva v. Office of the Attorney General of Texas*, 935 S.W.2d 953 (Tex. Ct. App. 1996) (holding that Texas' enactment of UIFSA explicitly forbade a paternity defense when paternity had been established by another legal proceeding).

Since N.C. Gen. Stat. § 52C-3-314 explicitly bars the defense of nonparentage when paternity has already been established, we hold that the trial court erred in allowing Mr. Dixon to challenge his paternity of the subject child in North Carolina. Accordingly, the orders of the trial court are

Vacated.

Chief Judge EAGLES and Judge WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 30 December 1999

BARRINGER-WILLIS v. HEALTHSOURCE N.C., INC. No. 99-171	Wake (98CVS1208)	Dismissed and remand to the trial court for further proceedings
BOWEN v. CONTINENTAL GEN. TIRE No. 98-803	Ind. Comm. (618608) (592477)	Affirmed
CANADA v. RAYNOR No. 99-316	Guilford (97CVS8332)	Dismissed
CARRANZA v. WILLIAMS No. 98-1539	Orange (96CVS1437)	No Error
CHILDERS v. N.C. DIV. OF MOTOR VEHICLES No. 99-300	Mecklenburg (98CVS4726)	Affirmed
EVANS v. McLAMB SUPERMARKET No. 98-1436	Ind. Comm. (545308)	Affirmed
FEDERAL INS. CO. v. NATIONWIDE MUT. INS. CO. No. 99-275	Scotland (95CVS818)	Reversed and Remanded
GAINEY v. MARAPESE MASONRY, INC. No. 99-196	Ind. Comm. (432830)	Affirmed
KEY v. GREAT ATL. & PAC. TEA CO. No. 98-1575	Harnett (97CVS00298)	Reversed and Remanded
PEARSON v. ITHACA INDUS., INC. No. 99-164	Ind. Comm. (229242)	Affirmed
RICKARD v. JORDAN No. 98-1321	Davidson (96CVS271)	No Error
RILEY v. N.C. BD. OF TRANSP. No. 99-142	Yadkin (98CVS79)	Affirmed
SIMS v. GEN. TIRE & RUBBER CO. No. 98-1562	Ind. Comm. (312085)	Affirmed
SOUTHTRUST BANK v. ENVTL. ASPECS, INC. No. 99-287	Wake (98CVS04041)	Affirmed
STATE v. BLY No. 98-1554	Forsyth (97CRS42016) (97CRS32210)	No Error

STATE v. BYRD No. 99-295	Rutherford (97CRS4813)	New Trial
STATE v. McCANTS AND CORBETT No. 98-1538	New Hanover (98CRS6599) (98CRS6600) (98CRS6601)	No Error
TEAGUE v. TEAGUE No. 98-1495	Catawba (95CVD1363)	Affirmed

FILED 18 JANUARY 2000

BLAKE v. REX HOSP., INC. No. 99-189	Wake (95CVS6633)	Affirmed
BROWN v. HOWELL No. 99-536	Wilson (97CVD1189)	No Error
GOUGE v. JOAN FABRICS CORP. No. 99-456	Ind. Comm. (618453)	Affirmed
IN RE APPEAL OF YOUNG No. 99-335	Prop. Tax Com. (97PTC313)	Affirmed
IN RE JAYNE No. 99-324	Mecklenburg (98J629)	Affirmed
IN RE SMITH No. 99-261	Durham (98J142)	Affirmed
LANDERS v. WHITMIRE No. 99-223	Transylvania (98CVS497)	Affirmed
MORGAN v. MORGAN No. 98-1356	Scotland (97CVS653)	Reversed
SMALL v. KOLAR No. 99-320	Haywood (97CVS699)	Affirmed
STATE v. ANDERSON No. 99-435	Wake (95CRS71180) (95CRS71181)	No Error
STATE v. BLAKNEY No. 99-663	Mecklenburg (98CRS121652) (98CRS121653) (98CRS121654)	No Error
STATE v. BOUCHELLE No. 99-558	Mecklenburg (97CRS102490)	No Error
STATE v. BYRD No. 99-92	Johnston (96CRS15156) (96CRS17887) (96CRS17890)	No Error

STATE v. CLAYTON No. 99-542	Durham (97CRS21592)	No Error
STATE v. COFIELD No. 99-410	Hertford (98CRS3364)	Affirmed
STATE v. DOVE No. 99-545	Onslow (96CRS17943)	Affirmed
STATE v. MILLER No. 99-409	Jackson (97CRS3597) (97CRS3598) (97CRS3601)	No Error
STATE v. MYERS No. 99-491	Davidson (97CRS12115)	No Error
STATE v. PERKINS No. 99-128	Wake (97CRS13312) (97CRS13313)	No Error
STATE v. PETERSON No. 99-425	Guilford (98CRS076142) (98CRS076143)	No Error
STATE v. RICHARDSON No. 99-474	Mecklenburg (98CRS21542)	No Error
STATE v. STANFIELD No. 99-500	Alamance (98CRS19272)	No Error
STATE v. SUTHERLAND No. 99-588	Yadkin (98CRS2957)	No Error
STATE v. SUTHERLAND No. 99-589	Yadkin (98CRS2956)	No Error
STATE v. TURLEY No. 99-647	Forsyth (98CRS36854)	No Error
STATE v. VOLCY No. 99-498	Wake (97CRS59765)	No prejudicial error
STATE v. WALKER No. 99-8	Stokes (97CRS4409) (97CRS4410) (97CRS4411)	No Error
STATE ex rel. SHELTON v. GREEN No. 99-194	Pamlico (96CVD33)	No Error

W. CARROLL STEPHENSON, JR., PLAINTIFF v. TOWN OF GARNER, A MUNICIPAL CORPORATION, RONNIE WILLIAMS, JACKIE JOHNS, SR., AND JOHN ADAMS, DEFENDANTS

No. COA99-43

(Filed 1 February 2000)

1. Zoning— conditional use permits—unfair trade practices claims—aldermen

The trial court did not err by dismissing plaintiff's Chapter 75 unfair trade practices claims against the Garner aldermen, based on their alleged inducement of Sprint to enter into the Garner-Sprint Lease by denying Sprint's conditional use permit (CUP) petition seeking to place a cellular tower on plaintiff's property, and the town's subsequent execution of the Garner-Sprint Lease, because: (1) the trial court's order did not compel the aldermen to approve Sprint's CUP petition based on evidence from the first hearing, but instead remanded the matter to the board for further proceedings; and (2) the trial court never ruled on the sufficiency of the new evidence in support of the aldermen's second denial of Sprint's CUP application.

2. Zoning— conditional use permits—unfair trade practices claims—town

The trial court did not err by dismissing plaintiff's Chapter 75 unfair trade practices claims against the Town of Garner, based on its alleged inducement of Sprint to enter into the Garner-Sprint Lease by denying Sprint's conditional use permit (CUP) petitions seeking to place a cellular tower on plaintiff's property, and the town's subsequent execution of the Garner-Sprint Lease, because a city or town may not be sued under Chapter 75.

3. Zoning— conditional use permits—interference with contractual relations—aldermen—legislative immunity

The trial court did not err in dismissing plaintiff's claims of interference with contractual relations against the Garner aldermen based on their denial of a conditional use permit because the aldermen may claim legislative immunity since: (1) conditional use permitting requires the exercise of substantial discretion on the part of local officials in deciding important community-wide land use policies; and (2) even if the trial court could not dismiss plaintiff's claim based on the lack of specificity in the pleadings,

plaintiff only seeks monetary damages from the government and the aldermen acting in their official capacities.

4. Zoning— conditional use permits—interference with contractual relations—town

Although plaintiff could not allege a claim for interference with contractual relations against the Town of Garner based on the right to income under an option contract in existence at the time the Garner-Sprint Lease was executed since plaintiff had no contract rights at the time the Garner-Sprint Lease was executed, the trial court erred in dismissing plaintiff's claim of interference with contractual relations against the Town based on plaintiff's right to future income under the Stephenson-Sprint Lease, had the Town eventually approved Sprint's conditional use permit, because viewing the facts in the light most favorable to plaintiff reveals: (1) the possibility of protracted litigation presented the Town with an opportunity to lease the top of its water tower to Sprint; (2) the execution of the Garner-Sprint Lease may have prompted Sprint's decision not to exercise its option under the Stephenson-Sprint Lease; and (3) the Town cannot claim governmental immunity since the execution of a lease, unlike the enactment and enforcing of zoning laws, is not an exercise of "police powers" delegated to the Town by the State.

Appeal by plaintiff from order entered 23 November 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 November 1999.

In April of 1994, plaintiff-appellant Stephenson (Stephenson) contracted with Sprint Cellular Company (Sprint) for an option to lease to Sprint a portion of Stephenson's land for the location of a cellular tower (the Stephenson-Sprint Lease). The option was conditioned on a grant of a conditional use permit (CUP) from defendant-appellee Town of Garner (the town). A CUP must be approved by a majority of the defendant-appellees Board of Aldermen (the aldermen).

On 1 June 1994, Sprint filed a CUP application with the town. At a 19 June 1994 hearing, three Garner residents opposed to the proposed tower expressed their concern that the tower would endanger public health and safety and would not be in harmony with the area in which it was to be located. In support of their application, Sprint presented expert testimony and exhibits showing that the tower posed no substantial danger to public health and safety, would not

materially affect local property values, would be in harmony with the surrounding community and would conform with all relevant land use ordinances. On 1 August 1994, the aldermen concluded that the proposed use was not in harmony with the surrounding neighborhood and denied Sprint's CUP application by a 3-2 vote. On 22 February 1995, Sprint filed a petition for judicial review in Wake County Superior Court. On 3 March 1995, Superior Court Judge Robert Farmer found that (1) the aldermen's denial (based on the testimony of the three Garner residents) was arbitrary and capricious and (2) Sprint's evidence was "competent and substantial" to support an issuance of a CUP. Judge Farmer therefore remanded the case to the aldermen for "further proceedings in accordance with . . . judgment."

The same day, Garner's attorney wrote to interested landowners that the town would not appeal Judge Farmer's decision because (1) Judge Farmer was justified in concluding that there was "not a substantial weight of technical evidence in opposition" to the CUP and (2) "if another hearing were held on the subject, the evidence would be pretty much what it was in the [original CUP] hearing."

On 3 April 1995, the aldermen again held hearings on the Sprint's CUP application, taking additional testimony from neighbors as to the adverse effects of the tower on neighborhood aesthetics and allowing the introduction of newspaper articles about electromagnetic fields. Sprint presented evidence (similar to that presented at the prior CUP hearing) that the proposed tower posed no health or safety risks whatsoever to the surrounding community. Following this second hearing, the aldermen again denied Sprint's application by a 3-2 vote.

On 13 April 1995, Sprint filed a Motion to Compel approval of the Sprint's CUP application in Wake County Superior Court, arguing that (1) the aldermen's actions were contrary to the town's land use ordinance and in direct defiance of Judge Farmer's order and (2) Sprint was losing $2000 for every day that they lacked a CUP. The town responded to Sprint's motion by offering to settle the matter by locating Sprint's cellular tower on top of the town water tower. On 1 May Sprint agreed to lease the top of the water tower (the Garner-Sprint Lease). Sprint's litigation with the town was subsequently ended by a consent judgment entered 4 May 1995.

On 3 February 1998 Stephenson filed the instant action against the town and the aldermen alleging that the aldermen and the town

conspired to force Sprint to abandon the Stephenson-Sprint Lease and enter into the Garner-Sprint Lease. The Garner-Sprint Lease names only the Town of Garner as lessor, and Stephenson does not allege in his complaint that the aldermen approved the Garner-Sprint lease. Stephenson argues that defendants' conduct constitutes (1) interference with contractual relations between Stephenson and Sprint and (2) unfair and deceptive trade practices.

In their answer, defendants moved to dismiss pursuant to N.C. R. Civ. P. 12(b)(6), denied Stephenson's allegations and asserted, in pertinent part, (1) that Stephenson lacked standing to appeal the denial of Sprint's CUP application; (2) that the aldermen and board were immune to suit; and (3) that Stephenson failed to prove that he suffered a legal harm or, if plaintiff had been harmed, that his injuries were not proximately caused by defendants. Thereafter, defendants moved to dismiss pursuant to N.C. R. Civ. P. 12(c).

Following a change of venue from Johnston County to Wake County Superior Court, the trial court granted defendants' motions to dismiss. Plaintiff Stephenson appeals.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Edward L. Eatman, Jr. and Holly L. Saunders, for defendant-appellees.

EAGLES, Chief Judge.

In reviewing the trial court's dismissal of Stephenson's claims under Rules 12(b)(6) or 12(c), we evaluate all facts alleged and permissible inferences therefrom in the light most favorable to Stephenson. Shuford, N.C. Practice and Procedure, §§ 12-8, 12-10. If the facts as alleged by the plaintiff do not either (1) give rise to any claim upon which relief may be granted, Shuford, § 12-8, citing *Andrews v. Elliot*, 109 N.C. App. 271, 426 S.E.2d 430 (1993), or (2) show that the nonmoving party is entitled to judgment as a matter of law, Shuford, § 12-10, citing *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974), then we must affirm the trial court.

[1] We first address whether the trial court properly dismissed plaintiff's Chapter 75 unfair trade practices claims. Stephenson argues that (1) the aldermen's "inducement" of Sprint to enter into the Garner-Sprint Lease by denying Sprint's CUP petitions "in violation of a court order" and (2) the town's execution of the Garner-Sprint Lease con-

stitute "[unlawful] unfair . . . acts or practices in or affecting commerce." G.S. § 75-1.1. We disagree.

Stephenson argues that the aldermen's "intentional violation of a court order" by denying Sprint's CUP application on rehearing was also a violation of public policy, establishing the aldermen's actions as "unfair" under G.S. § 75-1.1. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403-04 (1981). Viewing the facts in the light most favorable to the plaintiff, we do not agree that Judge Farmer's order compelled the aldermen to approve Sprint's CUP petition, making the aldermen's second denial of Sprint's petition an illegal act. Based on "substantial, competent and material evidence" in the record of the first CUP hearing, Judge Farmer concluded that the town's denial of Sprint's application was "arbitrary and capricious," but instead of ordering that the CUP be approved, Judge Farmer's order reversed the aldermen's first decision and remanded the matter to the board "for further proceedings in accordance with . . . judgment." We conclude that the aldermen *complied* with the court's judgment by holding "further proceedings," during which additional testimony and newspaper articles not previously considered by Judge Farmer were introduced. Because (1) the May 1995 consent judgment precluded a final ruling on Sprint's Motion to Compel approval based on evidence presented in the first hearing and (2) Judge Farmer never ruled on the sufficiency of the new evidence in support of the aldermen's second denial of Sprint's CUP application, we find no clear violation of Judge Farmer's order and uphold the trial court's dismissal of the Chapter 75 claims against the aldermen.

[2] As to the Chapter 75 unfair trade practices claim against the town, we held in *Rea Construction Co. v. City of Charlotte*, 121 N.C. App. 369, 465 S.E.2d 342, *disc. rev. denied*, 343 N.C. 309, 471 S.E.2d 75 (1996), that because the State is immune to Chapter 75 claims "regardless of whether sovereign immunity may exist," *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 125, 325 S.E.2d 642, 644 (1985), and cities *and towns* are "agenc[ies] created by the State," *State v. Furio*, 267 N.C. 353, 356, 148 S.E.2d 275, 277 (1966) (emphasis added), "in accord with *Sperry*, . . . a city may not be sued under Chapter 75." *Rea Construction*, 121 N.C. App. at 370, 465 S.E.2d at 343 (emphasis added). Under *Rea Construction*, dismissal of the claim against the town was proper.

[3] We next decide whether the court properly dismissed Stephenson's claims of interference with contractual relations against the aldermen and the town.

Defendants first argue that Stephenson lacks standing to bring an interference with contract claim against either the town or the aldermen. Specifically, defendants argue that because Sprint, as a "mere optionee," lacked the requisite standing as an "affected" property owner to appeal the aldermen's first denial of its CUP application, Sprint's appeal to Wake County Superior Court was improvidently granted. *Humble Oil & Refining Co. v. Board of Aldermen of the Town of Chapel Hill*, 20 N.C. App. 675, 678, 202 S.E.2d 806, 809, *rev'd on other grounds*, 286 N.C. 10, 209 S.E.2d 447 (1974) (citing *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946)). Defendants further argue that because Stephenson failed to file his own CUP application or appeal the aldermen's decision on Sprint's CUP application, he is precluded here from asserting "any claims he may have had regarding the denial of the conditional use permit." See G.S. § 160A-388(e) (providing for review of conditional use permitting decisions by any "aggrieved" party); *Lee*, 226 N.C. at 113, 37 S.E.2d at 133 ("a property owner whose property is affected by [a] proposed [zoning] change may seek review").

We note that Stephenson appears to concede the standing issue as to his claim against the aldermen when he states in his brief that "[i]f the defendants' mistreatment of Sprint had simply died without the Town of Garner usurping Stephenson's lease, it is debatable whether or not Stephenson would have had standing to seek damages for the loss of his lease income."

Even *assuming arguendo* that Stephenson does not concede the standing issue, we hold that when viewed in the light most favorable to the plaintiff, the facts support dismissal on grounds that the aldermen enjoyed legislative immunity to suit. *Vereen v. Holden*, 121 N.C. App. 779, 468 S.E.2d 471 (1996), *disc. rev. denied*, 347 N.C. 410, 494 S.E.2d 600 (1997). Officials may claim legislative immunity for action taken "in the sphere of legislative activity." See *Bogan v. Scott-Harris*, 523 U.S. 44, 140 L.Ed.2d 79 (1998). To prove legislative immunity, a public official must show that (1) he was acting in a legislative (non-ministerial) capacity at the time of the alleged incident and (2) his acts were not illegal. *Vereen*, 121 N.C. App. at 782, 468 S.E.2d at 473 (citing *Scott v. Greenville County*, 716 F.2d 1409, 1422 (4th Cir. 1983). *See also Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980)).

The question of whether local officials' actions are "legislative" depends on the nature of their acts. *Scott* at 1423; *Bruce* at 277-80, citing *Lake Country Estates, Inc. v. Tahoe Regional Planning*, 440 U.S. 391, 59 L. Ed. 2d 401 (1979) ("to an extent that the evidence discloses

that [regional land use officials] were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity"); *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895 (1978) (legislators, like judges, are entitled to absolute immunity "because of the special nature of their responsibilities"); *Tenny v. Brandhove*, 341 U.S. 367, 95 L. Ed. 1019 (1951) (reviewing the basis for conferring immunity on state legislators). While officials are not immune for acts outside the scope of their legislative duties, *Scott*, 716 F.2d at 1423, and arguably may claim only qualified immunity for "executive" acts (such as enforcement of zoning laws), *id.*, absolute immunity is available when officials, in the exercise of legitimate functions under state and local law, act in a "legislative capacity," *Pendleton Construction Corp. v. Rockbridge County*, 652 F.Supp 312, 323-24 (W.D. Va. 1987), *aff'd*, 837 F.2d 178 (4th Cir. 1988); *Bruce*, 632 F.2d at 279. So long as the acts are legislative in nature, immunity may extend to "vot[ing], . . . and . . . every other act resulting from the nature, and in the execution, of the office." *Bruce*, 631 F.2d at 280, citing *Tenny*, 341 U.S. at 374, 95 L. Ed. at 1025-26.

Stephenson argues that (1) conditional use permitting is a ministerial act and (2) "even if the first denial of Sprint's application was not ministerial," Judge Farmer's decision transformed the rehearing of Sprint's CUP application into a ministerial act of approval. We disagree.

Conditional use permitting is not, as plaintiff alleges, a ministerial process akin to "putting a square peg in a square hole." Ministerial acts are those in which "nothing is left to discretion." *Langley v. Taylor*, 245 N.C. 59, 62, 95 S.E.2d 115, 117 (1956); Black's Law Dictionary 1011 (7th ed. 1999). Under G.S. § 160A-381 (granting towns the power to adopt CUP ordinances), local zoning officials may not "deny applicants a permit in their *unguided* discretion or . . . refuse it solely because, in their view, [it] would 'adversely affect the public interest.' " *Triple E Assoc. v. Town of Matthews*, 105 N.C. App. 354, 361, 413 S.E.2d 305, 309, *disc. rev. denied*, 332 N.C. 150, 419 S.E.2d 578 (1992) (emphasis added). However, our courts have held that a town zoning board sits as a "trier of fact," *Ghidorzi Construction, Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986), and is vested with "independent decision-making authority" to balance the petitioner's interest in subjecting his or her land to a particular use against his neighbors' interest in maintaining harmony of use throughout the community. *Chrismon v. Guilford County*, 322 N.C.

611, 635-36, 370 S.E.2d 579, 593-94 (1988) (authorizing conditional use permitting in North Carolina); *see also Alexander v. Holden*, 66 F.3d 62, 66 (4th Cir. 1995) ("[i]f the underlying facts 'relate to particular individuals or situations' and the decision impacts specific individuals or 'singles out specifiable individuals,' the decision is administrative. On the other hand, the action is legislative if the facts involve 'generalizations concerning a policy or state of affairs' and the 'establishment of a general policy' affecting the larger population"). Where the evidence pertaining to a CUP application reveals "two reasonably conflicting views," neither the Superior Court nor this Court may supplant the judgment of local zoning officials. *Ghidorzi*, 80 N.C. App. at 440, 342 S.E.2d at 547.

We conclude that conditional use permitting requires the exercise of substantial discretion on the part of local officials in deciding important community-wide land use policies, and is therefore legislative in nature. Moreover, since Judge Farmer's decision did not preclude the aldermen from holding "further hearings" or compel them to approve Sprint's petition, the decision neither changed the legislative nature of the aldermen's acts nor made them illegal. Because the aldermen may claim legislative immunity to suits arising out of their denial of Sprint's CUP petition, we hold that dismissal was proper as to the aldermen.

We note that defendants also contend that the trial court properly dismissed this claim as to the aldermen because plaintiff failed to comply with the requirement of specificity in pleading set out in *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724-25 (1998) (when officials are sued in their individual capacities, a statement of the capacity in which they are being sued must be included in the caption, the allegations, and the prayer for relief). Stephenson contends that because the opinion in *Mullis* was filed three days after their complaint, he was not bound by its holding. We disagree, because Stephenson could have cured any deficiency by amending his complaint. See *id.* ("[a]lthough the defense of immunity had been raised . . . plaintiffs did not attempt to amend their complaint to specify the capacity in which they were suing"). Moreover, in reviewing prior applicable law, the *Mullis* court noted that:

> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action

> involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities."

Id. at 552, 495 S.E.2d at 723 (citing *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997)). After careful review of the record, we conclude that here the plaintiff seeks monetary damages only from the government *and* the aldermen acting in their official capacities. See *id.* at 554, 495 S.E.2d at 725. Accordingly, even if the trial court could not dismiss Stephenson's claim based on the lack of specificity in the pleadings, *Mullis* limits Stephenson to claims against the aldermen in their official capacities. We have already determined that the aldermen's official acts are protected by legislative immunity under *Vereen* and that dismissal was proper.

[4] We now consider whether the court properly dismissed the interference with contract claim against the town.

Unlike the claim against the aldermen, which is based on their denial of a CUP petition, Stephenson alleges that the town interfered with his contract rights by executing the Garner-Sprint Lease, thereby usurping his stream of income from the Stephenson-Sprint Lease. We first note that since execution of the Garner-Sprint Lease was not part of the CUP process, Stephenson has standing to bring this claim against the town. The remaining issues raised by the parties' briefs are (1) whether the Garner-Sprint Lease was legal; (2) whether plaintiff has stated a valid claim of interference with contract or prospective contract against the town, and if so, (3) whether the town may claim governmental immunity to Stephenson's suit. While we do not determine the legality of the Garner-Sprint Lease, we reverse the trial court's dismissal of Stephenson's claim of interference with prospective contract against the town.

Stephenson did not allege in his complaint that the Garner-Sprint Lease was illegal under G.S. § 160A-272. Because this issue was not addressed by the trial court and is not properly before us, we decline to address it. N.C. R. App. P. 10(b)(1).

To survive defendants' Rule 12(b)(6) and 12(c) motions, Stephenson's complaint must forecast that:

> (1) a valid contract between the plaintiff and a third person . . . confer[red] upon the plaintiff a contractual right against a third person; (2) defendant kn[ew] of the contract; (3) the defendant intentionally induc[ed] the third person not to perform the contract; (4) and in doing so act[ed] without justification; (5) resulting in actual damage to the plaintiff.

Embree Construction Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992). Defendants argue that on the face of the claim, Stephenson has failed to satisfy the first element of interference with contract.

We note that Stephenson alleges violation of two distinct contract rights: (1) the right to income under an option contract *in existence at the time the Garner-Sprint Lease was executed*, and (2) the right to *future* income under the Stephenson-Sprint Lease, *had the town eventually approved Sprint's CUP petition*. As to the former claim, defendants correctly argue that because the Stephenson-Sprint Lease was an option contract, Stephenson had no contract rights at the time the Garner-Sprint Lease was executed. *Rice v. Wood*, 82 N.C. App. 318, 328, 346 S.E.2d 205, 211, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 599 (1986). Therefore, the first element of interference with contract was not met.

However, as to the latter claim, plaintiff's claim of interference with *prospective* contract survives where the evidence shows that defendants' interference "prevent[ed] the *making* of a contract . . . with design . . . [of] gaining some advantage at [plaintiff's] expense." *Owens v. Pepsi Cola Bottling Co. of Hickory, N.C., Inc.*, 330 N.C. 666, 680-81, 412 S.E.2d 636, 644-45 (1992) (overcoming summary judgment); *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945) (plaintiff overcame demurrer on evidence showing that "but for" defendants' interference, the contract *would have been* made). Here, Stephenson alleges in his complaint that "defendants' . . . usurpation of the stream of lease income . . . by the Garner Lease constitutes wrongful interference with . . . prospective contract." The evidence shows that the town executed the Garner-Sprint Lease prior to Sprint's argument of its Motion to Compel approval of its CUP application. The town argues that these facts show, at most, the town's desire to prevent further litigation regarding Sprint's CUP Application. We agree that this is a *possible* inference, but not the *only permissible* inference. Viewing the facts and all reasonable permissible inferences therefrom in the light most favorable to

Stephenson, it is also reasonable to infer that (1) the specter of protracted litigation presented the town with an opportunity to lease the top of its water tower to Sprint and (2) the execution of the Garner-Sprint Lease may have prompted Sprint's decision not to exercise its option under the Stephenson-Sprint Lease. In its brief, the town does not challenge whether Stephenson met the remaining elements of Stephenson' claim. Accordingly, we hold that Stephenson has sufficiently stated a claim for interference with prospective contract against the town.

In deciding whether a governmental entity may claim immunity from suit, we must first determine whether the nature of the complained-of act is proprietary or governmental. *Rich v. City of Goldsboro*, 282 N.C. 383, 385, 192 S.E.2d 824, 826 (1972); see generally, Morris and Daye, North Carolina Law of Torts, § 19.42.31-32. *Baucom's Nursery v. Mecklenburg County*, 89 N.C. App. 542, 366 S.E.2d 558, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 274 (1988), cited by the town, is inapplicable because the execution of a lease, unlike the enactment and enforcement of zoning laws, is not an exercise of "police powers" delegated to the town by the State. *Id.* at 544, 366 S.E.2d at 560 (extending immunity to both the county and the board of commissioners). The better rule is found in *Lewis v. City of Washington*, 63 N.C. App. 552, 305 S.E.2d 752, *rev'd on other grounds*, 309 N.C. 818, 310 S.E.2d 610 (1983), in which we held that leasing property under G.S. § 160A-272, unlike zoning, is a proprietary activity. Pursuant to *Lewis*, we hold that the rule of governmental immunity does not bar Stephenson's claim against the town because the town's execution of a lease of town property was proprietary in nature.

In summary, we hold that the court properly dismissed Stephenson's Chapter 75 claims and his claim of interference with contract against the aldermen. We reverse the order of the trial court dismissing Stephenson's interference with contract claim against the town and remand the case for further proceedings in accordance with this decision.

Affirmed in part and reversed in part.

Judges JOHN and HUNTER concur.

LAURA DELANE BARKER, PLAINTIFF v. KIMBERLY-CLARK CORPORATION, CHRISTOPHER SCHNEIDER, AND THOMAS WAGAR, DEFENDANTS

No. COA99-162

(Filed 1 February 2000)

1. Libel and Slander— employment—actual malice—genuine issue of material fact

The trial court erred in granting defendants' motion for summary judgment on the slander per se claim, based on defendant-manager Schneider's accusation in front of third persons at their work that plaintiff-employee used illegal drugs on the company's premises and accessed pornography on the internet on one of the company's computers, because viewing the evidence in the light most favorable to plaintiff reveals a genuine issue of material fact exists concerning actual malice since there is evidence that: (1) although Schneider made a statement to a management employee who would have an interest, right, or duty regarding these activities, Schneider also made a statement to a non-management employee; (2) Schneider exhibited anger, personal hostility, and ill-will towards plaintiff when Schneider made the accusations, and also Schneider exhibited personal hostility towards plaintiff prior to this time; (3) Schneider had a "hit list" with plaintiff's name on it, and Schneider admitted his desire to terminate plaintiff's employment; (4) Schneider made the statements about plaintiff viewing the pornographic material with reckless disregard for the truth since Schneider based his accusation on the general description of a "big, tall muscular woman" and failed to further pursue the report; and (5) the company maintained attendance records, and plaintiff was not working on the date of the alleged incident regarding the pornographic material.

2. Employer and Employee— tortious interference with contractual rights—genuine issue of material fact

The trial court erred in granting defendants' motion for summary judgment on the tortious interference with contractual rights claim because viewing the evidence in the light most favorable to plaintiff-employee reveals that a genuine issue of material fact exists since: (1) plaintiff had a permanent position with defendant Kimberly-Clark Corporation for 11 years; (2) defendant-managers, Schneider and Wager, had knowledge of this contract; (3) Schneider intentionally accused plaintiff of

illegal drug usage and viewing pornography for the purpose of causing her termination; (4) defendant-managers acted solely with malice and without justification rather than for legitimate business interests; and (5) defendant-managers' actions caused plaintiff to lose her employment with Kimberly-Clark, resulting in her damage.

3. Employer and Employee— tortious interference with contractual rights—non-outsiders to contract

Although defendants, Schneider and Wager, contend they cannot be liable for a claim of tortious interference with contractual rights since they were managers and thus non-outsiders to plaintiff-employee's employment contract, the trial court erred in granting defendants' motion for summary judgment on this issue because: (1) non-outsider status is pertinent only to the question of whether defendants' actions were justified; (2) the qualified privilege of a non-outsider is lost if exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests in the contract; and (3) plaintiff's forecast of evidence sufficiently raises the issue as to whether the motives of the two managers were reasonable, good faith attempts to protect their interests or the corporation's interests.

4. Employer and Employee— tortious interference with contractual rights—ratification

Although defendant Kimberly-Clark Corporation contends it did not ratify any alleged tortious conduct, the trial court erred in granting defendant's motion for summary judgment on the tortious interference with contractual rights claim because plaintiff's forecast of evidence revealed Kimberly-Clark had an Open Door policy investigation and failed to use it, including evidence that: (1) the company's regional vice-president said he had talked with defendant-manager Wager and he was going to stand behind Wager's decision; (2) the company's regional vice-president admitted that he never talked to any of plaintiff's witnesses, nor did he do anything else other than talk to Wager; (3) the company's regional vice-president admitted that the company had no evidence that plaintiff ever accessed pornography on the internet while at work; and (4) another company employee never returned plaintiff's calls when she sought to report that she did not receive a fair investigation.

5. Employer and Employee— negligent supervision—actual or constructive knowledge required

The trial court did not err in granting defendant Kimberly-Clark Corporation's motion for summary judgment on the claim of negligent supervision because plaintiff's forecast of evidence was insufficient to show that Kimberly-Clark had actual or constructive knowledge of any tortious acts of defendant-manager Schneider since there is no evidence that any employee, including plaintiff prior to her discharge, ever complained to the management about Schneider.

Appeal by plaintiff from judgment entered 23 October 1998 and filed 28 October 1998 by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 1999.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Powell, Goldstein, Frazer & Murphy, LLP, by Samuel M. Matchett and Jona J. Miller; Smith Helms Mulliss & Moore, L.L.P., by Martin N. Erwin and Julie C. Theall, for defendants-appellees.

WALKER, Judge.

Plaintiff filed a motion for partial summary judgment on the claim of slander *per se*, which was denied by Superior Court Judge L. Todd Burke on 11 August 1998. Defendants then filed a motion for summary judgment along with supporting affidavits. In an order entered 23 October 1998 and filed 28 October 1998, Superior Court Judge Russell G. Walker, Jr. granted defendants' motion and dismissed all of plaintiff's claims.

From the pleadings and discovery, the evidence tended to show the following: Plaintiff was employed by Kimberly-Clark Corporation (Kimberly-Clark) from October 1985 until 19 August 1996 as a production associate at its Lexington facility. In August 1996, plaintiff was working as a member of the D team, which reported to defendant Schneider, a company manager. Defendant Schneider, in turn, reported to defendant Wagar, the mill manager. While plaintiff received "good" annual written evaluations and numerous certificates of commendation during her 11 years of employment with

Kimberly-Clark, plaintiff had also received several warnings from her supervisors.

Plaintiff alleges that on 12 August 1996, defendant Schneider accused her in front of Elliot Goldson, the Human Resources Manager, of using illegal drugs on the company's premises, but that the accusation was false and slanderous. Also in August 1996, a co-op student, Calvin Marshall, informed Steve O'Bryant, a manager at Kimberly-Clark, that he had seen several employees including "a man with a pony tail and a big, tall muscular woman" viewing sexual material on the internet on a Wednesday and Thursday night shift but that he did not know the employees' names. Defendant Wagar called a meeting of the mill's management team, which consisted of eleven individuals, to discuss the incident. Based on Marshall's descriptions, defendants contend that the management team concluded that the "man with the pony tail" was Wayne Koontz and the "muscular woman" was plaintiff. Then, on 19 August 1996, defendant Schneider met with plaintiff and accused her, in front of Elliot Goldson and another manager, Dan Heaton, of accessing pornography on the internet from a company computer. Defendants contend that during the discharge meeting, plaintiff admitted accessing non-business sites on the internet.

Plaintiff argues, however, that this accusation was false and that she was fired as a result of it. Plaintiff also denies ever accessing any non-business sites on the internet and denies admitting such during the discharge meeting. Instead, plaintiff maintains that she worked primarily in the lab area which is not in close proximity to the computer terminal in question on the Wednesday night of the alleged incident. Further, she states that she was not at work on the Thursday night the incident is alleged to have occurred.

Plaintiff alleges that when defendant Schneider made both of these statements to her, he exhibited "anger, personal hostility, and ill-will" towards her. According to plaintiff, both defendants Schneider and Wagar had exhibited personal hostility towards her prior to August 1996. Specifically, plaintiff contends that defendant Schneider had a "hit list with names of employees he intended to get rid of" and that her name was included. After Rick Purcell, a company manager, confirmed the existence of the "hit list," plaintiff confronted defendant Schneider and he admitted his desire to terminate plaintiff's employment.

Wayne Koontz, a non-management employee of Kimberly-Clark for almost 11 years, was also terminated on 19 August 1996. In his

affidavit, Koontz stated that he met defendant Schneider at his office on 19 August 1996 and that Schneider informed him that he was terminated for accessing pornographic material on the company's computer. Koontz also averred that defendant Schneider then "stated orally to me that Laura Barker had accessed pornography on the internet on one of the company's computers and that he was also going to fire her."

Plaintiff assigns that the trial court erred in: (1) granting defendants' motion for summary judgment on plaintiff's slander *per se* claim since the court overruled a previous order of another superior court which had determined that genuine issues of material fact existed regarding the slander *per se* claim; (2) granting defendants' motion for summary judgment on plaintiff's slander *per se* claim since there are genuine issues of material fact; (3) granting defendants' motion for summary judgment on plaintiff's claim of tortious interference with contractual rights; and (4) granting defendant Kimberly-Clark's motion for summary judgment on plaintiff's claim of negligent supervision.

Summary judgment is proper when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (Cum. Supp. 1998); *Coastal Leasing Corp. v. T-Bar S Corp.*, 128 N.C. App. 379, 496 S.E.2d 795 (1998). Defendant, as the moving party, bears the burden of showing that no triable issue exists. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-342 (1992). This burden can be met by showing: (1) that an essential element of plaintiff's claim is nonexistent, (2) that discovery indicates plaintiff cannot produce evidence to support an essential element, or (3) that plaintiff cannot surmount an affirmative defense. *Id.* at 63, 414 S.E.2d at 342. Once a defendant has met that burden, the plaintiff must forecast evidence tending to show a *prima facie* case exists. *Id.*

[1] We first address plaintiff's contention that the trial court erroneously granted defendants' motion for summary judgment on plaintiff's slander *per se* claim since issues of fact exist. Slander *per se* is a false statement which is orally communicated to a third person and amounts to:

> (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.

Averitt v. Rozier, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995). A *prima facie* presumption of malice and a conclusive presumption of legal injury and damage arises when a false statement falling into one of these categories is spoken. *Id.* Thus, an allegation and proof of special damages is not required. *Id.*

In her affidavit, plaintiff alleges that defendant Schneider falsely accused her of using illegal drugs on the company's premises and of accessing pornography on the internet on one of the company's computers. She further alleges that these accusations were made in front of third persons, amounted to accusations of crimes involving moral turpitude, and impeached her in her trade, business, or profession.

Defendants argue that defendant Schneider's statements did not amount to an accusation of a crime of moral turpitude or tend to impeach plaintiff in her trade, business, or profession, and further contend that even if any of the three statements constitute slander *per se*, the statements made by defendant Schneider were privileged. A defamatory statement is qualifiedly privileged when made:

> (1) in good faith, (2) on subject matter (a) in which the declarant has an interest or (b) in reference to which the declarant has a right or duty, (3) to a person having a corresponding interest, right, or duty, (4) on a privileged occasion, and (5) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Averitt, 119 N.C. App. at 219, 458 S.E.2d at 29. The existence of the privilege creates a presumption that the communication was made in good faith and without malice. *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). To rebut this presumption, the plaintiff must show the statement was made with actual malice. *Id.*

Plaintiff first argues that defendant Schneider's statement to Koontz was not privileged since Koontz had no corresponding interest, right, or duty. In his affidavit, Koontz states that he was a non-management employee at Kimberly-Clark, who was terminated just prior to defendant Schneider stating orally to him that "Laura Barker had accessed pornography on the internet on one of the company's computers and that he was going to fire her." Koontz's affidavit further provides:

> When Christopher Schneider made the statement to me about Laura Barker, I had no need for or interest in [the] information; and I had no duty to perform with respect to this information.

Although plaintiff admits that Kimberly-Clark's management employees would have an interest, right, or duty regarding an employee's illegal drug use on its premises or the accessing of pornographic material on the company's computer, she contends that there was sufficient evidence of actual malice to rebut any presumption of a qualified privilege. Actual malice may be proved by showing:

> evidence of ill-will or personal hostility on the part of the declarant ... or by showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity.

Clark v. Brown, 99 N.C. App. 255, 263, 393 S.E.2d 134, 138, *cert. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990).

Here, plaintiff alleges that defendant Schneider exhibited "anger, personal hostility, and ill-will" towards her when he made the accusations in August 1996 and that he had exhibited personal hostility towards her prior to this time. Specifically, plaintiff contends that defendant Schneider had a "hit list" with her name on it and that he admitted his desire to terminate her employment. Additionally, plaintiff argues that defendant Schneider made the statements regarding plaintiff's alleged viewing of pornographic material with reckless disregard for the truth since he based his accusation on the generic description of a "big, tall muscular woman" and failed to further pursue Marshall's report. In her affidavit, plaintiff further states:

> During my employment, the company maintained attendance records documenting the days I worked at the company and the days I was scheduled to work. On the Thursday night in question, I was not scheduled to work and I did not work that night. The description of a "big muscular girl" does not fit me, because I am 5 feet, 7 inches tall. There were females as tall as and taller than me during my employment with Kimberly-Clark.

After a careful review, we find that an issue of fact exists regarding plaintiff's slander *per se* claim and thus the trial court improperly granted defendants' motion for summary judgment as to this issue. Based on this finding, we need not address plaintiff's assignment of

error that one superior court improperly overruled another superior court.

[2] We next address plaintiff's contention that the trial court erroneously granted defendants' motion for summary judgment on plaintiff's claim of tortious interference with her contractual rights. The elements of tortious interference are: (1) the existence of a valid contract between plaintiff and a third party; (2) knowledge by defendant of the contract; (3) acts by defendant to intentionally induce the third party not to perform the contract; (4) defendant's acts were committed without justification; and (5) actual damage to the plaintiff. *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-182 (1954). Here, plaintiff's complaint and discovery documents give an evidentiary forecast adequate to withstand defendants' motion for summary judgment since (1) plaintiff held a permanent position with Kimberly-Clark, where she had been employed for 11 years; (2) defendants Schneider and Wagar, as managers, had knowledge of this contract; (3) defendant Schneider intentionally accused plaintiff of illegal drug usage and of viewing pornography for the purpose of causing her termination; (4) defendants Schneider and Wagar acted "solely with malice and without justification" rather than for legitimate business interests; and (5) the actions of defendants Schneider and Wagar caused plaintiff to lose her employment with Kimberly-Clark, resulting in damage to her.

[3] Defendants Schneider and Wagar contend that they cannot be liable for a claim of tortious interference with contractual rights since they were managers and thus non-outsiders to plaintiff's employment contract. It is true that non-outsiders often enjoy qualified immunity from liability for inducing their corporation or other entity to breach its contract with an employee. *Lenzer v. Flaherty*, 106 N.C. App. 496, 513, 418 S.E.2d 276, 286, *cert. denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). However, non-outsider status is pertinent only to the question of whether the defendant's action was justified. *Id.* "The qualified privilege of a non-outsider is lost if exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests in the contract interfered with." *Id.*; *see Wilson v. McClenny*, 262 N.C. 121, 133, 136 S.E.2d 569, 578 (1964) (holding that directors and stockholders were privileged to purposely cause the corporation not to renew plaintiff's contract as president if they did not employ any improper means and if they acted in good faith to protect the corporation's interests); *see also Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *cert. denied*, 314 N.C.

331, 333 S.E.2d 490 (1985) (holding that non-outsider status is immaterial where the allegations in the complaint show defendants' motives for procuring the plaintiff's termination were unrelated to their business interest).

Here, plaintiff alleges that defendant Schneider falsely accused her of taking illegal drugs and accessing pornographic material on the internet and that "defendants Schneider and Wagar, out of personal hostility and ill-will toward the Plaintiff, schemed to come up with false and defamatory accusations against the Plaintiff with the intent to bring about the termination of her employment." Further, plaintiff contends that defendant Schneider had a "hit list with names of employees he intended to get rid of" and that her name was included, and when she confronted defendant Schneider regarding the "hit list," he admitted his desire to terminate her employment. Thus, plaintiff's forecast of evidence sufficiently raises the issue as to whether the motives of defendants Schneider and Wagar were reasonable, good faith attempts to protect their interests or the corporation's interests.

[4] Defendant Kimberly-Clark also contends that it did not ratify any alleged tortious conduct. In her affidavit, however, plaintiff alleges:

> 6. When Christopher Schneider fired me, I told him that I did not access pornography on the company's computer. I asked to meet with Tom Wagar, the plant manager. When I met with him, I told him that these accusations were false, and I asked him to investigate this. He declined to do so. Kimberly-Clark Corporation has an Open Door policy. I used the Open Door policy and called Wayne Sanders, the President and CEO of Kimberly-Clark. He never returned my calls, although I talked with his secretary on several occasions. I received a call from Jerry Schwoerer, the company's regional Vice-President, at its Roswell, Georgia facility. I told Mr. Schwoerer that I had been falsely accused by Chris Schneider and wrongfully fired by him. Mr. Schwoerer said that he would do an Open Door policy investigation and I gave him details of the situation concerning Chris Schneider's conduct toward me. Mr. Schwoerer said that he would interview my witnesses, and I gave him a list of the employees on my team, the D1 team. The Open Door Policy requires that the company conduct a fair and thorough investigation. When Mr. Schwoerer called me back, he informed me that he had talked with Tom Wagar and that he was going to stand behind Tom's decision. He admitted to me

> that he never talked to any of the witnesses that I had given him, nor did he do anything else other than talk with Tom Wagar. He stated that Kimberly-Clark had no evidence that I had ever accessed pornography on the Internet while at work. I called Wayne Sanders after that and told his secretary that Mr. Schwoerer had not conducted a proper Open Door Policy investigation. I asked her to have Wayne Sanders call me. I told her that my situation was urgent. I never heard from Wayne Sanders. Kimberly-Clark failed to follow its Personnel policies and practices, because although an Open Door Policy investigation was supposed to be fair and thorough, this did not occur in my case. In addition, Kimberly-Clark had a Progressive Disciplinary Policy, which it also failed to follow in my case. A fair and thorough investigation would have revealed that I was not even at work the night that Calvin Marshall allegedly observed pornography pulled up on the company computer.

Based on these allegations, plaintiff's forecast of evidence was sufficient to show that there was an issue of fact regarding defendant Kimberly-Clark's ratification; therefore, summary judgment on this issue was improperly granted.

[5] Plaintiff also assigns as error the trial court's granting of summary judgment to defendant Kimberly-Clark on the claim of negligent supervision. In the recent case of *Smith v. Privette*, 128 N.C. App. 490, 494-95, 495 S.E.2d 395, 398, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998), this Court held that to support a claim of negligent supervision against an employer the plaintiff must prove:

> that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency.

There is no evidence here that any employee, including plaintiff prior to her discharge, ever complained to the management at Kimberly-Clark about defendant Schneider. Thus, we conclude that plaintiff's forecast of evidence was insufficient to show that defendant Kimberly-Clark had actual or constructive knowledge of any tortious acts of defendant Schneider and that the trial court properly granted defendant's motion for summary judgment on the negligent supervision claim.

In summary, the trial court erred in granting defendants' motion for summary judgment on plaintiff's slander per se claim and plain-

tiff's tortious interference with contractual rights claim. Summary judgment for defendant Kimberly-Clark on plaintiff's negligent supervision claim is affirmed.

Affirmed in part and reversed in part.

Judges GREENE and TIMMONS-GOODSON concur.

JANICE D. ROYAL, ADMINISTRATRIX OF THE ESTATE OF DARION TYRON ROYAL AND JANICE D. ROYAL, INDIVIDUALLY, PLAINTIFFS v. LAMAR ARMSTRONG, MARCIA ARMSTRONG, AND BRIAN BURTON, DEFENDANTS

No. COA99-255

(Filed 1 February 2000)

1. Premises Liability— drowning—private home pool party

The trial court did not err in granting defendants' motion for summary judgment in a negligence action for the drowning death of an eight-year-old boy at a private home pool party based on the theory of premises liability, even though plaintiffs allege there was no lifeguard on duty and that adequate safety devices were not available, because: (1) private homeowners are not required to provide a lifeguard at a private pool when guests are swimming; (2) plaintiffs failed to establish that the safety devices were required by law or ordinance, and that even if such devices were necessary to meet the reasonable landowner standard, their absence was the proximate cause of the victim's death; and (3) plaintiffs did not allege any sort of defect in the pool or surrounding premises that proximately caused the victim's death.

2. Negligence— breach of duty to supervise—direct duty— delegation of duty—drowning—private home pool party

The trial court did not err in granting defendants' motion for summary judgment in a negligence action for the drowning death of an eight-year-old boy at a private home pool party based on the theory of defendant-Armstrongs' breach of duty to supervise because: (1) all the evidence is that defendants acted reasonably while they were directly supervising and watching the children, including that defendants only allowed the children to enter the pool after establishing rules about the pool, defendants asked

two adults who sat by the pool to watch the children while defendants were preparing food for the party in the kitchen where they could still see the pool, and there was no indication that any of the children were not capable swimmers; and (2) defendants acted reasonably in delegating the supervision of the children to two able-bodied adults, who had ample incentive to monitor the swimmers closely since their children were also attending the party and their son was the guest of honor.

3. **Negligence— breach of duty to supervise—delegation of duty—drowning—private home pool party**

The trial court did not err in granting defendants' motion for summary judgment in a negligence action for the drowning death of an eight-year-old boy at a private home pool party, based on the theory of the Burtons' breach of duty to supervise being attributable to defendant-Armstrongs, because the evidence reveals: (1) defendant-Burton warned the children who were using the diving board to be sure the diving area was clear before jumping or diving from the board; (2) Burton watched both the deep and shallow ends of the pool; (3) Burton acted immediately when he saw the victim at the bottom of the pool; (4) there is no indication that a different outcome would have resulted if Burton had dived into the pool himself instead of sending another swimmer to check on the victim.

4. **Emotional Distress— negligent infliction—drowning—private home pool party—no negligence as a matter of law**

The trial court did not err in granting defendants' motion for summary judgment on the negligent infliction of emotional distress claim based on the drowning death of an eight-year-old boy at a private home pool party, because the court already determined that defendants were not negligent as a matter of law.

Appeal by plaintiffs from judgment entered 25 August 1998 by Judge Robert L. Farmer in Johnston County Superior Court. Heard in the Court of Appeals 28 October 1999.

Foil Law Offices, by Martha McKee and Laura Stephenson Irwin, for plaintiff-appellants.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey, for defendant-appellees Lamar Armstrong and Marcia Armstrong.

EDMUNDS, Judge.

Plaintiffs appeal the trial court's grant of defendants' motion for summary judgment in this negligence action. We affirm.

On 17 July 1999, defendants (Mr. and Mrs. Armstrong) hosted a pool party for Robbie Burton. Eight-year-old Darion Tyron Royal (Darion), who had visited defendants in the past, was one of the invited guests. Darion's grandmother, plaintiff Janice Royal, and Darion's mother dropped him off at defendants' house around 6:17 p.m. At that time, Darion had known how to swim for approximately one and one-half years. The children were not allowed to enter defendants' private pool until Mrs. Armstrong came home from work. When Mrs. Armstrong arrived, which was shortly after Darion's appearance, she set down for the children several rules for using the pool. One of the rules was that each child should wait until the diving area was clear of other children before jumping or diving off the diving board.

Once Mrs. Armstrong briefed the children, they were allowed to swim. Although the numbers varied, between seven and ten children were usually in the pool at any given time. A few minutes after opening the pool for use, Mrs. Armstrong asked Brian and Liz Burton, parents of the guest of honor, to watch the swimmers. While the Burtons stayed outside by the pool, Mrs. Armstrong went inside the house to prepare hotdogs for the children. Other parents who attended the party helped Mrs. Armstrong inside the house. She could see the pool from her vantage point in the kitchen.

Mr. Armstrong arrived home around 6:45 p.m. When he entered the pool area, he saw Mrs. Burton near the pool-side table and Mr. Burton close to the pool's ladder. He spoke briefly with the Burtons before joining Mrs. Armstrong and other adults who were preparing food in the house. Before going inside, he saw some children in the shallow end of the pool, while others were getting out of the water to jump off the diving board, but did not observe any unusual behavior.

Mr. Burton was a swimmer and had experience as a lifeguard. He observed that the children were all having a good time in the pool. Some were playing a game with a "nerf" type ball in which one child would throw the ball as another child would run off the diving board in an attempt to catch it. Mr. Burton instructed the children not to run to the board and to be sure the diving area in front of the board was clear before jumping off the diving board.

After the "nerf" game ended, some of the children, including Darion, remained in the deep end of the pool. Mr. Burton continued to observe the children in both ends of the pool. He noticed that Darion was sitting at the bottom of the pool. Although his first reaction was that Darion was playing, he was concerned and told one of the children to swim down to check on Darion. When the child surfaced, he reported to Mr. Burton, who had risen from the chair in which he had been sitting, that Darion was fine and that his eyes were open. Mr. Burton sent the child back down to have Darion come up. The child brought Darion to the surface, and Mr. Burton pulled him out of the water and began administering CPR.

Mr. Armstrong had been in the house only a matter of minutes when someone rushed in to report something was wrong with Darion. Mr. Armstrong immediately went out to the pool where Mr. Burton was administering CPR. The two men were able to expel some water from Darion's lungs. Paramedics transported Darion to the hospital, but he did not survive. The cause of death was drowning. No one at defendants' pool party reported observing Darion display any signs of distress before he was observed at the bottom of the pool, and no evidence was presented as to specific events that led to the drowning.

Plaintiff Janice Royal brought suit both as administratix of Darion's estate and in her individual capacity as Darion's grandmother. She alleges that defendants' negligence was the proximate cause of Darion's death. Defendants' motion for summary judgment was heard on 20 August 1998 in Wake County Superior Court, and on 25 August 1998, the trial court granted defendants' motion. Plaintiffs appeal.

Summary judgment is appropriate 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 trial court found facts from proper evidence sufficient to support the judgment, *see J.M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 423-24, 324 S.E.2d 909, 912 (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). "Even though summary judgment is seldom appropriate in a negligence case, summary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d

567, 569 (1995) (citations omitted). The elements of negligence are duty owed by defendants to plaintiffs and nonperformance of that duty proximately causing plaintiffs' injury. *See Camalier v. Jeffries*, 340 N.C. 699, 460 S.E.2d 133 (1995).

I. Wrongful Death

Plaintiffs' action for wrongful death is premised upon three theories of liability. We review these theories seriatim.

A. Premises Liability

[1] Plaintiffs contend that defendants were negligent because no lifeguard was on duty and that adequate safety devices were not available at their pool. We must review this issue in light of our Supreme Court's holding in *Nelson v. Freeland*, which "eliminate[d] the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors." 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998). Because the Supreme Court further determined that *Nelson* was to be applied retroactively, it applies to the case at bar. Cases that are factually similar but whose outcomes are based on an analysis of a visitor's status are of limited value. *See, e.g.*, *Howard v. Jackson*, 120 N.C. App. 243, 461 S.E.2d 793 (1995).

Nevertheless, the substitution of a "reasonable care" standard for earlier distinctions between the duties a host owed to invitees and to licensees in determining premises liability does not mean that summary judgment is inappropriate where, as a matter of law, "there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Lavelle*, 120 N.C. App. at 859, 463 S.E.2d at 569 (citations omitted); *see Freeman v. Sugar Mountain Resort, Inc.*, 351 N.C. 184, 522 S.E.2d 582, (1999) (per curiam) (reversing 134 N.C. App. 73, 516 S.E.2d 616 (1999) for reasons stated in dissenting opinion of Lewis, J.). "[W]e do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson*, 349 N.C. at 632, 507 S.E.2d at 892.

There is no evidence of negligence related to defendants' use or maintenance of their premises. Although plaintiffs alleged that there were no lifeguards on duty while the children were swimming, we never have held that private homeowners are required to provide a lifeguard at a private pool when guests are swimming, and we make

no such holding now. Plaintiffs have alleged further that no whistles, alarms, or other signaling devices were available and that the pool was not equipped with safety lines or other similar lifesaving devices (although the guests used floatation toys). However, plaintiffs failed to establish that such equipment was required by law or ordinance, and they have been unable to demonstrate that, even if such devices were necessary to meet the reasonable landowner standard, their absence was the proximate cause of Darion's death. *See Bray v. A & P Tea Co.*, 3 N.C. App. 547, 165 S.E.2d 346 (1969). The evidence establishes that the presence of such devices would not have prevented the tragic outcome. An alarm triggered by a disturbance in the water would have been ineffective at a pool party attended by splashing, swimming children. Uncontested evidence was presented that Darion was a competent swimmer. Because no one observed him in distress before Mr. Burton saw him at the bottom of the pool, lifesaving devices would have been useless; once Mr. Burton realized Darion was in trouble, rescue efforts proceeded expeditiously.

The instant case is similar to *Sasser v. Beck*, 65 N.C. App. 170, 308 S.E.2d 722 (1983), in which a child swimming in a motel pool unattended by adults was found at the bottom of the pool. Affirming the trial court's directed verdict for the defendant motel, we stated:

> Plaintiff offered no evidence showing that he sustained his injuries by reason of some defect in the pool, that additional safety precautions would have prevented the injuries, or that their absence proximately caused the accident. . . .
>
> . . . .
>
> . . . The evidence shows that an unfortunate injury occurred, but leaves to pure speculation the question of the cause.

Id. at 171-72, 308 S.E.2d at 723 (citations omitted). Plaintiffs in the case at bar also have not alleged any sort of defect in the pool or surrounding premises that proximately caused Darion's death. Therefore, plaintiffs have failed to establish a claim for premises liability as a matter of law.

B. Breach of Duty to Supervise

[2] Plaintiffs contend that defendants failed properly to supervise the children at the party. We agree that defendants were required to exercise reasonable care supervising children lawfully using the pool at their invitation. *See Corda v. Brook Valley Enterprises, Inc.*, 63

N.C. App. 653, 306 S.E.2d 173 (1983) (holding that lifeguard owed a country club member, who drowned in club pool while swimming legally, the duty to exercise the care of a reasonably prudent lifeguard). Also instructive are cases addressing the duty of a teacher or day care provider. In *Pruitt v. Powers*, we stated that "[w]hile North Carolina case law does not specifically address the duty owed by day care providers to the children under their supervision, our courts have held that the appropriate standard of care for a school teacher is that of a person of ordinary prudence under like circumstances." 128 N.C. App. 585, 590, 495 S.E.2d 743, 747 (1998) (citing *Daniel v. City of Morganton*, 125 N.C. App. 47, 54, 479 S.E.2d 263, 268 (1997)). We modeled the standard of care for day care providers after the standard imposed upon teachers, which is that standard of care " 'a person of ordinary prudence, charged with his duties, would exercise under the same circumstances.' " *Izard v. Hickory City Schools Bd. of Education*, 68 N.C. App. 625, 626-27, 315 S.E.2d 756, 757-58 (1984) (quoting *Kiser v. Snyder*, 21 N.C. App. 708, 710, 205 S.E.2d 619, 621 (1974) (citation omitted)).

While an adult who volunteers to host or supervise a child's pool party is in a position only somewhat analogous to that of a paid teacher or day care provider, each, nevertheless, is entrusted with the welfare of a child. Consistent with the holdings in the cases cited above, we believe that such adult hosts or supervisors have a duty to the children to exercise a standard of care that a person of ordinary prudence, charged with similar duties, would exercise under similar circumstances. As with students, "the amount of care due . . . increases with the student's immaturity, inexperience, and relevant physical limitations." *Payne v. N.C. Dept. of Human Resources*, 95 N.C. App. 309, 314, 382 S.E.2d 449, 452 (1989) (citations omitted).

The evidence in the case at bar establishes that between seven and ten children were swimming in the pool. Mrs. Armstrong allowed the children to enter the pool only after establishing rules about the pool, and later Mr. Burton reiterated some of the rules. Shortly after she allowed the children to begin swimming, but before she left the pool area, Mrs. Armstrong asked the Burtons to watch the children. Mrs. Armstrong then went into the kitchen to prepare food for the party. From this location she could see the pool. Mr. Armstrong also watched the children playing in the pool for a short time before he entered the kitchen. When Mr. Armstrong left the pool area, Mrs. Burton was at a pool-side table and Mr. Burton was in the area by the pool's ladder. Neither Darion's grandmother nor mother placed any

limitation on his use of the pool. There is no indication that any of the children were not capable swimmers. The record indicates that Mr. Burton realized Darion was in trouble so shortly after Mr. Armstrong left the pool that Mr. Armstrong did not even have time to set his jacket down before someone entered the house to request that 911 be called. Therefore, all the evidence is that defendants acted reasonably while they were directly supervising and watching the children; no evidence suggests that their direct supervision was negligent.

We next consider whether it was reasonable for defendants to delegate the supervision of the children to the Burtons. It does not appear to us unreasonable for a parent to delegate the pool-side duties to another equally capable individual. In the case at bar, defendants left the children in the care of two able-bodied adults with no physical handicaps that would prevent them from rescuing a child in trouble. Mrs. Armstrong specifically asked the Burtons to watch the children before she went inside to work on the food. By doing so, she entrusted her own three children, who were among those playing in and around the pool, to the care of the Burtons. Moreover, the Burtons' son was the guest of honor, and the record suggests that other Burton children also may have attended the party; consequently, the Burtons had ample incentive to monitor the swimmers closely. Defendants were readily accessible should trouble arise, and, in fact, Mr. Armstrong was able to help Mr. Burton administer CPR. All the evidence indicates that defendants reasonably delegated supervision duties to the Burtons, while no evidence indicates that the delegation was negligent. Therefore, defendants were not negligent in delegating the duty of attending the swimmers to the Burtons.

C. Negligence by the Burtons

[3] Plaintiffs also contend that the Burtons were negligent in exercising the supervisory duties delegated to them, and the Burtons' negligence should be attributable to defendants. Assuming *arguendo* that the Burtons were agents of defendants, a question we do not reach, no evidence suggests that the Burtons were negligent. They were not deposed. Mr. Burton submitted an affidavit stating that he warned the children using the diving board to be sure the diving area was clear before jumping or diving from the board, that he watched both the deep and shallow ends, and that he acted immediately when he saw Darion at the bottom of the pool. Nothing done or not done by Mr. Burton as reflected in this affidavit can be construed as negligence; instead, the affidavit presents a picture of a supervisor who was properly and appropriately vigilant. Although a witness for plain-

tiffs stated in an affidavit: "I also question the judgment of an individual who saw a child on the bottom of a pool, then sends another child to check on him," this expression of opinion is not evidence of negligence. There is no indication in the record or even in the affidavit quoted above that if Mr. Burton had dived in himself rather than sending another swimmer to check on Darion, the outcome would have been different. Therefore, even if the Burtons were agents of defendants, because the Burtons were not negligent, it follows that defendants cannot be deemed vicariously negligent.

In light of uncontested evidence that defendants exercised reasonable care toward Darion, the trial court properly granted defendants' motion for summary judgment as to plaintiffs' claim for wrongful death. This assignment of error is overruled.

II. Negligent Infliction of Emotional Distress.

[4] Plaintiffs next argue that the court erred in granting defendants' motion for summary judgment as to plaintiffs' claim of negligent infliction of emotional distress. However, because we have determined above that defendants were not negligent as a matter of law, this claim also fails. This assignment of error is overruled.

The trial court's grant of summary judgment in favor of defendants is affirmed.

Affirmed.

Judges McGEE and SMITH concur.

ROBERT LONDON, EMPLOYEE, PLAINTIFF-APPELLEE v. SNAK TIME CATERING, INC., EMPLOYER AND ANTHEM CASUALTY INSURANCE GROUP, CARRIER, DEFENDANT-APPELLANTS

No. COA99-342

(Filed 1 February 2000)

1. Workers' Compensation— findings of fact—attendant health care services—evidence sufficient

The Industrial Commission's findings of fact in a workers' compensation case regarding plaintiff-employee's need for attendant care services are binding because they are supported by competent evidence.

2. Workers' Compensation— conclusions of law—attendant health care services—family member

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff-employee is entitled to compensation for attendant health care services provided by his wife because this conclusion is supported by the findings of fact, and family members are entitled to payment for attendant care provided to an injured family member.

Appeal by defendants from judgment entered 6 October 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 January 2000.

Robert London (plaintiff/employee) was employed with Snak Time Catering, Inc. (defendant/employer), a company he owned and operated, when he was injured in an automobile accident on 17 October 1977. The accident left plaintiff hospitalized for nearly three months. During that time, plaintiff was diagnosed with chronic brain syndrome secondary to post-traumatic damage with a right cerebral contusion, bilateral frontal subdural hematomas and left hemiparesis. The injuries were admittedly compensable, the parties entered into a Form 21 agreement, and plaintiff continues to receive benefits pursuant to the agreement. Plaintiff filed this claim with the Industrial Commission seeking compensation for attendant care services and attorney fees pursuant to N.C. Gen. Stat. § 97-88.1 (1999). Following an appeal from the decision of a Deputy Commissioner, the Full Commission awarded compensation to plaintiff's wife for "attendant care services for eight hours per day, seven days per week at the rate of $6.00 per hour for the period from February 20, 1997 and continuing." The Commission found that defendants had reasonable grounds to defend this action, and made no award for attorney fees. Defendants appealed, assigning errors.

Sellers, Hinshaw, Ayers, Dortch, Honeycutt and Lyons, P.A., by Mark T. Sumwalt; and Lore & McClearen, by R. James Lore, for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III, for defendant appellants.

HORTON, Judge.

[1] Defendants first assign error to numerous findings of fact made by the Full Industrial Commission (Commission) regarding plaintiff's

need for attendant care services. Our review is limited to determining whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). On appeal, so long as there is *any* competent evidence to support the facts found by the Commission, they are binding on appeal even though evidence to support a contrary finding exists. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Although there is competent evidence in the record to support the findings made by the Commission, we will comment briefly on each of the findings about which defendants complain.

A.

Plaintiff's wife testified that she worked with plaintiff in his catering business from its inception until plaintiff's accident, but had not worked outside the home since the accident. When asked how long she worked with plaintiff, his wife answered:

> From day one until his accident. I was entirely over the inside, the commissary, all the food in the office and he took care of the trucks. He was on the outside.

Defendants rely on a portion of the deposition testimony of the disabled plaintiff in which he stated that, before the accident, his wife did not have a full-time job outside the home "that [he] kn[e]w of." Although the Commission considered and weighed all the evidence and found that plaintiff's wife did work in the catering business prior to the accident but not thereafter, defendants continue to argue that there was no evidence that plaintiff's wife worked prior to the accident. This argument is clearly without merit and is overruled.

B.

Plaintiff's wife further testified that she carefully supervises plaintiff's daily activity in order to guard against harm to him or others and that plaintiff wanders about his home in the early hours of the morning. Based on competent medical evidence of record, the Commission found that "plaintiff also retains cognitive impairments which affect his personality and judgment, including obsessive/compulsive behavior, difficulty recognizing danger, immature decision-making, spontaneous actions, lack of patience, frustration with changes to his routine, anger, and a child-like dependency on his wife." The Commission further found that plaintiff's impairments are

the result of his frontal lobe injury. Defendants offered evidence that plaintiff could do many tasks without constant supervision by other persons, including driving an automobile, using a lawnmower, using a microwave, making coffee, feeding and dressing himself, and taking care of his personal needs. There was medical evidence from a board-certified neuropsychologist, however, that persons with brain injuries do fairly well if in a "structured" setting, but problems arise when they are confronted by "novel" situations. Further, the two rehabilitation nurses who testified in this case have observed plaintiff in his usual environment and consider him a safety risk to himself and to other persons. There is ample evidence to support the Commission's finding that plaintiff's wife must keep him under "supervision in order to keep him from being injured."

C.

Defendant also argues that the Commission failed to make findings of fact on evidence which was offered with regard to plaintiff's unsupervised attendance at a flea market during the work week. The Commission is not required, however, to find facts as to all credible evidence. *Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 377 S.E.2d 267, *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989). That requirement would place an unreasonable burden on the Commission. Instead, the Commission must find those facts which are necessary to support its conclusions of law. Further, the questioned activities are cumulative of other evidence in this case which tends to show that plaintiff has the cognitive ability to perform simple tasks which are part of his routine activities. Even assuming the Commission erred in not making further findings of fact relative to plaintiff's attendance at flea markets, such omission would not be prejudicially erroneous under the facts of this case.

D.

Defendants contend that there was no basis for the finding by the Commission that the plaintiff set fire to his home lawn on two occasions. Defendants argue that the only evidence of record about lawn fires was as a basis for the opinion testimony of Ms. Barbara Armstrong, and thus not a proper basis for findings of fact by the Commission. Again, defendants ignore the plain language of the transcript of testimony of plaintiff's wife, in which she testified that her husband set the lawn on fire on three occasions. Further, Ms. Armstrong's testimony tends to corroborate the testimony of plaintiff's wife. This assignment of error is overruled.

E.

The Commission's findings that plaintiff is in need of 24-hour attendant care are supported by the testimony of Ms. Barbara Armstrong, a certified life care planner, registered nurse, certified disability management specialist, and certified case manager. A certified life care planner is specifically trained to assess the need for attendant care services and normally makes that assessment as part of preparation of a life care plan. Ms. Armstrong testified that in her opinion plaintiff needed 24-hour-per-day attendant care. Although defendants now question Ms. Armstrong's expertise, it was for the Commission, not this Court, to assess her credibility and weigh her testimony in light of her experience and professional credentials.

F.

There was ample testimony that plaintiff needed supervision at intervals throughout the day. The neuropsychologist opined that plaintiff needed supervision every two or three hours. Dr. Gualtieri testified that, if something happened to plaintiff's wife, plaintiff would need frequent supervision, someone checking in on him at least two to four times each day. Both Ms. Armstrong and Ms. Hill, the Commission's rehabilitation nurse, were of the opinion that plaintiff needed around-the-clock attendant care. Ms. Hill also testified that it would not be practical to have a home health care agency provide attendant care services by monitoring plaintiff's condition every two to four hours and that such care would be confusing to the plaintiff. Ms. Armstrong testified that many of the health care providers in North Carolina will not even go to a home unless guaranteed at least four hours of work. Thus, competent evidence supports the Commission's findings that it would be in the best interests of plaintiff for his wife to continue to provide attendant care for him.

G.

Finally, defendants complain that the Commission's finding that there are times when plaintiff's wife needs outside help in providing attendant care, and that persons who come into plaintiff's home to provide attendant care will usually want to have a minimum of eight hours of work in any given day, is not supported by competent evidence. We disagree. Defendants argue that there is no evidence in the record to support the need of plaintiff's wife for outside help, but ignore the following testimony from the record:

> Q. Okay I take it that the principal thing that you feel, in terms of you personally feel that you need, is you just need some assistance so you can get a break from all that, is that correct?
>
> A. Yes, sir. You know, I wish I could explain. I don't know what I need. All I know is I've got to have some help. That's the only thing I do know.

On another occasion, plaintiff's wife testified, "I've just come to the point in my life now that I've got to have some kind of help—some kind." Other evidence tended to show that plaintiff's wife was 62 years old, suffers from fibromyalgia and arthritis, has custody of her nine-year-old grandson, and cares for her elderly mother. The findings of the Commission about her need for outside help with plaintiff is amply supported by competent evidence. Further, defendants argue that the Commission erred in finding that "[p]ersons willing to come into a home for attendant care will usually want to have a minimum of eight hours in any given day." In its conclusion of law, the Commission directed that on occasions when plaintiff's wife needed outside help, defendants pay $6 per hour for such help. If outside help is unavailable for $6 per hour, defendants are to pay a "reasonable hourly amount for such outside care, not to exceed eight hours in any given day." In its Award, the Commission ordered "[o]utside help shall be paid at $6 per hour if available at that rate or at a reasonable other hourly rate if not available at $6 per hour." We believe the finding is supported by competent evidence in the record. The testimony of the rehabilitative nurses was to the effect that plaintiff requires attendant care at intervals of two to four hours, and that a home health care worker would usually not come into the home unless guaranteed at least four hours of work. It appears from the evidence that two shifts of not less than four hours each would be the absolute minimum to have persons available to provide attendant care for plaintiff during the course of the daylight hours. We do not believe that the Commission erred in its findings.

[2] Defendants argue that the Commission erred in concluding that plaintiff is entitled to compensation for attendant care services provided by his wife. While the Commission's findings are binding on appeal, its conclusions of law are reviewable. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985). Thus we must determine whether this conclusion is supported by the findings of fact made by the Commission.

The following findings of fact are relevant to the Commission's conclusions of law:

> 9. Barbara Armstrong, a life care planning specialist, found that the plaintiff was in need of twenty-four hour per day attendant care. Ms. Armstrong was present in the courtroom where she testified for approximately two hours.
>
> * * * *
>
> 12. Since February 20, 1997, the plaintiff requires attendant care services only a few minutes at a time, every three or four hours per day to ensure that he is having no difficulties. However, due to the sporadic nature and due to the minimum billing required by most agencies, it is not reasonable to expect a home health care agency to provide this type of service for the plaintiff, and it would be confusing for the plaintiff if he received care from many people. Furthermore, it would not be in the plaintiff's best interest to have multiple caregivers due to the confusion a change in his routine would pose.
>
> 13. Unskilled attendant care services in the area through a home health agency would be at a rate of $6.00 per hour unless the market requires a higher rate otherwise.
>
> 14. Plaintiff's wife has been providing this care for the plaintiff, and she is capable of continuing to provide the supervision which is required.
>
> 15. There are times when plaintiff's wife needs outside help in providing attendant care. Persons willing to come into a home for attendant care will usually want to have a minimum of eight hours in any given day.

These findings of fact were supported by competent evidence and support in turn the conclusion by the Commission that plaintiff is "entitled to have the defendants pay for eight hours per day, seven days per week, of attendant care services . . . provided by the plaintiff's wife" and that when plaintiff's wife needs assistance "defendant shall pay a reasonable hourly amount for such outside care, not to exceed eight hours in any given day."

Defendants argue, however, that plaintiff should not be entitled to compensation for his wife's services since she is doing nothing more than she was doing prior to his accident. Defendants again insist, contrary to the weight of the evidence, that plaintiff's wife did

not work outside the home before the accident. Defendants argue that, since plaintiff's injury, his wife's "duties within the household have remained unchanged." Although defendants disagree with the Commission's finding that plaintiff's wife worked with him in the catering business prior to the accident but has been unable to work since that time, we believe its finding is supported by competent evidence.

Finally, defendant argues that plaintiff's wife was merely carrying out her marital duties and is not entitled to compensation for attendant care services for plaintiff. Our Supreme Court has, however, authorized payment to family members for attendant care provided to an injured family member. *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967) (compensation allowed to plaintiff's brother and sister-in-law for 24-hour-per-day attendant care).

This Court does not write on a clean slate in reviewing an Opinion and Award of the Full Industrial Commission. The Commission is the trier of fact and weighs the credible evidence. Here, the Commission's findings are supported by competent evidence, and those findings support its conclusions of law. Consequently, the Opinion and Award of the Full Commission is

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

NANCY CULLEN, AND DOUGLAS CULLEN, CO-ADMINISTRATORS OF THE ESTATE OF CAMERON PATRICK CULLEN, PLAINTIFF-APPELLANTS v. CAROLINA HEALTHCARE SYSTEMS, FORMERLY KNOWN AS THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY; THE WILLOWS AT AMETHYST, A FACILITY OF CAROLINA HEALTHCARE SYSTEMS; AND DR. JAMES E. LEE, DEFENDANT-APPELLEES

No. COA99-671

(Filed 1 February 2000)

Civil Procedure— voluntary dismissal—taxing of costs

In a case where the parties were initially told by one judge that their medical malpractice case would be continued based on the misplacement of the court file and the estimated lengthy trial time requiring a special session, but later that same day were told

by a second judge the case would be tried since changed circumstances revealed the court file was located and a special superior court judge was available, the trial court did not err in ruling that plaintiffs' conditional voluntary dismissal constituted a voluntary dismissal under N.C.G.S. § 1A-1, Rule 41(a)(1), in dismissing the action, and in taxing costs of $23,431.59 against plaintiffs pursuant to Rule 41(d).

Appeal by plaintiffs from order taxing costs entered 8 March 1999 by Judge L. Oliver Noble, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 January 2000.

On 3 June 1997, plaintiffs filed this medical malpractice action to recover money damages from defendants arising out of the death of their son while in the care of the defendants. The matter came on for trial on 11 January 1999 in Mecklenburg County Superior Court before Judge Loto Caviness. Judge Caviness informed the parties that the file could not be located, and also announced that "in view of the estimated trial time on this [case] which is ten to twelve days and no file to start with, with a file to locate, it would seem that this one perhaps should be recommended to a special setting." Counsel advised the trial court that the estimated trial time was probably a month or more, and Judge Caviness stated that it appeared "this one will need to go over." Counsel for plaintiffs objected that counsel was from Fayetteville, had been in Mecklenburg County since the previous Friday, and was prepared for trial. The trial court expressed regret over the situation, again commented to the clerk that a special session would need to be scheduled, and again noted that the estimated time of trial was about one month.

Later that same day, counsel for all parties appeared before Judge Beverly Beal, and Judge Beal advised counsel that although "[a]s a result of a decision made earlier today you all thought you were going to be down this week for this case[,] [a]s a result of administrative decision-making the opportunity is present for the trial of the case and the resources of the Court are at your disposal to get the case tried." Judge Beal then advised the parties that Special Superior Court Judge Charles Lamm was available to try the case. Counsel for plaintiffs informed Judge Beal that he had released his clients and witnesses and was not prepared to go forward. Judge Beal advised counsel for plaintiffs that he should take the matter up with Judge Lamm. When Judge Lamm arrived in the courtroom, counsel for plaintiffs had the following colloquy with the judge:

THE COURT: In talking with Judge Beal I understand that you may have had some problem, Mr. Byrd, about releasing your clients?

MR. BYRD: Yes, sir.

When the Court this morning ordered that the case go over I took my clients back and explained that to them and let them go; started to release witnesses.

Released my rooms at the hotel, and I'm not in a position to go forward.

[THE COURT] Well, are your clients local?

MR. BYRD: They are.

THE COURT: What witnesses did you release?

MR. BYRD: I released two police officers who were standing here at the time.

THE COURT: Local police officer?

MR. BYRD: Yes, sir. Yes, sir.

THE COURT: Well, I think you—have you made any attempt to see whether or not you can get your room back for tonight?

MR. BYRD: I have not.

THE COURT: Why don't you do that and also notify your clients to see if you can be back in the morning, assuming this is agreeable with defense counsel, and I'll hear you all if you want to hear anything.

I understand that things may have been a little bit disjointed over here in the Civil Courts Building this morning.

And I'm sure we can make whatever arrangements are necessary to have the police officers back.

So if you want to take a few minutes now and see if you can reinstate your room and contact your clients and then we can do what we need to do in the way of pretrial motions, any pretrial conferences, or anything this afternoon and plan on picking the jury in the morning.

MR. BYRD: Your Honor, my position is that the case was ordered continued this morning, and I have acted accordingly, and that it is no longer on will [*sic*] calendar.

* * * *

THE COURT: As it stands right now the case is still on the calendar and we would like to begin jury selection in the morning.

So let's go ahead and take the time you need this afternoon to see if you can get your clients back.

If you need help through the Sheriff's Department to locate the police officers witnesses and have them to be available tomorrow, whenever you need them, and see if you can get your hotel accommodations back or some hotel accommodations so that we can go forward in the morning.

So we will take a twenty minute recess at this time. If you need more time let me know.

Court will stand in recess for twenty minutes.

* * * *

THE COURT: Okay[,] Mr. Byrd.

MR. BYRD: Your Honor, if it please the Court my position is that this Court is without jurisdiction, that we're not prepared to go forward and do not choose to go forward.

If the Court is of a mind to order us to go forward then I will take a voluntary dismissal without prejudice pursuant to Rule 41.

Defense counsel indicated a readiness to try the case, and the trial court denied the plaintiffs' motion to continue. Judge Lamm advised plaintiffs' counsel that he would give him "all the time [he] need[ed] . . . to get [his] clients back, talk to them, explain the situation, and get [his] officers back, you know, like I would do with any attorney through the trial; if something comes up, they have some scheduling problems, the Court will do anything within reason to accommodate them." After expressing his concern with the confused events of the morning, plaintiffs' counsel then stated:

MR. BYRD: I can tell the Court it's my present intent to file a voluntary dismissal without prejudice if I could have until in the

morning to inform the Court of that or to try to go forward then I would appreciate it.

The trial court then recessed until 9:30 a.m. the following morning. On the following morning, counsel for defendants appeared before Judge Lamm to ask for a clarification of the voluntary dismissal plaintiffs had filed. Counsel for defendants advised Judge Lamm that they had told plaintiffs' counsel that they intended to discuss the wording of the dismissal with the court and invited plaintiffs' counsel to be present, but that plaintiffs' counsel stated "I am through."

The document filed by plaintiffs was labeled a "conditional" voluntary dismissal without prejudice, and recited that the plaintiffs contended that Judge Lamb had no jurisdiction over the case "for this term for the reason that this matter has already been set over and continued by the Honorable Loto Caviness." Plaintiffs stated that because of the situation, they voluntarily dismissed their action against the defendants without prejudice and pursuant to the provisions of Rule 41(a) of the North Carolina Rules of Civil Procedure.

Defendants then moved that the costs be taxed against plaintiffs pursuant to Rule 41(d). On 8 March 1999, the trial court taxed costs totaling $23,431.59 against the plaintiffs, and plaintiffs appealed.

Wade E. Byrd and Leighton W. McFarland, III, for plaintiff appellants.

Golding Holden Cosper Pope & Baker, L.L.P., by John G. Golding, for the defendant appellee Carolina Healthcare Systems, formerly known as The Charlotte-Mecklenburg Hospital Authority; The Willows at Amethyst, a facility of Carolina Healthcare Systems.

Parker, Poe, Adams & Bernstein L.L.P., by David N. Allen and Patrick J. Fogarty, for defendant appellee Dr. James E. Lee.

HORTON, Judge.

Plaintiffs contend the trial court erred in (I) ruling that their conditional voluntary dismissal constituted a voluntary dismissal under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, (II) dismissing the action, and (III) taxing costs against plaintiffs pursuant to Rule 41(d). We disagree, and affirm the order of the trial court. Since

the assignments of error all relate to the application of Rule 41, we will consider the assignments together.

The trial court taxed costs against plaintiffs pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure, which provides in pertinent part that "[a] plaintiff who dismisses an action or claim under section (a) of this rule *shall* be taxed with the costs of the action unless the action was brought in forma pauperis." N.C. Gen. Stat. § 1A-1, Rule 41(d) (1999) (emphasis added). Plaintiffs contend that their action had not been voluntarily dismissed pursuant to Rule 41(a), so that the taxing of costs by the trial court was error. We disagree.

Plaintiffs first argue that their action had not been voluntarily dismissed because the "Conditional Voluntary Dismissal was, as a matter of law, a nullity with no effect whatsoever." In support of their proposition, plaintiffs rely on *Thompson v. Newman*, 101 N.C. App. 385, 399 S.E.2d 407 (1991), *aff'd in part, vacated in part on other grounds*, 331 N.C. 709, 417 S.E.2d 224 (1992), in which we held that a prospective oral statement of intent to dismiss a case voluntarily was not sufficient to constitute a voluntary dismissal under Rule 41(a). In *Thompson*, plaintiff's counsel stated, "we're going to take a voluntary dismissal without prejudice." The statement "[was] ambiguous in the absence of additional evidence as to whether plaintiffs' attorney was in fact taking a voluntary dismissal or was merely expressing an intention to do so." *Id.* at 389, 399 S.E.2d at 409.

Appellants also rely on the case of *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501 (10th Cir.), *cert. denied*, 391 U.S. 905, 20 L. Ed. 2d 419 (1968). In *Hyde*, the plaintiff filed a motion in opposition to a change of venue, and also filed notice that if venue were changed, the action would be voluntarily dismissed. The trial court in *Hyde* denied plaintiff's motion and dismissed the action. The Circuit Court of Appeals reasoned that the *Hyde* plaintiff's statement amounted to a "*conditional* notice of dismissal [which] is not within the scope of Rule 41(a)(1)." *Hyde*, 388 F.2d at 507 (emphasis added).

Thompson and *Hyde* are clearly distinguishable from the case before us. "The crucial element in a notice of dismissal is the intention of the party actually to dismiss the case." *Robinson v. General Mills Restaurants*, 110 N.C. App. 633, 636, 430 S.E.2d 696, 698 (1993), *disc. review denied as improvidently granted*, 335 N.C. 763, 440 S.E.2d 274 (1994). In both *Thompson* and *Hyde*, the intention to enter a voluntary dismissal was *prospective* and was conditional in *Hyde*.

Here, despite the "Conditional" label plaintiffs attempted to place upon their notice of dismissal, the plaintiffs actually filed a notice of voluntary dismissal, and expressly stated in that document that the dismissal was entered pursuant to the provisions of Rule 41(a).

Plaintiffs also argue that fairness and equity require that their notice of dismissal be treated as a nullity, and the case restored to the trial calendar. Plaintiffs are understandably concerned about the trial court's decision to attempt to try their case, following an initial indication that the case would be continued. Plaintiffs further contend that Judge Lamb's decision to go forward with the case reversed, in effect, the decision of Judge Caviness to continue the matter, in violation of our well-established rule regarding the inability of a superior court judge to change the judgment of another superior court judge. *Calloway v. Motor Co.*, 281 N.C. 496, 504, 189 S.E.2d 484, 490 (1972).

Here, plaintiffs initially objected to the case being continued, stated that they had completed all necessary trial preparation, and wanted to try the matter. Although plaintiffs' counsel had released two witnesses who were police officers, and released the plaintiffs themselves, both the parties and witnesses resided in the Charlotte area and the trial court promised necessary assistance to have the witnesses appear for trial as needed. Further, there were pretrial matters to be heard and a jury to be selected before trial of the case could begin, thereby allowing additional time to secure all necessary witnesses. Finally, the trial court asked plaintiffs' counsel to contact his clients and witnesses to determine their availability, but never stated that the case was going to be tried in the absence of a necessary party or witness. Plaintiffs never reported to the trial court either an inability to return to court or an inability to have their witnesses present. Plaintiffs' motion for continuance was never renewed prior to filing their voluntary dismissal.

Plaintiffs also argue that the action by Judge Lamm reversed the order of continuance entered by Judge Caviness. However, "a judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action." *Id.* at 502, 189 S.E.2d at 488. Here, there were obvious *changed circumstances* after the parties' appearance before Judge Caviness, in that the court file in this case was located and a special superior court judge became available to try this protracted matter. Under these circumstances, Judge Caviness' order of continuance could be modified.

We find no abuse of discretion by the trial court in failing to continue the matter, hold that the voluntary dismissal entered by the plaintiffs was sufficient to dismiss the case without prejudice pursuant to Rule 41(a), and hold that the trial court did not err in taxing costs to the plaintiffs as the provisions of Rule 41(d) required the court to do so.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

SUZANNE ENGLISH McCRARY, BY AND THROUGH HER GENERAL GUARDIAN, CHARLES W. McCRARY, JR., PLAINTIFF-APPELLANT v. TERESA BYRD AND HAM'S RESTAURANTS, INC., DEFENDANT-APPELLEES

No. COA99-322

(Filed 1 February 2000)

Appeal and Error— appealability—interlocutory appeal—stay of arbitration

An appeal from a stay of arbitration pending completion of discovery in an action arising from an automobile accident was dismissed as interlocutory where the order neither compelled nor prohibited arbitration but reserved its ruling until the parties had complied with discovery. There was no waiver of the right to arbitration because that is an issue of fact which the trial court has not yet decided; the court's actions did not amount to a denial of the motion to compel arbitration because some delay is inherent in the situation; and there was no evidence of any burdensome expense.

Appeal by plaintiff from orders entered 28 July 1998 and 7 December 1998 by Judge Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 5 January 2000.

Suzanne English McCrary (plaintiff) is a resident of Randolph County. Plaintiff brings this action by and through her father, who is her general guardian. Teresa Byrd (defendant Byrd) is a resident of Alamance County. Defendant Ham's Restaurants, Inc., is a North Carolina corporation which has various places of business in the State.

On 23 October 1997, plaintiff brought this personal injury action against defendant Byrd and defendant Ham's Restaurants, Inc. Plaintiff alleged that on the evening of 18 October 1991, both plaintiff and defendant Byrd were present in the Ham's Restaurant in Burlington, but were seated at different tables; that both plaintiff and defendant Byrd left the restaurant at about the same time. Plaintiff further alleged in her complaint that she had a "brief exchange" with defendant Byrd in the parking lot of the restaurant; that plaintiff became "visibly upset" after the exchange; that defendant Byrd got into her car and exited the parking lot; that plaintiff ran toward defendant Byrd's vehicle, attempting to flag Byrd down, lost her balance, and fell onto the road; that defendant Byrd's vehicle ran over plaintiff, resulting in serious injury to plaintiff.

Police officers arrived on the scene at approximately 12:43 a.m., and arrested defendant Byrd for driving under the influence. On 8 January 1992, defendant Byrd pled guilty to the charge of impaired driving under N.C. Gen. Stat. § 20-138.1 (1999). As a result of the accident, plaintiff suffered serious brain injury and other physical injuries and was later adjudicated to be legally incompetent. Defendant Byrd contends that plaintiff was also intoxicated at the time of the accident.

At the time of the accident which is the subject of this lawsuit, plaintiff apparently was an "insured" under three policies of automobile insurance issued by Nationwide Mutual Insurance Company (Nationwide) to plaintiff's father, which policies provided underinsured motorist coverage to plaintiff. The Nationwide policies contain an arbitration provision. On 8 December 1997, Nationwide, as a potential underinsured motorist carrier, filed an answer asking that the court allow it to appear as an unnamed defendant and pleading the plaintiff's alleged intoxication as a defense. Thereafter, the parties engaged in discovery. Plaintiff served interrogatories and requests for production of documents on defendants Byrd and Ham's and on unnamed defendant Nationwide. In addition, plaintiff took the deposition of defendant Byrd and five other witnesses. Nationwide served interrogatories and requests for production of documents on plaintiff and noticed the depositions of plaintiff, her parents, and plaintiff's toxicologist. On 26 June 1998, Nationwide made a motion to compel the deposition testimony of plaintiff's toxicologist, and a motion for sanctions against plaintiff for failure to comply with discovery requests. On 6 July 1998, plaintiff made a motion to compel arbitration. On 20 July 1998, Nationwide made a motion to prohibit arbitration.

On 22 July 1998, the trial court heard arguments on Nationwide's motions to compel deposition testimony and motion for sanctions, Nationwide's motion to prohibit arbitration, plaintiff's motion for a protective order and plaintiff's demand for arbitration. The trial court found, among other things, that "plaintiffs [Suzanne McCrary and Charles McCrary] wilfully failed to present themselves or Susan McCrary [plaintiff's mother] or Andrew Mason [plaintiff's toxicologist] for the depositions at the time and place properly noticed . . . without just cause and . . . without a filed objection or motion for protective order . . . ." On 28 July 1998, the trial court entered an order requiring that the McCrarys and Andrew Mason present themselves for their depositions on or before 31 July 1998. In addition, the trial court ordered that Linda Molter, Robert Cross, M.D., Webb Love and Nancy Parker present themselves for their scheduled depositions in Chapel Hill on 31 July 1998. Finally, the trial court ordered that "the motion to demand arbitration and motion to prohibit arbitrations shall be reserved by this Court to be heard at a later time and date after proper notice and after all depositions above-described have been completed." Plaintiff appealed in apt time from the entry of the above-described order.

In response to notice from the American Arbitration Association (AAA) that it was going to proceed with the arbitration of this matter, Nationwide moved that the trial court clarify its 28 June 1998 order, or issue an order staying the plaintiff and AAA from proceeding with arbitration. By order filed 7 December 1998, the trial court ordered that Nationwide's motion "to Stay the Plaintiff and American Arbitration Associates (AAA) from proceeding forward with arbitration, pending the compliance with the Order of July 27, 1998, or the outcome of an appeal from said Order, shall be and the same is hereby allowed." Plaintiff also appealed from the 7 December 1998 order.

Gordon & Nesbit, P.L.L.C., by Thomas L. Nesbit, for plaintiff appellant.

Teague, Rotenstreich and Stanaland, L.L.P., by Kenneth B. Rotenstreich and Ian J. Drake, for Unnamed Defendant Appellee Nationwide Mutual Insurance Company.

HORTON, Judge.

Plaintiff contends the trial court erred in staying arbitration until the completion of discovery. Defendant Nationwide argues that plain-

tiffs' appeal is interlocutory and should be dismissed. We agree with unnamed defendant Nationwide, hold that plaintiffs' appeal is interlocutory, and order that this appeal be dismissed.

As a general rule, there is no right of immediate appeal from interlocutory orders and judgments. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992). However, an " 'order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.' " *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998) (citation omitted). In *Burke*, the trial court *denied* the motion to compel arbitration. Here, the trial court neither compelled nor prohibited arbitration in its 28 June 1998 order, but reserved its ruling until the parties had complied with discovery. Plaintiff appealed from that order, and the trial court ordered arbitration *stayed* until the scheduled discovery was completed or until the results of plaintiff's appeal. At most, the trial court's order of 28 June 1998 *delayed* its ruling on plaintiff's request for arbitration. Plaintiff argues, however, that the effect of the ruling of the trial court was to deny her request for arbitration and subjected her to additional delay and expense. Plaintiff also contends that had she submitted to Nationwide's discovery efforts, her actions might have amounted to a waiver of her right to demand arbitration of her claim against Nationwide. She finally contends that the trial court had no choice but to grant arbitration immediately upon her request, and could not delay its ruling on her motion. We disagree with plaintiff for the reasons set out below. The Uniform Arbitration Act, N.C. Gen. Stat. §§ 1-567.1 to -.20 (1999), provides in part that:

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C. Gen. Stat. § 1-567.2(a). Here, there is no question about the existence of a valid arbitration agreement. Plaintiff has demanded arbitration and Nationwide has refused. N.C. Gen. Stat. § 1-567.3(a) provides that where one party to an arbitration agreement refuses to arbitrate, the party seeking to arbitrate the dispute may apply to the court for

an order compelling arbitration. Even where there is a valid contractual agreement to arbitrate, however, that right is not absolute but may be waived by the conduct of the parties. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984); *see Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). Because of our public policy favoring arbitration, however, our "courts must closely scrutinize any allegation of waiver of such a favored right." *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876.

Here, Nationwide alleged in its motion to prohibit arbitration that plaintiff has waived her right to arbitration. Whether plaintiff has waived the right to arbitration is not now before us, however. Waiver is a question of fact to be decided by the trial court, *id.*, and the trial court has not yet decided the contested facts and ruled on Nationwide's objections.

Nor do we agree that the trial court's actions in delaying, and then staying, arbitration were tantamount to a denial of plaintiff's motion to compel arbitration. Plaintiff seems to argue that once a motion to compel arbitration is filed, the trial court must, upon finding a valid arbitration contract to exist, order arbitration without regard to other pending matters. While we would agree that the trial court should rule on the motion to compel arbitration without undue delay, some delay is inherent in the situation where a party contends that another party has waived the right to seek arbitration. Since the question is one of fact, there must be notice and an evidentiary hearing on the issue. Further, where depositions have already been scheduled and noticed, as in the case before us, we do not believe it to be an abuse of discretion for the trial court to enter an order requiring the completion of scheduled discovery prior to ruling on the arbitration request. That seems to us to be particularly true here, where the plaintiff has already availed herself of discovery procedures, but seeks to prevent the unnamed defendant from completing its scheduled discovery. Although plaintiff argues that this subjects her to burdensome delay and expense, we note that the depositions in question were scheduled for 31 July 1998, only nine days after the 22 July 1998 motions hearing before the trial court. Following the completion of the discovery process, plaintiff could have calendared her motion to compel arbitration before the trial court for a ruling on her request. We do not find evidence in the record of any burdensome expense to the plaintiff in allowing Nationwide to complete its discovery, and the trial court was in a superior position to weigh and consider the concerns of plaintiff when it entered its order on 28 June 1998. Under the

circumstances of this case, we cannot say that the trial court abused its discretion in briefly delaying its ruling on plaintiff's right to arbitration in order to allow the completion of discovery.

Plaintiff also argues that she refused to cooperate with Nationwide's discovery efforts because she feared that a failure to object to discovery might amount to a waiver of her right to arbitration. We do not believe that plaintiff's fears are well founded. Without expressing any opinion as to whether events prior to plaintiff's motion to compel arbitration amount to a waiver, plaintiff clearly did not acquiesce in Nationwide's attempts to complete the deposition process, and objected to the order of the trial court allowing discovery to go forward. It is difficult to imagine that complying with an order of the trial court to which one objects would amount to a waiver of the right to arbitration. In *Cyclone*, after stating that courts are reluctant to find a waiver of arbitration, the Supreme Court held that "a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with the arbitration, another party to the contract is prejudiced by the order compelling arbitration." *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876 (footnote omitted). Plaintiff's actions in resisting further discovery efforts would seem to be consistent with her desire for arbitration, and Nationwide would be hard-pressed to show that it was prejudiced by the grant of its own motion.

We also note that although plaintiff contended on oral argument that she had a right to appeal because the order of 28 July 1998 included sanctions for discovery violations, plaintiff does not discuss that assignment of error in her brief, and it is deemed abandoned. N.C.R. App. P. 28(a).

Plaintiff's appeal is dismissed and the case is returned to the trial court for compliance with the orders of that court. If after the completion of discovery as previously ordered the trial court allows the plaintiff's motion to compel arbitration, completion of discovery will likely prove helpful to the arbitrator who will have the benefit of information discovered by both parties. Should the trial court deny plaintiff's motion to compel arbitration, plaintiff will then have the right to seek review of that denial from this Court.

Plaintiff having had the opportunity to complete discovery, we find no abuse of discretion on the part of the trial court in allowing Nationwide a brief time to complete its discovery efforts, par-

ticularly since those efforts began *prior* to plaintiffs' motion to compel arbitration.

Plaintiff's appeal is dismissed.

Judges MARTIN and TIMMONS-GOODSON 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 1 February 2000)

1. Deeds— designation of corporate grantee—erroneous name

The trial court did not err by granting summary judgment for plaintiff on defendant's claim that a deed of church property from defendant to plaintiff was void because plaintiff's name was shown on the deed as "Tomika Investments, Inc." rather than "Tomika Investment Company." A misnomer in the name of a corporate grantee does not render the conveyance void; here, there is only a latent ambiguity in the deed and no evidence that defendant was prejudiced.

2. Evidence— relevance—unstated theory of case

The trial court did not abuse its discretion in an action involving the transfer of church property by excluding video evidence of the value of the property where defendant argued that the evidence was relevant to establishing a claim of equitable mortgage, but neither the pleadings, the pretrial conference, nor the trial itself show any attempt by defendant to advance that theory. While defendant's exception to the court's ruling preserves the relevance issue, it is not true that any legal theory that might have been supported by that evidence may be asserted on appeal.

3. Appeal and Error— preservation of issues—motion for jnov—unstated theory of case

The trial court did not err by denying defendant's motion for a jnov in an action arising from the transfer of church property

where defendant sought to have the evidence reviewed as if it had been tried on the theory of equitable mortgage, but the record clearly indicates that defendant did not attempt to raise this issue at any time preceding or during trial. It will not be considered for the first time on appeal.

This opinion supersedes the previous opinion filed on 2 November 1999, 135 N.C. App. 476.

Appeal by defendant from judgment entered 22 May 1998 by Judge Melzer A. Morgan, Jr., in Forsyth County Superior Court. Originally heard in the Court of Appeals 24 August 1999. An opinion affirming the judgment of the trial court was filed by this Court on 2 November 1999. Defendant's Petition for Rehearing was filed on 7 December 1999, granted on 6 January 2000, and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed on 2 November 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 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] Plaintiff Tomika agrees that its proper corporate name was at all times relevant hereto "Tomika Investment Company," rather than "Tomika Investments, Inc.," as shown on the deed executed by defendant Macedonia. Defendant contended in its answer and counterclaim that, because of the misnomer, the deed to Tomika was void as a matter of law. On 10 March 1998, plaintiffs Latimer and Tomika moved for summary judgment on Macedonia's defense that the deed in question was void, and the trial court granted summary judgment for plaintiffs on that issue.

Defendant cites no authority for the proposition that the deed to Tomika was void because the corporation was not correctly identified as "Company" rather than "Inc." A misnomer in the name of a corporate grantee does not render the conveyance void, however. *Gold Mining Co. v. Lumber Co.*, 170 N.C. 273, 87 S.E. 40 (1915). In *Gold Mining Company*, a deed was executed to the trustees of the "Troy (N.Y.) and North Carolina Gold Mining Company." At the time of the conveyance, however, there was no corporation by that exact name, the correct name of the corporation being "Troy and North Carolina Gold Mining Company." In discussing the disparity in the corporate name, our Supreme Court stated that "[a]s to the plaintiff being described by the wrong name in the deed, this is at most but a misnomer or latent ambiguity, which can be explained by parol evidence so as to fit the description to the person or corporation intended. . . . A corporate name is essential, but the inadvertent or mistaken use of the name is ordinarily not material if the parties really intended the corporation by its proper name. If the name is expressed in the written instrument, so that the real name can be ascertained from it, this is sufficient; but if necessary, other evidence may be produced to establish what corporation was intended." *Id.* at 277-78, 87 S.E. at 42. *See also Byrd v. Patterson*, 229 N.C. 156, 48 S.E.2d 45 (1948); *Institute v. Norwood*, 45 N.C. (Busb. Eq.) 65 (1852);

Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 10-32 (4th ed. 1994).

Here, there is only a latent ambiguity in the deed, and no evidence that defendant was prejudiced by the misstatement of Tomika's corporate name. Defendant knew it was dealing with a corporation named "Tomika Investment" or "Tomika Investments," of which defendant Latimer was President. Concurrently with the execution of the deed, Tomika executed a lease with option to buy to the defendant, and impressed its corporate seal bearing its correct corporate name on the lease. We hold that the error in designating the grantee in the deed from defendant Macedonia was not sufficient to void the deed as a matter of law, and hold that the trial court correctly granted summary judgment on this issue.

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 (1985), *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.

GEORGE W. WILSON, JR., AND MARY E. WILSON DOWNING, PLAINTIFFS v. LETHA FRANCES WILSON WATSON, DEFENDANT

No. COA99-60

(Filed 1 February 2000)

1. Appeal and Error— appealability—denial of summary judgment—res judicata

The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal.

2. Clerks of Court— compelling accounting—jurisdiction

The clerk of court had jurisdiction to enter an order denying a request for an accounting from an attorney-in-fact where the power of attorney waived inventories and accounts. The provision relied upon by plaintiff, N.C.G.S. § 32A-11(b), does not address the clerk's jurisdiction to compel inventories and accounts; the relevant provision, N.C.G.S. § 7A-103(15), grants the clerk the jurisdiction to audit the accounts of fiduciaries and by implication to deny a request to audit such accounts as well.

3. Collateral Estoppel and Res Judicata— right to appeal waived—new action

The trial court erred by denying defendant's motion for summary judgment in an action to compel an accounting by an attorney-in-fact where the clerk of court had entered an order denying plaintiffs' request, plaintiffs did not appeal from the clerk to superior court, and plaintiffs later filed a complaint in superior court seeking the accounting. Having waived the right of appeal to superior court, the doctrine of res judicata bars the new action.

Judge JOHN concurring in the result.

Appeal by defendant from order entered 20 October 1998 by Judge Howard E. Manning, Jr. in Craven County Superior Court. Heard in the Court of Appeals 20 October 1999.

Ernest C. Richardson, III for the plaintiff-appellees.

James M. Ayers, II for the defendant-appellant.

LEWIS, Judge.

The parties in this case are all children of Letha Mae Morris Wilson, who died on 23 November 1996. Ms. Wilson executed a power of attorney which appointed defendant as her attorney-in-fact. It included a clause which stated: "I hereby relieve my attorney-in-fact of the responsibility and duty of filing any reports, inventories or accounts with the Clerk of Superior Court of any county."

On 20 May 1997, plaintiffs brought a Motion to Compel an Accounting before the Craven County Clerk of Superior Court ("Case I"). In that action, they moved the court to "enter an Order requiring [defendant] to appear before the [c]lerk at a date certain, and to bring with her, canceled checks, bank statements, tax returns, any and all documentation and correspondence with institutions which [defendant] has in her possession of Letha Mae Morris Wilson for the past three (3) years." Following a hearing, the clerk of court entered an order denying plaintiffs' request on 17 December 1997. The clerk had the discretion and authority to grant or deny the request. Plaintiffs did not appeal from this order and lost their right.

On 8 January 1998, plaintiffs filed a complaint in Craven County Superior Court ("Case II"). In their complaint, plaintiffs requested the court to "enter a Mandatory Injunction, as well as an Order directing and requiring [defendant] to produce any and all records she has concerning the accounts of Letha Mae Morris Wilson prior to the death of Letha Mae Morris Wilson and to provide an accounting of any and all transactions in which she exercised her [p]ower of [a]ttorney and/or acting on behalf of her mother, Letha Mae Morris Wilson." On 20 October 1998, the trial court entered an order denying defendant's motion for summary judgment. Defendant appeals from this order.

[1] The order denying defendant's motion for summary judgment was interlocutory, and not immediately appealable unless it affects a substantial right. N.C. Gen. Stat. § 7A-27 (1999). The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal. *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Accordingly, defendant's appeal is properly before this Court.

[2] Defendant argues that the present claims are barred by principles of collateral estoppel and res judicata. Collateral estoppel, or issue preclusion, applies to a subsequent suit between the parties on a dif-

ferent cause of action. *Nationsbank of N.C. v. American Doubloon Corp.*, 125 N.C. App. 494, 503, 481 S.E.2d 387, 392 (1997). Res judicata, or claim preclusion, on the other hand, entirely bars an identical party or those in privity from relitigating a second action identical to the first where a court of competent jurisdiction has already rendered a final judgment on the merits. *News and Observer Pub. Co. v. Coble*, 128 N.C. App. 307, 310-11, 494 S.E.2d 784, 786-87 (1998).

Plaintiffs concede that the parties and subject matter in Case I and Case II are identical. Indeed, Case I and Case II arose out of a single action, involve the same facts, and identical parties have raised identical issues of law in each case. The issue for our consideration, then, is properly one of res judicata.

Plaintiffs argue that the Craven County Clerk of Court was without jurisdiction to enter its order of 20 May 1997 denying plaintiffs' Motion to Compel an Accounting. Specifically, plaintiffs assert that inclusion of the clause relieving defendant of the responsibility to file reports, inventories and accounts with the clerk tacitly removed the clerk's jurisdiction to enter an order in their Motion to Compel an Accounting under G.S. 32A-11(b). Because the clerk was without jurisdiction, plaintiffs contend that the decision was made by a court without competent jurisdiction, thereby making the doctrine of res judicata inapplicable. We must first clarify the statutory provision plaintiff contends is relevant to this argument. Section 32A-11(b) provides in relevant part:

> Any provision in the power of attorney waiving or requiring the rendering of inventories and accounts shall govern, and a power of attorney that waives the requirement to file inventories and accounts need not be filed with the clerk of superior court. Otherwise, subsequent to the principal's incapacity or mental incompetence, the attorney-in-fact shall file in the office of the clerk of the superior court of the county in which the power of attorney is filed, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of property of the principal and of other transactions in behalf of the principal.

This section does not even address the clerk's jurisdiction to compel the production of inventories and accounts; it simply allows those attorneys-in-fact who are given waivers to choose not to file them with the clerk. Instead, the real provision relevant to the issue of the clerk's jurisdiction in this case is N.C. Gen. Stat. § 7A-103(15)

(1999). This section grants the clerk of superior court jurisdiction to "audit the accounts of fiduciaries, as required by law," and by implication, to deny a request to audit such accounts as well. Thus, the clerk here had jurisdiction to grant or deny plaintiffs' Motion to Compel an Accounting. We conclude, then, that a court of competent jurisdiction entered the order of 17 December 1997 in Case I.

[3] We must note that plaintiffs had a 10-day right of appeal from the clerk's order of 17 December 1997, the superior court having jurisdiction to hear and determine all matters in controversy in the proceeding. N.C. Gen. Stat. § 1-301.1 (1999). Having waived their right of appeal to superior court, we conclude that the doctrine of res judicata bars the new action asserted by plaintiffs in Case II. Accordingly, the trial court erred in denying defendant's motion for summary judgment. We reverse for entry of summary judgment in defendant's favor.

Reversed and remanded.

Judge McGEE concurs.

Judge JOHN concurs in the result with separate opinion.

Judge JOHN concurring in the result.

I believe this Court should entertain defendant's appeal and I therefore concur in the result reached herein by the majority. However, I write separately to address the issue of the interlocutory nature of defendant's appeal.

> As a general rule, the denial of a motion for summary judgment is a nonappealable interlocutory order. However, an exception arises when a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment.

Northwestern Financial Group v. County of Gaston, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993) (citation omitted).

In electing to entertain defendant's appeal, the majority cites *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993) as holding that denial of a summary judgment motion predicated upon *res judicata* implicates a substantial right entitling a party to an immediate appeal. However, our Supreme Court stated in *Bockweg* only that

> denial of a motion for summary judgment based on the defense of *res judicata may affect* a substantial right . . . .

Id. at 491, 428 S.E.2d at 161 (emphasis added). Further, in a subsequent opinion of this Court, *Bockweg* was interpreted as follows:

> *Bockweg* [does not mandate] in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. . . .
>
> . . . .
>
> [Rather], 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."*

Country Club of Johnston County v. USF&G, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545-46 (1999) (emphasis added) (citing *Community Bank v. Whitley*, 116 N.C. App. 731, 733, 449 S.E.2d 226, 227, *disc. review denied*, 338 N.C. 667, 453 S.E.2d 175 (1994)).

Accordingly, the issue is not solely whether the defense of *res judicata* has been raised in a summary judgment motion, but also whether, absent an immediate appeal, there exists the possibility of inconsistent verdicts if the case proceeds to trial. *See id.* Another recent opinion of this Court indicates that the answer under the circumstances *sub judice* is in the affirmative.

In *Little v. Hamel*, 134 N.C. App. 485, 517 S.E.2d 901 (1999), summary judgment was entered on the plaintiff's claim of negligent representation against a law firm, and plaintiff did not pursue an appeal. Approximately one year later, plaintiff instituted a "joint and several" claim of fraud against the law firm and an individual member thereof essentially based upon the same alleged actions the plaintiff had cited as supporting the earlier negligence claim. In the second case, the defendants' summary judgment motion grounded upon the defense of *res judicata* was denied. Although not analyzing the issue, this Court appears to have determined a substantial right was affected in light of the potential for a verdict in the second case inconsistent with the award of summary judgment to the defendant law firm in the first case. *Cf. Community Bank*, 116 N.C. App. at 733, 449 S.E.2d at 227 (appeal of denial of summary judgment motion based on *res judicata* deemed interlocutory; "facts of this case would not lead to" inconsistent verdicts if case proceeded to trial).

In the instant case, were plaintiff's action to proceed to trial, a result might be reached inconsistent with the earlier ruling of the clerk of court. I therefore join with the majority in voting to consider defendant's appeal and concur in the resulting opinion save as noted above.

ROBERT CLARK, PLAINTIFF v. VISITING HEALTH PROFESSIONALS, INC., AND JOHN WELLS, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. JAMES J. HOSKI, M.D., THIRD-PARTY DEFENDANT

No. COA99-145

(Filed 1 February 2000)

Pleadings— third-party complaint—dismissed and refiled

The trial court erred by dismissing a third-party complaint in a medical malpractice action where the complaint was filed, voluntarily dismissed under Rule 41, refiled without leave of the court within one year but more than 45 days after the answer was served, and dismissed under Rule 14. Rules 14 and 41 are in conflict and the restrictive Rule 14 approach would violate the traditional open courts policy of North Carolina.

Appeal by defendant and third-party plaintiffs from order entered 12 November 1998 by Judge Richard L. Doughton in Yancey County Superior Court. Heard in the Court of Appeals 28 October 1999.

No brief filed for plaintiff.

Womble Carlyle Sandridge & Rice, by Alan R. Gitter and Alison R. Bost, for defendant/third-party plaintiff-appellants.

Northup & McConnell, PLLC, by Isaac N. Northup, Jr., and Anna R. Hamrick, for third-party defendant-appellee.

EDMUNDS, Judge.

Visiting Health Professionals, Inc. (VHP) and John Wells (Wells), defendants and third-party plaintiffs, appeal the trial court's dismissal of their third-party complaint. We reverse.

Plaintiff Clark (Clark) filed a complaint on 18 August 1997 against VHP and Wells for medical malpractice and negligent provision of physical therapy services. On 25 September 1997, VHP and Wells filed an answer along with a third-party complaint seeking contribution from Dr. James J. Hoski (Dr. Hoski), plaintiff's treating physician. Dr. Hoski did not answer the third-party complaint, but moved to dismiss that complaint on 16 October 1997 for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990) and for failure to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j) (Supp. 1998). On 22 October 1997, VHP and Wells gave notice of voluntary dismissal without prejudice of their third-party complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) (1990).

On 26 June 1998, VHP and Wells refiled a third-party complaint against Dr. Hoski; Rule 41(a) refers to such a refiling as a "new action based on the same claim." N.C. Gen. Stat. § 1A-1, Rule 41(a). The refiled complaint complied with the requirements of N.C. Gen. Stat. § 1A-1, Rule 9(j); however, VHP and Wells refiled without obtaining leave of court in accordance with N.C. Gen. Stat. § 1A-1, Rule 14 (1990). On 2 September 1998, Dr. Hoski filed his answer to the refiled third-party complaint, then on 24 September 1998 moved to dismiss the third-party complaint for failure to comply with Rule 14.

After hearing Dr. Hoski's motion to dismiss on 9 November 1998, the trial court granted the motion pursuant to Rule 14, on the ground that without obtaining leave of court VHP and Wells refiled the third-party complaint more than forty-five days after the answer to the complaint was served. VHP and Wells, arguing that Rule 41 permits them to refile their third-party complaint within a year of taking a voluntary dismissal without the need for obtaining leave of court, appeal the trial court's dismissal of their third-party complaint.

We begin our analysis with a review of the pertinent Rules of Civil Procedure. Rule 14, dealing with third-party practice, provides in pertinent part:

> (a) *When defendant may bring in third party.*—At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Leave to make the service need not be obtained if the third-party complaint is filed not later than 45 days after the answer to the complaint is

> served. Otherwise leave must be obtained on motion upon notice to all parties to the action. . . . Any party may move for severance, separate trial, or dismissal of the third-party claim.

N.C. Gen. Stat. § 1A-1, Rule 14(a).

The purpose of Rule 14 is to promote judicial efficiency by "provid[ing] a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically." Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 1442, at 291 (1990). The rationale for giving the trial court discretion to allow filing of the third-party claim after forty-five days is to ensure that the claim does not lead to "delay, confusion of the issues or complication of the trial with new issues." 1 G. Gray Wilson, *North Carolina Civil Procedure* § 14-4, at 280 (2d ed. 1995) [hereinafter *Wilson on Civil Procedure*] (citing *O'Mara Enter. v. Mellon Bank*, 101 F.R.D. 668 (W.D. Pa. 1983)).

Rule 41, dealing with the dismissal of actions, provides in pertinent part:

> (a) *Voluntary dismissal; effect thereof.*—
>
> (1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that 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 or any other state or of the United States, an action based on or including the same claim. 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 unless a stipulation filed under (ii) of this subsection shall specify a shorter time.
>
> . . . .

> (c) *Dismissal of counterclaim; crossclaim, or third-party claim.*—The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), (c).

Rule 41 gives a litigant one year to refile a claim that he or she has voluntarily dismissed. *See Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 344 S.E.2d 302 (1986); *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 198 S.E.2d 741 (1973). Rule 41 is also interpreted as a savings provision because it allows a third-party plaintiff (among others) to dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired. *See* N.C. Gen. Stat. § 1A-1, Rule 41 official commentary; *Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991). Because the statute of limitations has not been pled in the case at bar as an affirmative defense, *see* N.C. Gen. Stat. § 1A-1, Rule 8(c) (1999), we assume that VHP and Wells refiled their third-party complaint within the limitations period. Therefore, cases recently decided by this Court that interpret Rules 41 and 9(j) in the context of the running of the statute of limitations are not applicable. *See Brisson v. Santoriello*, 134 N.C. App. 65, 516 S.E.2d 911 (1999); *Robinson v. Entwistle*, 132 N.C. App. 519, 512 S.E.2d 438 (1999).

In the case at bar, Rules 14 and 41 conflict. VHP and Wells argue they "invoked their absolute right under Rule 41 to re-file their third-party complaint . . . ." They contend that because no leave of court was required for the original filing and because their third-party complaint was refiled within one year of a voluntary dismissal, leave of court was not necessary for the refiling. Dr. Hoski responds that, pursuant to Rule 14, a third-party complaint that has been voluntarily dismissed may be refiled only with leave of court once forty-five days have elapsed from the filing of the answer to the original complaint.

We turn to pertinent principles of statutory and rule interpretation. Although a specific statute controls over a general statute if the two cannot be reconciled, *see Krauss v. Wayne County DSS*, 347 N.C. 371, 493 S.E.2d 428 (1997), it appears to us that Rule 14, addressing third-party practice, and Rule 41, applicable to all third-party claims, are equally specific. Therefore, the Rules of Civil Procedure must be interpreted as a whole. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655 (1988). A similar rule applies when several statutes must be interpreted together. "It is well established that

when there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but to the extent that they are necessarily repugnant, the one last enacted shall prevail." *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 125-26, 252 S.E.2d 826, 830 (1979) (citing *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E.2d 22 (1967)). These principles and a review of the policies behind Rules 14 and 41 lead us to conclude that VHP and Wells properly refiled their complaint and were not required to seek leave of court. As noted above, the savings provision of Rule 41 has been interpreted broadly by our courts. Were we to adopt the restrictive approach advocated by Dr. Hoski, our courts would be closed to a party that properly filed a third-party complaint within the time limits set out in Rule 14, then properly entered a voluntary dismissal of the third-party complaint, as permitted by Rule 41, then sought to refile more than forty-five days after a responsive pleading had been filed but within a year of dismissal, if the court declined to grant leave. We believe such a result is contrary to the traditional policy of open courts in North Carolina. *See* N.C. Const. art. I, § 18. Therefore, we hold that a third-party plaintiff who originally files a third-party complaint within the time limits set out in Rule 14 and subsequently enters a voluntary dismissal may, within one year, refile the complaint or an amended complaint without leave of court.

We are aware that this holding means that the trial courts' ability to control the filing of third-party complaints is correspondingly diminished. However, the case at bar illustrates that refiling a complaint need not be burdensome. Third-party plaintiffs refiled their third-party complaint while the original action remained pending. It was still possible, if the original action went to trial, for the third-party complaint to have been heard contemporaneously. In more problematic instances, judges may exercise their discretionary authority under Rules 14(a) and 42(b) to grant motions for severance and separate trials, *see* N.C. Gen. Stat. § 1A-1, Rule 14(a), Rule 42(b) (1999), to avoid "delay, confusion of the issues or complication of the trial with new issues." *Wilson on Civil Procedure* § 14-4, at 280. This case is reversed and remanded to the trial court for actions consistent with this opinion.

Reversed and remanded.

Judges McGEE and HORTON concur.

STATE OF NORTH CAROLINA v. JAMIE LYNN CABE

No. COA98-1031

(Filed 1 February 2000)

1. Confessions and Incriminating Statements— voluntariness—promises

The trial court correctly concluded in a first-degree sexual offense prosecution that defendant's confession was voluntary where defendant was not under arrest, he was advised of and waived his rights, the interview lasted approximately forty-five minutes and defendant was allowed to go home, the statements made by the detective were in response to questions asked by defendant, the statement that the detective could not see why defendant would lose his job cannot be construed as a promise to keep his job, and any improper promises that may have been made concerned collateral matters.

2. Evidence— offer to take polygraph excluded—subsequent testimony

Even if evidence that defendant had offered to take a polygraph test was erroneously excluded on cross-examination, any prejudice was cured by defendant's subsequent testimony that such an offer had been made, defendant did not make an offer of proof, and defendant waived plain error by not arguing it in his brief.

3. Criminal Law— judge's reference to victim—not plain error

There was no plain error in a first-degree sexual offense prosecution in the court's reference to the prosecuting witness as "the victim."

Appeal by defendant from judgment entered 16 March 1998 by Judge Shirley L. Fulton in Gaston County Superior Court. Heard in the Court of Appeals 27 April 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. Harris, for the State.

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

MARTIN, Judge.

Defendant appeals from judgment entered upon his conviction of two counts of first degree sexual offense in violation of G.S. § 14-27.4(a)(1). While this appeal was pending, defendant filed in this Court a motion for appropriate relief alleging the existence of newly discovered evidence. By order dated 14 April 1999, we remanded this case to the Superior Court of Gaston County for a determination of the matters alleged in the motion for appropriate relief. On 7 September 1999, the Superior Court of Gaston County entered an order, filed in this Court on 6 January 2000, denying defendant's motion for relief. No review of that order has been sought as of the date of this opinion and it is not before us.

Briefly summarized, the State's evidence at trial tended to show on 16 August 1997 that defendant's son, who was three years old at the time, reported to his grandmother and mother that his rectum hurt, and that his daddy had done something. He demonstrated by touching his penis and saying, "[m]y Daddy plays with it" and also by sticking his finger in his rectum and saying, "[m]y Daddy does that and it hurts." A subsequent medical examination of the child on 20 August 1997 indicated an abnormality in a rectal reflex which could have been caused by excessive dilation of the rectal sphincter, though there was no redness or skin tear.

Detective Jan Powers of the Belmont Police Department investigated the case after having been contacted by defendant and after the child's mother filed a complaint. In the course of her investigation, Detective Powers interviewed defendant. After having been advised of his rights, defendant admitted to having digitally penetrated his son's rectum for sexual pleasure on three or four occasions, and having touched his son on his penis. He told Detective Powers he knew what he did was wrong and wanted to get help. Defendant testified in his own behalf and denied putting his finger into his son's rectum.

The record on appeal contains eight assignments of error, three of which are argued on appeal. Those assignments not argued on appeal are deemed abandoned. N.C.R. App. P. 28(a); *State v. Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789 (1996). We have considered defendant's arguments with respect to each of them and conclude that defendant received a fair trial, free from prejudicial error.

I.

[1] First defendant contends the trial court erred when denying his motion to suppress the inculpatory statement which he made to officers, on the grounds it violated his constitutional rights. The essence of defendant's argument is that he was promised "help" if he cooperated, and that he would not lose his job, his car, or his right to see his son. Defendant contends, therefore, that the confession was not voluntary because it was improperly influenced by a threat or promise and should have been excluded. We disagree.

"The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993) (citing *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982)); *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992).

Even when there is technical compliance with the procedural Constitutional requirements of the Fourth and Fifth Amendments to the United States Constitution, there remains the issue of whether "the statement was in fact voluntarily and understandingly made." *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982) (citing *State v. White*, 291 N.C. 118, 229 S.E.2d 152 (1976)); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed.2d 155 (1982). "The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983) (citing *Frazier v. Cupp*, 394 U.S. 731, 22 L.Ed.2d 684 (1969)). The long-standing rule in this jurisdiction was stated by Chief Justice Taylor in *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1827):

> The true rule is, that a confession cannot be received in evidence, where the Defendant has been influenced by any threat or promise; for, as it has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotions of hope or fear, ought to be rejected.

Justice Henderson, concurring, set forth the rule which we have followed since:

> Confessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with *him*, and which, it is said, in the perfectly good man, cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope, or exhorted by fear, are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected . . . .

Id. at 261-62; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732; *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975).

When evaluating whether a police officer's statements constituted improper promises, it has been stated that "any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, and not to any mere collateral advantage." *Rook*, 304 N.C. at 219, 283 S.E.2d at 744. *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102. It has also been determined the "[p]romises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused." *State v. Richardson*, 316 N.C. 594, 604, 342 S.E.2d 823, 831 (1986).

Competent evidence supports the trial court's findings and conclusions that no improper promises made to defendant induced an involuntary confession. Defendant was not under arrest during the questioning; he was advised of and knowingly waived his constitutional rights. The interview lasted approximately forty-five minutes, and defendant was allowed to go home. The statements regarding defendant's employment, the possession of his car, and his rights to visit his son, came in response to specific questions asked by defendant. Detective Powers' statement that she could not see why defendant would lose his job cannot be construed as a promise to let him keep his job if he cooperated.

Further, any improper promises that may have been made concerned collateral matters, not involving the crime charged. The officer's remarks were made in response to defendant's questions regarding his job, car, and rights with respect to his son. The trial court correctly concluded that the confession was voluntary. This assignment of error is overruled.

II.

[2] Second, defendant argues the trial court erred in excluding evidence elicited from Detective Powers on cross-examination that defendant had volunteered to take a polygraph test. The State's objection was sustained, and defendant made no offer of proof. Although defendant assigned this as plain error, defendant did not argue plain error in his brief, and so the plain error argument is deemed abandoned. N.C.R. App. P. 28(a); *State v. Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789 (1996).

"An exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness's testimony would have been had he been permitted to testify." *State v. Barts*, 321 N.C. 170, 178, 362 S.E.2d 235, 239 (1987) (citing *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985)); *State v. Cheek*, 307 N.C. 552, 299 S.E.2d 633 (1983).

In any event, defendant subsequently testified that he had requested a lie detector test and that he was told that such tests are not accurate. "It is well settled in this jurisdiction that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence." *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982); N.C. Gen. Stat. § 15A-1443(a) (1997). Therefore, even if evidence that defendant requested a polygraph exam was erroneously excluded on cross-examination of Detective Powers, any prejudice was cured by defendant's subsequent testimony that such a request was made. This assignment of error is overruled.

III.

[3] Finally, defendant argues the trial court committed plain error when it referred to the complainant as "the victim." We disagree.

"Plain error is 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994) (quoting *State v. Gibbs*, 335 N.C. 1, 37, 436 S.E.2d 321, 341 (1993)). The North Carolina Supreme Court has held that referring to the prosecuting witness as "the victim" does not constitute plain error. "We cannot hold that the reference to the prosecuting witness as the victim was an error so basic and lacking in its elements that justice could not have been done." *Id.*; see also *State v. Allen*, 92 N.C. App.

168, 171, 374 S.E.2d 119, 121 (1988), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989) ("By his use of the term 'victim,' the trial judge was not intimating that defendant had committed any crime."). This assignment of error is overruled.

No error.

Judges GREENE and McGEE concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER DEVON DUNCAN

No. COA99-163

(Filed 1 February 2000)

1. Robbery— instructions—use of firearm

There was no error in an armed robbery prosecution in which the trial court denied defendant's requested instruction defining a handgun as being capable of expelling a projectile at the time of the alleged offense. There was contradictory testimony as to the nature of the weapon here and the instruction given properly left resolution of the factual issue with the jury. Moreover, the instruction given was substantially the same as the one requested.

2. Robbery— firearm—not operational

The trial court did not err by denying defendant's motion to dismiss a charge of armed robbery where the firearm was not recovered and defendant contended that there was insufficient evidence of the use of a firearm. Defendant's testimony that he employed only the barrel of a gun which was not operational was sufficient to remove the presumption that his actions endangered or threatened the victim's life, but failed to show conclusively that the weapon was not operational and did not eliminate the permissive inference of danger to the victim.

Appeal by defendant from judgment entered 5 November 1998 by Judge Sanford L. Steelman, Jr., in Union County Superior Court. Heard in the Court of Appeals 5 January 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

Goodwin & McGuirt, PLLC, by S. Stephen Goodwin, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of robbery with a firearm. Briefly summarized, the evidence presented at trial tended to show that on 22 January 1997, defendant and Reavious Okone Robinson, his co-defendant, entered the Quick One Food Mart. After shopping for approximately ten minutes, Robinson approached the counter to make a purchase; when Youlim Tam, the clerk, opened the cash register to make change, defendant held an object to Tam's shoulder and demanded money. Tam testified the object was a "two barrel[ed], silver handgun."

Defendant and Robinson escaped with $280, part of which defendant gave to Robinson, and defendant told Robinson to get rid of the gun.

Defendant testified in his own behalf. He stated that the object which he held to Tam's shoulder was only the barrel of a .22 caliber handgun and that it was incapable of firing a bullet.

Defendant presents three arguments in support of five of the six assignments of error set forth in the record on appeal; the remaining assignment of error, which is neither presented nor discussed in defendant's brief, is deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5).

Defendant contends the trial court erred by (1) refusing to grant defendant's request for a jury instruction, (2) denying defendant's motions to dismiss the charge of robbery with a firearm due to the insufficiency of the evidence, and (3) denying defendant's motion to set aside the verdict. We find no error.

I.

[1] Defendant first contends the trial court erred in denying his request for an additional instruction to the jury in defining the element requiring use of a firearm. The trial court gave the following instruction:

> [T]hat the defendant had a firearm in his possession at the time he obtained the property, or that it reasonably appeared to the victim that a firearm was being used, in which case you may, but were not required to, infer that the said instrument was what the defendant's conduct represented it to be. A firearm in this case would be a handgun which is capable of expelling a projectile by action or an explosion. At all times, the burden of proof remains upon the State to show beyond a reasonable doubt that the defendant had a firearm in his possession at the time he obtained the property.

Defendant requested, and the court refused, to insert the phrase "at the time of the alleged offense" at the end of the sentence defining firearm, so the instruction would have read "a firearm in this case would be a handgun which is capable of expelling a projectile by action of an explosion at the time of the alleged offense."

The trial court has discretion in selecting the language used in its jury instructions; *State v. Bostic*, 121 N.C. App. 90, 465 S.E.2d 20 (1995), but "[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993); See also *State v. Summey*, 109 N.C. App. 518, 428 S.E.2d 245 (1993).

The law regarding the definition of a firearm was clearly articulated in *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986). In *Allen*, the defendant pointed what appeared to be a small caliber handgun at a store clerk and demanded money from the cash register. Defendant then pointed the "gun" at another patron, who happened to be an off-duty correctional facility employee, and ordered him out of the defendant's way. The defendant claimed that the "gun" was a cap pistol and was not capable of actually harming either victim. Both victims testified that they saw the barrel of the gun and thought that it looked like a real gun. The trial court instructed the jury that a dangerous weapon "include[d] pistols which look like firearms such as cap pistols" and that "[a]n instrument is a dangerous weapon if it is apparently a weapon capable of inflicting a life threatening injury." *Id.* at 121, 343 S.E.2d at 895. The North Carolina Supreme Court held that an object incapable of endangering or threatening life cannot be considered a dangerous weapon. In *Allen*, as in the case at bar, contradictory testimony was presented as to the nature of the weapon used in the commission of the robberies. However, the instruction

given in the current case, unlike the one in *Allen*, properly leaves the resolution of this factual dispute within the province of the jury.

In its instruction, the trial court instructed the jury that the State was required to prove the defendant "had a firearm in his possession **at the time** he obtained the property," and that a firearm is "a handgun which is capable of expelling a projectile by action of an explosion." The instruction given was substantially the same as the one requested, and this assignment of error is overruled.

II.

[2] Defendant next assigns error to the trial court's denial of his motion to dismiss the charge of robbery with a firearm. He contends the State failed to offer substantial evidence to prove an essential element of the crime, i.e., his use of a firearm.

It is well established that a motion to dismiss should be denied if there is substantial evidence of each essential element of the crime and defendant is the perpetrator. *State v. Young*, 120 N.C. App. 456, 462 S.E.2d 683 (1995). "Substantial evidence requires that the evidence must be 'existing and real, not just seeming and imaginary.' " *State v. McKenzie*, 122 N.C. App. 37, 45, 468 S.E.2d 817, 824 (1996) (quoting *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983)). The trial judge must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *Young, supra.* "[C]ontradictions and discrepancies [in the evidence] are for the jury to resolve and do not warrant dismissal." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

G.S. § 14-87 defines the crime of robbery with a firearm or other dangerous weapon as:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . ., at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87 (1999); *State v. Barnes*, 125 N.C. App. 75, 479 S.E.2d 236, *affirmed*, 347 N.C. 350, 492 S.E.2d 355 (1997). Therefore, to overcome defendant's motion the State must have presented sub-

stantial evidence that defendant, in taking the money from Tam, used a dangerous weapon and endangered or threatened Tam's life.

Tam testified as follows:

A: Yeah. The gun on my shoulder, have it on it and then showed it to me, this gun on his hand.

Q: How did he show it to you?

A: On my shoulder right here and I saw that he—there's a gun on his hand and it was two barrels, silver handgun.

Q: Now, when he showed you the gun could you see the entire gun?

A: Yeah. I could see it on his hands with two barrels. I could tell it was silver handgun, small gun.

Q: Could you see a handle on the gun?

A: Yeah, a black handle.

The weapon itself was never recovered. Viewing the foregoing evidence in the light most favorable to the State, it is sufficient to support a finding that defendant used a dangerous weapon in the commission of this robbery.

"When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, the law presumes, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed." *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). However, when any evidence is presented showing the weapon is not operational and does not pose a danger, the mandatory presumption disappears and the jury is permitted, but is not required, to infer, that the life of the victim was endangered or threatened by the apparent weapon. *Id.* If evidence is presented that conclusively proves the weapon posed no danger, then even the inference is not permitted and the jury cannot be given the option of finding defendant guilty of robbery with a dangerous weapon. *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986).

In this case, defendant's testimony that he employed only the barrel of a gun which was not an operational weapon and could not have endangered the life of the victim is sufficient to remove the pre-

sumption that his actions endangered or threatened Tam's life. Defendant's evidence, however, fails to show conclusively that the weapon was not operational and did not eliminate the permissive inference of danger to the victim. The jury was properly instructed that they "may, but were not required to, infer that the said instrument was what the defendant's conduct represented it to be," namely an operational handgun. Therefore, the State presented substantial evidence of each element of robbery with a dangerous weapon, and the trial court properly denied defendant's motions to dismiss.

III.

Finally, defendant argues the trial court erred in failing to set aside the verdict of guilty of robbery with a dangerous weapon and enter judgment as upon a conviction of common law robbery. The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss, i.e., whether there is substantial evidence of each essential element of the crime. *State v. Young, supra.* For the reasons set forth in section II above, we also reject this assignment of error.

Defendant received a fair trial, free of prejudicial error.

No error.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. REAVIOUS OKONE ROBINSON

No. COA99-343

(Filed 1 February 2000)

Accomplices and Accessories— testimony of one against another—limiting instruction

The trial judge erred in a robbery prosecution by not giving a limiting instruction when a codefendant's testimony was introduced over defendant's objection. The court is required to give a limiting instruction when evidence is introduced at a joint trial against one defendant which is not admissible against a codefendant and the codefendant makes a general objection to the evi-

dence. The objecting defendant must make a timely objection or a specific request for a limiting instruction, but is not required to request a limiting instruction if he makes a general objection. The error was prejudicial because this statement, admitted on cross-examination to attack the witness's credibility, was the only evidence that defendant intended or planned to commit the robbery with the codefendant; the other circumstances argued by the State would permit an inference that defendant was acting in concert, but do not compel a finding of guilt and there is a reasonable possibility the outcome would have been different.

Appeal by defendant from judgment entered 5 November 1998 by Judge Sanford L. Steelman, Jr., in Union County Superior Court. Heard in the Court of Appeals 5 January 2000.

Attorney General Michael F. Easley, by Associate Attorney General David L. Elliott, for the State.

Carol L. Huffman for defendant-appellant.

MARTIN, Judge.

Defendant, Reavious Okone Robinson, appeals from a judgment entered upon his conviction by a jury of robbery with a firearm. Defendant was tried jointly with Christopher Devon Duncan, who was also charged with robbery with a firearm based on the same facts.

Briefly summarized, the evidence presented at trial tended to show that on 22 January 1997 defendant and Duncan entered the Quick One Food Mart and, after shopping for approximately 10 minutes, defendant approached the counter to purchase a bag of chips. When Youlim Tam, the clerk, opened the register to make change, Duncan held an object appearing to be a gun to Tam's shoulder and demanded money. Defendant and Duncan escaped with $280, part of which Duncan gave to defendant. Defendant also disposed of the weapon.

Defendant offered no evidence at trial. Duncan testified in his own behalf and stated that defendant did not plan to commit the robbery and had no prior knowledge that Duncan was going to rob the store. During the State's cross-examination of Duncan, he was impeached by use of a statement which he had made to police after his arrest and in which he had implicated defendant in the robbery.

Defendant's objection to the statement was overruled; he made no request for a limiting instruction as to the jury's proper use of Duncan's statement and none was given.

When, at a joint trial, evidence is admitted against one defendant which is not admissible against a co-defendant and the co-defendant makes a general objection to the evidence, the court is required to give a limiting instruction to the jury. *State v. Franklin*, 248 N.C. 695, 104 S.E.2d 837 (1958); See also *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293, *cert. denied*, 501 U.S. 1208, 115 L.Ed.2d 977 (1991). Such instruction must distinguish the defendant(s) against whom the evidence is admissible from the defendant(s) against whom it is not admissible. *Phillips*, *supra*. The objecting defendant must make either a timely general objection or a specific request for a limiting jury instruction, but is not required to request a limiting instruction if he makes a general objection. *State v. Pierce*, 36 N.C. App. 770, 245 S.E.2d 195 (1978). It is the duty of the trial court to give a specific limiting instruction due to the inherent danger of confusing the jury with the admission of evidence applicable only to one of multiple defendants.

In the present case, Duncan testified that defendant was not involved in the robbery. The State cross-examined him with respect to his previous statement to law enforcement officers that defendant was involved with the robbery. On re-direct, Duncan explained that the law enforcement officers wanted him to implicate defendant in the commission of the crime, although defendant had played no part in the robbery. Duncan's prior statement was not admissible against defendant for any purpose. *Franklin*, *supra*. Thus, the trial court erred in failing to specifically instruct the jury that it could not consider Duncan's previous statement against defendant.

Having found error, we must now determine whether the error warrants a new trial for defendant. To be entitled to a new trial, defendant has the burden of showing the error prejudiced him in some way.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (1998); See also *State v. Rush*, 340 N.C. 174, 456 S.E.2d 819 (1995). The court may negate the effect of the error by giving a proper instruction. "When the trial court instructs the jury not to consider incompetent evidence, any prejudice is ordinarily cured." *State v. Adams*, 347 N.C. 48, 68, 490 S.E.2d 220, 230 (1997), *cert. denied*, 522 U.S. 1096, 139 L.Ed.2d 878 (1998) (citations omitted).

A defendant may be convicted for a crime committed by another if the State proves the defendant acted "in concert" with the other to commit the crime. At the time this crime was committed, acting in concert required proof beyond a reasonable doubt that defendant was "at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime." *State v. Blankenship*, 337 N.C. 543, 557-58, 447 S.E.2d 727, 736 (1994), *overruled by*, *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024, 140 L.Ed.2d 473 (1998). In addition to the proof requirements associated with acting in concert, if the crime is a specific intent crime, such as robbery with a dangerous weapon, the defendant, like the actual perpetrator, must be shown to have the requisite specific intent. *Id.* "The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan." *Id.* at 558, 447 S.E.2d at 736. "Although a common plan for all crimes committed may exist at the outset of the criminal enterprise, its scope is not invariable; and it may evolve according to the course of events." *Id.*

In determining whether a reasonable possibility exists that defendant would have been convicted in spite of the trial court's failure to give a proper limiting instruction, the focus of our inquiry is on the evidence supporting specific intent. The only direct evidence that defendant intended or planned to commit the robbery with Duncan came through Duncan's extra-judicial statement which was used to attack his credibility during his cross-examination.

The State argues, however, that sufficient circumstances exist to show defendant's knowledge and intent. Defendant and Duncan went to the Quick One Food Mart together; they perused the shelves in the store for several minutes before defendant approached the clerk to buy a drink and a bag of chips. When the clerk opened the cash register drawer to make change for defendant's purchase, Duncan placed a weapon against his shoulder and demanded money. Defendant walked out of the store ahead of Duncan. While these facts

are sufficient to permit an inference that defendant was acting in concert with Duncan to rob the store, and thus to overcome defendant's motion to dismiss, they do not compel a finding of guilt. Without the statements from Duncan describing defendant's involvement in the scheme, there is a reasonable possibility the outcome would have been different for defendant. Therefore, we must grant defendant a new trial.

We do not address defendant's remaining assignments of error as they may not arise upon retrial.

New trial.

Judges TIMMONS-GOODSON and HORTON concur.

STATE OF NORTH CAROLINA v. MICHAEL L. HATCHER, DEFENDANT-APPELLANT

No. COA99-782

(Filed 1 February 2000)

1. Witnesses— cross-examination—credibility

The trial court did not abuse its discretion in a prosecution for armed robbery by not allowing defendant to cross-examine the victims regarding their immigration status and an accomplice regarding his history of firearm use and his plea agreement. The immigration status of the victims was at best of tenuous relevance to their credibility, and, given other testimony of similar import concerning the accomplice, the court did not abuse its discretion by refusing further repetitious and cumulative cross-examination.

2. Appeal and Error— brief—supporting authority or citation of authority

An assignment of error concerning the sufficiency of the evidence in a robbery prosecution was considered abandoned where defendant did not make any supporting argument or citation of authority.

3. Sentencing— structured—prior record level points—pjc

The trial court did not err in its assessment of prior record points when sentencing defendant for armed robbery by assess-

ing prior record level points for an offense to which he pled no contest and for which prayer for judgment was continued. Defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered.

4. Sentencing— aggravating factor— ethnic group of victim

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the offenses were committed against the victims because of their race, color, religion, or country of origin where defendant's accomplice testified that they selected two Hispanic men as their victims because they thought that Hispanics carried large sums of cash and were less likely to report crimes committed against them. There is no language in N.C.G.S. § 15A-1340.16 (d)(17) to suggest a limiting requirement that the defendant harbor animosity toward a race or ethnic group.

Appeal by defendant from judgments entered 26 January 1999 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 17 January 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles J. Murray, for the State.

Donald K. Tisdale, Sr., for defendant-appellant.

SMITH, Judge.

Defendant was found guilty as charged of two counts of robbery with a dangerous weapon. He was sentenced in the aggravated range to a minimum term of 108 months and the corresponding maximum of 139 months for each offense, to run consecutively.

The State presented evidence tending to show that on 5 January 1998 defendant and Anthony Eaton took at gunpoint a 1989 Toyota Tercel automobile and a wallet containing cash from Angel Prudente and jewelry from Delfino Laredo.

Defendant's assignments of error are grouped into four questions for review. For the following reasons, we affirm defendant's convictions.

[1] First, defendant contends the court erred in restricting his cross examination of witnesses in violation of his constitutional right to

confront the witnesses against him. He assigns as error the court's refusal to allow defendant to question (1) Prudente and Laredo regarding their immigration status, (2) Eaton regarding his history of carrying and discharging firearms, (3) Eaton regarding his sentencing to a lower category than appropriate, and (4) Eaton's attorney regarding what would happen to Eaton if he did not testify. He argues these questions were designed to show bias.

The right to cross examine a witness to expose the witness' bias is not unlimited. *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986). "[W]hile it is axiomatic that the cross-examiner should be allowed wide latitude, the trial judge has discretion to ban unduly repetitious and argumentative questions, as well as inquiry into matters of tenuous relevance." 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 170 (5th ed. 1998). Moreover, the trial judge retains the discretion to prohibit cross examination that is intended to harass, annoy or humiliate a witness. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). The trial judge's rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

Applying these principles to the case at bar, we note that the immigration status of the two victims was of very tenuous, if any, relevance to their credibility. Although Eaton testified that his plea was not contingent upon testifying against defendant, he acknowledged on cross examination that the written plea agreement called for him to testify. Eaton acknowledged on direct examination and again on cross examination that he had two prior convictions of carrying a concealed weapon. He further admitted on cross examination that he received a sentence less severe than he should have for his prior record level. Given this testimony of similar import, the court did not abuse its discretion in refusing to allow further repetitious and cumulative cross examination into these matters. Moreover, the court's rulings could not have affected the verdict in view of the overwhelming evidence of defendant's guilt.

[2] Defendant next assigns as error the court's denial of his motion to dismiss for insufficient evidence. He makes no argument except to acknowledge "the heavy burden" placed on him to show the evidence was not sufficient and to request this Court to review the evidence "to determine if it is insufficient as a matter of law." Because of defendant's failure to make any supporting argument or citation of author-

ity, this assignment of error is considered abandoned. N.C.R. App. P. 28(b)(5).

[3] Defendant next contends the court erred in computing his prior record level points by assessing points for an offense to which he pled no contest and for which prayer for judgment was continued. "A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime . . . ." N.C. Gen. Stat. § 15A-1340.11 (7) (1997). "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). We have interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction. *State v. Fuller*, 48 N.C. App. 418, 268 S.E.2d 879, *disc. review denied*, 301 N.C. 403, 273 S.E.2d 448 (1980). Consequently, we conclude that defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered. This assignment of error is overruled.

[4] Finally, defendant contends the court erred by finding as a factor in aggravation of the sentences that the offenses were committed against the victims because of their race, color, religion, nationality or country of origin. He argues that this finding pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(17) (1997) applies only when the defendant has some *animus* against the victim due to the victim's race or nationality. We disagree.

N.C. Gen. Stat. § 15A-1340.16 (d) (17) reads as follows: "The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin." There is no language in the statute to suggest a limiting requirement that the defendant harbor animosity toward a race or ethnic group. The statute merely provides that the offense be committed against a victim "because of the victim's race, color, religion, nationality or country of origin." Accordingly, a finding of this factor may be made any time the defendant targets a person for victimization because of his race or national origin. Here, Eaton testified that he and defendant selected Prudente and Laredo, two Hispanic men, as their victims because they thought Hispanics carry large sums of cash and are less likely to report crimes committed against them. This assignment of error is therefore overruled.

In defendant's trial and sentence we find no error.

No error.

Judges LEWIS and TIMMONS-GOODSON concur.

CAROL TAYLOR, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ROSA TAYLOR, PLAINTIFF v. VENCOR, INC., FIRST HEALTHCARE CORPORATION D/B/A HILLHAVEN SOUTH, INC., AND HILLHAVEN REHABILITATION AND HEALTHCARE CENTER, DEFENDANTS

No. COA99-123

(Filed 1 February 2000)

Hospitals and Other Medical Facilities— nursing home—observation of patient's smoking—not medical malpractice

The trial court erred by granting a motion to dismiss under N.C.G.S. § 1A-1, Rule 9(j) in an action alleging negligence in the observation and supervision of the smoking area of a nursing home. The observation and supervision of plaintiff while she smoked did not constitute an occupation involving specialized knowledge or skill and did not involve matters of medical science; this was a claim for ordinary negligence, not medical malpractice subject to Rule 9.

Appeal by plaintiffs from judgment entered 6 November 1998 and filed 10 November 1998 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 26 October 1999.

Burford & Lewis, PLLC, by Robert J. Burford, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by H. Lee Evans, Jr. and Jaye E. Bingham, for defendants-appellees.

WALKER, Judge.

Plaintiff Carol Taylor filed this action alleging negligence in the wrongful death of her mother, Rosa Taylor. Defendants denied liability and subsequently moved to dismiss the action pursuant to Rules 12(b) and 9(j) of the North Carolina Rules of Civil Procedure. Prior to the trial court's ruling on defendants' motion, plaintiff moved for leave to amend the complaint, which was denied. Based on plaintiff's

failure to comply with Rule 9(j), the trial court granted defendants' motion to dismiss with prejudice.

Plaintiff's complaint alleged the following: Rosa Taylor, a resident of defendants' nursing home for approximately two months before the accident occurred, required direct observation and supervision while smoking due to her mental and physical problems. While in a designated smoking area in the nursing home, Rosa Taylor attempted to light a cigarette and somehow caught her nightgown on fire, inflicting serious burn injuries, which resulted in her death one week later. Plaintiff claims that defendants failed, through inadequate staffing and other negligent behavior, to provide adequate observation and supervision while Rosa Taylor smoked cigarettes.

Defendants argue that plaintiff alleged a claim for medical malpractice only, thus subjecting her complaint to the requirements of Rule 9(j), which provides in part:

> (j) Medical malpractice.—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999). Defendants moved to dismiss plaintiff's claim based on her failure to comply with Rule 9(j) and the trial court allowed the motion based on non-compliance with Rule 9(j).

Plaintiff first assigns as error the trial court's granting of defendants' motion to dismiss by arguing that her complaint alleged a claim for ordinary negligence and thus was not subject to the requirements of Rule 9(j).

In *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998), this Court stated:

> A "medical malpractice action" as used in Article 1B of Chapter 90 of the North Carolina General Statutes is defined as "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish *professional services* in the per-

> formance of medical, dental, or other health care by a health care provider." N.C.G.S. § 90-21.11 (1997) (emphasis added). "Professional services" has been defined by this Court to mean an act or service " 'arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.' " *Smith v. Keator*, 21 N.C. App. 102, 105-06, 203 S.E.2d 411, 415 (1974) (*quoting Marx v. Hartford Acc. & Ind. Co.*, 157 N.W.2d 870, 872 (Neb. 1968)), *cert. denied*, 285 N.C. 235, 204 S.E.2d 25, *and aff'd*, 285 N.C. 530, 206 S.E.2d 203, *and appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974); *see* Irving J. Sloan, *Professional Malpractice* 4 (1992) (professional services encompass work that is "predominately intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work)"); 1 David W. Louisell and Harold Williams, *Medical Malpractice* § 8.01[2] (1998) ("[A]cts or omissions in malpractice involve matters of medical science").

In *Lewis*, a patient was injured while being transferred from the examination table to her wheelchair. The patient sued the defendant for failure to use reasonable care by not raising and lowering the head of the examining table in the course of performing the plaintiff's examination. In reversing the trial court's dismissal of plaintiff's claim for failure to comply with Rule 9(j), this Court held that "[a]ny negligence which may have occurred when the defendant and [plaintiff's live-in assistant] attempted to move the plaintiff from the examination table back to his wheelchair falls squarely within the parameters of ordinary negligence." *Id.* at 608, 503 S.E.2d at 674.

Likewise in this case, the observance and supervision of the plaintiff, when she smoked in the designated smoking area, did not constitute an occupation involving specialized knowledge or skill. Preventing a patient from dropping a match or a lighted cigarette upon themselves, while in a designated smoking room, does not involve matters of medical science. Such behaviors are properly applied to the standards of ordinary negligence. The trial court's granting of defendants' motion to dismiss was error in regard to plaintiff's ordinary negligence claim.

Plaintiff next assigns as error the trial court's denial of her motion to amend the complaint. Since the acts complained of only give rise to an ordinary negligence claim, any amendment of her com-

plaint to comply with Rule 9(j) would be futile. Thus, the trial court did not err in denying plaintiff's motion to amend.

Affirmed in part and reversed in part.

Judges GREENE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JOSHUA PATRICK GRIFFIN, DEFENDANT

No. COA99-140

(Filed 15 February 2000)

1. Venue— State's motion to change—limitation of facilities

The trial court did not abuse its discretion in a first-degree murder prosecution by granting the State's motion to change the venue based upon the physical limitations of the facilities. Although the better practice would be to make findings of fact to support the order for a change, there was no abuse of discretion in light of the detailed statements by the trial court about the factors it was considering.

2. Homicide— first-degree murder—failure to instruct on second-degree

The trial court did not err in a first-degree murder prosecution by not giving an instruction on second-degree murder where the State offered evidence on each element of first-degree murder and there was no conflicting evidence.

3. Kidnapping— sufficiency of evidence

The trial court did not err by not dismissing a first-degree kidnapping prosecution where there was ample evidence from which the jury could infer that defendant, a law enforcement officer, stopped the victim for the purpose of a sexual encounter; "something" occurred; and defendant drove the victim from the well-traveled area where he had stopped her to a quiet, dark place so that he could ensure her silence by killing her and concealing her body.

4. Homicide— first-degree murder—sufficiency of the evidence

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss where the State offered substantial evidence of each element of first-degree murder based on premeditation and deliberation.

5. Criminal Law— curative instructions—timeliness

Instructions to disregard testimony which were given the day after the testimony was given were not too late to prevent reversible error where the court was specific as to the content of the testimony, gave a curative instruction after discussing the contents of the curative instruction with the defendant, and received assurances from the jurors that they could obey the court's instructions. Moreover, even assuming error, there was no prejudice in light of the copious evidence offered by the State.

6. Evidence— habit—others in defendant's position—relevance

The trial court did not err in the prosecution of a police officer for first-degree murder by not allowing evidence that it was the habit of several officers to "run tags" and stop attractive women following the State's evidence that defendant had this habit. The State's evidence was relevant to showing that defendant had a habit with which he conformed on the morning of the crime and the fact that other officers engaged in the same activity is not relevant to any fact of consequence in the case. Moreover, there was other testimony that other officers engaged in this activity.

7. Constitutional Law— state—unrecorded bench conferences

Unrecorded bench conferences did not violate a first-degree murder defendant's right to be present at every stage of the trial where defense counsel moved for a "complete recordation," the court replied that bench conferences were not included, defense counsel answered in the affirmative, and the trial court directed defense counsel to inform defendant that the court should be advised and would address the issue if defendant wanted any of the discussions at the bench recorded. The record does not reflect any objection by defendant and defendant had constructive knowledge of all that transpired.

8. Criminal Law— arraignment—day of trial

There was no prejudice when a first-degree murder defendant was arraigned on the first day of trial after venue of the trial

had been moved from Union County, where formal arraignment had not been required because there were not more than 20 scheduled weeks of sessions for the trial of criminal cases. Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.

9. Witnesses— statements—not disclosed

The trial court did not abuse its discretion in a first-degree murder prosecution by not ordering the disclosure of witness statements after the witnesses testified or by failing to order the disclosure of notes used to refresh the recollection of witnesses.

10. Grand Juries— review of members and witnesses—validity of indictment

The trial court did not err in a first-degree murder prosecution by not conducting an in camera review of grand jury members and witnesses who appeared before the grand jury in order to determine the validity of the indictment.

Appeal by defendant from judgments entered 4 March 1998 by Judge William H. Helms in Rowan County Superior Court. Heard in the Court of Appeals 9 December 1999.

Joshua Patrick Griffin (defendant) was convicted of first-degree kidnapping and first-degree murder of Mrs. Kimberly Medlin (Mrs. Medlin) at the 12 January 1998 Session of Rowan County Superior Court. The charges against the defendant arose from the death of Mrs. Medlin on 29 March 1997.

The State offered evidence at trial tending to show that in the early morning hours of 29 March 1997, Mrs. Medlin left her place of employment in Charlotte and drove towards her home in Union County in her red Jeep Wrangler with black and white cowhide seat covers. Mrs. Medlin usually traveled home from work on Old Highway 74, also known as the Old Charlotte Road. Old Highway 74 and Rocky River Road intersect at Baker's Crossroad. On her way home, Mrs. Medlin spoke with her husband, Bridger Medlin, by cell phone on two occasions. On the second occasion, Mr. Medlin had arrived home and telephoned Mrs. Medlin at 2:45 a.m to ask about her location. Mrs. Medlin informed him that she was near Union Station about two miles from Baker's Crossroad. The State offered the business records of Bell Atlantic's Mobile System to confirm the time and

duration of the telephone calls. Mr. Medlin testified that he fell asleep, woke up and found that Mrs. Medlin was still not home. When he tried to call Mrs. Medlin on her cell phone at 3:59 a.m., her cell phone was answered by a police officer who informed Mr. Medlin that his wife was not at the scene.

Troy Brocato (Brocato) testified that he worked at a location off Old Highway 74 and that he prepared to leave work between 2:48 a.m. and 3:00 a.m. on 29 March 1997. As Brocato was about to turn onto the highway, he had to wait for a red "off road-type of Jeep like a Wrangler" traveling east. Brocato headed east as well and noticed a westbound vehicle make a "three-point turn" and head east behind the Jeep at a high rate of speed. Brocato further testified that the car following the Jeep had blue reflective tape on the rear, a whip antenna on the trunk, and lights on the roof. Brocato was not sure whether the car had "Police" on the trunk, but was sure he saw a "P" on the trunk. According to Brocato, the "police car activated its bubble gum lights" near the intersection of Teledyne Road and Old Highway 74. Both the Jeep and the police car continued through the green light at that intersection while Brocato made a right turn onto Rocky River Road.

David Smith, who lived diagonally across the street from the location where Mrs. Medlin's Jeep was found, testified that he was awakened by flashing lights. Upon looking out of his window, Smith saw a red Jeep and a police car parked behind it. Smith further testified that his digital clock read 3:22 a.m., but he kept that clock 15 to 20 minutes fast so that it was actually between 3:02 and 3:07 a.m.

Randy Baker testified that he drove his girlfriend home in the early morning hours of 29 March 1997. According to Mr. Baker, as he passed Shady Lane at "approximately 3:10, 3:15" while driving west on Old 74, he saw a "Wrangler Jeep" parked off the road on the other side of the road. The lights of the Jeep were on and no one was in or around the vehicle. When Mr. Baker returned some 20 to 25 minutes later, he passed the Jeep again, slowed down and noticed that no one was in or around the Jeep, but continued on his way.

Captain Simpson of the Monroe Public Safety Department (MPSD) testified he discovered Mrs. Medlin's Jeep at approximately 3:45 a.m. The Jeep was pointed east, its engine was running, the headlights were on and the driver's side window was open. Inside the Jeep lay a woman's handbag and beside the handbag was "a lady's billfold

and it was open." There was no sign of a struggle inside the Jeep and the only thing missing was Mrs. Medlin's driver's license.

On Sunday, 30 March 1997, at approximately 6:30 p.m., Mrs. Medlin's body was found at the end of Westwood Industrial Drive near the intersection of Rocky River Road. Her body was partially covered by a pallet, some roofing shingles and brush. The victim's bra was up above her breasts, her sweatshirt was inside out, pulled over her head and wrapped around her wrists or lower arms. An autopsy revealed abrasions on her knees consistent with her falling to the pavement, long scratches consistent with her body having been dragged, abrasions on the front of the neck, pinpoint hemorrhages in her eyes and a broken hyoid bone, all consistent with strangulation which could have been caused by a "heavy flashlight held against the neck" by a person standing behind her. Chemical testing in the Westwood Drive area revealed what appeared to be a trail of blood leading from the end of the road to the brush where the body was found.

The State also offered evidence that the impression of a heel print having the outline of chevron stripes was noted on the back of the victim's sweatshirt. The chevron stripes were similar to those found on the soles of shoes approved for use by officers of the MPSD. Testing by the SBI revealed that the print left on the victim's shirt was similar to one made by a size 8-½ shoe. The State offered evidence that size 8-½ Clarino shoes having chevron stripes on the sole were issued to the defendant on 5 December 1995 from the Monroe Family Shoe Center.

The Clarino shoes were not located at defendant's home. The State offered evidence that defendant told investigators that he had to throw the shoes away following an accident investigation, during which battery acid had gotten on the shoes. However, Officer Bradley, a witness for the State, testified that he assisted at the accident referred to by defendant, and recalled that defendant stated after the accident that his shoes were not damaged and he did not need new ones issued to him.

Other evidence tended to show that on the night of 28 March 1997, defendant worked at the Monroe Mall as a security officer. Upon finishing his shift, defendant went to the Monroe Police Department about 10:30 p.m., and talked to the dispatchers on duty. Defendant went to get ice cream for the officers, and then informed one of the dispatchers that he intended to go "harass some people."

At that time, defendant was being cross-trained as a police officer and a fireman. Defendant was not supposed to patrol during off-duty hours without the knowledge and permission of his supervisor. The State offered evidence tending to show that on the night of 28 March and during the early morning hours of 29 March 1997, the defendant was patrolling in Zone 5, which includes the Baker's Crossroad area.

Glenn Shelton testified that at about 1:00 a.m. on the morning of 29 March 1997, he saw a police car parked at Ron's Restaurant, which is located in Zone 5 near Baker's Crossroad. Shelton stopped to get money from an ATM and continued west on Old Highway 74. Shelton fell asleep at the wheel and drove his vehicle into a ditch. Shelton remembered seeing the police car parked at Ron's Restaurant and walked back to the restaurant, arriving there about 1:45 a.m. The police officer was still there and Shelton advised him of his situation. The police officer, identified at trial as defendant, told Shelton that he was off duty but would help him. Defendant and Shelton drove back to the location of Shelton's car. Defendant then used his cell phone, rather than his radio, to call a wrecker.

Lanny Tice testified that he received the dispatch call for a wrecker and arrived at the scene between 2:20 and 2:30 a.m. on the morning of 29 March 1997. Tice further testified that the police officer remained at the scene for some 15 minutes until Tice had pulled the car out of the ditch. The car was not driveable, however, and Tice loaded the disabled car onto his truck. Defendant left the scene while Tice was loading the car for transport.

The investigating officers testified that they interrogated defendant on several occasions during the investigation of Mrs. Medlin's murder; that defendant told them he arrived at his home at about 2:30 a.m. on the morning of 29 March 1997, after doing some off-duty patrolling; and that his brother and his brother's girlfriend were at home when he arrived there. Agent Burpeau testified that defendant's brother, Jeremy Griffin, told him that defendant arrived home about 2:48 a.m. and that he saw defendant vacuum his patrol car later the same morning.

Defendant further told investigators that he did not encounter Mrs. Medlin, did not see her Jeep, and had no recollection of having ever seen her before. However, Officer Bradley of the MPSD testified that defendant had on two separate occasions used his patrol radio to inform Bradley that a blonde "babe" driving a red Jeep with

black-and-white cowhide seat covers was passing through the area and that Officer Bradley should attempt to see her. On one of those occasions, Officer Bradley did take steps to observe the operator of the Jeep as she drove through the area. Bradley testified that the defendant told him that the driver was "hot" and he was going to "get her tag number."

The State offered further evidence tending to show that on numerous occasions defendant obtained information about attractive female drivers by using their license plate numbers ("running" their tags). Officer Bradley testified that defendant had on several occasions stopped attractive women by flashing his lights, even though the women had not committed any traffic violations. Two women testified at trial that defendant obtained information about them by running their license tags. One of the women testified that she encountered defendant at a party where he surprised her by knowing some personal information about her and defendant admitted that he obtained the information by running her tags when he saw her drive by one day.

On 4 April 1997, during the course of the investigation of Mrs. Medlin's murder, defendant was suspended. His patrol car was seized on 5 April 1997 for the purpose of laboratory testing. Officer Manus of the MPSD testified that defendant telephoned him on 5 April 1997 to ask whether testing with a "blue light" could reveal blood on the floor or on the seat of his vehicle. Manus advised the defendant that such testing could be done, and defendant responded by saying, "show me a police officer that doesn't have blood in his car, and I'll show you a police officer that doesn't do anything." On the following day, 6 April 1997, defendant asked Officer Manus to meet him at a bowling alley and Manus did so. Officer Manus testified that the defendant told him he was at Ron's Restaurant when he saw Mrs. Medlin's Jeep travel through the intersection, that the Jeep was weaving, and that he followed it. Manus further testified that defendant told him that he stopped Mrs. Medlin at the location where her Jeep was found; that she did not have a driver's license with her; that defendant asked Mrs. Medlin to sit in his patrol car because he suspected she was driving while impaired; that Mrs. Medlin became upset; that defendant determined she had not been drinking, and told Mrs. Medlin to wait in her Jeep until she was calm and then proceed. Defendant told Officer Manus that he then went directly home. During the conversation with Manus, defendant allegedly also told him that he was on Westwood Industrial Drive earlier that same day,

that he had to urinate, and that he might have left a "cover like you keep tools in" out there. Officer Manus testified that he reported the conversation with defendant to the Chief of Police.

Defendant offered alibi evidence through his brother Jeremy, and Jeremy's girlfriend, Holly Polk. Both defendant's brother and Ms. Polk testified that defendant got home before 3:00 a.m. on the morning of Mrs. Medlin's murder. Jeremy Griffin testified that his bedroom clock read "2:52 or 2:53" when defendant arrived home, and that the bedroom clock was "10 or 15 minutes fast." Jeremy Griffin denied that he told SBI Agent Burpeau that defendant arrived home at 2:48 a.m. He further denied that he told Agent Burpeau that he saw the defendant vacuuming the interior of his patrol car later that same morning.

Defendant offered evidence from Amanda Bartley who testified that she drove through Baker's Crossroad about 2:15 a.m. on 29 March 1997, and saw a police car there with its lights on. Nathan Hargett testified that he discovered a suspicious vehicle, a black Chrysler with Texas license plates, parked behind Ron's Restaurant, and that he saw a "light-headed" person who appeared to be a woman in the backseat of the car. Joshua Fraley testified that he and two other teenagers were walking through the area about 3:15 a.m. on 29 March 1997, and observed a red Jeep parked on the side of the road with the engine running. Fraley further testified that he heard two people arguing in the Jeep.

Defendant also offered evidence through friends and family members that he had no bruises, abrasions or scratches on his body on the day following the murder. Defendant's mother gave testimony corroborating defendant's claim that he had thrown away his Clarino shoes after getting battery acid on them. Defendant offered evidence that other officers patrolled off duty without obtaining permission from their superiors.

Laboratory tests on defendant's patrol car did not produce evidence that Mrs. Medlin had been in the car, nor did they reveal the presence of blood in defendant's patrol vehicle. Laboratory tests on defendant's uniforms did not reveal any hair or fiber transfer from Mrs. Medlin or her vehicle.

After deliberation, the jury returned verdicts of guilty of first-degree kidnapping and first-degree murder on the basis of both malice, premeditation and deliberation, and under the felony murder

rule. After deliberating punishment, finding both aggravating and mitigating circumstances, the jury recommended that defendant be sentenced to life imprisonment without parole. The trial court entered judgments based on the jury verdicts sentencing defendant to life imprisonment without parole on the charge of first-degree murder and to a minimum term of 73 months and a maximum term of 97 months on the charge of first-degree kidnapping. Defendant appealed from the judgments of the trial court.

Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

Law Office of Harold J. Bender, by Kevin L. Barnett, for defendant appellant.

HORTON, Judge.

I.

[1] Defendant first assigns error to the trial court's grant of the State's motion to change the venue of this case from Union County. The State's motion was based on the physical limitations of the Union County facilities and the desire to begin the trial on 12 January 1998, the trial date set by the trial court. Defendant contends that the defendant had a right to be tried "in the place of the crime" and the citizens of Union County had a right "to see justice done in their own community." *State v. Chandler*, 324 N.C. 172, 184, 376 S.E.2d 728, 736 (1989). Our Supreme Court pointed out in *Chandler*, however, that while those are important and legitimate considerations, they are not the test for determining whether the trial court should transfer venue of a case. *Id.; see also State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983). "[A] motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a showing of an abuse of discretion." *State v. Barfield*, 298 N.C. 306, 320, 259 S.E.2d 510, 524 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980).

In *Barfield*, a case in which the State sought the death penalty, the trial court moved the case from Robeson County to Scotland County on motion of the defendant. Later, the district attorney moved that the case be transferred from Scotland County to Bladen County, because of the large number of persons awaiting trial in Scotland County, and because Scotland County had limited court sessions

available. Defendant Barfield objected to the transfer, arguing that N.C. Gen. Stat. § 15A-957 provided for a change of venue *on the motion of the defendant* and that the trial court is limited to ordering a transfer to another county in the same judicial (now, prosecutorial) district, or a county in an adjoining judicial district.

Our Supreme Court held in *Barfield* that, although the *statutory power* of the trial court to change venue is limited by the provisions of N.C. Gen. Stat. § 15A-957, the superior court has the inherent authority to order a change of venue in the interests of justice. *Barfield*, 298 N.C. at 320, 259 S.E.2d at 524; *English v. Brigman*, 227 N.C. 260, 41 S.E.2d 732 (1947). The Supreme Court found no evidence of an abuse of discretion in the transfer of the *Barfield* trial to Bladen County and noted that the trial court "had to consider the rights of the twenty other defendants awaiting trial in Scotland County as well as the rights of the defendant [Barfield]." *Barfield*, 298 N.C. at 321, 259 S.E.2d at 525.

In the case before us, the State moved for a change of venue in August 1997. The first hearing on the motion was continued on request of the defendant in order to prepare for the hearing. The trial court advised the parties at the time the hearing on the motion was continued that

> in the meantime I'm going to be checking with the Clerks and the Sheriffs in each county in this Prosecutorial District to see about the case load and the facilities and that sort of thing. I just want you to be aware of the fact that I'm going to make inquiry on my own in those four counties.

The District Attorney stated that the State had no objection to such inquiry by the trial court and counsel for defendant pointed out that the statute permitted the court to consider an adjoining county, and that Mecklenburg County was an adjoining county. The trial court then stated that "[w]e'll check with [Mecklenburg County] too to see what the status is." The trial court informed the parties that it was going to set the case for trial on 12 January 1998, and intended to try the case on that date because it was necessary to deny bail in the case.

On 16 September 1997, the State argued its motion for change of venue based on the pending caseload in Union County, including nine pending murder cases. The State used caseload figures from the Administrative Office of the Courts to show the caseload in each of

the counties in the district, and argued that the case should be moved to Stanly County. The State also pointed out the lack of a holding cell in the Union County Courthouse, no meeting rooms for lawyers, and no place for the jury to congregate except in the stairwells.

Defendant argued that the State was afraid "the good folks of Union County might render a fair and impartial verdict in [the] case," and that the case should not be moved from Union County. Defendant further argued that, if the trial court were inclined to move the case from Union County, it should be moved to Mecklenburg County, rather than to Stanly County. Upon inquiry by the trial court, defense counsel stated that, if the case were going to be moved, defendant did not object to Mecklenburg, Cabarrus, or Rowan Counties. The trial court stated that:

> In the event that it is moved outside of the district, if I decide to move it, I'll attempt to make sure that it's not at such a distance that it would inconvenience the family from either side as far as driving distance and that sort of thing. So I'll check with the people in Mecklenburg County. I'm going to check the figures over here. I'm going to check all of this argument that the District Attorney has made as far as numbers.

The trial court continued to discuss the matter with counsel stating that "there's a facility's [*sic*] problem throughout the district and the growing caseload creates a problem with case management, so that's one thing I'm going to take into consideration, among some other factors." The trial court further stated:

> This case is going to take longer than any case we've had in recent memory anywhere in the district other than the one that may have concluded today in Richmond County, which took about eight weeks—nine weeks. . . . [I]t's probably going to be a protracted sort of jury selection process, simply because of the alleged facts of the case and the apparent extensive family connection on both sides and law enforcement overtones in the case. So I'm going to take all of these factors into consideration and I'll let you know of my decision. But I'm interested in the case being tried as expediently as possible and in a place that's fair to both sides and in a place that's not unduly burdensome to anyone that has to participate in the trial or that chooses to observe it. So I'm going to take all of those factors into consideration before I make a ruling.

The trial court then took the motion for change of venue under consideration. At a subsequent motions hearing on 20 November 1997, the trial court asked if either the State or defendant wanted to be heard further on the motion for change of venue. Neither side wished to be heard. The trial court then ordered the case transferred to Rowan County without stating its reasons. Although we find no requirement that the trial court make findings of fact in support of its order for change of venue, we believe that would be the better practice. Yet, in light of the detailed statements by the trial court in the record about the factors it was considering in determining the State's request for change of venue, we conclude that the court did not abuse its discretion in ordering the change of venue to Rowan County. Defendant's first assignment of error is overruled.

II.

[2] Defendant assigns error to the trial court's failure to give a jury instruction on second-degree murder. Our Supreme Court has disavowed the rule that "the trial court is required to instruct on second degree murder in all first degree murder cases in which the State relies on the elements of premeditation and deliberation." *State v. Hickey*, 317 N.C. 457, 470, 346 S.E.2d 646, 655 (1986), (citing *State v. Strickland*, 307 N.C. 274, 290-91, 298 S.E.2d 645, 656 (1983) (overruled on other grounds)). So long as the evidence introduced by the State is "positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged" the court is not required to give a second-degree instruction. *Strickland*, 307 N.C. at 283, 298 S.E.2d at 652.

"First degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). Premeditation and deliberation are mental processes that are difficult to prove and are usually established by circumstantial evidence. *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). "To determine if a crime was with premeditation and deliberation, there must be evidence that a defendant thought about the act for some length of time, however short, before the actual killing; no particular amount of time is necessary to illustrate that there was premeditation." *Id.* Deliberation is a "fixed design to kill notwithstanding defendant was angry or in an emotional state at the time." *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979). Further evidence from which premeditation and deliberation might be inferred is the conduct of the defendant

following the killing and the brutal manner in which the killing was done. *Sierra*, 335 N.C. at 758, 440 S.E.2d at 794.

In this case the State produced circumstantial evidence tending to show that defendant stopped Mrs. Medlin, placed her in his squad car, perhaps with the intent of making some sexual advance, "something" happened and he drove her to the location where her body was found some 36 hours later. The evidence tended to show that Mrs. Medlin died of strangulation, that her neck was broken, her skull was fractured at its base, her killer broke the hyoid bone in her neck, and there were pinpoint hemorrhages in her eyes. Her killer attempted to conceal her body by placing it under a pallet, some shingles and brush.

Thus, the State offered evidence on each element of first-degree murder. Although defendant argues that a jury could find that he panicked, killed Mrs. Medlin without premeditation or deliberation, and concealed her body while still in a panicked state, defendant presented no evidence in support of that theory. Defendant's evidence was focused on establishing an alibi and creating a reasonable doubt that he killed Mrs. Medlin. There was simply no conflicting evidence from defendant or any other witness to indicate that defendant did not commit premeditated murder. As the evidence raised no "material question as to the existence of premeditation [or] deliberation," there was no conflicting evidence which would have required a charge on second-degree murder. *State v. Brown*, 339 N.C. 426, 439, 451 S.E.2d 181, 189 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995).

Defendant's reliance on the decision of our Supreme Court in *State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994), is misplaced. In *Camacho*, the defendant never denied killing his girlfriend, but the evidence was in conflict as to whether defendant committed the crime by lying in wait. Because of the conflict in the evidence, the Supreme Court held that the trial court should have instructed the jury on the lesser offenses of second-degree murder and voluntary manslaughter, both of which were supported by evidence other than evidence of lying in wait. *Id.* at 232, 446 S.E.2d at 12. Here, defendant denied that he killed Mrs. Medlin, and his evidence raised no conflict in the evidence as did the defendant's testimony in *Camacho*. The jury was properly instructed in this case, and this assignment of error is overruled.

III.

[3] Defendant next assigns error to the trial court's failure to dismiss the kidnapping charge at the close of State's evidence and at the close of all evidence. Defendant's motion to dismiss at the close of the State's evidence is waived because he introduced evidence. N.C.R. App. P. 10(b)(3). *State v. Elliott*, 69 N.C. App. 89, 100, 316 S.E.2d 632, 640, *appeal dismissed and disc. review denied*, 311 N.C. 765, 321 S.E.2d 148 (1984). Therefore we address only defendant's motion to dismiss the kidnapping charge made at the close of all of the evidence.

Review of a motion to dismiss requires that

> [a]ll of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged.

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). In order to withstand a motion to dismiss, the evidence, whether direct, circumstantial, or both must be sufficient to draw a "reasonable inference of defendant's guilt." *State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 914, 919 (1993). Once the court makes that determination it is up to the jury to decide whether " 'the facts *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* (citation omitted). Our statutes provide that

> 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 . . . for the purpose of:
>
> * * * *
>
> (2) facilitating the commission of a felony . . .

is guilty of kidnapping. N.C. Gen. Stat. § 14-39(a)(2) (1999). First-degree kidnapping, punishable as a Class C felony, requires a finding that the victim was either "not released . . . in a safe place or had been seriously injured or sexually assaulted." N.C. Gen. Stat. § 14-39(b) (1999).

The State offered evidence in this case tending to show that prior to the morning on which Mrs. Medlin was killed, defendant had called another officer's attention to the "babe" in the red Jeep, and defendant had stated that he was going to get her license tag number; that defendant frequently engaged in the practice of "running" the license tag numbers of attractive females to obtain personal information about them; that in the early morning hours of 29 March 1997 defendant encountered Mrs. Medlin on the road, stopped her and removed her from her Jeep into his squad car; that "something" transpired in the squad car; that the concealed body of Mrs. Medlin was later discovered a few miles from where her Jeep had been stopped; that on the back of the sweatshirt Mrs. Medlin was wearing, there was a shoe print of the same size and type usually worn by defendant; that defendant initially denied that he had seen, stopped, or even knew, Mrs. Medlin, but later admitted that he had stopped her on the morning in question and put her in his patrol vehicle; that Mrs. Medlin's Jeep was discovered at the location where she was stopped by defendant with its lights on, its engine running, and the victim's purse on the seat; that only Mrs. Medlin's driver's license was missing. There was ample evidence from which the jury could reasonably infer that the defendant stopped Mrs. Medlin for the purpose of a sexual encounter, that "something" occurred and that defendant drove Mrs. Medlin from the much-traveled area where he had stopped her to a quiet, dark place so that he could ensure her future silence by killing her and concealing her body.

Defendant contends, however, that the evidence was not sufficient as a matter of law to support a finding of guilt as to first-degree kidnapping. While we agree with defendant that he may not be convicted on evidence which merely raises a "suspicion or conjecture," we hold that the State introduced substantial evidence of each element of the crime charged. The cases cited by defendant are distinguishable because they involved factual situations in which there was no evidence that the defendant in those cases had formed an intent to commit a felony *before* the victim was removed to another location. *See State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In *Jackson*, the defendant asked the victim for a ride to town to obtain jumper cables, but actually had the intention of robbing the victim. The victim was later found dead in his car. Our Supreme Court held that defendant Jackson's conviction for first-degree kidnapping could not stand, since it was a reasonable inference that the victim drove to the place where he was shot, and defendant Jackson there

revealed for the first time his intent to rob the victim. "By this account of events, defendant would have restrained [the victim] for the first time only after the car had stopped . . . [and] such restraint would have been an inherent, inevitable feature of the armed robbery, and thus judgment for kidnapping could not be entered based on this restraint." *Jackson*, 309 N.C. at 41, 305 S.E.2d at 714.

Here, the evidence tends to show that defendant caused Mrs. Medlin to get into his patrol car where, according to defendant's statement to Officer Manus, she became very upset; and that defendant transported her to another location, killed her and concealed her body. A jury could reasonably infer that defendant did not kill Mrs. Medlin while sitting in his patrol car in a well-traveled lighted area, with the victim's car only a short distance away, its lights on and motor running. Further, there was no evidence that a struggle took place in defendant's patrol car, nor did scientific tests reveal the presence of blood in the patrol car. There being substantial evidence from which the jury could find every element of first-degree kidnapping, defendant's assignment of error is overruled.

IV.

[4] Defendant next assigns error to the trial court's failure to grant his motion to dismiss the charge of first-degree murder at the close of the State's evidence and at the close of all evidence. Again, defendant waived his motion at the close of the State's case by offering evidence. N.C.R. App. P. 10(b)(3). We have previously summarized the evidence tending to show that defendant murdered Mrs. Medlin with premeditation and deliberation in section II. above. For the reasons stated therein, we hold that the State offered substantial evidence of each element of the crime of murder in the first degree based on premeditation and deliberation and that the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder.

V.

[5] Defendant argues that the trial court committed prejudicial error in allowing the jury to hear certain testimony offered by Agent Isley and thereafter instructing the jury to disregard Isley's testimony. The challenged testimony relates to events that occurred when Agent Isley went to defendant's home on 8 April 1997, in order to discuss the investigation into the death of Mrs. Medlin. Prior to 8 April 1997, defendant had been suspended from work, and his patrol vehicle had

been seized for the purpose of laboratory tests. Agent Isley testified that he and defendant were outside defendant's home when Isley related to defendant that

> investigators knew that he stopped Kim Medlin's Jeep. We —I informed Mr. Griffin that we also knew that Kim Medlin was inside his patrol car.
>
> I informed Mr. Griffin that we also knew that he was on Westwood Industrial Drive. I also informed Mr. Griffin that we knew that he left evidence at the crime scene that could tie him to Kim Medlin's injuries.
>
> * * * *
>
> While I was speaking with Mr. Griffin and informing him of his association with Kim Medlin, he stood with both hands in his pockets and shaking his head up and down.
>
> * * * *
>
> Mr. Griffin never denied or confirmed all of the information that I had just provided to him.

On the following day the trial judge instructed the jury to disregard the above testimony of Agent Isley relating to his visit with defendant on 8 April 1997. The court then inquired of the jurors whether they could follow his instruction and completely disregard that testimony. Each juror answered in the affirmative by raising his or her hand.

The State does not concede that the testimony of Agent Isley was inadmissible and argues that the testimony was properly received pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d). However, since the trial court decided to reverse its earlier decision to allow the testimony, we will assume for the purposes of argument that such evidence was not admissible, and will address the manner and timeliness with which the trial court dealt with its introduction.

The gist of defendant's argument is that the curative instruction came too late to prevent reversible error. We disagree. While we are aware that timeliness of curative instructions is a factor in deciding whether the instruction did in fact cure any error, *see State v. Hunt*, 287 N.C. 360, 215 S.E.2d 40 (1975), the crucial inquiry is into the "nature of the evidence and its probable influence upon the mind of

the jury in reaching a verdict" as well as the probable "difficulty in erasing it from the mind." *State v. Strickland*, 229 N.C. 201, 207, 49 S.E.2d 469, 473 (1948). We have, therefore, considered the passage of time before the trial court gave curative instructions, Agent Isley's testimony that defendant "never confirmed or denied" any of the allegations against him, the trial court's inquiry of the jury as to whether each member could heed the curative instructions and ignore the testimony of Agent Isley and the jury's affirmative answers to the questions asked by the trial court, and cannot say as a matter of law that the curative instruction was untimely or ineffective.

Our Supreme Court has held that "[o]rdinarily, when objectionable evidence is withdrawn, no error is committed." *State v. Thomas*, 350 N.C. 315, 358, 514 S.E.2d 486, 512, *cert. denied*, — U.S. —, 145 L. Ed. 2d 388 (1999). However, defendant argues that the admission of evidence of his silence in the face of Isley's statements was "highly incriminating," was "tantamount to a confession," and therefore could not be cured by an instruction to the jury. Defendant cites *Hunt*, 287 N.C. 360, 215 S.E.2d 40, in support of his contention.

In *Hunt*, defendant was tried for (then capital) rape, armed robbery, and felonious assault. Defendant did not testify himself, but called a witness who testified to his good character and reputation. On cross-examination, the assistant solicitor asked defendant's character witness if the witness was aware of defendant's "police record," that the defendant had "served time," and that defendant was on probation for possession of marijuana and assault. Over objection, the trial court allowed the character witness to answer that he did not know those things about defendant, and would not have been able to say that defendant had a good reputation if he had known those things about him. The following morning, defendant Hunt moved for a mistrial; the trial court denied the motion but gave the following instructions to the jury:

> "THE COURT: Members of the jury, the witness, Richard Vaughan, the last witness who testified for the defendant, and testified as to the general character and reputation of the defendant, was asked a number of questions on cross examination by the Solicitor. The first question asked on cross-examination was: Mr. Vaughan, you say you have known him for a long time. Answer: Yes, sir. Members of the jury, there were a number of other questions asked by the Solicitor of the witness, Richard Vaughan, two of those questions under objection by defendant's counsel, and

> the Court overruled the objection. I now reverse my ruling and sustain the objection, not only to those two questions, but I instruct you that you will not consider for any purpose the other questions propounded by the Solicitor. The Court instructs you that you will disregard each of these questions propounded by the Solicitor of the witness, Mr. Vaughan, and erase the matter from your minds. You will disabuse your minds of those questions on cross examination by the Solicitor of the witness, Richard Vaughan.
>
> "Members of the jury, questions are not evidence. Questions by counsel or by the Solicitor are not evidence, they are simply questions. Evidence is the sworn testimony that comes from the lips of the witnesses on the stand."

Id. at 373-74, 215 S.E.2d at 49.

After discussing the general rules with regard to incompetent evidence and the effect of curative instructions, our Supreme Court held that the defendant in *Hunt* was entitled to a new trial because the "harmful effect of the evidence could not have been removed by the Court's instructions." *Id.* at 377, 215 S.E.2d at 50. In so ordering, the Supreme Court emphasized that

> the instructions then given were not specific as to the content of the challenged questions, and by this time the evidence must have found secure lodgment in the minds of the jurors. The questions posed by the prosecutor were loaded with prejudice, and we are of the opinion that under the circumstances of this capital case, the harmful effect of the evidence could not have been removed by the Court's instructions.

Id. at 376-77, 215 S.E.2d at 50.

In the case before us, the trial court was specific as to the content of the testimony given by Agent Isley and gave a curative instruction after discussing the contents of the curative instruction with the defendant. Furthermore, unlike this case, there was no evidence in *Hunt* that the trial court inquired of the jury about their individual abilities to ignore the withdrawn testimony. Here, the trial court received assurances from the members of the jury that they could obey the trial court's instructions. *See State v. Adams*, 347 N.C. 48, 490 S.E.2d 220 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). In *Adams*, our Supreme Court found no error where the trial court withdrew certain testimony, instructed the jury not to consider

the testimony, and the jury indicated in response to questions asked by the trial court that they would comply with the trial court's directives. *Id.* at 68, 490 S.E.2d at 230-31. Moreover, even assuming that the trial court committed error in admitting Agent Isley's testimony and in failing to withdraw it until the following day, we cannot say, in light of the copious circumstantial evidence offered by the State linking defendant to Mrs. Medlin's murder, that such an error was so prejudicial as to require a new trial. Defendant's fifth assignment of error is overruled.

VI.

[6] Defendant next assigns error to the trial court's failure to allow his evidence that it was the habit and custom of several MPSD officers to "run tags" and stop attractive women following the State's evidence that defendant had this habit. The gravamen of defendant's argument is that the State's evidence, introduced pursuant to N.C. Gen. Stat. § 8C-1, Rule 406, opened the door for evidence showing the practice was common in the MPSD. We disagree.

The admissibility of evidence is governed by a threshold inquiry into its relevance. N.C. Gen. Stat. § 8C-1, Rules 401-403 (1999). In order to be relevant, the evidence must have a "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). The evidence produced by the State was relevant to showing that defendant had a habit with which he conformed on the morning of 29 March 1997. That other officers engaged in the same activity is not relevant to any fact of consequence in this case for it does not weaken the inference that defendant acted in conformity with his own habit during the events then under investigation.

Moreover, in this case other officers testified that officers other than defendant engaged in the activity at issue. For example, Officer Bradley testified on cross-examination that it was "not unusual" for MPSD officers to run the tags of attractive women and the officers would talk on their radios about women they had seen. Therefore, even assuming for the purposes of argument that the additional evidence should have been allowed, no prejudice could have resulted because "substantially the same testimony" was later admitted. *State v. Hageman*, 307 N.C. 1, 23-24, 296 S.E.2d 433, 446 (1982). Thus, this assignment of error is likewise overruled.

VII.

[7] Next, defendant assigns error to the numerous unrecorded bench conferences held during the trial of this case. Defendant alleges that his constitutional right to be present at every stage of trial was violated due to the number of these conferences. This assignment of error is without merit.

> It is the presence of defendant's counsel at a bench conference which ensures that the subject matter of the conference is not concealed from defendant. As we have said in such cases, defendant was "in a position to observe the context of the conferences and to inquire of his attorneys as to the nature and substance of each one" such that he could have taken appropriate exception.

State v. White, 349 N.C. 535, 546, 508 S.E.2d 253, 261 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999) (quoting *State v. Speller*, 345 N.C. 600, 605, 481 S.E.2d 284, 286 (1997)).

Prior to trial, defendant's counsel moved for a "complete recordation." The trial court replied, "[t]hat does not include bench conferences. Everybody understand that?" Defendant's counsel answered in the affirmative, and the trial court directed defense counsel to inform defendant that, if defendant desired any of the discussions at the bench to be recorded, the trial court should be advised and would address the matter of recordation at that time. Later, the trial court directly addressed the defendant and advised him of the procedure regarding bench conferences:

> THE COURT: Your attorneys will inform you of anything that takes place at the bench. Anytime you want to be present or want that recorded, let your attorneys know and I'll see that it is recorded. Do you understand?
>
> MR. GRIFFIN: Yes, sir.

The record does not reflect any objection at any time by defendant to the trial court's procedure regarding bench conferences, nor is there any allegation that the procedure amounted to plain error. Indeed, the record is replete with instances in which the trial court stated for the record the purpose of a bench conference and many other instances in which the purpose of the conference is apparent from the context. Thus, through his counsel, defendant had "constructive knowledge of all that transpired." *State v. Buchanan*, 330 N.C. 202, 223, 410 S.E.2d 832, 844 (1991). Therefore, this assignment of error is overruled.

VIII.

[8] Next, defendant assigns error to his purported arraignment on the first day of the trial. The State concedes that defendant was not formally arraigned but argues that no prejudice resulted. We agree. The applicable statute requires that there be calendared arraignment in counties in which there are 20 or more weeks of criminal trial sessions. N.C. Gen. Stat. § 15A-943(a) (1999). In this case the prosecutor told the court that arraignment had not taken place in Union County because there were not more than 20 scheduled weeks of sessions for the trial of criminal cases. Therefore, formal arraignment in Union County was not required.

Arraignment is the procedure whereby the defendant is "formally apprised of the charges pending against him and directed to plead to them." *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980). However, "[w]here there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *Id.* In this case, defendant was present at a minimum of four hearings held prior to the commencement of the trial. At a motions hearing held 3 June 1997 defendant was asked by the trial court whether he understood that he was charged with first-degree murder and first-degree kidnapping. Defendant responded by saying, "Yes, sir." At a hearing on 28 July 1997, defendant was informed in open court that the State intended to try him for capital murder.

Furthermore, the trial itself was adversarial in nature without any indication that defendant was unaware of the charges against him. Defendant presented 34 witnesses in his own defense, and was ably represented by counsel. Finally, at the conclusion of pretrial motions on the first day of defendant's trial, the district attorney inquired of defendant, through counsel, whether he desired a formal arraignment, and defendant replied that he did not. Defendant has failed to show any prejudicial error resulting from the lack of a formal arraignment. This assignment of error is overruled.

IX.

[9] Defendant next argues that the trial court erred in failing to order the disclosure of witness statements after the witnesses testified and by failing to order the disclosure of notes used to refresh the recollection of witnesses. N.C. Gen. Stat. § 15A-903(f) provides that a

defendant is entitled to statements that have been "signed or otherwise adopted or approved by" a witness who testifies as a witness for the State. N.C. Gen. Stat. § 15A-903(f)(5)(a) (1999). Upon careful review of the record and pertinent transcript sections, we find no error.

The trial court conducted a *voir dire* examination of Tammy Boylen and David Simpson, two of the witnesses whose alleged statements are at issue. After each examination, the trial court concluded that the witness had not signed or otherwise adopted the statements that were taken by investigating officers. Thus, defendant has not shown any prejudicial error regarding the statements allegedly made by those witnesses.

The request to view writings used by a witness to refresh his memory prior to testifying is addressed to the sound discretion of the trial judge. N.C. Gen. Stat. § 8C-1, Rule 612(a)(b) and its "Commentary"; *State v. Steele*, 86 N.C. App. 476, 478, 358 S.E.2d 98, 99, *disc. review denied*, 320 N.C. 797, 361 S.E.2d 86 (1987). Therefore, the decision of the trial court in this regard will not be disturbed absent a showing of abuse of discretion. Upon review of the record, we hold that the trial court did not abuse its discretion on these facts.

In one instance the trial judge examined the notes reviewed by Officer Bradley prior to testifying. He found that they did not contain *Brady* material and were not inconsistent with Officer Bradley's testimony. In another instance cited by defendant, a witness reviewed notes before coming to court and left the notes locked in his car. The court denied defendant's motion to view those notes. We cannot say that on these facts the trial court abused its discretion when it denied defendant's motion. This assignment of error is overruled.

X.

[10] Finally, defendant assigns error to the trial court's failure to conduct an *in camera* review of grand jury members and witnesses who appeared before the grand jury, in order to determine the validity of the indictments returned against defendant. The purpose of the grand jury proceeding is to determine whether probable cause to bring charges exists. N.C. Gen. Stat. § 15A-628(a)(1) (1999). "The nature and character of the evidence presented to the grand jury is by statute secret." *State v. Jones*, 85 N.C. App. 56, 69, 354 S.E.2d 251, 258, *disc. reviews denied*, 320 N.C. 173-74, 358 S.E.2d 61-62, *cert.*

denied, 484 U.S. 969, 98 L. Ed. 2d 404 (1987). However, the defendant is protected " 'by his right to object to improper evidence and cross-examine the witnesses presented against him at trial.' " *Id.* (quoting *State v. Porter*, 303 N.C. 680, 689, 281 S.E.2d 377, 384 (1981)). This final assignment of error is overruled.

Defendant was accorded a trial free from prejudicial error before an able trial court and a jury of his peers. The judgments based on the verdicts of the jury are therefore affirmed.

No error.

Judges McGEE and EDMUNDS concur.

DONALD I. CARRINGTON, PLAINTIFF v. MARY SUE BROWN, IN HER OFFICIAL CAPACITY AS CHAIRMAN OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, DEFENDANT

No. COA98-1513

(Filed 15 February 2000)

Employer and Employee— unlawful discharge—Employment Security Commission—department head has authority to discharge

The trial court did not err in granting summary judgment in favor of defendant Mary Sue Brown in her official capacity as Chairman of the Employment Security Commission on plaintiff-employee's unlawful discharge claim because the Chairman, as the department head, has authority to terminate an employee in an exempt policymaking position since it is the individual who has authority to make personnel decisions in the department or unit in which the employee in the exempt position is employed who may "transfer, demote, or separate" the employee pursuant to N.C.G.S. § 126-5(e).

Appeal by plaintiff from an order entered 17 August 1998 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 October 1999.

John C. Hunter for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Tiare B. Smiley and Employment Security Commission Chief Counsel V. Henry Gransee, Jr., for defendant-appellee.

HUNTER, Judge.

Donald I. Carrington ("plaintiff") appeals from summary judgment in favor of Mary Sue Brown in her official capacity as Chairman of the Employment Security Commission of North Carolina ("defendant"). On appeal, plaintiff contends that the superior court erred in granting summary judgment to defendant on plaintiff's unlawful discharge claim. We affirm on the basis that the Chairman of the Employment Security Commission of North Carolina has authority to terminate an employee in an exempt policymaking position under N.C. Gen. Stat. § 126-5(e).

The evidence submitted to the trial court indicates that plaintiff had been a state employee for eight and one-half years when he was terminated from his position as Deputy Director of the Labor Market Information Division of the Employment Security Commission of North Carolina ("ESC") in 1993. On 29 April 1993, Governor James B. Hunt, Jr. ("Governor Hunt") designated plaintiff's position as an "exempt policymaking position" pursuant to the provisions of N.C. Gen. Stat. § 126-5. This designation effectively exempted plaintiff's position from almost all of the civil service type protections afforded to state employees under the North Carolina State Personnel System, N.C. Gen. Stat. § 126-1, *et seq.* On 3 May 1993, plaintiff received a letter from Ann Duncan ("Duncan"), who was then Chairman of the ESC, informing him that his position had been designated as "policy-making exempt" and that henceforth he would serve at the pleasure of the Chairman of the ESC. On 11 August 1993, plaintiff received a second letter from Duncan informing him that effective that day, he was being terminated pursuant to Governor Hunt's designation of his position as an "exempt policymaking position." The letter gave no specific reason, but did state that "your continuing employment in this role is not consistent with the overall needs of this Administration." It also stated that the termination was being taken "pursuant to the authority provided in N.C.G.S. § 126-5(e)" and was signed by Duncan.

Plaintiff filed this action on 9 August 1996, wherein he seeks reinstatement to his former position as if he had not been terminated, including the reinstatement of all back pay and benefits. Plaintiff brought suit against defendant, the Chairman of the ESC at the time this action was filed, in her official capacity; however, in his complaint, plaintiff alleges no wrongful acts by defendant. Instead, he alleges that former Chairman Duncan had no lawful authority to discharge him from his "policymaking position" as such power was vested solely in Governor Hunt pursuant to N.C. Gen. Stat. § 126-5(e); that such action was "unlawful, arbitrary and capricious" in violation of Article I, Section 19 of the Constitution of North Carolina; and that his discharge was due to plaintiff being a member of the Republican Party and such unequal treatment violated Article I, Section 19 of the Constitution of North Carolina. Defendant answered, alleging several defenses including lack of service, statute of limitations, sovereign and official immunity, *res judicata*, and collateral estoppel. The *res judicata* and collateral estoppel defenses were based on the allegation that plaintiff's claims had previously been litigated and judgment entered in a suit in the federal district court, which was affirmed by the United States Fourth Circuit Court of Appeals in *Carrington v. Hunt*, No. 95-3117, per curiam, (4th Cir. 1997) (unpublished).

Defendant subsequently moved for dismissal on the basis of lack of jurisdiction due to lack of service, defendant's sovereign and official immunity, failure to state a claim for which relief can be granted, that defendant acted at all times in compliance with applicable state law, and that plaintiff's action is barred by the applicable statute of limitations. Plaintiff moved for partial summary judgment. The court converted defendant's motion to dismiss to one for summary judgment pursuant to N.C.R. Civ. P. 12(c), and in granting defendant's motion, the trial court made no findings of fact and stated in pertinent part:

> It appears to the court that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the plaintiff for summary judgment on the issue of the authority of the Chairman of the Employment Security Commission to discharge plaintiff pursuant to G.S. § 126-5(e) is hereby denied; that the motion of the defendant for summary judgment on the issues of personal service and statute of limitations are hereby denied; that the motion of the defendant

> for summary judgment on the issue of state constitutional violations is hereby allowed; and that the motion of defendant for summary judgment on the issue of the authority of the Chairman of the Employment Security Commission to discharge plaintiff pursuant to G.S. § 126-5(e) is hereby allowed.

The trial court thereupon dismissed the action with costs taxed to plaintiff. As is evident, the order gives no indication of which argument(s) advanced by the defendant in her motion to dismiss was the basis of its ruling in her favor.

Plaintiff does not allege error as to the dismissal of his constitutional claims. In his only assignment of error, plaintiff contends that the trial court erred in granting summary judgment to defendant because Duncan, as chairman of the ESC, did not have legal authority to discharge him. Plaintiff contends that only the governor had authority to discharge him. Plaintiff points out the governor is the official who designates exempt positions in the Department of Commerce, pursuant to N.C. Gen. Stat. § 126-5(d), from which the ESC receives administrative oversight, and

> [a]n exempt employee may be transferred, demoted, or *separated from his position by the department head authorized to designate the exempt position* except:
>
> (1) When an employee who has the minimum service requirements described in subsection (c)(1) above but less than 10 years of cumulative service in subject positions prior to placement in an exempt position is removed from an exempt position, for reasons other than just cause, the employee shall have priority to any position that becomes available for which the employee is qualified, according to rules and regulations regulating and defining priority as promulgated by the State Personnel Commission; or
>
> (2) When an employee who has 10 years or more cumulative service, including the immediately preceding 12 months, in subject positions prior to placement in an exempt position is removed from an exempt position, for reasons other than just cause, the employee shall be reassigned to a subject position within the same department or agency, or if necessary within another agency, and within a 35 mile radius of the exempt position, at the same grade

> and salary, including all across-the-board increases since placement in the position designated as exempt, as his most recent subject position.

N.C. Gen. Stat. § 126-5(e) (1991) (emphasis added). Plaintiff does not contend that he met the requirements of N.C. Gen. Stat. § 126-5(e)(1) or (2). However, because the governor designates exempt positions in the Department of Commerce, plaintiff argues that he is the only "department head" who could have "separated" him from his position under the authority granted in N.C. Gen. Stat. § 126-5(e).

In response to plaintiff's assignment of error, defendant argues: (1) plaintiff has not stated a cause of action because no statute allows an employee who is exempt from the State Personnel Act a cause of action challenging his termination; (2) defendant is protected by sovereign immunity; (3) plaintiff was separated from his employment as a result of the elimination of his position based on the North Carolina Government Performance Audit Committee ("GPAC") recommendations; and (4) the State Personnel Act does not limit the authority to discharge exempt policymakers solely to the governor. Defendant asserted (1) and (2), as listed above, in her motion to dismiss before the trial court; however, the 17 August 1998 order does not indicate that they were considered by the trial court. Also, defendant did not assert in her motion before the trial court that plaintiff was separated from employment as a result of GPAC recommendations. Accordingly, we will not consider defendant's arguments (1), (2) and (3) as listed above, and our inquiry will focus on whether or not Duncan had authority to terminate plaintiff from his exempt policy-making position with the ESC pursuant to N.C. Gen. Stat. § 126-5(e).

The general rule in statutory construction is that "[a] statute must be construed as written."

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein. . . .
>
> When the section dealing with a specific matter is clear and understandable on its face, it requires no construction.

27 Strong's North Carolina Index 4th, *Statutes* § 28 (1994) (footnotes omitted). Our review of N.C. Gen. Stat. § 126-5(e) indicates that this section is not clear when read alone. In order to determine who may

transfer, demote, or separate an exempt employee pursuant to N.C. Gen. Stat. § 126-5(e), one must first determine (1) who is the "department head" over the subject employee and (2) is that department head "authorized to designate the exempt position" in which the subject employee is employed. Accordingly, we must determine plaintiff's department head who could "designate the exempt position" in which he was employed. Plaintiff was dismissed in 1993 and we shall therefore examine the relevant statutes as of that date.

The State Personnel Act provides that a "policymaking position" is "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." N.C. Gen. Stat. § 126-5(b) (1991). Except for certain specified provisions, such as compensation and equal employment opportunity, the State Personnel Act does not apply to "[e]mployees in policymaking positions designated as exempt pursuant to G.S. 126-5(d)." N.C. Gen. Stat. § 126-5(c)(3) (1991). Exempt policymaking positions are designated either by the governor or elected department heads:

> The Governor may designate as exempt policymaking positions, as provided below, in each of the following departments:
>
> a. Department of Administration;
>
> b. Department of Commerce;
>
> c. Department of Correction;
>
> d. Department of Crime Control and Public Safety;
>
> e. Department of Cultural Resources;
>
> f. Department of Human Resources;
>
> g. Department of Environment, Health, and Natural Resources;
>
> h. Department of Revenue; and
>
> i. Department of Transportation.
>
> The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate as exempt policymaking positions, as provided below, in their respective offices.

N.C. Gen. Stat. § 126-5(d)(1) (Cum. Supp. 1992). "The rationale for creating exempt positions, positions exempt from the protection afforded by the civil service statute, was to allow the governor to employ top level state employees on an at-will basis, and to reposition these employees as he felt necessary in order to further the agenda of the administration." *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990). The parties agree that plaintiff's position was designated policymaking exempt as part of the Department of Commerce. N.C. Gen. Stat. § 126-5(d)(1) does not indicate that cabinet department heads, who are appointed by the governor, can designate exempt policymaking positions. Therefore, while the term "department head" as used in N.C. Gen. Stat. § 126-5(e) clearly refers to those elected department heads identified in § 126-5(d)(1), a plain reading of the statute indicates that it does not refer to cabinet department heads because they do not have the authority to designate exempt positions. It also indicates that the governor is not referred to in N.C. Gen. Stat. § 126-5(e) because although he designates cabinet department exempt policymaking positions, he is not a "department head."

The North Carolina Constitution grants the governor the executive power of the state. N.C. Const. art. III, § 1. As the holder of this power, the governor is the chief executive officer of the state and is head of the executive branch of government. Chapter 143B of our General Statutes, entitled "Executive Organization Act of 1973," states that except where the context clearly requires otherwise, the term "head of department" means "head of one of the principal State departments." N.C. Gen. Stat. § 143B-3 (1990). Chapter 143A, entitled "State Government Reorganization" indicates that department heads, except for those elected officials who are department heads and are also constitutional officers, are Cabinet members appointed by the governor:

> Any provisions of law to the contrary notwithstanding, and subject to the provisions of the Constitution of the State of North Carolina, the head of a principal department, except those departments headed by elected officials who are constitutional officers, shall be appointed by the Governor and serve at his pleasure. . . .

N.C. Gen. Stat. § 143A-9 (1983). Thus, it is abundantly clear that while the governor appoints certain department heads, and others are elected by the people, the governor is not categorized as a "department head" in our General Statutes in the ordinary or technical meaning of the term.

If read strictly, the reference to department heads in N.C. Gen. Stat. § 126-5(e) would include only "elected" department heads identified in section (d), since elected department heads are the only "department heads" who designate exempt positions pursuant to N.C. Gen. Stat. § 126-5(d)(1). Under that interpretation, no one would have the authority to transfer, demote, or separate exempt employees in positions designated as policymaking exempt by the governor, since the governor is not a "department head." This result would be impracticable—certainly the legislature did not intend that no one would have the authority to separate these employees since the State Personnel Commission's policies regarding separation of employees is not applicable to exempt policymaking positions. *See* N.C. Gen. Stat. § 126-5(c) (Cum. Supp. 1992). This impracticable result leads us to hold that N.C. Gen. Stat. § 126-5(e) is ambiguous and therefore subject to interpretation for legislative intent.

> An ambiguity justifying the interpretation of a statute is not simply that arising from the meaning of particular words, but includes such as may arise in respect to the general scope and meaning of a statute when all its provisions are examined. The courts regard an ambiguity to exist where the legislature has enacted two or more provisions or statutes which appear to be inconsistent. There is also authority for the rule that uncertainty as to the meaning of a statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impracticable, or absurd consequences as to compel a conviction that they could not have been intended by the legislature.

73 Am. Jur. 2d *Statutes* § 195 (1974) (footnotes omitted). "Where a literal interpretation of the language of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." 27 Strong's North Carolina Index 4th *Statutes* § 35 (1994). Legislative intent is to be determined by

> ". . . appropriate means and *indicia, such as the purposes appearing from the statute taken as a whole,* the phraseology, the words ordinary or technical, *the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia,* the preamble, the title, *and other like means. . . .*" Other *indicia* considered by this Court in determining legislative intent are the legislative history

> of an act and *the circumstances surrounding its adoption*, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.

State v. Green, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999) (emphasis in original) (*citing State v. Partlow*, 91 N.C. 550, 552 (1884); *In re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 388-89 (1978) (citations omitted)).

Viewing N.C. Gen. Stat. § 126-5 as a whole gives further direction as to whom the term "department head" refers to in section (e) of the statute. In order to reassign an exempt employee pursuant to N.C. Gen. Stat. § 126-5(e)(1) or (e)(2), a "department head"

> is authorized to use existing budgeted positions within his department in order to carry out the provisions of subsection (e) of this section. If it is necessary to meet the requirements of subsection (e) of this section, a department head may use salary reserve funds authorized for his department.

N.C. Gen. Stat. § 126-5(f) (1991). Clearly, this referral to "department head" cannot refer to the governor as he is not the head of a cabinet department who would control the use of salary reserve funds for the department.

N.C. Gen. Stat. § 126-5(d) also provides in pertinent part:

> (2) Number.—The number of policymaking positions designated as exempt in each department or office listed in subsection (d)(1), except the Department of Commerce, shall be limited to one and two-tenths percent (1.2%) of the number of full-time positions in the department or office, or 30 positions, whichever is greater. The Governor may designate 85 policymaking positions as exempt in the Department of Economic and Community Development. *Provided, however, that the Governor or elected department head may request that additional policymaking positions be designated as exempt. . . .*
>
> . . .
>
> (5) Creation, Transfer, or Reorganization.—*The Governor or elected department head may designate as exempt a policy-*

making position that is created or transferred to a different department, or is located in a department in which reorganization has occurred, after May 1 of the year in which the oath of office is administered to the Governor. The designation must be made in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate within 120 days after such position is created, transferred, or in which reorganization has occurred.

(6) Reversal.—Subsequent to the designation of a policymaking position as exempt as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter *by the Governor or by an elected department head* in a letter to the State Personnel Director, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

N.C. Gen. Stat. § 126-5(d)(2), (5), (6) (Cum. Supp. 1992) (emphasis added). Just as it did in N.C. Gen. Stat. § 126-5(d) subsections (2), (5) and (6), if the General Assembly had meant to allow only the governor to transfer, demote, or separate employees in exempt positions in cabinet departments, we believe it would have specifically used the term "governor" in N.C. Gen. Stat. § 126-5(e). Also, by the provisions of N.C. Gen. Stat. § 126-5(d)(2), it is apparent that the governor could designate hundreds, potentially thousands, of exempt positions at the time plaintiff's position was designated as exempt. If we interpreted N.C. Gen. Stat. § 126-5(e) as plaintiff contends it should be, the result would be a serious intrusion into the administration and operation of the executive branch of North Carolina government. The governor would be forced to manage departments in which he appoints officials for that exact duty, and he would be required to make hundreds, possibly thousands, of individual transfer, demotion, and separation decisions for employees in positions which he designated as exempt. This would be an extraordinary burden on him in light of his duties as governor.

Examining the law as it existed and was construed at the time of plaintiff's dismissal, it is apparent that the governor did not interpret N.C. Gen. Stat. § 126-5 as plaintiff contends. As stated by Governor Hunt in his testimony in plaintiff's federal case:

> [D]epartment heads have the responsibility for their departments. The Governor cannot possibly go down and be making

> decisions about hiring and firing and promoting and that sort of thing. The system won't work if you try to do that. So I depend on my department heads and agency heads to do that.

Apparently, the governor relied on the ESC Chairman to fill this duty in regards to plaintiff as plaintiff was specifically informed that he would "serve at the pleasure of the Chairman of the Employment Security Commission" in the letter informing him that his position had been designated as policymaking exempt by the governor under N.C. Gen. Stat. § 126-5.

Other statutes *in pari materia* indicate that department heads make personnel decisions in their departments, including the hiring and dismissal of employees. Chapter 126 of the General Statutes of North Carolina, entitled "State Personnel System," states that it has the "intent and purpose . . . to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry." N.C. Gen. Stat. § 126-1 (1991). Other than N.C. Gen. Stat. § 126-5, the authority of department heads in regards to exempt positions is not discussed any further in the State Personnel Act. However, as to the power of department heads in regards to employees in their department, Chapter 143B, "Executive Organization Act of 1973," provides that department heads have the following powers and duties:

> (a) Assignment of Functions.—Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.
>
> . . .
>
> (c) Department Staffs.—The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensa-

tion of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. . . .

. . .

(e) Departmental Management Functions.—All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

. . .

(j) Departmental Rules and Policies.—The head of each principal State department and the Director of the Office of State Personnel may adopt:

. . .

(2) Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, *staffing*, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;

(3) *Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. . . .*

N.C. Gen. Stat. § 143B-10 (1990) (emphasis added). N.C. Gen. Stat. § 143A-8, entitled "Internal organization of departments; allocation and reallocation of duties and functions; limitations" provides that the governor "shall cause the administrative organization of each department to be examined with a view to promoting economy and efficiency" and "may reorganize and organize the principal;" however, the department head is given legal custody of all books, papers, documents and other records of the department and is responsible for the preparation and presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department. N.C. Gen. Stat. § 143A-8 (1983). These statutes clearly provide that a department head is given all authority

to manage the department which he or she heads, including the authority to make staffing decisions, while the governor only oversees the administration of a department.

We note that the ESC is not a state department but is administratively overseen by the North Carolina Department of Commerce. The ESC consists of seven members who are appointed by the governor, who has the power to designate the member who shall act as chairman. N.C. Gen. Stat. § 96-3 (1991). The ESC has the duty to administer Employment Security Law as promulgated in Chapter 96 of the North Carolina General Statutes and has the "power and authority to adopt, amend, or rescind such rules and regulations, to *employ such persons*, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of [chapter 96]." N.C. Gen. Stat. § 96-4(a) (1991) (emphasis added). This section goes on to provide that the chairman of the ESC

> except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission.

N.C. Gen. Stat. § 96-4(a). Thus, the executive authority of the chairman of the ESC is comparable to that of a department head as identified in Chapter 143 in that she is given authority to employ persons in order to fulfill the duties of the ESC. We can therefore infer that the ESC Chairman has the corresponding authority to separate employees employed within the ESC.

Our review of the appropriate statutes indicates that the legislative intent as to the "department head" identified in § 126-5(e) is the official who has executive and managerial authority over the department in which the exempt policymaking position is designated. While this term clearly refers to elected department heads, it does not refer to the governor. The governor may designate exempt positions, but it is the individual who has authority to make personnel decisions in the department or unit in which the employee in the exempt position is employed who may "transfer, demote, or separate" the employee pursuant to N.C. Gen. Stat. § 126-5(e). Cabinet department heads have this authority in their respective departments. Because the Chairman of the ESC had the authority to staff and make personnel decisions in the ESC, we hold that she had authority to dismiss plain-

tiff from his policymaking position within the ESC pursuant to N.C. Gen. Stat. § 126-5(e).

Summary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56. No issues of any material fact exist, and based on our holding, we conclude that the defendant was entitled to judgment as a matter of law. Due to our holding, we need not reach defendant's cross-assignments of error. The order of the trial court is affirmed.

Affirmed.

Judges GREENE and WALKER concur.

MULTIMEDIA PUBLISHING OF NORTH CAROLINA, INC., D/B/A ASHEVILLE CITIZEN TIMES PUBLISHING COMPANY, A NORTH CAROLINA CORPORATION, PLAINTIFF V. HENDERSON COUNTY AND HENDERSON COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA99-520

(Filed 15 February 2000)

1. Open Meetings— government body—attorney-client exception—closed session minutes—in camera review by trial court required

Plaintiff's claim seeking injunctive relief to prevent recurring violations of the Open Meetings Law and also seeking a writ of mandamus ordering defendants to turn over minutes from a closed session of the Henderson County Board of Commissioners invoked pursuant the attorney-client exception under N.C.G.S. § 143-318.11(a)(3) is remanded to the trial court for an in camera review of the minutes of the closed session to ensure that neither general policy matters nor the propriety of the moratorium itself were ever discussed because although the attorney-client exception does not require a claim to be pending or threatened before it may be invoked by a government body as grounds to go into closed session, government bodies: (1) may only invoke the exception to the extent the circumstances require it,

and (2) have the burden of establishing that the circumstances did in fact necessitate the closed session.

2. Public Records— government body—closed session—minutes

Although plaintiff claims it is entitled to public disclosure of the minutes of a closed session of the Henderson County Board of Commissioners pursuant to the Public Records Law under N.C.G.S § 132-9(a) even if the closed session was warranted under the attorney-client exception in N.C.G.S § 143-318.1(a)(3), this deterimination must be made by the trial court after an in camera review of the minutes of the closed session.

Appeal by plaintiff from orders entered 22 February 1999 and 8 March 1999 by Judge Claude S. Sitton in Henderson County Superior Court. Heard in the Court of Appeals 4 January 2000.

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

Womble Carlyle Sandridge & Rice, by Tyrus V. Dahl, Jr., for defendant-appellees.

Everett Gaskins Hancock & Stevens, by Hugh Stevens and C. Amanda Martin, on behalf of the North Carolina Press Foundation, North Carolina Press Association, Burlington Times-News, Charlotte Observer, Durham Herald-Sun, Gaston Gazette, Greenville Daily Reflector, Hendersonville Times-News, Raleigh News & Observer, Paxton Media Group of North Carolina, Rocky Mount Telegram, Shelby Star, and Wilmington Morning Star/Star-News, amici curiae.

James B. Blackburn, III, on behalf of the North Carolina Association of County Commissioners, amicus curiae.

LEWIS, Judge.

Walt Whitman once penned, "I think heroic deeds were all conceiv'd in the open air." Walt Whitman, *Song of the Open Road*, in *Leaves of Grass*, stanza 4, line 11 (Random House 1993) (1855). The North Carolina General Assembly has apparently agreed. As government service is no doubt an "heroic deed," our legislature has implemented the Open Meetings Law, which mandates that all "official meeting[s] of a public body" be conducted in the open. N.C. Gen. Stat. § 143-318.10(a) (1999). This appeal presents a question of first

impression regarding the construction and application of the attorney-client exception to this openness requirement. *See* N.C. Gen. Stat. § 143-318.11(a)(3). It is the first such appeal since the statute was amended in 1994.

During the Fall of 1998, the Henderson County Board of Commissioners ("the Board") began discussing ways to regulate and limit noise that would result from racetracks and speedways being constructed within the county. Consequently, the Board began working on a proposed ordinance. On 12 November 1998, a special board meeting ("the meeting") was called to discuss a moratorium banning any construction or operation of racetracks and speedways until this noise ordinance could be finalized. Because the Board contemplated the adoption of the moratorium at this meeting, the meeting was "official" and thus open to the public, as required by statute. *See* N.C. Gen. Stat. § 143-318.10(a), (c).

According to the minutes from the public part of the meeting, copies of the proposed moratorium were distributed, followed by brief discussion by the Board. The county attorney then arrived, at which point the Board went into closed session pursuant to section 143-318.11(a)(3) ("the attorney-client exception"), purportedly to obtain legal advice. Both the county attorney and staff attorney then met with the Board in closed session. Following this closed session, the Board then reconvened the public meeting and read two amendments to the moratorium, which apparently had been drafted while in closed session. The moratorium as amended then passed by a unanimous vote.

Plaintiff filed a complaint on 8 December 1998, alleging that the Board had unlawfully gone into closed session. Specifically, plaintiff alleged that the Board's use of the attorney-client exception to justify going into closed session was improper under the circumstances here. Plaintiff sought injunctive relief to prevent recurring violations of the Open Meetings Law and also sought a writ of mandamus ordering defendants to turn over the minutes from the closed session pursuant to the Public Records Law. *See* N.C. Gen. Stat. § 132-9(a). From the trial court's orders denying this relief, plaintiff appeals.

[1] On appeal we first consider the effect of the legislature's 1994 amendments to the Open Meetings Law, especially with respect to the attorney-client exception outlined in section 143-318.11(a)(3). Plaintiff argues that the exception may only be invoked if there is a claim either pending or threatened against the government body.

Because there was no such claim here, plaintiff contends that the closed session was improper. Defendants, on the other hand, maintain that section 143-318.11(a)(3) actually contains two separate exceptions: one for discussions of specific claims (which would of course require a claim to be actually pending or threatened) and one for general attorney-client privileged matters (which would contain no such requirement). *See also* David M. Lawrence, *1994 Changes to the Open Meetings Law*, Local Gov't Law Bulletin, Sept. 1994, at 1, 5 (espousing a similar interpretation). The trial court accepted defendants' interpretation. After careful examination of the statutory amendments, we feel neither party's interpretation is entirely correct.

N.C. Gen. Stat. § 143-318.11 articulates the exceptions that allow government bodies to hold closed sessions. The only relevant subsection here is (a)(3), which outlines the attorney-client exception. Specifically, that subsection allows a session to be closed when it is needed:

> (3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

The polar star in statutory construction is that the intent of the legislature controls. *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978). "[T]hat intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548,

555 (1967). Prior to the 1994 amendments, the Open Meetings Law contained two relevant exceptions. The first allowed sessions to be closed in order for the government body:

> (4) To consider the validity, settlement, or other disposition of a claim against or on behalf of the public body . . . ; or the commencement, prosecution, defense, settlement, or litigation of a potential or pending judicial action or administrative proceeding in which the public body or an officer or employee of the public body is a party.

N.C. Gen. Stat. § 143-318.11(a) (amended 1994). The second exception allowed closed sessions:

> (5) To consult with an attorney employed or retained to represent the public body, to the extent that confidentiality is required in order to preserve the attorney-client privilege between the attorney and the public body.

Id. Thus, prior to the 1994 amendments, a pending or threatened claim was required before a government body could go into closed session without the presence of an attorney. However, any attorney-client privileged matters could serve as the pretext for going into closed session with an attorney, whether a claim was pending or not.

By the 1994 amendments, however, these exceptions were repealed and the exception in present subsection (a)(3) was enacted. Plaintiff points out that the second half of the present exception does speak about claims and settlements, whereas the former attorney-client exception in subsection (a)(5) spoke nothing of claims or settlements, instead focusing on generally privileged matters. Thus, plaintiff contends that the legislature necessarily intended that the present attorney-client exception include a requirement that a specific claim be either pending or threatened. However, upon examination of the various committee drafts leading up to the 1994 amendments, we disagree with plaintiff's interpretation.

The original bill in the House ("original bill") proposed to rewrite the two pre-1994 exceptions and allow closed sessions:

> (3) When a closed meeting is required to permit a public body to receive advice from an attorney employed or retained by the public body with respect to a judicial proceeding in which the public body has a direct interest. As used herein, "judicial

> proceeding" shall mean a pending or imminent lawsuit, appeal, arbitration, or administrative proceeding before a state or federal court or other judicial or quasi-judicial tribunal. The public body shall be deemed to have a "direct interest" in a judicial proceeding if it is a party or if it is the governing or representative body of a party. A judicial proceeding shall be deemed to be "imminent" if it has been publicly threatened or if the public body has been notified in writing of its probable occurrence.

Open Meetings Law Changes, Ch. 570, 1993 N.C. Sess. Law, H.B. 120 H1, at 5. Thus, under the original bill, a pending or threatened claim was required to invoke the new exception—general attorney-client privileged matters alone could not serve as grounds to close a meeting.

The House Judiciary Committee then substituted the original bill with its own version ("the committee substitute"). That draft permitted closed sessions:

> (3) When a closed session is required to permit an attorney employed or retained by the public body to provide legal advice with respect to (I) the public body's rights and obligations pursuant to an existing or proposed contract to which the public body is or will be a party; or (ii) a pending, threatened, or contemplated judicial proceeding in which the public body has a direct interest. . . .

Open Meetings/Records Law Changes, Ch. 570, 1993 N.C. Sess. Law, H.B. 120 H2, at 5. Thus, although different language was used, the committee substitute still required a claim to be either pending or threatened.

On the House floor, the exception was again amended to permit closed sessions:

> (3) When a closed session is required in order to preserve the attorney client privilege between the attorney and the public body, or to permit an attorney employed or retained by the public body to provide legal advice with respect to . . . [no changes from committee substitute].

Open Meetings/Records Law Changes, Ch. 570, 1993 N.C. Sess. Law, H.B. 120 H3, at 5. Thus, the House floor amendment proceeded to

allow closed sessions for general attorney-client matters, without regard to any pending or threatened claims.

The Senate Judiciary Committee then amended the exception once more. Its draft permitted closed sessions:

> (3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, or administrative procedure.

Open Meetings/Records Law Changes, Ch. 570, 1993 N.C. Sess. Law, H.B. 120 H4, at 3. This was the wording that was eventually adopted and passed into law.

Based upon this statutory history, we do not believe the legislature intended for the present attorney-client exception to be limited to a pending or threatened claim requirement. The House floor amendment affirmatively demonstrates that the members were concerned with the narrowness of both the original bill and the committee substitute because each required a claim to be specifically pending or threatened. Consequently, they—and the Senate Committee after them—focused on incorporating the attorney-client privilege in general, without regard to any pending or threatened claims. The reference to claims and settlements in the second half of the exception was never intended to create a limitation to the exception, but only to provide an illustration of what types of discussions can proceed in closed session. Accordingly, we hold that the present attorney-client exception in section 143-318.11(a)(3) does not require a claim to be pending or threatened before it may be invoked by the government body.

In analyzing the effect of the 1994 amendments, we do note the language in section 143-318.11(c) dealing with the procedural requirements of going into closed session. Specifically, that section states:

> (c) A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to

> close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. . . . *A motion based on subdivision (a)(3) of this section [the attorney-client exception] shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.*

N.C. Gen. Stat. § 143-318.11 (1999) (emphasis added). While the last sentence ostensibly supports plaintiff's interpretation that a pending or threatened claim, i.e. "each existing lawsuit," is required, again the legislative history refutes it. This language is basically the same language included in both the original bill before the House and in the House Judiciary Committee Substitute. *See* Open Meetings Law Changes, Ch. 570, 1993 N.C. Sess. Law, H.B. 120 H1, at 5-6; Open Meetings/ Records Law Changes, Ch. 570, 1993 N.C. Sess. Law, H.B. 120 H2, at 7. As previously pointed out, the original bill and committee substitute required there to be a specific claim pending or threatened. When these were subsequently amended to remove the claims requirement, this language in subsection (c) was left in. Accordingly, we feel this language was only included in response to the pending claim requirement that existed in the original bill and committee substitute. The language was then left in only to require that litigants be identified *if* in fact a pending claim existed.

In not adopting plaintiff's interpretation of the 1994 amendments, we now review defendants' interpretation, the one adopted by the trial court. Specifically, defendants contend that present subsection (a) (3) actually contains two exceptions: first, outlining an exception for matters within the attorney-client privilege and, second, outlining an exception for discussions of specific claims. We feel such a construction is both unnecessary and potentially problematic.

Such an interpretation is unnecessary in that discussions of specific claims necessarily fall within those matters protected by the attorney-client privilege. To create a second exception just for pending claims would thus be redundant. Defendants' interpretation is also potentially problematic in that it uses the same type of dichotomy that existed in the pre-1994 law. As previously pointed out, prior to the 1994 amendments, there were two separate exceptions: one for discussing pending claims and one for attorney-client privileged matters. An attorney's presence was not required for the former but was required for the latter. By interpreting the present statute to create a similar dichotomy, defendants implicitly suggest that an

attorney's presence is still not required when the government body is discussing pending claims. However, the plain language of the statute is clearly otherwise. The exception begins by explicitly stating that closed sessions are permitted only when the government body needs "[t]o consult with an attorney." N.C. Gen. Stat. § 143-318.11(a)(3) (1999). Obviously, an attorney's presence is needed for such consultations. We feel that the legislature only intended to create one exception in subsection (a)(3): matters falling within the attorney-client privilege. Discussions regarding claims are included within, not independent of, this exception.

We next ascertain whether the exception was applicable under these circumstances. In doing so, two considerations must be taken into account. First, in light of the general public policy favoring open meetings, the attorney-client exception is to be construed and applied narrowly. *Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 587 (1976). This is so notwithstanding the countervailing policy favoring confidentiality between attorneys and clients. In this regard, our legislature has explicitly forbidden general policy matters from being discussed during closed sessions. N.C. Gen. Stat. § 143-318.11(a)(3) (1999). Furthermore, the privilege must be viewed in light of the traditional duties performed by attorneys; "public bodies [cannot simply] delegate responsibilities to attorneys and then cloak negotiations and [closed] sessions in secrecy by having attorneys present." *Fisher v. Maricopa County Stadium Dist.*, 912 P.2d 1345, 1353 (Ariz. Ct. App. 1995); *see also Minneapolis Star & Tribune Co. v. Housing & Redevelopment Auth.*, 251 N.W.2d 620, 625 (Minn. 1976) ("[T]he public officers and attorneys [can]not abuse their trust by extending the privilege as a mere conduit to suppress public observation of the decision-making process.") Thus, discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session. Discussions regarding their constitutionality and possible legal challenges would likewise be so included. But as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends.

Second, and equally as important, the burden is on the government body to demonstrate that the attorney-client exception applies. *Publishing Co.*, 29 N.C. App. at 47, 223 S.E.2d at 587. After all, "[r]equiring a plaintiff to plead and prove specific facts regarding alleged violations that are taking place in secret is a circular impos-

sibility." *Fisher*, 912 P.2d at 1351; *see also Prescott v. Town of Chino Valley*, 803 P.2d 891, 897 n.4 (Ariz. 1990) (citing opinions from other states in which the burden is placed on the government body to show the applicability of the attorney-client exception). But, in meeting its burden, government bodies may not simply treat the words "attorney-client privilege" or "legal advice" as some talisman, the mere utterance of which magically casts a spell of secrecy over their meetings. After all, "the incantation of a[n] [attorney-client] rationale is not an abracadabra to which this Court must defer judgment." *MacLennan v. American Airlines, Inc.*, 440 F. Supp. 466, 472 (E.D. Va. 1977). Rather, the government body can only meet its burden by providing some *objective* indicia that the exception is applicable under the circumstances. Mere assertions by the body or its attorney(s) in pleadings will not suffice. In camera review by the trial court of the minutes of the closed session provides the easiest and most effective way for the government body to objectively demonstrate that the closed session was in fact warranted. Such review affords the benefits of an impartial arbiter without the risks accompanying public disclosure of the minutes.

In light of these two important considerations, we are compelled to conclude that the record before us is insufficient to determine whether it was appropriate to close the session here. The only information in the record as to the content of the discussions at the closed session comes from the self-serving affidavits of the Board's staff attorney and clerk in attendance. Without some objective indicia to determine the applicability of the exception here, we are compelled to remand this matter to the trial court for in camera review of the minutes of the closed session. In reviewing the minutes, the trial court must apply the narrow construction of the attorney-client exception articulated herein. Accordingly, the trial court must review the minutes to ensure that neither general policy matters nor the propriety of the moratorium itself were ever discussed during the Board's closed session. If such matters were in fact discussed, defendants would be in violation of the Open Meetings Law, and plaintiff would be entitled to the minutes of the closed session following a redaction by the trial court of any matters that were properly within the attorney-client privilege.

[2] Finally, plaintiff argues that, even if the closed session was warranted under the attorney-client exception, it is still entitled to public disclosure of the minutes of the closed session pursuant to the Public Records Law. *See* N.C. Gen. Stat. § 132-9(a) (1999). Although this

statute grants the public access to certain records, including the minutes of open sessions, the Open Meetings Law contains an important limitation to the Public Records Law: "[M]inutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection *so long as public inspection would frustrate the purpose of a closed session.*" N.C. Gen. Stat. § 143-318.10(e) (emphasis added).

Plaintiff argues that, because the fruits of the closed session, i.e. the amended moratorium, were disclosed once the open session reconvened, disclosure of the entire branch, if not the tree, i.e. the minutes, would not "frustrate the purpose of the closed session." We believe this largely depends on what the minutes contain. If they reveal that only issues of drafting and phraseology were discussed behind closed doors, their disclosure ostensibly would not frustrate the purpose of the closed session, given that the actual wording of the amended moratorium was made public once the open session reconvened. However, if the minutes reveal discussions regarding potential claims or possible legal challenges, or how to deal with them, their disclosure would indeed appear to frustrate the purpose of the closed session. Ultimately, however, this is for the trial court to determine after an in camera review. In making its determination, the trial court should be guided by our Supreme Court's cautionary language:

> This standard requires consideration of time and content factors, allowing courts to tailor the scope of statutory protection in each case. Courts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Law and the Open Meetings Law.

News and Observer Publishing Co. v. Poole, 330 N.C. 465, 480, 412 S.E.2d 7, 16 (1980).

In summary, we hold that the attorney-client exception in N.C. Gen. Stat. § 143-318.11(a)(3) contains no requirement that a specific announced claim be pending or threatened. Rather, through its 1994 amendments, our legislature intended to permit any general attorney-client privileged matters to serve as grounds for going into closed session. However, government bodies may only invoke the exception to the extent that the circumstances require it. Moreover, government bodies have the burden of establishing that the circumstances did in

fact necessitate the closed session. We know of no better arbiter of fairness than a Superior Court judge to receive, hear, and determine this issue. Accordingly, we vacate the trial court's orders and remand this matter for a review in camera of the minutes of the closed session. If the closed session was in fact warranted, the trial court must then also determine on remand whether disclosure of the minutes now would still frustrate the purpose behind the Board's going into closed session in the first place.

Vacated and remanded.

Judges GREENE and EDMUNDS concur.

KENNETH MAY, PAUL MARTIN, SUZANNE JOHNSON, LINDA BECK, AND JOLANDA CLAYTON, v. THE CITY OF DURHAM, ORVILLE POWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF DURHAM, AND J.W. MCNEIL, INDIVIDUALLY AND IN HIS CAPACITY AS CHIEF OF POLICE OF THE CITY OF DURHAM

No. COA99-136

(Filed 15 February 2000)

1. Trials— motion for continuance—no showing of diligence or good faith effort

The trial court did not abuse its discretion in denying plaintiff Martin's motion for an additional continuance of a summary judgment hearing, after plaintiff had already been granted a thirty day continuance in order to obtain new counsel and to allow his new counsel time to prepare, because plaintiff did not demonstrate diligence or a good faith effort to meet the schedule set by the trial court. N.C.G.S. § 1A-1, Rule 40(b).

2. Civil Rights— 1983 action—termination of police officer

The trial court did not err in granting summary judgment in favor of defendants on the 42 U.S.C. § 1983 retaliatory wrongful discharge claim premised upon a Durham Police Department Internal Affairs investigation, which resulted in a recommendation for plaintiff-officer's dismissal allegedly in retaliation for his publication of an editorial in a newspaper criticizing the department and for his reporting sexual misconduct incidents up the

chain of command, because: (1) plaintiff does not present evidence of any official policy by the City of Durham which would allow the inference that the City was the moving force behind the alleged constitutional violation and as a result, the two individual defendants may not be sued in their official capacities; and (2) the two individual defendants may not be sued in their individual capacities since defendants presented evidence that the disciplinary action was taken for numerous reasons unrelated to the speech at issue, was taken in a good faith belief that the actions were within the law, was reasonable in light of the circumstances, and therefore, within their qualified immunity.

3. Emotional Distress— intentional—sufficiency of evidence

The trial court did not err in granting summary judgment in favor of defendants on the intentional infliction of emotional distress claim because plaintiff did not present any evidence supporting a finding that he suffered from mental distress of a nature generally recognized by trained professionals.

Appeal by plaintiff from order entered 4 August 1998 by Judge Henry V. Barnette in Durham County Superior Court. Heard in the Court of Appeals 25 October 1999.

Ewing Law Center, P.C., by Carey L. Ewing, for plaintiff-appellant Paul Martin.

The Banks Law Firm, P.A., by Sherrod Banks, Bryan E. Wardell and Sheena J. Boyd, for defendant-appellees.

MARTIN, Judge.

Plaintiff, Paul Martin, appeals from an order granting summary judgment in favor of defendants. The record discloses that plaintiff, a former police officer for the City of Durham, together with other current and former employees of the Durham Police Department, filed suit in February 1996 against the City of Durham, its City Manager, Orville Powell, and its Chief of Police, J.W. McNeil, alleging sexual harassment, retaliatory harassment, and racial harassment. Plaintiffs' initial counsel, J. Anthony Penry, was permitted to withdraw by order dated 18 December 1996, and J. Wesley Covington entered his appearance for plaintiffs. After extensive discovery, defendants moved for summary judgment on 30 January 1998; the motion was apparently set for hearing on 17 June 1998.

According to plaintiff Martin's affidavit, which appears in the record, Mr. Covington recommended that plaintiffs voluntarily dismiss their claims in order to avoid the entry of summary judgment against them. The record shows that on 16 June 1998, all plaintiffs except plaintiff Martin submitted to voluntary dismissals without prejudice. On 17 June 1998, at the scheduled summary judgment hearing, Mr. Covington moved for leave to withdraw as counsel for plaintiff Martin, citing "irreconcilable differences." The transcript of the hearing shows that plaintiff Martin consented to the withdrawal, but requested a continuance of the summary judgment hearing for thirty days in order that he might obtain new counsel and for counsel to prepare. The trial court allowed Mr. Covington's motion for leave to withdraw, granted plaintiff Martin's request for a thirty day continuance, and noted that the matter was set for trial at the 3 August 1998 session and the summary judgment motion would need to be heard at the 20 July 1998 session.

The summary judgment hearing was rescheduled for 24 July 1998. According to documents contained in the record, plaintiff Martin went to Mr. Covington's office on 15 July to retrieve his file; he learned that Mr. Covington was out of town, but he was able to obtain copies of the depositions which had been taken in the action, along with his personal files. Plaintiff Martin's present counsel filed a notice of appearance on 17 July and, on 21 July, filed a document entitled "Plaintiff's Emergency Motion To Continue," seeking an additional continuance of the hearing upon defendants' motion for summary judgment and of the trial on grounds that she needed additional time to obtain the pleadings and discovery from Mr. Covington and to prepare for the hearing. The trial court denied the motion, finding that plaintiff had requested and consented to the earlier thirty day continuance and had failed to establish "good cause, diligence, or good faith" for an additional continuance.

The trial court then proceeded to hear defendants' motion for summary judgment. Plaintiff offered neither argument nor evidentiary materials in opposition to the motion and his counsel stated: "Your Honor, we're not putting on a defense at this time." The trial court granted summary judgment in favor of defendants. Plaintiff filed notices of appeal from the order denying his motion for a continuance and allowing defendants' motion for summary judgment.

At the outset, we note that our review of the record in this case, which exceeds three hundred and forty pages, has been made con-

siderably more difficult by appellant's failure to observe the requirements of N.C.R. App. P. 9(b)(4) to consecutively number the pages of the record. In addition, appellant's brief violates N.C.R. App. P. 28(b) in several respects. Appellant's eight page "Statement of the Procedural History of the Case" is argumentative and violates N.C.R. App. P. 28(b)(3), requiring "[a] concise statement of the procedural history of the case;" the "Statement of the Facts of the Case" violates N.C.R. App. P. 28(b)(4) in that it is also argumentative and contains no statement of the facts necessary to an understanding of the claims asserted in plaintiff's complaint; and the arguments contained in the brief are presented without reference to the assignments of error pertinent thereto, in violation of N.C.R. App. P. 28(b)(5). The Rules of Appellate Procedure are mandatory; an appellant's failure to observe the rules frustrates the process of appellate review and subjects the appeal to dismissal. *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). Nevertheless, we elect to exercise the discretion accorded us by N.C.R. App. P. 2 to consider this appeal on its merits despite appellant's violations of the Appellate Rules.

I.

[1] The majority of plaintiff Martin's assignments of error are directed to the denial of his motion to continue the 24 July summary judgment hearing. He contends he should have been permitted more than thirty days to obtain new counsel and to prepare for the hearing and that the denial of his motion for an additional continuance denied him "a fair opportunity to present his side of the case to the deciding tribunal."

Continuances are granted "only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40(b). Continuances are generally not favored, and the burden of showing sufficient grounds for a continuance is upon the party seeking it. *Bowers v. Olf*, 122 N.C. App. 421, 470 S.E.2d 346 (1996). Motions to continue are addressed to the sound discretion of the trial judge, who must determine "whether the grant or denial of a continuance will be in furtherance of substantial justice." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). In making that determination, the trial judge must consider, in addition to the grounds for the motion, whether the moving party has acted with diligence and in good faith, and may consider facts of record as well as facts within his judicial knowledge. *Id.* The trial court's decision whether to grant or deny a motion to continue may be reversed only

for a manifest abuse of discretion. *Caswell Realty Associates I, L.P. v. Andrews Co., Inc.*, 128 N.C. App. 716, 496 S.E.2d 607 (1998). An abuse of discretion occurs where the ruling of the trial court could not have been the result of a reasoned decision. *Alford v. Davis*, 131 N.C. App. 214, 505 S.E.2d 917 (1998).

In the present case, plaintiff consented to Mr. Covington's withdrawal as counsel and requested a thirty day continuance in order to obtain new counsel and allow his new counsel time to prepare. The trial judge granted his request, making it clear, however, that the summary judgment motion hearing would be set at the 20 July 1998 session so that it could be heard before the scheduled trial date, 3 August 1998. Notwithstanding, plaintiff did not contact Mr. Covington's office or attempt to obtain his file until 15 July 1998, and his new counsel did not file notice of her appearance until 17 July 1998, the thirtieth day after the court's order continuing the hearing. Plaintiff acknowledges that he received copies of the depositions taken in the action, as well as his personal files, from Mr. Covington's office on 15 July, but contends he was unable to obtain copies of other discovery documents or the pleadings from Mr. Covington so that his new counsel could prepare. Even so, there is no indication in the record that plaintiff or his counsel sought to obtain copies of the pleadings from the trial court's files, or copies of discovery materials from opposing counsel, during the seven day period from counsel's notice of appearance until the summary judgment hearing on 24 July. From the record, the only action apparently taken by plaintiff and his counsel during that seven day period was the preparation of the motion to continue and supporting documents. Indeed, there is nothing in the record before us which would indicate that the continuance from 17 June until 24 July, requested by plaintiff and granted by the trial court, was inadequate had plaintiff taken timely action.

Under these circumstances, we must agree with the trial judge that plaintiff demonstrated neither diligence nor a good faith effort to meet the schedule set by the trial court more than a month earlier. Accordingly, we cannot say the trial court's finding that plaintiff failed to establish grounds for an additional continuance could not have been the result of a reasoned decision or that the court's denial of the motion to continue was an abuse of discretion.

II.

Plaintiff also appeals from, and assigns error to, the order granting summary judgment in favor of defendants. Plaintiff's brief, how-

ever, contains no argument pointing to the existence of genuine issues of material fact with respect to plaintiff's substantive claims and, at oral argument, his counsel asserted only procedural arguments as grounds for reversal. See N.C.R. App. P. 28(a) (explaining that questions raised by assignments of error but not presented or discussed in appellant's brief are deemed abandoned). Nevertheless, plaintiff asserts that, notwithstanding his failure to file materials or argue in opposition to defendants' summary judgment motion, genuine issues of material fact were raised by the pleadings and other materials in the record before the trial court. Thus, we again exercise our discretion under N.C.R. App. P. 2 to review the propriety of the summary judgment dismissing plaintiff's substantive claims.

Summary judgment is proper where "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). It is the movant's burden to establish the lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co. Inc.*, 313 N.C. 488, 329 S.E.2d 350 (1985). The movant may do so by (1) proving that an essential element of the opposing party's claim is nonexistent, or (2) showing through discovery that the opposing party has failed to produce evidence to support an essential element of his or her claim. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C., 467, 251 S.E.2d 419 (1979)). If the movant meets this burden, the nonmovant must take "affirmative steps" to "set forth specific facts" showing the existence of a genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(e); *Id.* at 371, 289 S.E.2d 367. In other words, once the movant has established the absence of a genuine issue of material fact, "[t]he non-moving party may not rest upon the mere allegations of his pleadings." *Id.* at 370, 289 S.E.2d at 366. We must therefore analyze each claim to determine whether (a) defendants established the absence of any genuine issue of material fact with respect thereto, and (b) plaintiff responded by affirmatively pointing to those facts which show the existence of a triable issue.

In the present case, plaintiff claimed (1) he was disciplined in retaliation for criticisms lodged against the police department in violation of his free speech rights as granted by the United States Constitution, actionable through 42 U.S.C. § 1983, and (2) the retaliatory disciplinary action amounted to an intentional infliction of emotional distress. Because the record reveals that defendants

successfully showed the absence of any triable issue of fact as to each claim, and that plaintiff failed to make any affirmative showing that genuine issues of material fact exist, we affirm the order of summary judgment.

A.

[2] Plaintiff's § 1983 claim is premised upon a Durham Police Department Internal Affairs investigation which resulted in a recommendation for plaintiff's dismissal allegedly in retaliation for plaintiff's publication of an editorial in the 14 July 1996 edition of the Durham Herald-Sun which criticized the Department, and for "having reported [] sexual misconduct incidents up the chain of command and [] having attempted to protect the officers working under his command from McNeil's retaliatory actions." To prevail on a 42 U.S.C. § 1983 claim for retaliation by wrongful discharge or demotion in violation of First Amendment rights, a public employee must show that the speech which resulted in the retaliation was protected speech and "that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or demotion." *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 410 S.E.2d 232 (1991) (quoting *Jurgensen v. Fairfax County*, 745 F.2d 868, 877-78 (4th Cir. 1984)). To show that the speech complained of was protected, the employee must show that (1) the public employee was speaking on a matter of public concern; and (2) the public employee's first amendment interest outweighed the employer's interest in running an efficient public service. *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

Moreover, to make out a claim against a municipality directly, a plaintiff must do more than establish liability through respondeat superior, but must show that the "official policy" of the municipal entity is "the moving force of the constitutional violation." *Moore v. City of Creedmoor*, 345 N.C. 356, 366, 481 S.E.2d 14, 21 (1997) (quoting *Polk County v. Dodson*, 454 U.S. 312, 326, 70 L.Ed.2d 509, 521 (1981)). Where municipal employees are sued in their official capacities, the claim is against the office the employee holds rather than the particular individual who occupies the office. *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114 (1985). Therefore, in a suit where the plaintiff asserts a claim against a government entity, a suit against those individuals working in their official capacity for this government entity is redundant. *Moore*, at 367, 481 S.E.2d 21.

Finally, in a case such as this, where officials of the municipality are sued for actions carried out in their individual capacity and those officials have asserted a qualified immunity defense, the plaintiff must present facts sufficient to overcome this qualified immunity. A government official has qualified immunity in the performance of discretionary functions "to the extent that such conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lenzer,* 106 N.C. App. at 508, 418 S.E.2d at 284 (quoting *Corum v. University of North Carolina,* 330 N.C. 761, 413 S.E.2d 276 (1992)) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 73 L.Ed.2d 396 (1982)). As stated in *Morrison-Tiffin v. Hampton,* 117 N.C. App. 494, 501 451 S.E.2d 650, 655-56, *disc. review denied,* 339 N.C. 739, 454 S.E.2d 654 (1995), "where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated." *Id.* (quoting *Pueblo Neighborhood Health Centers., Inc., v. Losavio,* 847 F.2d 642, 649 (10th Cir. 1988)). "Mere conclusory assertions of discriminatory intent embodied in affidavits or deposition testimony are not sufficient to avert summary judgment." *Id.*

Plaintiff's § 1983 claim against the City of Durham fails on its face. Plaintiff presents no evidence of any official policy on the part of the City of Durham which would allow the inference that the City of Durham was the moving force behind the alleged constitutional violation. As a result, McNeil and Powell may not be sued in their official capacities.

In addition, the claims against Powell and McNeil in their individual capacities must also fail. Defendants presented voluminous evidence that the disciplinary action against plaintiff was taken for numerous reasons unrelated to the speech at issue. It was therefore incumbent upon plaintiff to forecast firm evidence establishing a causal relationship between the speech and the retaliation. "The causation requirement is rigorous; it is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that 'but for' the protected expression the employer would not have taken the alleged retaliatory action." *Huang v. Board of Governors,* 902 F.2d 1134, 1140 (4th Cir. 1990). Plaintiff offered no response to the showing made by defendants; the award of summary judgment against plaintiff on this claim may therefore be sustained on this ground alone.

In addition, plaintiff presented no evidence to rebut the showing by both defendants McNeil and Powell that the disciplinary actions against him were taken in a good faith belief that the actions were within the law, were reasonable in light of the circumstances, and, therefore, were within their qualified immunity. Summary judgment was also proper on this ground alone.

B.

[3] Defendants also met their burden to show the absence of any genuine issue of material fact which would support a claim of intentional infliction of emotional distress. A claim for intentional infliction of emotional distress requires the existence of three elements: (1) extreme and outrageous conduct; (2) which is intended to cause and does cause (3) severe emotional distress to another. *Dobson v. Harris*, 134 N.C. App. 573, 521 S.E.2d 710 (1999). To show severe emotional distress, a claimant must do more than simply state that he has suffered severe emotional distress; there must be evidence that he suffered from an "emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* at 579, 521 S.E.2d at 715 (quoting *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 583 (1998)). Here, plaintiff presented no evidence to support a finding that he suffered from mental distress of a nature generally recognized by trained professionals. Our Supreme Court has held summary judgment to be appropriate in such a case, *Waddle v. Sparks*, 331 N.C. 73, 414 S.E.2d 22 (1992); summary judgment was also proper as to this claim.

Plaintiff's sole remaining claim was for damages resulting from the alleged violation of his constitutional rights. Without the existence of a viable § 1983 claim, there can be no claim for damages.

We have carefully considered the remaining arguments contained in plaintiff-appellant's brief and find no basis upon which to disturb the orders from which plaintiff appeals. The trial court's order granting summary judgment in favor of defendants is, in all respects, affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

CHIEGE KALU OKWARA v. DILLARD DEPARTMENT STORES, INC., AND TOWN OF PINEVILLE, AND WALTER B. RORIE

No. COA99-309

(Filed 15 February 2000)

1. Costs— attorney fees—no time bar—award at end of litigation

Although plaintiff cites Federal Civil Procedure Rule 54(d)(2)(B) to show defendants' claims for attorney fees were time barred since the claims were not filed within fourteen days following entry of judgment, the trial court did not err in taxing plaintiff with costs, including attorney fees incurred in defending plaintiff's claims asserted under federal civil rights laws 42 U.S.C. §§ 1981 and 1983, because: (1) the federal civil procedure rule does not apply to litigation pending in our state courts; (2) the North Carolina Rules of Civil Procedure do not contain a counterpart to the federal rule, nor a deadline for filing a motion for costs and fees; and (3) the usual practice in awarding attorney fees is to make the award at the end of the litigation when all work has been done and all the results are known, and defendants' motions for costs were filed within a reasonable time after the results were known.

2. Costs— attorney fees—civil rights claim—frivolous

The trial court's taxing of plaintiff with costs, including attorney fees incurred in defending plaintiff's claims asserted under federal civil rights laws 42 U.S.C. §§ 1981 and 1983, was not unjustified under 42 U.S.C. § 1988(b) because: (1) the trial court found that plaintiff's claims were based solely on "conjecture and speculation" and were "not well-grounded in fact"; (2) plaintiff did not assign error to these findings, meaning they are binding on appeal; and (3) the findings support the trial court's conclusion of law that plaintiff's claims were frivolous and groundless.

3. Costs— attorney fees—reasonableness—usual and customary rates

The trial court did not abuse its discretion by determining that the hourly rates charged by defendant Dillard's counsel were reasonable when taxing plaintiff with costs, including attorney fees incurred in defending plaintiff's claims asserted under federal civil rights laws 42 U.S.C. §§ 1981 and 1983, because this con-

clusion was supported by the trial court's finding, to which plaintiff has not assigned error, that the hourly rates charged by the attorneys who worked on this case were the "usual and customary rates for the firm for such cases and were reasonable under the prevailing market rates for the defense of these types of claims by other firms and lawyers of comparable experience."

4. Costs— attorney fees—federal and other claims—common nucleus of law or fact

Although plaintiff contends the amount of attorney fees awarded to defendants should be reduced by the amount expended in defense of the non-federal claims, the trial court did not abuse its discretion in determining the amount it taxed plaintiff with costs because: (1) fees incurred defending both federal civil rights claims and other claims may be fairly charged to the prevailing party under 42 U.S.C. § 1988 so long as all of these claims stem from a common nucleus of law or fact; and (2) a prevailing defendant is not treated differently than a prevailing plaintiff when considering apportionment.

Appeal by plaintiff from judgment entered 7 December 1998 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 December 1999.

Daly & Daly, P.A., by George Daly, for plaintiff-appellant.

Underwood Kinsey Warren & Tucker, P.A., by C. Ralph Kinsey, Jr., for defendant-appellee Dillard Department Stores, Inc.

Bailey & Dixon, L.L.P., by Patricia P. Kerner, for defendant-appellee Town of Pineville.

MARTIN, Judge.

Plaintiff Chiege Kalu Okwara filed suit against Officer Walter B. Rorie, Dillard Department Stores ("Dillard") and the Town of Pineville ("Town") on 2 December 1994, alleging negligent hiring, defamation, slander *per se*, race discrimination, violations of 42 U.S.C. §§ 1981 and 1983, infliction of emotional distress, false imprisonment, battery, and assault. These allegations stemmed from a 10 December 1993 incident at a Dillard Department Store in Pineville, North Carolina, in which defendant Rorie, an off-duty Pineville police officer working as a security guard for Dillard, investigated a report that plaintiff was shoplifting. Plaintiff alleged that she was investi-

gated as a result of a race-based shoplifter profile, and also alleged that during Rorie's investigation, he struck her in the stomach, made derogatory and defamatory statements to her, and restrained her against her will.

Plaintiff's claims against Dillard and the Town for negligent employment and civil rights violations were dismissed pursuant to an order of summary judgment entered 14 December 1995. On 30 August 1996, plaintiff's remaining claims were dismissed as a sanction for failing to comply with previous discovery orders, and plaintiff was taxed with costs. Plaintiff appealed. By opinion filed 17 February 1998, this Court affirmed. *Okwara v. Dillard Dept. Stores* (unpublished, COA97-438, 128 N.C. App. 748, 496 S.E.2d 851 (1998)). Plaintiff's petition to the North Carolina Supreme Court for discretionary review was denied on 8 July 1998. *Okwara v. Dillard Dept. Stores*, 348 N.C. 499, 510 S.E.2d 652 (1998).

Both Dillard and Pineville moved for an order taxing plaintiff with costs, including attorneys' fees incurred in defending plaintiff's claims asserted under federal civil rights laws, 42 U.S.C. §§ 1981 and 1983. On 7 December 1998, the trial court entered a Judgment for Costs taxing plaintiff with costs, including attorneys' fees, incurred by both Dillard and the Town.

The trial court found, *inter alia*:

> 25. Discovery conducted by the parties in this action disclosed that there was no evidence to support Plaintiff's claims under Section 1983 against either the Town or Dillard. As clearly demonstrated by Plaintiff's sworn deposition testimony and interrogatory answers, Plaintiff did not have one scintilla of evidence to support her Complaint allegations with respect to these claims at the time she filed the Complaint and did not present any competent evidence to support them in opposition to the Town's and Dillard's Motion for Summary Judgment.
>
> 26. In her memorandum filed with this Court in opposition to the Motions for Summary Judgment, Plaintiff did not point to a single fact supporting her speculative allegations that the Town had an official policy to use a profile to identify shoplifters based on the race of the individual and that Dillard authorized and condoned Defendant Rorie's supposed use of such a policy.
>
> 27. Plaintiff made her allegations in her Verified Complaint with respect to her purported Section 1983 claims (Second Cause of

Action) against Dillard and the Town and prosecuted such claims through their dismissal based upon her own conjecture and speculation. Plaintiff's Section 1983 claims (Second Cause of Action) were not well-grounded in fact when Plaintiff filed her Verified Complaint and she did not develop or produce any evidence whatsoever to support her speculative allegations prior to the dismissal of such claims.

28. Plaintiff's Verified Complaint established that each of her purported eight (8) Causes of Action arose out of a common nucleus of operative facts and that each such Cause of Action was inextricably interwoven with the others. The work of Dillard's and the Town's counsel on the case was directed at all claims until their and the Town's Motions for Summary Judgment were heard and decided on December 14, 1995. Because all of Plaintiff's claims arose out of the same set of facts and related legal theories, all of the work of the attorneys for Dillard and the Town prior to that hearing, including extensive discovery (with the exception of some research time directed specifically at other claims), related to the litigation as a whole.

The trial court also made seventeen findings of fact regarding the hourly rates charged by defendants' counsel and the time spent in defense of plaintiff's claims.

The trial court reached the following conclusions of law:

1. This Court lacked jurisdiction to enter any order taxing costs until the mandate of the Court of Appeals was issued remanding this matter back to the Mecklenburg County Superior Court.

2. The North Carolina General Statutes set no specific deadline for filing a Motion for Costs.

3. Defendants Dillard and the Town were the prevailing parties in this action.

4. Plaintiff's claims pursuant to 42 U.S.C. § 1983 against Defendants Dillard and the Town were frivolous, unreasonable and groundless.

5. All of Plaintiff's claims involved a common core of facts and related legal theories.

6. The fees sought by Defendant Dillard for work done by attorneys and paralegals before the entry of partial summary judgment

on December 14, 1995, are reasonable, and the Court concludes, in its discretion that $65,111.00 for fees incurred by Defendant Dillard should be taxed as costs in this action.

7. The fees sought by Defendant the Town for work done by attorneys and paralegals before the entry of partial summary judgment on December 14, 1995, are reasonable, and the Court concludes, in its discretion, that $39,286.00 for fees incurred for the defense of the Town should be taxed as costs in this action.

8. Fees incurred by Defendants Dillard and the Town in defending this action after partial summary judgment was entered on December 14, 1995, cannot be taxed by the Court as costs in this action.

The trial court awarded costs and attorneys' fees to Dillard in the amount of $70,949.51 and to the Town in the amount of $40,735.00. Plaintiff appeals.

In each of her arguments to this Court, plaintiff challenges both the sufficiency of the evidence to support certain of the trial court's findings of fact, and the conclusions of law drawn from these findings. Plaintiff, however, has not assigned error to any of the trial court's findings. Appellate review is confined to a consideration of issues presented by proper assignments of error set out in the record on appeal. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding. *Taylor v. N.C. Dept. of Transportation*, 86 N.C. App. 299, 357 S.E.2d 439 (1987); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986) (finding that the failure of appellant to "except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence . . . will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact"). Where an appellant fails to assign error to the trial court's findings of fact, the findings are "presumed to be correct." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998). Our review, therefore, is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evi-

dence, support its conclusions of law and judgment. *Taylor v. N.C. Dept. of Transportation, supra.*

Plaintiff argues the conclusions of law are erroneous because (1) defendants were time-barred from seeking attorneys' fees two years after the federal claims were dismissed; (2) the facts found do not justify an award of attorneys' fees according to the standard set forth in 42 U.S.C. § 1988; (3) the award was unreasonable; and (4) at least a portion of the award should be nullified because it was incurred for work unrelated to the federal civil rights claims. We have carefully considered her arguments and find no basis upon which to disturb the trial court's judgment.

I.

[1] Plaintiff first contends defendants' claim for attorneys' fees was time-barred. Citing F.R. Civ. P. 54(d)(2)(B) requiring motions for attorneys' fees to be filed within fourteen days following the entry of judgment, plaintiff argues we should apply a "rule of reasonableness" and find that it was violated by the "unreasonable and prejudicial" two year time period between the partial summary judgment order and the attorneys' fee motions. The fourteen day rule contained in F.R. Civ. P. 54(d)(2)(B) clearly does not apply to litigation pending in our State courts and the North Carolina Rules of Civil Procedure contain neither a counterpart to F.R. Civ. P. 54(d)(2)(B) nor a deadline for filing a motion for costs and fees. Rather, "[t]he usual practice in awarding attorneys' fees is to make the award at the end of the litigation when all the work has been done and all the results are known." *Baxter v. Jones*, 283 N.C. 327, 331, 196 S.E.2d 193, 196 (1973).

As established by the record and the trial court's findings, the litigation was ended on 8 July 1998 when plaintiff's petition for discretionary review was denied by the North Carolina Supreme Court. Dillard's amended motion for costs was filed 14 September 1998, and the Town's motion for costs was filed 10 August 1998, both within a reasonable time after the "results were known." We hold the motions for costs were not time-barred.

II.

[2] Plaintiff next argues the award of attorneys' fees was unjustified according to 42 U.S.C. § 1988(b). This section expressly allows attorney's fees in federal civil rights cases and reads:

(b) Attorney's fees

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

A defendant in a § 1981 or § 1983 claim who successfully moves for summary judgment is a prevailing party for purposes of § 1988. *See, e.g., Shaw v. Jones*, 81 N.C. App. 486, 488, 344 S.E.2d 321, 323 (1986) (finding that where defendants in a § 1983 action successfully moved for summary judgment, "[t]here is no question that defendants were the 'prevailing parties' "). Although the statute itself does not distinguish between a prevailing defendant or a prevailing plaintiff, the Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 417, 54 L.Ed.2d 648, 698 (1978) held that, while a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," a prevailing defendant is differently situated and may only be entitled to attorney's fees if the claim brought by the plaintiff is "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422, 54 L.Ed.2d at 701. This stricter standard is based on the rationale that, although prevailing defendant awards are clearly warranted in some circumstances, large fee awards would have a "chilling effect" on plaintiffs considering civil rights claims. *Id.*

Christiansburg did not define a precise measure of frivolousness, stating only that subjective bad faith is not required in order to find the claim frivolous. *Id.* Instead, this determination was left to the discretion of trial courts; courts since *Christiansburg* have awarded attorney's fees under § 1988 against plaintiffs who have brought claims wholly untenable at law, or wholly unsubstantiated in fact. *See, e.g., Arnold v. Burger King Corp.*, 719 F.2d 63 (4th Cir. 1983), *cert. denied*, 469 U.S. 826, 83 L.Ed.2d 51 (1984) (discussing the reasons courts have found a claim frivolous); *Hutchison v. Staton*, 994 F.2d 1076 (4th Cir. 1993) (finding the district court properly granted attorney's fees against a plaintiff who brought a § 1983 claim which

was "conjecture" and "speculation" and "had no basis in fact"); *DeBauche v. Trani*, 191 F.3d. 499 (4th Cir. 1999) (finding that the trial court acted within its discretion in awarding attorney's fees on the basis that plaintiff's claim was "groundless" and "without foundation").

Plaintiff argues that her federal civil rights claims were not frivolous, so that any award of attorneys' fees was improper. However, in its finding of fact numbered 25, the trial court found, *inter alia*:

> Plaintiff did not have one scintilla of evidence to support her Complaint . . . and did not present any competent evidence to support them in opposition to the Town's and Dillard's Motion for Summary Judgment.

In its finding of fact numbered 27, the trial court found that plaintiff's claims were based solely on "conjecture and speculation," and were "not well-grounded in fact." Plaintiff did not assign error to these findings, they are binding on appeal, and they support the trial court's conclusion of law numbered 4 that plaintiff's claims were frivolous and groundless. A plaintiff who files frivolous claims may be charged with reasonable attorney's fees; this assignment of error is overruled.

III.

[3] Next plaintiff argues that, even if her claims are determined to be frivolous, the hourly rates charged by Dillard's counsel were unreasonable. Once it is established that the party seeking fees is entitled to them, the trial court must also make certain the fees charged are reasonable. *Arnold*, 719 F.2d at 67. This decision is largely left to the discretion of the trial judge, who has "intimate knowledge" of the facts and circumstances of the case." *Id.* The "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the ligation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40 (1983). To determine a reasonable hourly rate, the Court may look at "the customary fee for similar work in the community." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (listing this as one of twelve factors used to determine the amount of attorney's fees; its use in federal civil rights cases was cited with approval in *Hensley*).

Here, the trial court's conclusion that the hourly rate charged by Dillard's attorneys was reasonable is clearly supported by its finding that the hourly rates charged by the attorneys who worked on this

case were "the usual and customary rates for the firm for such cases and were reasonable and under the prevailing market rates for the defense of these types of claims by other firms and lawyers of comparable experience to [Dillard's attorney]," a finding to which plaintiff has not assigned error. This assignment of error is overruled.

IV.

[4] Finally, plaintiff challenges the amount of the fee, arguing that it should be reduced by the amount expended by defendants in defense of the non-federal claims. In *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40 (1983), the Supreme Court held that where multiple state law and federal law claims are litigated together, fees incurred defending both the federal civil rights claims and other claims may be fairly charged to the prevailing party under § 1988 so long as all of these claims stem from a common nucleus of law or fact. *See also Ward Lumber Co. v. Brooks, Comm'r of Labor*, 50 N.C. App. 294, 273 S.E.2d 331, *cert. denied*, 454 U.S., 70 L.Ed.2d 638 (1981). This is so because, as noted in *Hensley*, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435, 76 L.Ed.2d at 51. This determination is left largely to the discretion of the trial courts. *Id.*

Plaintiff urges this Court to treat a prevailing defendant differently than a prevailing plaintiff when considering apportionment. Plaintiff argues that a stricter standard should be applied to apportionment when the defendant seeks damages in order to avoid the "chilling effect" large fee awards would have on plaintiffs pursuing federal civil rights claims. We are not persuaded. Plaintiff has not guided us to a single case which recognizes this distinction when apportioning fees incurred in the defense of non-federal claims. The Seventh Circuit, when faced with this issue, found that rules of apportionment from *Hensley* should apply equally to prevailing defendants and prevailing plaintiffs. *Munson v. Milwaukee Board of School Directors*, 969 F.2d 266 (7th Cir. 1992); *see also Hoffine v. Brogan*, 1998 WL 1118672 (S.D.Cal 1998); *Kennedy v. McCarty*, 803 F.Supp. 1470 (S.D Ind. 1992). The Fourth Circuit has observed that once the court properly determines a claim is frivolous, an imposition of fees "chills nothing that is worth encouraging." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).

The trial court in this case properly applied this standard in the Judgment for Costs, concluding that defendants may be awarded fees

for any portion of the defense stemming from the same nucleus of fact. In its finding of fact numbered 28, the trial court found that plaintiff's claims arose from "a common nucleus of operative facts," and that each claim was "inextricably interwoven" with the other claims. The finding, to which error was not assigned, supports the trial court's conclusion that no apportionment of fees was necessary before partial summary judgment; the conclusion is a correct application of the law. This assignment of error is overruled.

We have reviewed plaintiff's remaining assignments of error and find them without merit. We affirm the Judgment for Costs.

Affirmed.

Judges LEWIS and WYNN concur.

IN RE: J.L.W. (JUVENILE)

No. COA99-283

(Filed 15 February 2000)

1. Appeal and Error— appealability—juvenile—finding of probable cause—not a final order

A finding of probable cause that a juvenile had committed felony larceny and felony possession of stolen property was not immediately appealable and was dismissed since it was not a final order under N.C.G.S. § 7A-666.

2. Constitutional Law— double jeopardy—juvenile—adjudicatory hearing—transfer of case—same charges—violation

The juvenile court's transfer of misdemeanor charges to superior court is vacated and remanded to the juvenile court for a final disposition since the binding over for trial in superior court following an adjudicatory hearing on the same charges in the juvenile court constitutes double jeopardy.

3. Juvenile— transfer of case—reasons for transfer not stated—abuse of discretion

The juvenile court abused its discretion in transferring felony charges to the superior court for trial as an adult because the juvenile court failed to adequately state reasons underlying the

decision as required by N.C.G.S. § 7A-610, and therefore, these charges are remanded to juvenile court for disposition.

4. Appeal and Error— appealability—juvenile—adjudication of delinquency—not a final order

A finding that a juvenile was delinquent on four misdemeanor charges of injury to personal property was not immediately appealable and the appeal was dismissed as premature because it was not a final order under N.C.G.S. § 7A-666 since no disposition had been made.

Judge GREENE concurs with separate opinion.

Appeal by juvenile from orders entered 5 October 1998 and filed 7 October 1998 and 12 October 1998 by Judge Ernest J. Harviel in Alamance County District Court. Heard in the Court of Appeals 7 December 1999.

Attorney General Michael F. Easley, by Assistant Attorney General M.A. Kelly Chambers, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine C. Fodor, for juvenile-appellant.

WALKER, Judge.

On 26 August 1998, petitions were filed in the juvenile court of Alamance County alleging that J.L.W. was a delinquent juvenile because he had committed eight counts of larceny, eight counts of possession of stolen property, twenty-two misdemeanor counts of injury to personal property, and one misdemeanor count of damage to real property. A hearing on probable cause, on the State's motion to transfer jurisdiction to superior court, and an adjudicatory hearing on the misdemeanor counts were held in the juvenile court. The juvenile court found probable cause with respect to all the felony charges and adjudicated the juvenile delinquent on all the misdemeanor counts. The juvenile court also transferred both the felony counts and the misdemeanor counts to superior court for trial as in the case of an adult.

The State's evidence tended to show the following: J.L.W., 15 years old at the time, and his friend, Perry Torain, 17, entered a parking lot containing the school buses owned by the Alamance-Burlington School District. J.L.W. and Torain drove an unknown number of the buses within the parking lot, damaging the buses through

vandalism and collisions. Eighteen buses and a fence were damaged, and eight of the buses were rendered inoperable. Damages exceeded $23,500.00. J.L.W. admitted driving two of the buses.

[1] J.L.W. first assigns as error the trial court's finding probable cause with respect to the charges of felony larceny and felony possession of stolen property, because of the State's lack of sufficient evidence.

This Court held in *In re K.R.B.*, 134 N.C. App. 328, 517 S.E.2d 200, *disc. review denied,* 351 N.C. 187, — S.E.2d — (1999), that a finding of probable cause in a juvenile proceeding is not immediately appealable. In *K.R.B.*, the juvenile appealed the trial court's finding of probable cause with regard to a murder. This Court dismissed the juvenile's argument based upon § 7A-666[1] of the North Carolina Juvenile Code and *In re Ford,* 49 N.C. App. 680, 272 S.E.2d 157 (1980). *K.R.B.*, 134 N.C. App. at 331, 517 S.E.2d at 202. Section 7A-666, repealed effective 1 July 1999, still controls the determination of J.L.W.'s case.

J.L.W. argues that the juvenile court erred in finding probable cause existed for the felony larceny and felony possession of stolen property offenses. Finding *K.R.B.* controlling, we dismiss J.L.W.'s argument that the juvenile court's finding of probable cause was error.

[2] J.L.W. next argues that the juvenile court's transfer of his misdemeanor charges to the superior court for trial as an adult subjected him to double jeopardy. The juvenile court adjudicated J.L.W. delinquent on the misdemeanor charges and then bound these same misdemeanor charges over to the superior court for J.L.W. to be tried as an adult. J.L.W. contends that since there was an evidentiary hearing where he was adjudicated delinquent on the misdemeanor charges, a trial in the superior court on those same misdemeanor charges violates his consitutional protection from double jeopardy.

"Jeopardy attach[es] when [the juvenile] [is] put to trial before the trier of facts, [. . .] that is, when the Juvenile Court, as the trier of the facts, be[gins] to hear evidence." *Breed v. Jones*, 421 U.S. 519, 531, 44 L. Ed. 2d 346, 357 (1975)(citations omitted); *In re Drakeford,* 32 N.C. App. 113, 230 S.E.2d 779 (1977).

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1. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1000 *et seq.*

Here, the juvenile court heard evidence regarding the misdemeanor charges and adjudicated J.L.W. delinquent. Then, the juvenile court transferred those same charges for trial in the superior court. The binding over for trial in superior court following an adjudicatory hearing on the misdemeanor charges in the juvenile court constitutes double jeopardy, which the State concedes. *Breed*, 421 U.S. at 541, 44 L. Ed. 2d at 362. The juvenile court's transfer order of the misdemeanor charges is vacated and the case is remanded to the juvenile court for final disposition.

[3] J.L.W. next argues that the juvenile court's transfer of the felony charges to the superior court for trial as an adult was an abuse of discretion given the circumstances surrounding the incident.

We note at the outset that the appeal of a juvenile transfer order is distinguishable from the juvenile court's finding of probable cause. As previously discussed, the finding of probable cause is not immediately appealable. However, "juvenile transfer orders entered by the District Court are final orders within the meaning of [N.C. Gen. Stat. § 7A-666]" and thus are properly before the Court of Appeals for review.[2] *State v. T.D.R.*, 347 N.C. 489, 496, 495 S.E.2d 700, 703 (1998).

Pursuant to N.C. Gen. Stat. § 7A-610[3]:

> (a) If probable cause is found and transfer to superior court is not required by G.S. 7A-608, the prosecutor or the juvenile may move that the case be transferred to the superior court for trial as in the case of adults. *The judge may proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court for trial as in the case of adults. . . .*

N.C. Gen. Stat. § 7A-610(a) (1995) (emphasis added). The transfer of a juvenile's case to superior court is in the sound discretion of the juvenile court. *State v. Green*, 124 N.C. App. 269, 276, 477 S.E.2d 182, 185 (1996), affirmed, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). While the decision to transfer a case to the superior court is addressed to the discretion of the juvenile court, the transfer order must contain the reasons underlying the

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2. Effective 1 July 1999, transfer orders are not appealable to the Court of Appeals and may be appealed to the Superior Court. N.C. Gen. Stat. § 7B-2603.

3. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-2200 *et seq.*

decision. N.C. Gen. Stat. § 7A-610(c) (1995); *State v. Green*, 348 N.C. 588, 601, 502 S.E.2d 819, 826 (1998).[4]

J.L.W. contends that the juvenile court's findings failed to take into consideration J.L.W.'s needs, family support, maturity level, level of intellectual functioning, or his rehabilitative potential. Further, the juvenile court's reliance upon J.L.W.'s confession to his involvement in the activity was inaccurate since J.L.W.'s confession concerned the misdemeanor charges and not the felony charges.

In transferring the felonies to superior court, the juvenile court stated:

> In this matter, I will enter an order directing that this, these felonies be transferred to the Superior Court Division for disposition. And the basis of that finding are the following considerations: One, the juvenile is fifteen years of age. And secondly, the co-defendant in this matter is 16, 17 years of age. That it is desireable [sic] that the disposition of both individuals' cases be done in one court. It's clear from the juvenile's statements to the officer of his culpability and guilt in these matters. Also considering the extraordinary amount of damages to public school property [sic].

Consistent with the juvenile court's ruling, the transfer order stated the following reasons:

1. Juvenile is 15 years of age.
2. Co-defendant in the matter is 17 years of age.
3. It is desirable that BOTH cases be done in one Court.
4. Juvenile admitted guilt to officer.
5. Extent of damage to public school property. ($23,564.97 buses, $785.30 fence)

(Emphasis in original).

In *Green*, our Supreme Court affirmed the constitutionality of § 7A-610, and stated:

> When a juvenile court judge decides transfer meets "the needs of the juvenile or [serves] the best interest of the State," [. . .] he or

4. Effective 1 July 1999, the juvenile court must consider eight enumerated factors pursuant to a transfer hearing and then specify the reasons for transfer if the case is transferred to superior court.

> she does so with full knowledge of the dispositional alternatives in the juvenile and adult systems. The juvenile court judge seeks to develop a disposition that takes into account the facts of the case, such as the seriousness of the crime, the viciousness of the attack, the injury caused and the strength of the State's case. The juvenile court judge's decision is also guided by the needs and limitations of the juvenile, as well as the strengths and weaknesses of the juvenile's family. Moreover, the juvenile court judge takes into account the protection of public safety and the legislature's growing concern with serious youthful offenders and increasing dissatisfaction with the ability of the juvenile system to provide either adequate public protection or rehabilitative service to the juvenile given the usual short period of time between conviction and release from the juvenile system.

Green, 348 N.C. at 599-600, 502 S.E.2d at 826.

In this case, J.L.W. is charged with a non-violent offense committed against property, does not have a criminal record, and is learning disabled. His teacher and an investigating officer both stated that J.L.W. had the potential for rehabilitation. Additionally, J.L.W.'s parents were in attendance at the proceeding. However, the juvenile court's transfer order does not reflect that consideration was given to the needs of the juvenile, to his rehabilitative potential, and to the family support he receives. Therefore, the transfer order is deficient in that the juvenile court failed to adequately state reasons as required by N.C. Gen. Stat. § 7A-610 and *State v. Green*, supra. Thus, the juvenile court abused its discretion in transferring the felony charges to superior court and these charges are remanded to the juvenile court for disposition.

[4] Finally, J.L.W. argues that the juvenile court's finding J.L.W. delinquent on four misdemeanor charges of injury to personal property was error given the lack of sufficient evidence.

Pursuant to N.C. Gen. Stat. § 7A-666:

> Upon motion of a proper party as defined in G.S. 7A-667, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written

notice of appeal may be given within 70 days after such entry. A final order shall include:

(3) Any order of disposition after an adjudication that a juvenile is delinquent, undisciplined, abused, neglected, or dependent. . . .

N.C. Gen. Stat. § 7A-666 (1995). "An adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency." *In re Taylor*, 57 N.C. App. 213, 214, 290 S.E.2d 797, 797 (1982).

Here, J.L.W. filed his notice of appeal on 15 October 1998, only ten days after his adjudication and before any disposition had been made. Accordingly, J.L.W.'s appeal regarding the sufficiency of the State's evidence as to four misdemeanor counts is premature and is dismissed. *See Taylor*, 57 N.C. App. at 214, 290 S.E.2d at 797-98.

In summary, J.L.W.'s appeal of a finding of probable cause on the felony charges is dismissed. The juvenile court's transfer order of the misdemeanor charges is vacated and the case is remanded to the juvenile court for final disposition. The juvenile court's transfer order of the felony charges is vacated and these charges are remanded to the juvenile court for disposition. J.L.W.'s appeal regarding the sufficiency of the evidence as to four misdemeanor charges is dismissed.

Vacated and remanded in part; appeal dismissed in part.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurs with separate opinion.

I agree with the majority that the trial court's felony transfer order must be vacated but for a somewhat different reason. Otherwise, I fully concur with the majority.

The trial court was required to consider the "needs of the juvenile," N.C.G.S. § 7A-610(a) (1995), and the findings do not reveal the court considered all the evidence presented relating to the needs of the juvenile. Without these specific findings of fact, this Court cannot

determine whether the order "represent[s] a correct application of the law." *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

The same principle applies to the current juvenile transfer statute requiring the trial court, prior to a transfer to the superior court, to consider the "needs of the juvenile" in the context of eight specific factors. N.C.G.S. § 7B-2203(b) (1999). Thus, under section 7B-2203, the trial court is required to enter findings of fact revealing a consideration of any evidence offered with respect to any of the eight factors listed in section 7B-2203(b); however, there is no requirement for the trial court to make "exhaustive findings regarding the evidence presented at the hearing." *See Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988).

DAVID A. ANDERSON, ANCILLARY ADMINISTRATOR OF THE ESTATE OF GARY R. ANDERSON, PLAINTIFF v. DEMOLITION DYNAMICS, INC., DEFENDANT

No. COA98-1350

(Filed 15 February 2000)

Employer and Employee— employment by defendant—genuine issue of material fact

Although defendant contends decedent was barred from bringing this wrongful death action because the exclusive remedy would be under the Workers' Compensation Act since decedent was a joint employee of defendant and Griffin Wrecking, the trial court erred by granting defendant's motion for summary judgment because there is a genuine issue of material fact under the "special employer" test concerning whether decedent was an employee of defendant based on: (1) whether there existed a contract for hire between defendant and decedent; and (2) the nature of defendant's right to control the detail of decedent's work.

Appeal by plaintiff from judgment entered 2 July 1998 by Judge W. Erwin Spainhour in Guilford County Superior Court. Heard in the Court of Appeals 19 August 1999.

Twiggs, Abrams, Strickland & Trehy, P.A., by Douglas B. Abrams, and Iraelson, Salsbury, Clements & Beckman, by Stewart M. Salsbury and Leslie Hayes Russo, for plaintiff-appellant.

Smith, Helms, Mulliss & Moore, L.L.P., by Jon Berkelhammer, Andrew S. Chamberlin, and Manning A. Connors, III, for defendant-appellee.

JOHN, Judge.

Plaintiff David A. Anderson, ancillary administrator of the estate of Gary R. Anderson (decedent), appeals the trial court's grant of defendant Demolition Dynamics, Inc.'s motion for summary judgment. For the reasons stated below, we reverse and remand to the trial court for further proceedings.

Pertinent facts and procedural history include the following: Plaintiff initiated the instant wrongful death suit 22 August 1996. Decedent died 19 August 1995 as a result of injuries suffered when he fell from an abandoned conveyor structure in a quarry. At the time, decedent and several employees of defendant were preparing the structure for demolition by means of explosives.

In his complaint, plaintiff alleged, *inter alia*, that defendant, through its agents and employees,

> [n]egligently and wantonly undermined the structural integrity of the conveyor system while Plaintiff's decedent Gary R. Anderson was working on the bridge conveyor frame,

and that such negligence was the proximate cause of decedent's death. Included in defendant's answer was the defense that

> [a]t the time of the incident that forms the subject matter of Plaintiff's complaint, [decedent] was in the employ of [defendant] and was covered by the provisions of the North Carolina Workers' Compensation Act, which provides the sole and exclusive remedy to Plaintiff.

On the basis of the foregoing, defendant subsequently moved to dismiss for lack of subject matter jurisdiction, or alternatively for summary judgment. Following a hearing, the trial court entered summary judgment in favor of defendant 2 July 1998. Plaintiff timely appealed.

The Workers' Compensation Act (the Act), N.C.G.S. § 97-10.1 (1991), provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

In addition, this Court has stated that

> an employee's remedies are exclusive as against the employer where the injury is caused by an accident arising out of and in the course of employment. Thus, the exclusivity provision of the Act precludes a claim for ordinary negligence, even when the employer's conduct constitutes willful or wanton negligence.

Wake County Hosp. Sys. v. Safety Nat. Casualty Corp., 127 N.C. App. 33, 40, 487 S.E.2d 789, 793, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997) (citation omitted).

Summary judgment is appropriately granted when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.G.S. § 1A-1, Rule 56(c) (1990). A summary judgment movant bears the burden of showing either that (1) an essential element of the non-movant's claim is nonexistent; (2) the non-movant is unable to produce evidence which supports an essential element of its claim; or, (3) the non-movant cannot overcome affirmative defenses raised in contravention of its claims. *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, accepting the latter's asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994).

Plaintiff contends the record reflects a genuine factual issue as to whether decedent was an employee of defendant. We agree.

It is undisputed that decedent was employed by a separate but related company, D.H. Griffin Wrecking Company (Griffin Wrecking). D.H. Griffin, Sr., (Mr. Griffin), his son, and Steve Pettigrew (Pettigrew), a former co-worker of decedent, formed defendant company to provide Griffin Wrecking with explosive demolition capabilities. The two companies often worked together on demolition projects, and decedent likewise was regularly involved with such projects.

Defendant maintains decedent, at the time of his death, was an employee of both Griffin Wrecking and defendant and that plaintiff's claim alleging negligence by defendant is barred by the exclusivity provisions of the Act. However, plaintiff contends decedent was solely an employee of Griffin Wrecking and that plaintiff's wrongful death action against defendant may therefore proceed.

> [S]ituations may exist under which an employee may properly be considered to be in the joint employment of two employers so that both become jointly responsible to pay compensation if the employee is injured by accident arising out of and in the course of such employment.

Collins v. Edwards, 21 N.C. App. 455, 458, 204 S.E.2d 873, 876, *cert. denied*, 285 N.C. 589, 206 S.E.2d 862 (1974). Our courts utilize the following three-prong "special employer" test to determine whether an employee may be deemed to have joint employers for purposes of the Act. *See id.* at 459, 204 S.E.2d at 876.

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for worker's compensation.

3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 67 (1999) [hereinafter Larson][1], *cited with approval in Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876. Continuance of the "general" employment is presumed, and the party asserting otherwise must make a "clear demonstration that a new . . . employer [was] substituted for the old." Larson § 67.02, *quoted in Collins*, 21 N.C. App. at 460, 204 S.E.2d at 877.

Accordingly, in order to prevail on its summary judgment motion, defendant was required to show, *see Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350, that it was an employer of decedent, *i.e.*, that: (1) decedent made a contract for hire with defendant; (2) the work being done at the time of the accident was the work of defendant; and, (3) defendant had the right to control the detail of decedent's work, *see Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876. For purposes of our ruling herein, we assume *arguendo* that the second prong of the special employer test has been met. However, we conclude the record reveals genuine issues of material fact as to the remaining prongs.

Employee is defined in the Act as

> every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . .

N.C.G.S. § 97-2(2) (Supp. 1998). As this Court has previously noted,

> [b]ecause of this statutory requirement that the employment be under an "appointment or contract of hire," . . . the first question which must be answered in determining whether a lent employee has entered into an employment relationship with a special employer for [purposes of the Act] is: Did he make a contract of hire with the special employer? If this question cannot be answered "yes," the investigation is closed . . . .

Collins, 21 N.C. App. at 459, 204 S.E.2d at 876-77. The contract requirement is crucial because

> the employee loses certain rights along with those gained when striking up a new employment relation. Most important of all, he or she loses the right to sue the special employer at common law for negligence; and . . . the courts have usually been vigilant in

1. This treatise has recently been restructured and most sections renumbered. Previous cases of this Court therefore cite to § 48, which has now been renumbered § 67.

> insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.

Larson § 67.01[2].

In the case *sub judice*, defendant makes no argument nor does the record reflect that decedent entered into a written employment contract with defendant. Nonetheless, defendant asserts decedent "expressly accepted . . . employment" by defendant for the quarry demolition job which resulted in decedent's death. Defendant points to evidence that decedent, after being contacted by Pettigrew, sought permission from Mr. Griffin to work at the site and maintains that by coming to the site, decedent "accepted that assignment." These actions standing alone do not conclusively satisfy the contract for employment prong of the special employer test.

Moreover, additional evidence was presented through the deposition testimony of Mr. Griffin, Pettigrew, and decedent's widow tending to show the following:

> (1) Decedent was paid by and insured through Griffin Wrecking, although defendant reimbursed Griffin Wrecking for forty percent of decedent's salary;
>
> (2) Defendant neither paid payroll taxes on behalf of decedent nor claimed him as an employee for insurance purposes;
>
> (3) Decedent represented to third parties that he was an employee of Griffin Wrecking;
>
> (4) Decedent drove a Griffin Wrecking truck and used tools and safety equipment provided by Griffin Wrecking; however, at the demolition site the explosives were provided by defendant;
>
> (5) Mr. Griffin gave decedent his assignments and decedent sought Mr. Griffin's permission to work on jobs with defendant; and,
>
> (6) Griffin Wrecking was the general contractor at the demolition site and defendant a subcontractor, indicating decedent might have been present as a representative of either Griffin Wrecking or defendant.

Most notable among the foregoing is evidence concerning how decedent himself viewed his employment status, because an employment "relationship could not [have] arise[n] without his express or

implied consent." *Collins*, 21 N.C. App. at 460, 204 S.E.2d at 877. Although defendant presented evidence indicating decedent had obtained licenses and permits pertaining to explosives using defendant's name, such evidence is at least counterbalanced by the following exchange during the deposition of decedent's widow:

> Q: At all times that you talked to [decedent], did he tell you and others that he was employed by [Griffin Wrecking]?
>
> . . . .
>
> A: Yes.
>
> Q: Did you talk to [decedent] about who he believed he was employed by?
>
> A: Yes, sir.
>
> Q: What did he tell you?
>
> A: D.H. Griffin Wrecking Company.
>
> . . . .
>
> Q: Did [decedent] in your presence ever tell other people by whom he was employed?
>
> A: Yes, sir.
>
> Q: And what did he say?
>
> A: D.H. Griffin Wrecking Company.
>
> . . . .
>
> Q: Had he ever told you that he was employed by [defendant]?
>
> A: No, sir.

Consideration of all the above evidence in the light most favorable to plaintiff, *Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, raises at a minimum a genuine factual issue as to the first prong of the special employer test, *i.e.*, whether there was an employment contract between defendant and decedent.

The third prong, control of the detail of the work, may be the most significant. *See Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944) ("[t]he vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details"). We therefore

examine the record regarding whether decedent accepted control and direction from defendant.

Taking the evidence presented in the light most favorable to plaintiff, *Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, we note that although Pettigrew, supervisor of the demolition project, directed decedent regarding what needed to be done, no evidence was presented that the latter was told *how* to do the specific tasks assigned, *see Collins*, 21 N.C. App. at 461, 204 S.E.2d at 877-78 (merely telling plaintiff truck driver where to make delivery and furnishing directions did not rise to level of supervision and control necessary to establish employment relationship); *cf. Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 760, 460 S.E.2d 356, 360-61 (decedent accepted assignment from general employer to work with special employer and "performed the work at the direction and under the supervision of" special employer who "controlled the details of decedent's work"; decedent therefore qualified as employee of special employer), *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995).

In his deposition, Pettigrew stated decedent was an explosive demolition expert who was "instructed to complete the final wiring and placement of charges at the quarry floor" and who "was in charge of the bottom charges" while Pettigrew was "in charge of the horizontals." Deposition testimony of Mr. Griffin also tended to show decedent was in charge of part of the demolition:

> Q: Who does the analysis of where to do the cuts [on the structure to be demolished]?
>
> A: On that particular job, I would imagine it would have been [decedent]. It'd either have been [decedent] or [Pettigrew], I really don't know, one of the two would have been in charge.

Mr. Griffin continued by noting that he "thought [decedent] was gonna do it on this one" and that decedent "did, when he was on jobs for [Pettigrew], do it all." Finally, Chris Jones (Jones), a co-worker present at the scene, was asked in his deposition, "did you understand that [Pettigrew] was in charge of bringing the structure down?" Jones responded, "yes, I was—I listened to both, I mean [decedent]—him and—him and [decedent] are more or less equals, I would say."

Testimony of Pettigrew, Mr. Griffin and Jones therefore reflects that decedent, an expert, was "in charge" of at least part of the demolition and not subject to Pettigrew's control over how the bottom

charges were to be wired or other details of his work. Taken in the light most favorable to plaintiff, *Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, such evidence

> hardly amounts to such supervision and control over [decedent's] activities as to justify implying therefrom that [decedent] . . . was thereby consenting to enter into some type of special employment relationship,

Collins, 21 N.C. App. at 461, 204 S.E.2d at 878, with defendant. In short, defendant at best has shown a genuine issue of material fact as to the third prong of the special employer test, defendant's control over the details of decedent's work.

To summarize, given the evidence presented to the trial court by both parties as to whether there existed a contract for hire between defendant and decedent and as to the nature of defendant's right to control the detail of decedent's work, *see id.* at 459, 201 S.E.2d at 876, we conclude defendant failed to meet its summary judgment burden, *see Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350, of showing decedent was a joint employee of defendant and Griffin Wrecking, and thereby failed to establish that plaintiff's claim was barred by the affirmative defense, *see id.*, of the exclusivity provisions of the Act. Accordingly, the trial court's grant of defendant's motion for summary judgment must be reversed.

Reversed.

Judges LEWIS and EDMUNDS concur.

STATE OF NORTH CAROLINA v. DEXTER HARRIS

No. COA98-100

(Filed 15 February 2000)

Evidence— codefendant's statement—no prejudicial error

The trial court did not commit prejudicial error by admitting inculpatory statements of an unavailable codefendant in a prosecution for first-degree murder under the felony murder rule, first-degree kidnapping, conspiracy to commit murder, and robbery with a dangerous weapon, because: (1) the evidence of defend-

ant's participation in the death of the victim, including defendant's own statements to the FBI admitting culpability in the carjacking that led to the victim's murder, was overwhelming even without admission of the codefendant's statement; (2) defendant received the minimum allowable sentence of life imprisonment without parole; and (3) the challenged statement was not introduced during the State's case-in-chief, but on rebuttal, after defendant testified that he knew nothing about the kidnapping or the victim.

On remand by order of the Supreme Court of North Carolina filed 25 June 1999 to reconsider the unanimous decision of the Court of Appeals, *State v. Harris*, 132 N.C. App. 134, 517 S.E.2d 427 (1999) (unpublished table opinion) in light of the decision of the United States Supreme Court in *Lilly v. Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117 (1999). Appeal by defendant from judgment entered 26 February 1997 by Judge Quintin T. Sumner in Nash County Superior Court was originally heard in the Court of Appeals 16 November 1998. Heard on remand 3 January 2000.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

SMITH, Judge.

Defendant was convicted of first-degree murder pursuant to the felony murder rule, first-degree kidnapping, conspiracy to commit murder, and robbery with a dangerous weapon. The trial court sentenced defendant to life imprisonment for murder, 144 to 182 months for kidnapping, and 480 to 585 months for conspiracy. On appeal to this Court, the conviction and sentence were affirmed in an unpublished opinion. The North Carolina Supreme Court allowed discretionary review "for [the] limited purpose of remanding to NC Court of Appeals for reconsideration in light of *Lilly v. Virginia*." On remand to this Court, parties were ordered to file supplemental briefs addressing the *Lilly* issue—that is, whether admission of certain inculpatory statements by an unavailable co-defendant violated defendant's confrontation clause rights. We find no prejudicial error in defendant's conviction.

During defendant's trial for the robbery, kidnapping, and murder of Jodie Plew, defendant testified that, although he stole the car from

the victim, co-defendant Bobby Arrington had committed the kidnapping and murder alone without defendant's knowledge. In rebuttal, the State presented Arrington's confession to FBI agents describing his and defendant's involvement in the crimes. Arrington's statement admitted participation in the crimes, but stated that defendant fired the fatal shot that killed the victim.

After conducting a *voir dire* hearing to determine the admissibility of the statement, the trial court allowed admission of this statement under N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (1999) (statement by co-conspirator in furtherance of conspiracy). On appeal to this Court, we held that because the statement was made after Arrington was taken into custody, it necessarily could not have been made "during the course and in furtherance of the conspiracy." *Id.* However, we found the evidence admissible under N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (1999) (statements against interest), because of the highly inculpatory nature of Arrington's statement to FBI agents and because "[t]he statement gave details of the crime and the location of the body, both of which were substantially corroborated by uncontroverted evidence presented during trial."

Without reaching the issue of whether the statement against interest exception to the hearsay rule is "firmly rooted," we found sufficient indicia of reliability in the statement itself and corroborating evidence presented during the trial to conclude that there had been no violation of defendant's confrontation clause rights. Subsequent to that decision, however, the United States Supreme Court, in *Lilly*, 527 U.S. 116, 144 L. Ed. 2d 117, visited the issue of confrontation clause violations resulting from admission of statements made by unavailable co-defendants.

"In all criminal prosecutions . . . the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, 'to be confronted with the witnesses against him.' " *Id.* at —, 144 L. Ed. 2d at 126 (quoting U.S. Const. amend. VI). However, this right is not unqualified. Rather, when a declarant is unavailable to testify at trial, his or her hearsay statement may only be admitted if it "is sufficiently dependable to allow [its] untested admission . . . against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Id.* at —, 144 L. Ed. 2d at 127 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 497, 608 (1980)).

In *Lilly*, the Virginia Supreme Court upheld a state trial court decision admitting, in their entirety, several tape recordings and written transcripts of a series of statements by the defendant's brother during a police interrogation. In those statements, the defendant's brother admitted being present throughout the crime spree for which both were charged, but insisted that he was drunk at the time and that the defendant was primarily responsible for the assorted crimes and violence. *See Lilly*, 527 U.S. at —, 144 L. Ed. 2d at 124-25. The United States Supreme Court reversed, with a four justice plurality concluding that because this accomplice confession was largely "non-self inculpatory," in that the declarant minimized his own criminal responsibility and shifted blame to the defendant, it was presumptively unreliable. *See id.* at —, 144 L. Ed. 2d at 135-36.

Additionally, the United States Supreme Court, by plurality opinion in *Lilly*, established that "statements against interest" do not fall within a "firmly rooted" hearsay exception. Therefore, to be admissible into evidence, co-conspirator's statements must contain " 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Id.* at —, 144 L. Ed. 2d at 127. Such indicia of reliability must be present in the statement itself and not by reference to other evidence presented at trial. *See id.* at —, 144 L. Ed. 2d at 135.

Pursuant to *Lilly*, co-defendant Arrington's statement to FBI agents is not a "firmly rooted" hearsay exception and thus must bear sufficient indicia of reliability to be admissible against defendant Harris. Even assuming *arguendo* that Arrington's statement failed to meet that standard of reliability, such error is not prejudicial.

Prejudicial error is shown " 'when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]' " *State v. Wiggins*, 334 N.C. 18, 27, 431 S.E.2d 755, 760 (1993) (alteration in original) (quoting N.C. Gen. Stat. § 15A-1443(a) (1988)). Errors affecting a defendant's constitutional rights are presumed to be prejudicial. *See State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578 (1982). Therefore, the defendant will be entitled to a new trial unless the State demonstrates that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967); *Brown*, 306 N.C. 151, 293 S.E.2d 569; *see also* N.C. Gen. Stat. § 15A-1443(b).

In the case at bar, the State has successfully met this burden. Evidence of defendant's participation in the crimes that resulted in

the death of Jodie Plew was overwhelming even without admission of Arrington's statement.

The victim was driving a black Mazda 626 at the time of her disappearance, and the record of the victim's gas card showed usage from North Carolina to Florida following her disappearance. Defendant was taken into custody in Florida after the black Mazda 626 he had been driving was impounded.

Furthermore, a friend of defendant, Merl Wayne Joyner, testified for the State. Joyner stated that on the day of the victim's disappearance, Joyner and his brother met defendant and Arrington at an apartment complex in Raleigh. The four drove to a pawn shop (where defendant pawned a few items), consumed several beers, and returned to Joyner's house in Rocky Mount so that defendant could retrieve his .12 gauge sawed-off shotgun. During the time they were together, defendant informed his companions that he needed to leave Raleigh, as he felt he was about to be charged with carjacking. Defendant and Arrington discussed stealing a car so that they could leave town.

Joyner testified that during the time they were together, they rode through several parking lots, one of them being the Winn-Dixie parking lot (on Sunset Avenue) from which the victim was later abducted. Joyner dropped off defendant and Arrington around 6:30 p.m. at a Holiday Inn in the vicinity of Sunset Avenue. Defendant retrieved the weapon from the trunk of Joyner's car and wrapped it in a towel. Arrington had in his possession a pool stick. Joyner's brother also testified and corroborated Joyner's testimony.

Joyner and his brother positively identified the weapon in the State's possession as belonging to defendant. Joyner testified that at the time defendant retrieved the weapon, there were four shells in the chamber and Joyner gave defendant four more. Seven shells of similar size and type were presented to Joyner, who recognized them as those provided to defendant on the day of the victim's disappearance. Six shells were unspent; one was spent.

David C. Haseman, another friend of defendant, also testified for the State. Defendant regularly kept a duffle bag full of clothes at Haseman's home. On the night of the victim's disappearance, defendant tapped on Haseman's window and told Haseman he needed to retrieve his bag. Haseman testified that when he went to the front of the house to give defendant the bag, he saw a dark-colored Mazda

parked in front of his house. He had never before seen the vehicle, nor had he seen it since that night. Haseman asked Arrington for his pool stick, which Arrington had borrowed from him earlier that day. Defendant returned the pool stick, and defendant and Arrington hurriedly drove away.

Additionally, Jorge M. Rodriguez, an employee for Beach Towing Services in Miami Beach, Florida, testified for the State. Shortly after midnight on 1 April 1995, a black Mazda sedan with North Carolina license plates was towed from a shopping center parking lot. Rodriguez recorded the vehicle identification number and license plate number when the vehicle was towed. The numbers matched those of the victim's vehicle. At around 3:00 or 3:30 a.m., two men arrived at the towing company inquiring about the Mazda. Rodriguez identified defendant as one of the men present that morning.

John Sallie was the security officer on duty at the towing company when the two men came to inquire about the Mazda. He also identified defendant as one of the men. Sallie was called back to the tow lot the next day. Rodriguez opened the trunk of the Mazda, where he had discovered a sawed-off shotgun. Sallie identified the weapon in court. It was the same weapon previously identified as that belonging to defendant.

An FBI agent working in forensics testified regarding the search of the Mazda that was located at the tow facility. Inside the passenger side of the vehicle, he found a green shotgun shell. He also noticed bark on the front turn signal. He found a piece of paper with a name and address written on it (the same name and address of defendant's and Arrington's acquaintance in Florida) and a note addressed to "Dexter." Also within the vehicle was a court document with the name "Dexter Harris" on it, defendant's birth certificate, and several documents signed by defendant. The agent also testified to a grocery receipt found within the vehicle; the grocery store was the Winn-Dixie from which the victim purchased grocery items and listed the same items that the victim had purchased just prior to her abduction.

Another FBI agent, admitted as an expert in fingerprint identification, testified that the print found on the shotgun matched defendant's fingerprint card. Additionally, the State offered in evidence testimony of a conversation between investigators and defendant, in which defendant informed the investigators of the location of the victim's body.

Most important to our analysis here is the testimony of an FBI agent assigned to the case in Florida. The agent testified that defendant, after consulting with his attorney at some length, provided the investigators in Florida with a statement admitting his involvement in the carjacking that led to the murder of the victim. The statement provided specific facts of the events of that day, corroborating much of the testimony already presented by the State. In the statement, defendant admitted forcing the victim into the trunk of the vehicle and driving away from the Winn-Dixie parking lot to a secluded area; both defendant and Arrington exited the car and removed the victim from the trunk. Defendant then claimed to go to the front of the vehicle, leaving Arrington alone with the victim. He heard a shotgun blast and returned to the rear of the vehicle. He then stated that Arrington dragged the victim's body into the woods and covered it with leaves and branches. The two left the area and disposed of the victim's possessions behind a Kroger grocery center. Defendant proceeded to list the items the two disposed of and the items they retained. The agent testifying to this statement indicated that defendant's demeanor during the interview was "very laid back . . . very casual." Accordingly, defendant, in his statement to the FBI, admitted culpability in the very crimes for which the jury found him guilty, including first-degree murder by reason of the felony murder rule.

The evidence of defendant's participation in the crimes was staggering. "Overwhelming evidence of guilt will render even a constitutional error harmless." *State v. Welch*, 316 N.C. 578, 583, 342 S.E.2d 789, 792 (1986) (citations omitted). After conducting a thorough review of the evidence presented in this case and taking into consideration that the jury found defendant guilty of first-degree murder under the felony murder rule as opposed to premeditation and deliberation, we conclude that the jury would have reached the same verdict without admission of Arrington's hearsay statement.

Because admission of the statement did not affect the guilty verdict reached by the jury, the only prejudice defendant could have suffered would have to exist in the sentencing. When a defendant is convicted of first-degree murder under the felony murder rule, the jury may either recommend a life sentence or death. *See* N.C. Gen. Stat. § 14-17 (1999). The only difference between Arrington's statement and defendant's own statement to FBI was the identity of the triggerman. For defendant to have received the death sentence, the State was required to prove either that defendant actually pulled the trigger or that he shared in the triggerman's intent to kill. *See Enmund v.*

Florida, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982) (holding that before a defendant may be sentenced to death, he must have killed or attempted to kill or intended or contemplated that life would be taken). Here, the jury was unable to reach a unanimous verdict regarding sentencing. Accordingly, the trial court was required to impose on defendant the minimum sentence—life imprisonment without parole. *See* N.C. Gen. Stat. § 15A-2000(b) (1999). Because defendant received the minimum allowable sentence for conviction of first-degree murder, he necessarily suffered no prejudice.

We further note that the challenged statement was not introduced during the State's case-in-chief, but on rebuttal, after defendant testified that he knew nothing about the kidnapping of the victim. "Evidence which might not otherwise be admissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself." *State v. Small*, 301 N.C. 407, 436, 272 S.E.2d 128, 145-46 (1980) (citations omitted), *superseded by statute on other grounds as stated in State v. Holmes*, 120 N.C. App. 54, 64, 460 S.E.2d 915, 921-22 (1995).

No prejudicial error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

DEBORAH LYNN OLLO, PLAINTIFF v. KENNETH MILLS, DEFENDANT

No. COA99-65

(Filed 15 February 2000)

1. Costs— attorney fees—abuse of discretion standard

Although plaintiff requested $37,364.88 to cover her attorney fees and costs in a case involving violation of the Electronics Communications Privacy Act under 18 U.S.C. § 2520, the trial court did not abuse its discretion in awarding $1,000 in attorney fees and $140.00 in costs because: (1) the pertinent statute does not require an award of attorney fees or litigation costs, but instead leaves an award to the discretion of the trial court; and (2) plaintiff's failure to provide necessary information to the trial court meant it lacked the ability to trace her expenses to the successful claim against defendant Mills.

2. Costs— attorney fees—motion to vacate or amend order—specificity required

The trial court did not abuse its discretion when it denied plaintiff's motion to vacate or amend the trial court's order awarding nominal attorney fees and costs in a case involving violation of the Electronics Communications Privacy Act under 18 U.S.C. § 2520 because: (1) plaintiff did not allege with any specificity the grounds upon which her motion should be granted; (2) Rules 59 and 60 reveal no grounds upon which plaintiff would have succeeded even if her motion had been more specific; and (3) the fact that plaintiff is unhappy with her award is not an adequate reason to justify awarding her a larger sum.

3. Costs— attorney fees—motion to vacate or amend order—no hearing required

The trial court did not abuse its discretion by denying plaintiff's motion to vacate or amend the trial court's order awarding attorney fees and costs without notice and hearing in a case involving violation of the Electronics Communications Privacy Act under 18 U.S.C. § 2520 because contrary to plaintiff's assertions, a hearing on this motion was not the only opportunity for plaintiff to present the evidence from her former attorney regarding his fees and costs.

Appeal by plaintiff from order entered 7 November 1997 by Judge Judson D. DeRamus, Jr. in Superior Court, Cabarrus County. Heard in the Court of Appeals 3 January 2000.

Deborah Lynn Ollo, plaintiff-appellant, pro se.

No brief for the defendant.

WYNN, Judge.

Since the defendant in this matter chose to neither file a brief nor partake in the settlement of the record, we must rely on the facts supplied to us by the plaintiff. Those facts show that the plaintiff, Deborah Lynn Ollo, and the defendant, Kenneth Mills, were once wife and husband. While their divorce was pending, Mr. Mills and some of his friends intercepted and recorded some of Ms. Ollo's phone calls. Mr. Mills played one of these conversations first during a divorce hearing, then a few days later at a press conference.

On 25 October 1995, Ms. Ollo brought an action against Mr. Mills, Renee Robinson and Jeanette Robinson in the Superior Court of Cabarrus County alleging violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq. (1993), racketeering activity, intentional infliction of emotional distress, invasion of privacy, and civil conspiracy. She also asserted the claim of wiretapping violations against the *Concord Tribune* and two of its writers who wrote an article about Mr. Mills' press conference. Ms. Ollo was originally represented by counsel who assisted her through all preliminary motions, discovery, and mediation; however, her counsel was allowed to withdraw before the trial court entered its order for partial summary judgment. From that point on, Ms. Ollo proceeded without counsel.

The trial court granted summary judgment in favor of Mr. Mills, Renee Robinson and Jeanette Robinson as to Ms. Ollo's claims of racketeering, invasion of privacy, and civil conspiracy. The trial court found that Mr. Mills had engaged in the illegal interception of a March 1994 phone call and imposed a statutory damage award of $20,000. The issue of punitive damages was left for a jury to determine. Further, the trial court found that a genuine issue of material fact existed as to whether Mr. Mills intercepted phone calls in January and May 1995, and left this question for a jury. The trial court found Renee and Jeanette Robinson guilty of intercepting a September 1995 phone call, but awarded no statutory damages, leaving the question of punitive damages for a jury. Mr. Mills was ordered to pay an extra $10,000 for the September 1995 phone call, and the question of punitive damages was left to a jury. Finally, the court granted summary judgment in favor of Jeanette Robinson on the issue of intentional infliction of emotional distress, but found that a genuine issue of fact remained as to Renee Robinson and Mr. Mills.

Before the trial in which a jury would have determined Ms. Ollo's actual damages against the three defendants, she settled her claims against Jeanette and Renee Robinson, dismissed her action against them, and proceeded with a jury trial against Mr. Mills only. The jury awarded Ms. Ollo damages for the January and May 1995 interceptions, punitive damages for the interceptions, and costs including attorney's fees. The amount of fees and costs was to be determined at a later hearing.

Ms. Ollo filed a motion and affidavit in which she requested $37,364.88 to cover her attorney's fees and costs. Superior Court

Judge Judson D. DeRamus, Jr. awarded Ms. Ollo $1,000.00 in attorney fees and $140.00 in costs. Ms. Ollo then filed a motion to vacate or amend the order. Without notice or hearing, Judge DeRamus denied her motion. She appealed these orders.

[1] On appeal, Ms. Ollo argues that the trial court committed reversible error when it awarded only nominal attorney's fees and costs and excluded any litigation costs. We disagree.

18 U.S.C. § 2520 (1993) reads

> (a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.
>
> (b) Relief.—In an action under this section, appropriate relief includes—(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c) and punitive damages in appropriate cases; and (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

This statute allows a person to recover attorney's fees and other litigation costs associated with successfully pursuing a wiretap claim. However, the question as to whether fees and costs are mandatory is a question of first impression in North Carolina. Since we have no case law of our own State or the United States Supreme Court to guide us, we turn to the plain language of the statute and the persuasive authority of the Federal Circuit Courts.

Subsection 2520(a) provides that the victim of a violation of the Electronic Communications Privacy Act *may* recover from the person or entity which engaged in that violation such relief as may be appropriate. Subsection 2520(b)(3) allows the recovery of attorney's fees and other litigation costs reasonably incurred. The plain language of § 2520 provides that a successful party *may* collect attorney's fees and litigation costs—it does not *require* such an award. We conclude that since the statute does not *require* an award of attorney's fees or litigation costs, such an award is within the discretion of the trial court. Accordingly, we will overturn a trial court's award only upon a showing of an abuse of discretion.

We are supported in setting this standard of review by the holdings of the limited number of federal cases which have reviewed the

application of § 2520(b)(3). In *Culbertson v. Culbertson*, 143 F.3d 825 (4th Cir. 1998), the United States Court of Appeals for the Fourth Circuit reviewed a case involving 18 U.S.C. § 2520. Although that case dealt with a subsection of § 2520 not presently before us, the Court also set forth the standard of review for awards under § 2520(b)(3). The Court held that orders for attorney's fees and costs under § 2520(b)(3) were subject to an abuse of discretion standard of review. *See id.* at 827.

Two other United States Circuit Courts have addressed the issue of whether § 2520(b)(3) makes attorney's fees and costs mandatory, or whether such an award is within the discretion of the trial court. The United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Eighth Circuit have both held that the award of fees and costs is within the sound discretion of the trial court, and an award will not be altered absent a showing of an abuse of discretion. *See Dorris v. Absher*, 179 F.3d 420 (6th Cir. 1999); *Bess v. Bess*, 929 F.2d 1332 (8th Cir. 1991); *Morford v. City of Omaha*, 98 F.3d 398 (8th Cir. 1996). *See also Shaver v. Shaver*, 799 F. Supp. 576 (E.D.N.C. 1992) (holding that the trial court has discretion whether to award costs and attorney's fees for violations of 18 U.S.C. § 2520(b)(3)).

Finally, we have reviewed the case law in North Carolina pertaining to other awards of attorney's fees and litigation costs. All such awards are within the discretion of the trial court and are reviewed under the abuse of discretion standard. Although none of these cases are controlling on our interpretation of 18 U.S.C. § 2520, we are convinced that our review of the attorney's fees and litigation costs in the case before us should follow the same standard of review. *See, e.g., Graham v. Rogers*, 121 N.C. App. 460, 466 S.E.2d 290 (1996); *Burnett v. Wheeler*, 515 S.E.2d 480 (N.C. App. 1999); *Ruggery v. N.C. Dep't of Corrections*, 520 S.E.2d 77 (N.C. App. 1999).

We now turn our attention to Ms. Ollo's claim that the trial court committed reversible error when it awarded only nominal attorney's fees and costs and excluded any litigation costs. As we have already pointed out, awards of attorney's fees and litigation costs are not required by 18 U.S.C. § 2520(b)(3); rather, they *may* be awarded at the discretion of the trial court. We therefore review the trial court's award under the abuse of discretion standard.

Ms. Ollo originally presented the trial judge with a general list of attorney's fees and other costs, along with an affidavit that said the

information was correct. At the hearing on her motion for costs, Ms. Ollo supplemented this information with an itemized list of costs and financial records. Ms. Ollo requested a total award of $37,624.88 to cover attorney's fees and other costs of litigation.

The trial court made a number of findings. Among these were: 1) Ms. Ollo failed to appropriately relate the attorney's fees to her successful claim against Mr. Mills, as opposed to her claims against the previously dismissed defendants and unsuccessful claims against Mr. Mills; 2) Ms. Ollo failed to demonstrate the reasonableness of the attorney's fees; 3) Ms. Ollo did not apply for witness fees under N.C. Gen. Stat. § 7A-314 (1995) and the requested fees were unsubstantiated; and 4) Ms. Ollo's remaining claims for costs were inadequately substantiated, inadequately related to her successful claims, or not routinely allowed as costs in civil superior court cases. The trial court awarded Ms. Ollo $1,000.00 in attorney's fees and $140.00 in costs against Mr. Mills.

Our review of the trial court's award is limited to the determination of whether the record demonstrates a manifest abuse of discretion by the judge. *See Leftwich v. Gaines*, 521 S.E.2d 717 (N.C. App. 1999). The trial court's discretion is practically unlimited. *See id.* The record in this case, even considering Ms. Ollo's amended affidavit and bill of costs, is indeed lacking the information necessary for the trial judge to accurately allocate expenses. For instance, although she provided a detailed list of the amount of work each attorney put into her case, she did not specify what portions of that work led to the successful claim against Mr. Mills. Furthermore, Ms. Ollo's counsel had withdrawn from her case at least one year before her success against Mr. Mills, adding further confusion about which attorney's fees should be applied to her claim.

Ms. Ollo's amended affidavit also included receipts and a breakdown of costs and fees; but again, Ms. Ollo did not trace which of these costs were incurred in her successful claim against Mr. Mills, as opposed to her other claims. Since Ms. Ollo failed to provide this information to the trial judge, he lacked the ability to trace her expenses to the successful claim against Mr. Mills. We therefore find no abuse of discretion in the trial judge's decision to deny Ms. Ollo's request for the full $37,624.88 in fees and costs. His award of $1,140.00 recognized that at least *some* of her expenses were probably incurred in her claim against Mr. Mills, but being unable to determine which expenses were directly related to Ms. Ollo's claim, the trial judge did not err in awarding only this nominal amount.

[2] Ms. Ollo next argues that the trial court abused its discretion when it denied her motion to vacate or amend the order. We disagree.

We first note that in her motion to vacate or amend the order, Ms. Ollo was, at best, very vague as to why her motion should be granted. She argued as a general matter that N.C.R. Civ. P. 59 allowed amendments to an order, and that N.C.R. Civ. P. 60 allowed relief from orders predicated on a mistake, inadvertence, excusable neglect, or "any other reason" justifying relief. Ms. Ollo did not allege with any specificity how the facts of her case entitled her to relief.

Our review of a trial court's denial of a Rule 59 motion is limited to a determination of whether the trial judge abused his discretion. *See In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999). Our review of a denial of a Rule 60 motion is also subject to the abuse of discretion standard of review. *See Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E.2d 862 (1977). Therefore, our review of Judge DeRamus' denial of Ms. Ollo's motion is limited to whether the record demonstrates a manifest abuse of discretion. *See Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982).

We hold that the trial court did not abuse its discretion when it denied Ms. Ollo's motion to vacate or amend the order. First, she did not allege with any specificity the grounds upon which her motion should have been granted. Second, Rules 59 and 60 reveal no grounds upon which Ms. Ollo would have succeeded even if her motion had been more specific.

Under Rule 59, only one possible ground for an amendment to the order presents itself. N.C.R. Civ. P. 59(a)(6) allows for an amended order when a court awards "inadequate damages appearing to have been given under the influence of passion or prejudice." We have already examined how Judge DeRamus reached his figure; he did not have enough information to trace all of Ms. Ollo's expenses to her successful claim against Mr. Mills. His decision was not the product of passion or prejudice.

Rule 60 generally allows relief from an order that is inaccurate due to some sort of mistake; usually a clerical error or a mistake arising from fraud or newly discovered evidence, etc. Rule 60(b)(6) also allows relief from an order for "Any other reason justifying relief . . . ." This Rule is equitable in nature and allows us to set aside or modify an order whenever such action is necessary to do justice. *See Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987).

Ms. Ollo asserts on appeal that a miscarriage of justice would result if we denied her recovery of the claimed attorney's fees and litigation costs. However, the fact that Ms. Ollo is unhappy with her award is not an adequate reason to justify awarding her a larger sum, particularly in light of the fact that the trial judge reached his decision based on the information that *she* provided. In addition, we have no more information upon which we could base a new award.

[3] Ms. Ollo finally argues that the trial court committed prejudicial error when it denied her motion to vacate or amend without notice and hearing. We disagree.

Our review of the trial court's decision to enter an order on Ms. Ollo's motion under Rules 59 and 60 without notice or a hearing is limited to whether the trial judge abused his discretion. *See Will of Buck, supra*; *Hickory White Trucks, supra*.

Ms. Ollo argues that the trial court should have given her notice and allowed a hearing because that would have been her only opportunity to subpoena her former attorney to testify in support of her motion for fees and costs. However, Ms. Ollo had other opportunities to subpoena her former attorney, either by compelling an affidavit in support of her motion for fees and costs, or by subpoenaing him to appear at her hearing on the motion for fees and costs. Although Ms. Ollo asserts several times that she was unable to compel her former attorney to provide her with an affidavit regarding his fees, she offers no explanation as to why she was unable to do so, nor does she provide proof that she attempted to so compel him. In view of her lack of evidence regarding her failure to make her attorney supply either an affidavit or testimony, we are unpersuaded that a hearing on her motion to vacate or amend the award was her only opportunity to present this evidence. The trial judge did not abuse his discretion by denying Ms. Ollo's motion to vacate or amend the award without notice or a hearing.

The decision whether to award attorney's fees and litigation costs is within the sound discretion of the trial court. Absent a showing that a trial judge abused his discretion, we will not disturb his decision on appeal. In the case at bar, the trial judge did not err by not awarding all of the fees and costs requested by Ms. Ollo. He did not err by not granting Ms. Ollo's motion to amend or vacate the order, nor did he err by making this decision without a hearing on the matter. The trial court's award of attorney's fees and other costs is,

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

PARKERSMITH PROPERTIES, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF V. HERMAN C. JOHNSON, PEGGY JANELL JOHNSON, AND SAMUEL GWYNN, DEFENDANTS

No. COA99-407

(Filed 15 February 2000)

1. Pleadings— additional theory—failure to plead or amend complaint

The trial court did not err by granting defendant-Johnsons' motion for summary judgment in a claim for interference with contractual relations based on the issue of whether the installment contract was an equitable mortgage because: (1) plaintiff's complaint does not allege equitable mortgage as a possible claim against defendants and does not allege any facts that would put defendants on notice as required by N.C.G.S. § 1A-1, Rule 8(a); (2) plaintiff did not amend its complaint at any time to allege this additional theory of recovery to put defendants on notice as required by N.C.G.S. § 1A-1, Rule 8(c); and (3) plaintiff cannot assert an additional theory of recovery for the first time on appeal.

2. Contracts— assignment of rights—withholding consent—reasonableness not required

Defendant-Johnsons' withdrawal or withholding of their consent to defendant-Gwynn's assignment of his rights under an installment contract to plaintiff is not unreasonable and does not violate public policy because: (1) there is no evidence that defendants gave written consent to this assignment as required by the express terms of the contract; and (2) there is no authority in North Carolina that a party may not withhold its consent to an assignment under a valid non-assignment clause unless the party's withholding of consent is reasonable.

3. Estoppel— quasi—no evidence of actual benefits

Defendant-Johnsons are not estopped from denying the validity of Gwynn's assignment of rights under the installment con-

tract to plaintiff based on quasi-estoppel because the record does not contain any evidence defendants actually received any benefits as a result of the assignment.

4. Estoppel— equitable—put on inquiry as to truth

Since plaintiff had a copy of the installment contract which required written consent by defendant-Johnsons before it could be assigned and plaintiff knew written consent was not given, defendants are not equitably estopped from denying the validity of Gwynn's assignment of rights under the installment contract to plaintiff because a party cannot rely on equitable estoppel if it was put on inquiry as to the truth and had available the means for ascertaining it.

Appeal by plaintiff from order filed 9 February 1999 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 11 January 2000.

Donna Ambler Davis, P.C., by Donna Ambler Davis, for plaintiff-appellant.

Grady Joseph Wheeler, Jr. for defendant-appellees.

GREENE, Judge.

PARKERSMITH PROPERTIES (Plaintiff), a partnership, appeals an order filed 9 February 1999 in favor of Herman C. Johnson (Johnson) and Peggy Janell Johnson (collectively, Defendants) granting Defendants' motion for summary judgment.

The evidence shows that prior to 31 March 1995, Samuel Gwynn (Gwynn) deeded property located in Burlington, North Carolina (the property) to Defendants. Then, on 31 March 1995, Gwynn and Defendants entered into a real estate installment sales contract (installment contract) in which Gwynn agreed to make payments to Defendants in the amount of approximately $252,939.13 plus 10% interest to repurchase the property. The installment contract stated Defendants would, upon receipt of the full purchase price, "execute and deliver to [Gwynn] a general warranty deed for [the property]." The installment contract also stated, in pertinent part: "It is specifically understood, contracted and agreed that this [installment contract] shall not be assigned by [Gwynn], nor shall [Gwynn] convey or attempt to convey the subject real property or any rights hereunder, without the prior written approval of [Defendants]."

On 30 October 1997, Gwynn and Plaintiff entered into a contract (the assignment) whereby Gwynn assigned his rights under the installment contract to Plaintiff; however, Defendants did not provide written consent to the assignment. Plaintiff then attempted to purchase the property by tendering to Defendants the total amount of funds due under the installment contract, and Defendants refused to accept the tender.

On 14 January 1998, Plaintiff filed suit against Gwynn and Defendants, asserting a claim for breach of contract against Gwynn and a claim for interference with contractual relations against Defendants. Plaintiff subsequently voluntarily dismissed its claim against Gwynn. Plaintiff's claim against Defendants stated, in pertinent part:

> 11. . . . Plaintiff avers that the [assignment] that exists between . . . Plaintiff and . . . Gwynn is a valid contract.
>
> 12. . . . Defendants . . . had knowledge of . . . Plaintiff's [assignment] with . . . Gwynn.
>
> 13. . . . Defendants . . . became aware of the [assignment] in or about October, 1997. Said Defendants intentionally interfered with the [assignment] between . . . Plaintiff and . . . Gwynn with the goal of inducing . . . Gwynn not to perform his part of the contract with . . . Plaintiff. In doing so, . . . Defendants . . . acted without justification.

In their answer, Defendants denied having knowledge of the assignment. Defendants further stated Gwynn entered into the assignment without "discussion with or approval of . . . Defendants."

On 12 January 1995, Defendants filed a motion for summary judgment and an affidavit in support of that motion. In the affidavit, Johnson made the following pertinent statements:

> 8. [A partner of Plaintiff] without the knowledge of the undersigned Defendant obtained the signature of . . . Gwynn on a purported assignment of Gwynn's rights pursuant to the terms of the agreement to repurchase the land. . . .
>
> . . . .
>
> 11. The undersigned Defendant never executed any written approval or consent for assignment of the agreement as none is alleged in the complaint and the Defendant did not by his

words or actions consent to such an agreement and such is not alleged in the complaint.

. . . .

13. Without the consent of the undersigned, . . . Plaintiff[] proceeded toward a purported closing of the sale of the real property based on a value which did not include all of the acquisition costs of the undersigned and no value attributed to the land. There never was a meeting of the minds as to anything related to the purported sales price. . . .

14. The undersigned did not agree as to the tendered price, and did not consent to the assignment of the rights of Gwynn under the contract which prohibited assignment without the approval of [Defendants].

Timothy Parker (Parker), a general partner of Plaintiff, filed an affidavit in opposition to Defendants' motion for summary judgment, which stated in pertinent part:

6. . . . Johnson knew in advance that . . . Gwynn was going to sign [the assignment] with my partnership. I specifically discussed this with . . . Johnson.

. . . .

9. At all times . . . Johnson did by his words, actions and conduct consent to the [assignment] signed by . . . Gwynn with my partnership and I further **AFFIRMATIVELY ASSERT** that . . . Johnson should be estopped from attempting to assert any differently under both the theory of estoppel based on acceptance of benefits and upon the general principles of equitable estoppel.

10. It is true that my partners and I attempted to close on the sale of the purchase of [the property] pursuant to the terms of the [assignment] and attempted to tender to [Defendants] and . . . Gwynn all monies due and owing to them thereunder. There was clearly a meeting of the minds as to the sales price as set forth under the [assignment], which ensured that [Defendants] received all funds due and owing to them pursuant to the [installment contract] between [Defendants] and . . . Gwynn.

11. . . . Gwynn made it clear to the undersigned that the only reason for the deed he signed to [Defendants] was so that they would invest money in his trailer park and absolve him of the

> financial troubles that were surrounding him at the time he entered into the [installment contract] with [Defendants] . . . . There clearly was a debtor/creditor relationship between . . . Gwynn and [Defendants] and the [installment contract] makes it clear that the deed was security for the debt from . . . Gwynn to [Defendants] and that, in fact, the deed was more indicative of a mortgage. . . . Gwynn remained in possession of the [property] after the conveyance of the deed to [Defendants] and he was clearly under the pressure of need (being hard pressed for money) at the time of the execution of the deed. As such, the undersigned **AFFIRMATIVELY ASSERTS** that the undersigned and his partners are entitled to recover in this action under the theory of equitable redemption.

The issues are whether: (I) Plaintiff's pleadings provided Defendants with notice, pursuant to Rule 8(a) of the North Carolina Rules of Civil Procedure, of Plaintiff's equitable mortgage claim; (II) Defendants' withdrawal or withholding of their written consent to the assignment of the installment contract was unreasonable and, therefore, void as against public policy; and (III) Defendants are estopped from denying the validity of the assignment when Defendants were aware of the assignment and did not state any objection to it.

I

[1] Plaintiff argues Defendants were not entitled to summary judgment because a genuine issue of material fact exists regarding whether the installment contract was an equitable mortgage. We disagree.

The North Carolina Rules of Civil Procedure require a pleading setting forth a claim for relief to include "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." N.C.G.S. § 1A-1, Rule 8(a) (1999). Under this " 'notice theory' " of pleading, a pleading must give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and . . . to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970).

In this case, Plaintiff's complaint alleges a cause of action against Defendants for interference with contractual relations based on

Defendants' alleged interference with Plaintiff's assignment to Gwynn. Plaintiff's complaint does not allege equitable mortgage as a possible claim against Defendants, and does not allege any facts that would put Defendants on notice of an equitable mortgage claim. Moreover, Plaintiff did not amend its complaint at any time to allege this additional theory of recovery.[1] Plaintiff's pleadings, therefore, do not provide Defendants with notice pursuant to Rule 8(c) of Plaintiff's equitable mortgage claim, and this claim was consequently not properly before the trial court. Because a plaintiff cannot assert an additional theory of recovery for the first time on appeal, *Gilbert v. Thomas*, 64 N.C. App. 582, 586, 307 S.E.2d 853, 856 (1983), we do not address Plaintiff's equitable mortgage claim.

II

[2] Plaintiff argues Defendants' withdrawal or, in the alternative, withholding of their consent to Gwynn's assignment to Plaintiff is unreasonable and, therefore, void as against public policy. We disagree.

Generally, contracts are freely assignable unless prohibited by statute, public policy, or the terms of the contract. *Kraft Foodservice, v. Hardee*, 340 N.C. 344, 348, 457 S.E.2d 596, 598 (1995).

In this case, Gwynn and Defendants entered into an installment land contract for purchase of the property, and the express terms of the contract stated it was not assignable by Gwynn absent written consent by Defendants. Plaintiff has not alleged Defendants provided Plaintiff or Gwynn with any written consent, and there is no evidence in the record that Defendants gave written consent to the assignment. Because there is no evidence Defendants gave written consent, Defendants could not have withdrawn their consent as Plaintiff contends.

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1. Plaintiff submitted to the trial court Parker's affidavit, which stated "the undersigned and his partners are entitled to recover in this action under the theory of equitable redemption." Plaintiff then argued in its brief to this Court that equitable redemption applies to this case under the theory of equitable mortgage. A plaintiff may not, however, assert an additional claim against a defendant by submitting an affidavit in opposition to summary judgment which raises an additional theory of recovery. *Cf. Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E.2d 856, 857-58 (1980) ("[u]npled *affirmative defenses* may be heard for the first time on motion for summary judgment even though not asserted in the answer at least where both parties are aware of the defense") (emphasis added), *rev'd in part on other grounds*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Plaintiff argues in the alternative that Defendants' withholding of their consent violated public policy and is, therefore, void.

Assignments are governed by the general principles of contract law, *see Gillespie v. DeWitt*, 53 N.C. App. 252, 262, 280 S.E.2d 736, 743, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 832 (1981), and "provisions in bilateral contracts that forbid or restrict assignment of the contract without the consent of the obligor are generally valid and enforceable," 6 Am. Jur. 2d *Assignments* § 21 (1999). We find no authority in North Carolina for Plaintiff's argument that a party may not withhold its consent to an assignment under a valid non-assignment clause unless the party's withholding of consent is reasonable.[2] Defendants' withholding of their consent to the assignment, therefore, was not void as against public policy.

III

Plaintiff argues Defendants should be estopped from denying the validity of the assignment based either on quasi-estoppel or equitable estoppel.[3] We disagree.

[3] Quasi-estoppel is based on a party's acceptance of the benefits of a transaction, and provides " '[w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.' " *Carolina Medicorp v. Bd. of Trustees of the State Medical Plan*, 118 N.C. App. 485, 492, 456 S.E.2d 116, 120 (1995) (citation omitted).

In this case, Plaintiff claims in its brief to this Court Defendant received a "monetary and psychological benefit" from Gwynn's

2. Plaintiff cites in support of this argument *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980), in which the North Carolina Supreme Court held preemptive rights may be upheld if they are reasonable and do not impose an impermissible restraint on alienation. The installment contract in this case, however, did not contain a preemptive rights provision; rather, the installment contract contained a non-assignment clause. The rule of *Smith*, therefore, is not applicable to this case.

3. Defendants argue Plaintiff cannot raise the issue of estoppel on appeal because Plaintiff did not allege a theory of estoppel in its complaint. Plaintiff did, however, assert a theory of estoppel in its motion in opposition to summary judgment. Because estoppel is an affirmative defense and Defendants had notice of the defense prior to the summary judgment hearing, Plaintiff properly raised the theory of estoppel and the issue is, therefore, properly before this Court. *See Dickens*, 45 N.C. App. at 696, 263 S.E.2d at 857-58 ("[u]npled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the [pleadings] at least where both parties are aware of the defense").

assignment to Plaintiff because the assignment "relieved [Defendants] of their need to find another buyer." The record, however, does not contain any evidence Defendants actually received any benefits as a result of the assignment. There is no evidence Defendants were in need of finding a buyer at the time Gwynn and Plaintiff entered into the assignment, and Defendants never accepted any funds from Plaintiff under the assignment. Because there is no evidence in the record Defendants received a benefit based on Gwynn's assignment to Plaintiff, Defendants are not estopped based on a theory of quasi-estoppel from denying the validity of the assignment.

[4] Plaintiff also argues Defendants are equitably estopped from denying the validity of the assignment because Defendants were aware Plaintiff and Gwynn were negotiating an assignment of the installment contract and Defendants did not state any objection to the assignment.

A party invoking the doctrine of equitable estoppel has the burden of proving the following elements:

> "(1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon[;]
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped;
>
> (6) Action based thereon of such a character as to change his position prejudicially."

State Farm Mut. Auto. Ins. Co. v. Atlantic Indemnity Co., 122 N.C. App. 67, 75, 468 S.E.2d 570, 574-75 (1996) (citations omitted). A party cannot rely on equitable estoppel if it "was put on inquiry as to the truth and had available the means for ascertaining it." *Hawkins v. Finance Corp.*, 238 N.C. 174, 179, 77 S.E.2d 669, 673 (1953) (citation omitted).

In this case, Plaintiff had a copy of the installment contract, which required written consent by Defendants before it could be assigned. Although Plaintiff alleges Parker specifically discussed the assignment with Johnson and Johnson did not state any objection, Plaintiff was on notice that written consent was required and knew Defendants had not given written consent. Plaintiff, therefore, did not have a "[l]ack of knowledge of the truth as to the facts in question," *State Farm Mut. Auto. Ins. Co.*, 122 N.C. at 75, 468 S.E.2d at 574, and Defendants are consequently not equitably estopped from denying the validity of the assignment.

Affirmed.

Judges LEWIS and EDMUNDS concur.

STATE OF NORTH CAROLINA v. JOHN PHILLIP FORD

No. COA99-53

(Filed 15 February 2000)

1. Criminal Law— prosecutorial vindictiveness—additional charge

The trial court did not err in denying defendant's motion to dismiss a charge of first-degree sexual offense based on prosecutorial vindictiveness when defendant was initially charged with taking indecent liberties with a child before plea negotiations broke down because the decision to charge defendant with first-degree sexual offense was made before trial and defendant's assertions, without more, do not establish a showing of prosecutorial vindictiveness.

2. Witnesses— child—competency

The trial court did not abuse its discretion in a first-degree sexual offense and taking indecent liberties with a child case by

finding the four-year-old female victim competent to testify, even though she did not know what it meant to put her hand on the Bible and swear to tell the truth, because voir dire examination revealed that she knew what it meant to tell the truth since she stated, among other things, that she would get a spanking if she did not tell the truth. N.C.G.S. § 8C-1, Rule 601.

3. Evidence— hearsay—corroboration—excited utterance

The trial court did not commit plain error in a first-degree sexual offense and taking indecent liberties with a child case by admitting the testimony of the minor victim's mother, relating what the minor victim said about the attack when the child was picked up from day care, because: (1) even though the State did not specify the purpose for which the testimony was offered and defendant did not object or request a limiting instruction, the trial court informed the jury during its final instruction that the evidence of any out-of-court statement was to be received for corroborative purposes only, and this testimony did tend to corroborate the victim's in-court testimony; and (2) this testimony could have qualified as substantive evidence under the excited utterance exception of N.C.G.S. § 8C-1, Rule 803(2).

4. Sexual Offenses— first-degree sexual offense—indecent liberties—sufficiency of evidence

The trial court did not err in a first-degree sexual offense and taking indecent liberties with a child case by denying defendant's motion to dismiss because viewed in the light most favorable to the State, the evidence reveals: (1) the victim's testimony that defendant sexually attacked her was corroborated by the victim's mother, the social worker, and the detective; and (2) a witness testified she left the victim alone in defendant's care.

Appeal by defendant from judgment entered 30 July 1998 by Judge Thomas W. Ross in Forsyth County Superior Court. Heard in the Court of Appeals 26 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little, for the State.

Urs R. Gsteiger for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first degree sexual offense and taking indecent liberties with a child. He was sentenced to a minimum of 360 months and a maximum of 441 months in prison.

The State's evidence tended to show the following: On 6 January 1997, the child (A.C.) was at the home of Emma Williams. For several years, Williams provided day care for A.C. while A.C.'s mother was at work. On this day, Williams was also looking after her great-grandson, J.P., and great-granddaughter, J.F. Defendant is the father of J.P. and J.F. A.C. was four years old at the time of the incident. Williams went to a bank with the defendant's wife and left defendant to watch the children while she was gone. Defendant took A.C. into the bathroom and sexually attacked her. The victim's mother picked her up at the end of the day and asked her about her day. The victim initially stated she did not want to talk about her day, but she eventually told her mother that she had choked that day because "J.P.'s dad" put "his pee thing" in her mouth. The next day, the victim repeated the same story to hospital personnel and to the detective investigating the matter.

After a *voir dire* examination, the trial court found A.C. competent to testify. A.C. testified that "J.P.'s dad" had put "his pee thing" in her mouth, which choked her. A.C.'s mother testified and corroborated what A.C. had told her about the attack. The social worker, who conducted an interview with A.C. at the hospital, testified that A.C. told her that the defendant "put his pee-pee in her mouth until she choked and coughed on his pee-pee and then he offered her candy." The investigating detective testified that A.C. made similar statements to him regarding the attack.

Defendant testified that, on this occasion, he went to the bathroom and that A.C. and his daughter entered the bathroom while he was there. Defendant denied ever touching A.C. The trial court denied defendant's motion to dismiss the charges.

[1] Prior to trial, defendant moved to dismiss the charge of first degree sexual offense on the basis of prosecutorial vindictiveness, which was denied by the trial court. Defendant contends the trial court's denial of his motion was error. Defendant was initially charged with taking indecent liberties with a child. When plea negotiations broke down, defendant was additionally indicted for first degree sexual offense. In denying defendant's motion, the trial court

relied on *Bordenkircher v. Hayes*, 434 U.S. 357, 54 L. Ed. 2d 604 (1978), and *United States v. Goodwin*, 457 U.S. 368, 73 L. Ed. 2d 74 (1982).

In *Goodwin*, the defendant was initially charged with several misdemeanors and petty offenses under federal law. The defendant entered plea negotiations regarding these charges but later refused to plead guilty to the charges and requested a jury trial. *Id.* at 371, 73 L. Ed. 2d at 79. Approximately six weeks later, the prosecutor sought and received an indictment including one felony count arising out of the same facts which constituted the lesser offenses. *Id.* The jury convicted the defendant on the felony count and the defendant moved to set aside the verdict based on prosecutorial vindictiveness. *Id.* In declining to apply a presumption of vindictiveness or make a finding of it, the Court recognized that:

> 'additional' charges obtained by a prosecutor could not necessarily be characterized as an impermissible 'penalty.' Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a 'benefit' to the defendant—changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.' An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forego legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.

457 U.S. at 379-80, 73 L. Ed. 2d at 84 (*citing Bordenkircher v. Hayes*, 434 U.S. 357, 54 L. Ed. 2d 604 (1978) (footnotes omitted). Also, the Court stated that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pre-trial decision." *Id.* at 381, 73 L. Ed. 2d at 85.

Here, the decision to charge defendant with first degree sexual offense was made before trial on the present charge. Defendant argues that since the State's indictment for first degree sexual offense was added only after plea negotiations broke down, a showing of vindictiveness was made. The State contends that the elements of first degree sexual offense have always been present and denies the fail-

ure to negotiate a plea played a part in the State seeking the indictment for first degree sexual offense.

"To presume that every case is complete at the time an initial charge is filed [. . .] is to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources." *State v. Rogers*, 68 N.C. App. 358, 383, 315 S.E.2d 492, 509, *cert. denied*, 311 N.C. 767, 319 S.E.2d 284 (1984) (*quoting Goodwin*, 457 U.S. at 382, n. 14, 73 L. Ed. 2d at 86). Additionally, it must be remembered that nothing else appearing, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." *Id.* Finding *Goodwin* controlling, defendant's assertions, without more, do not establish a showing of prosecutorial vindictiveness.

[2] Defendant next contends the trial court erred in finding A.C. competent to testify, arguing that she did not know what it meant to put her hand on the Bible and swear to tell the truth. The *voir dire* examination of A.C. produced, in part, the following:

> Q: Okay. And do you know what a lie is, [A.C.]?
>
> A: If you don't tell the truth, you'll go to jail.
>
> Q: And what happens if you don't tell the truth to your mommy?
>
> A: I get a whipping.
>
> . . .
>
> Q: [A.C.], do you promise to tell the truth today about what happened between you and [the defendant]?
>
> A: Yes.
>
> . . .
>
> Q: Do you know what it means when you put your hand on the Bible?
>
> A: No.

At the conclusion of the *voir dire* examination, the trial court found that:

> In this matter, the Court has had an opportunity to observe the testimony of [A.C.] That the Court finds for the record that she was asked a series of questions by the prosecution and by the defense. That her answers to the questions were reasonable in

> light of the questions asked. That when asked specific questions, she appeared to know the answers to those questions including questions concerning her family, her school, and a demonstration in the courtroom involving a pen and a cup. Including all those matters and the age of the child, the Court finds that she is a competent witness and entitled to testify in these proceedings and that her credibility should be for the jury to determine.

The competency of witnesses is determined by Rule 601 of the North Carolina Evidence Code, which provides in pertinent part that "[e]very person is competent to be a witness" except "when the court determines that he is . . . (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601 (a), (b) (1999); *State v. Gordon*, 316 N.C. 497, 502, 342 S.E.2d 509, 512 (1986). Our Supreme Court has defined competency as "the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide." *State v. Fearing*, 315 N.C. 167, 173, 337 S.E.2d 551, 554 (1985) (*quoting State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984)). The trial court "must rely on [its] personal observation of the child's demeanor and responses to inquiry on voir dire examination." *Id.* at 174, 337 S.E.2d at 555. The competency of a witness is a matter which rests in the sound discretion of the trial judge. *State v. Andrews*, 131 N.C. App. 370, 373, 507 S.E.2d 305, 307 (1998). "Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987).

The testimony in this case is similar to that in *Hicks*, where our Supreme Court affirmed the trial court's finding that a seven year old was competent to testify. The Court stated:

> [A]lthough [the victim] did not understand her obligation to tell the truth from a religious point of view, and although she had no fear of certain retribution for mendacity, she knew the difference between the truth and a lie . . . . She indicated a capacity to understand and relate facts to the jury concerning defendant's assaults upon her, and a comprehension of the difference between truth and untruth. She also . . . affirmed her intention to [tell the truth].

319 N.C. at 88-89, 352 S.E.2d at 426.

A.C.'s testimony met the standard of Rule 601 and thus we find there was no abuse of discretion by the trial court in finding her competent to testify. *See Jones*, 310 N.C. at 722, 314 S.E.2d at 533 (finding as evidence of competency that the child knew that if she did not tell the truth she would get a spanking).

[3] Defendant also argues that the trial court erred in admitting hearsay testimony. A.C.'s mother testified that, while in the car after picking her up from day care, A.C. told her about the defendant's attack. While conceding the failure to object at trial, defendant argues that the trial court's admission of this hearsay testimony was plain and reversible error.

Evidence of an out-of-court statement of a witness, related by the in-court testimony of another witness, may be offered as substantive evidence[1] or offered for the limited purpose of corroborating the credibility of the witness making the out-of-court statement.[2] *See State v. Ferebee*, 128 N.C. App. 710, 715, 499 S.E.2d 459, 462 (1998). Although the better practice calls for the party offering the evidence to specify the purpose for which the evidence is offered, unless challenged there is no requirement that the purpose be specified. *See State v. Haskins*, 104 N.C. App. 675, 411 S.E.2d 376 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). If the offering party does not designate the purpose for which the evidence is offered, the evidence is admissible if it qualifies either as corroborative evidence or competent substantive evidence. *State v. Goodson*, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968); *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989). If admitted only for corroborative purposes *and* requested by a party, the trial court is required to instruct the jury that the evidence may be considered by them for the limited purpose of corroborating the witness making the out-of-court statement. *Goodson*, 273 N.C. at 129, 159 S.E.2d at 311. The trial court is not required to provide a limiting instruction unless requested by the party objecting to the use of the evidence as substantive evidence. *Id.*

In this case, although the State did not specify the purpose for which it offered A.C.'s mother's testimony about A.C.'s out-of-court

1. The evidence would qualify as substantive evidence if it was offered for the truth of the matter asserted and qualified as an exception under our hearsay rules. N.C. Gen. Stat. § 8C-1, Rule 803 (1999).

2. If offered simply as corroborative evidence and admitted for this limited purpose, the evidence does not constitute hearsay evidence because it is not offered to prove the truth of the prior out-of-court statement. As such this evidence does not qualify as an exception to the hearsay rule.

statement and defendant did not request a limiting instruction, the trial court, in its final instructions to the jury, informed the jury that evidence of any out-of-court statement was to be received for corroborative purposes only. In that this testimony did tend to corroborate A.C.'s in-court testimony, it was properly admitted for this purpose. In any event, we note that A.C.'s mother's testimony relating the child's out-of-court statements could have qualified as substantive evidence under the excited utterance exception of Rule 803(2). *See State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988) (child's statement to mother regarding sexual abuse made ten hours after leaving defendant's custody held admissible as excited utterance); *State v. Thomas*, 119 N.C. App. 708, 460 S.E.2d 349 (1995) (child's statement regarding child's sexual abuse admissible as excited utterance when made four to five days after the startling event).

[4] Finally, defendant contends that the trial court erred in denying his motions to dismiss for insufficient evidence. Defendant argues that A.C.'s inability to identify defendant in court and her inherently incredible testimony was not sufficient to justify submitting the case to the jury.

On a defendant's motion to dismiss for insufficiency of the evidence, the trial court must consider "whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged." *State v. Robbins*, 309 N.C. 771, 774, 309 S.E.2d 188, 190 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference. *State v. Wright*, 127 N.C. App. 592, 596-97, 492 S.E.2d 365, 368 (1997), *disc. review allowed*, 347 N.C. 584, 502 S.E.2d 616 (1998). Further, if the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion even though the evidence may also support reasonable inferences of the defendant's innocence. *Id.* at 597, 492 S.E.2d at 368.

A.C.'s testimony that "J.P.'s dad" sexually attacked her was corroborated by her mother, the social worker, and the detective. Williams testified that she left A.C. in the care of the defendant at her home. Taken in the light most favorable to the State, there was sufficient evidence from which the trial court could deny defendant's motion to dismiss.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

NEW HANOVER RENT-A-CAR, INC., PLAINTIFF v. HOLLY N. MARTINEZ, DEFENDANT

No. COA99-321

(Filed 15 February 2000)

Employer and Employee— covenant not to compete—signature required

In a case where defendant-former employee's name is not found in any form on the signature line of an agreement not to compete, but defendant did print her name at the top of the agreement ahead of the substantive portions, the trial court erred in granting a preliminary injunction preventing plaintiff from working with other rental car agencies because N.C.G.S. § 75-4 requires this type of agreement to be signed, and extrinsic evidence of the other employment documents completed at the same time reveals that: (1) where a document requested identification information, defendant printed her name, but where a document requested a signature as acknowledgment and acceptance of the material or as conformation of the information requested in the document, defendant wrote her name in cursive; and (2) there was no cursive script or any writing at all on the signature line of the agreement not to compete.

Appeal by defendant from order entered 8 January 1999 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 9 December 1999.

Hogue Hill Jones Nash & Lynch, LLP, by David A. Nash, for plaintiff-appellee.

Rice, Bryant & Mack, P.A., by Ralph T. Bryant, Jr., for defendant-appellant.

EDMUNDS, Judge.

Defendant Holly Martinez appeals the trial court's grant of a preliminary injunction. We reverse.

Plaintiff New Hanover Rent-A-Car, Inc., is a corporation that owns Avis automobile rental franchises in New Bern, Wilmington, Jacksonville, and Greenville, North Carolina; and Florence, South Carolina. Each location draws customers from an area within a 100-mile radius of the airport in that city. Because all auto rental companies offer vehicles that are essentially identical, the business is driven principally by the prices charged by competing rental agencies. However, according to John Dalton, plaintiff's president, customer service, including the services provided by franchise employees who work at the rental counter in each airport, is also an important factor in the business.

Defendant successfully interviewed for employment with plaintiff near the end of July 1998 and reported for training on 17 August 1998. She was given a packet of materials to read and sign. The packet included an agreement not to compete, which is at the center of this dispute. Defendant worked for plaintiff from 17 August 1998 through 17 December 1998. Her duties included taking reservations over the phone, serving customers at the counter, and performing other routine daily chores. On 17 December 1998, defendant informed plaintiff she was resigning her position to return to school, adding that she hoped to obtain part-time work in the auto rental business. The next day, defendant began working for the Hertz Rent-A-Car Agency in New Bern at a counter adjacent to plaintiff's counter.

On 29 December 1998, plaintiff obtained a temporary restraining order to prevent defendant from working for Hertz. Following a hearing on 8 January 1999, the trial court granted a preliminary injunction enjoining defendant from continuing her employment with Hertz Rent-A-Car Agency in New Bern, North Carolina, and from accepting employment with any other rental car business within a 100-mile radius of any city where plaintiff has other rental car franchises. Defendant appeals.

Defendant contends the trial court erred in granting the preliminary injunction. Our Supreme Court has said regarding a preliminary injunction:

> [It] is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the

> Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citations omitted). "[O]n appeal from an order of [a] superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Industries v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983) (citations omitted).

An agreement not to compete will not be enforced unless it is: "(1) in writing, (2) entered into at the time and as a part of the original contract of employment, (3) based on a valuable consideration, (4) reasonable both as to the time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *U-Haul Co. v. Jones*, 269 N.C. 284, 286, 152 S.E.2d 65, 67 (1967). The requirement that an agreement not to compete be in writing includes a requirement that the writing be signed. "No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory . . . ." N.C. Gen. Stat. § 75-4 (1999). We have held: "G.S. 75-4 is consistent with the other 'statute of frauds' provisions in our law which require only that the writing be 'signed by the party charged therewith[,'] or require that the writing be signed by 'the party against whom enforcement is sought.' " *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 519-20, 257 S.E.2d 109, 113 (1979) (internal citations omitted); *see* N.C. Gen. Stat. § 75-4.

The case at bar may be resolved by an examination of the requirement that the writing be signed by defendant. The agreement not to compete is in the form of a printed "EMPLOYMENT AGREEMENT." It begins with a line at the top for the date. This line has been filled in by hand and reads "17 August 1998." The next line begins: "I, _________________, in consideration of being accepted for employment . . . ." and continues with the substantive terms of the agreement. This second blank has been filled in by hand with the printed name "Holly N. Martinez." At the bottom of the form, following the substantive provisions, there is a line titled "Signature." This line is blank. Beneath the signature line is a notarization, signed by Robin Dalton, who is plaintiff's secretary/treasurer and wife of plaintiff's president. Defendant argues the agreement is invalid because she did

not sign it. Plaintiff responds that a signature is not the same as a subscription, and that by printing her name on the top of the agreement, defendant signed it and thereby agreed to its terms.

Our Supreme Court has held that when a statute dictates that a document has to be subscribed, the signature should be at the end of the document, but "it is not essential that the signatures should be placed at the end of the deed or other instrument, where the law requires signing only." *Devereux v. McMahon*, 108 N.C. 134, 140-41, 12 S.E. 902, 904 (1891) (citation omitted); *see also Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915).

> The signature, it is obvious, is most regularly and properly placed at the foot or end of the instrument signed; but it is decided in many cases that although the signature be in the middle or beginning of the instrument, it is as binding as if at the foot; *although, if not signed regularly at the foot, there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.*

Love v. Harris, 156 N.C. 88, 91, 72 S.E. 150, 151 (1911) (emphasis added).

In determining whether defendant signed the agreement not to compete, we find guidance in *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 423 S.E.2d 791 (1992). In that case, the plaintiff terminated his dealership agreement with the defendant Snap-On Tools. As part of the termination, the defendant presented to the plaintiff a document entitled "Termination Agreement." *Id.* at 269, 423 S.E.2d at 793. This agreement contained a printed provision binding the plaintiff to pay the difference between any amount the plaintiff owed the defendant, less any credit the plaintiff received from the defendant by turning in unused inventory. The parties wrote the terms of the plaintiff's repayment plan on the back of the document, and the plaintiff signed his name beneath this recitation of terms. Another printed provision in the document bound the parties to arbitration. The printed signature line at the bottom of the document contained the signature of one of the defendant's representatives but not the signature of the plaintiff. In reviewing the trial court's determination that there was no meeting of the minds as to the arbitration agreement in the printed document, we observed that when an "agreement is ambiguous, interpretation of the contract is a question for the fact-finder to resolve, and parol or extrinsic evidence is admissible to explain or

qualify the written instrument." *Id.* at 273, 423 S.E.2d at 795 (internal citations omitted). Because "plaintiff signed below only the added language . . . and not on the applicable signature line, an ambiguity results as to whether plaintiff agreed to all the terms contained in the Termination Agreement or merely those terms in the added sentence immediately preceding his signature." *Id.* We went on to affirm the trial court's decision that the plaintiff did not agree to all the terms in the agreement.

The evidence as to the existence of an agreement in the case at bar is ambiguous. Defendant's name is not found in any form on the signature line of the agreement; however, she did print her name at the top, ahead of the substantive portions of the agreement. Therefore, consistent with *Routh*, the fact-finder below could consider extrinsic evidence to determine whether defendant signed the document, and consistent with *A.E.P.*, we may review that extrinsic evidence independently.

Defendant testified that when she began her employment, plaintiff's office assistant handed her a number of forms. She testified that the office assistant instructed her to date and put her name on the agreement not to compete, and then took the agreement from her after she followed these instructions. Although the notarization form at the bottom of the agreement recites, "Before me personally appeared Holly N. Martinez to be known as the person described in and who executed the foregoing instrument, and acknowledged to and before me that she executed said instrument for the purposes therein expressed," defendant testified that she never discussed the agreement not to compete with any of plaintiff's employees.

A comparison of this document with other documents completed by defendant at the same time is instructive.

(a) Defendant completed in print an "AVIS EMPLOYEE RECORD," a document that sought basic personal information. This document did not contain a signature line.

(b) Defendant wrote her name in cursive script at the bottom of a "NON-DISCRIMINATION POLICY" in the space labeled "Employee."

(c) Defendant wrote her name in cursive script in the space labeled "Employee" at the bottom of a document entitled "ACKNOWLEDGMENT OF EMPLOYEE," in which defendant was asked to acknowledge plaintiff's company policies and receipt of plaintiff's company personnel manual.

(d) Defendant printed her name on State and Federal tax forms where the forms state "Type or print your . . . name," but wrote her name in cursive script on the line calling for "Employee's signature."

(e) Finally, a document entitled, "NEW HANOVER RENT A CAR RENTAL SALES AND SERVICE AGENT COMPENSATION PACKAGE" contains three spaces at the bottom, labeled "Print Name," "Sign Name," and "Date." Defendant printed her name in the first space, signed her name in cursive script in the second space, and provided the date in the third space.

Plaintiff responded with evidence provided by Ms. Dalton, who notarized the agreement not to compete. Although the document contains a blank signature line, Ms. Dalton testified that she witnessed defendant "complete this document" before she notarized it. Ms. Dalton testified that defendant was told to read the form and, when she asked if defendant had any questions, defendant responded that she did not. Ms. Dalton further testified that when she completed the notary form, she did not notice the signature line directly above the notarization was blank.

Our review of the record reveals that the preliminary injunction was improperly issued. The evidence established that where a document requested identification information, defendant printed her name, but where a document requested a "signature" as acknowledgment and acceptance of the material or as confirmation of information requested in the document, defendant wrote her name in cursive. There was no cursive script or any writing at all on the signature line of the agreement not to compete and, therefore, no signature. Based on this evidence, we hold that plaintiff was unable to show a likelihood of success on the merits of its case. Accordingly, we need not address the other issues raised by defendant. The action of the trial court is reversed, and the case is remanded for further action consistent with this opinion.

Reversed and remanded.

Judges McGEE and HORTON concur.

[136 N.C. App. 648 (2000)]

IN THE MATTER OF PATRICK JASON MURRAY, JUVENILE/APPELLANT

No COA99-475

(Filed 15 February 2000)

1. Search and Seizure— school official—weapon in student's book bag—reasonableness

The trial court did not err in denying defendant's motion to suppress evidence of a pellet gun found in defendant's book bag at school by a school official because: (1) the search was reasonable at its inception since the principal received a student's unsolicited tip that defendant had something in his book bag that he should not have at school, followed by defendant's lie that he did not have a book bag, which would provide sufficient grounds to decide that a search of the book bag would yield evidence that defendant had broken a school rule or law; and (2) the search was conducted in a reasonable manner, even though the school's dean of students and resource officer handcuffed defendant before the principal searched the book bag, in light of the facts that the principal had the right to search the book bag, defendant refused to turn it over voluntarily, defendant physically protected the bag when the principal attempted to take it, and defendant began struggling with the school's dean of students and resource officer.

2. Schools and Education— possession of weapon—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss his charges for possessing a pellet gun on school property in violation of N.C.G.S. § 14-269.2(d) based on the State's failure to show defendant had exclusive possession of the book bag in which the pellet gun was found or its contents because viewed in the light most favorable to the State, the evidence reveals defendant admitted the book bag was his, it was within his reach when the principal walked into the classroom, and no one else was in the room.

Appeal by juvenile from orders entered 5 January 1999 by Judge Rebecca W. Blackmore in New Hanover County District Court. Heard in the Court of Appeals 18 November 1999.

Michael F. Easley, Attorney General, by T. Brooks Skinner, Jr., Assistant Attorney General, for the State.

Smith, Smith & Harjo, by Jennifer Harjo, for juvenile-appellant.

EDMUNDS, Judge.

Juvenile Patrick Jason Murray (Murray) appeals the trial court's order denying his motion to suppress and the order adjudicating him to be a delinquent pursuant to N.C. Gen. Stat. § 7A-517(12) (Supp. 1998) (repealed effective July 1, 1999). We affirm.

On 15 October 1998, Williston Middle School Assistant Principal LaChawn Smith (Ms. Smith) was approached by a student who told her, "Jason had—Murray had something in his book bag that he should not have at school." Ms. Smith found Murray alone in Room 105. In response to her question, he denied having a book bag. However, Ms. Smith noticed a red book bag "less than an arm's reach away" from Murray and asked if it was his. When Murray acknowledged that it was, Ms. Smith asked him to accompany her about twenty feet to her office. As they walked, Murray carried his book bag. Once they reached her office, Ms. Smith asked Murray if there was anything in the book bag that should not be there. He answered that there was not. Ms. Smith then advised Murray that she needed to search the bag. He responded that he did not want her to search it and expressed a desire that his father be called.

Ms. Smith contacted the school's Dean of Students and the school's Resource Officer, Deputy Johnson. After Deputy Johnson and the Dean arrived, they explained to Murray that they "needed to search his book bag because [they] were concerned about his safety and the safety of others in the building." However, when Ms. Smith attempted to take possession of the book bag, Murray "clamped down on it." Deputy Johnson testified at the suppression hearing: "I then grabbed [Murray], and he struggled with me a little bit. So, I cuffed him so that he wouldn't hurt himself or I wouldn't get hurt in the incident." Once the book bag was secured, Ms. Smith opened it and found a pellet gun. Deputy Johnson then removed the handcuffs from Murray and the principal called his father.

Murray filed a motion to suppress the physical evidence. After conducting a hearing, the trial court denied the motion, then adjudicated Murray delinquent for possessing a weapon on school property,

in violation of N.C. Gen. Stat. § 14-269.2(d) (Supp. 1998). Murray appeals.

I.

[1] Murray first challenges the trial court's failure to suppress the fruits of the search of the book bag. Initially, we must determine the standard to be used in reviewing the legality of the search. The standard we use depends on whether a school official or law enforcement officer conducted the search.

The record reveals that Ms. Smith, an assistant principal, received information that focused her suspicion on Murray's book bag. After initially confronting Murray and receiving contradictory information from him, she escorted Murray to her office, where she asked if she could search his book bag. Only after the student refused to allow a voluntary search did she call for Deputy Johnson and the Dean of Students. She testified, "I needed someone with greater strength than I have," indicating that she had decided to search the bag. Deputy Johnson handcuffed Murray only after Murray made it obvious that he was not going to relinquish his book bag without a struggle. Deputy Johnson acted to enable Ms. Smith to obtain the bag and search it. He did not search the bag himself, nor did he conduct any investigation on his own. Therefore, we hold that the search of Murray's book bag was conducted by a school official. *See Cason v. Cook*, 810 F.2d 188, 192 (8th Cir. 1987) ("At most . . . this case represents a police officer working *in conjunction with* school officials."); *see also Martens v. District No. 220, Bd. of Educ.*, 620 F. Supp. 29 (N.D. Ill. 1985); *Coronado v. Texas*, 806 S.W.2d 302 (Tex. App. 1991), *rev'd on other grounds*, 835 S.W.2d 636 (Tex. Crim. App. 1992). Consequently, we review the search in light of *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985), wherein the United States Supreme Court examined the legality of a school official's search of a student's purse.

In *T.L.O.*, a student was discovered smoking in a school lavatory. Although caught in the act, the student denied even being a smoker. When the school's assistant vice-principal searched the student's purse for cigarettes, he also found marijuana, rolling papers, and other paraphernalia. In holding that the search was reasonable, the Supreme Court acknowledged the difficulties faced by schools in maintaining discipline. The Court observed that the majority of lower courts had held, "the Fourth Amendment applies to searches conducted by school authorities, but the special needs of the school envi-

ronment require assessment of the legality of such searches against a standard less exacting than that of probable cause." *Id.* at 332 n.2, 83 L. Ed. 2d at 728-29. Agreeing with those courts, the Supreme Court held:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio*, [392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968)]; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.*

Id. at 341, 83 L. Ed. 2d at 734 (omission in original).

Because the *T.L.O.* reasonableness standard applies to the facts of this case, we first examine whether the search was reasonable at its inception.

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

Id. at 341-42, 83 L. Ed. 2d at 734-35. "[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . .' " *Id.* at 346, 83 L. Ed. 2d at 737 (omission in original) (quoting *Hill v. California*, 401 U.S. 797, 804, 28 L. Ed. 2d 484, 490 (1971)).

In the case at bar, Ms. Smith received an unsolicited tip from a student that Murray had something in his book bag that he should not have at school. At the time, Ms. Smith was walking to a classroom in order to escort Murray to another classroom. Although she testified that she was doing so because of a "disturbance," further details are not set out in the record. When she found Murray, he was alone in a classroom and a red book bag lay within his reach. She asked him if he had a book bag, and he falsely answered that he did not. Only when she asked him specifically if the red book bag was his did he admit ownership. The student's tip, followed by Murray's lie, pro-

vided sufficient grounds for a reasonable person to decide that a search of the book bag would yield evidence that Murray had broken a school rule or law. Ms. Smith's decision to search the book bag, like the decision to search the purse in *T.L.O.*, was "the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *Id.* at 346, 83 L. Ed. 2d at 737 (quoting *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981)) (alteration in original); *see generally* Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 Urb. Law. 117 (1993) (discussing various court cases that have addressed whether searches conducted by school officials were reasonable).

Having determined that Ms. Smith had reasonable grounds for suspicion, we next turn to the second prong of the *T.L.O.* test, which requires that the search be conducted in a reasonable manner. A "search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342, 83 L. Ed. 2d at 735. Ms. Smith's search, confined to the book bag, was reasonable in scope. Murray contends that it was improper and excessive for Deputy Johnson to handcuff him before Ms. Smith searched the book bag. However, we hold that this measure was reasonable in light of the circumstances. Although Ms. Smith had the right to search the book bag, Murray refused to turn it over voluntarily. He physically protected the bag when Ms. Smith attempted to take it and then began struggling with Deputy Johnson. Handcuffs insured that Ms. Smith could safely search the bag without interference and allowed the deputy to control a potentially unpleasant or even perilous situation. Deputy Johnson released Murray as soon as Ms. Smith found the pellet gun and any danger of disruption dissipated. Therefore, consistent with the Supreme Court's holding in *T.L.O.*, we hold that the trial court properly denied Murray's motion to suppress the search.

Murray also contends that the search violated the constitution of North Carolina. Because there is no variance between North Carolina's law of search and seizure and the requirements of the Fourth Amendment to the Constitution of the United States, *see State v. Hendricks*, 43 N.C. App. 245, 251-52, 258 S.E.2d 872, 877 (1979), we hold that the search was proper under the laws of North Carolina. This assignment of error is overruled.

II.

[2] Murray next claims the trial court erred in denying his motion to dismiss for insufficiency of the evidence at the close of the State's case and at the close of all the evidence. The trial court found that Murray violated N.C. Gen. Stat. § 14-269.2(d), which makes it a Class 1 misdemeanor "for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol . . . on educational property." Murray argues that the State failed to show he had "exclusive possession of the bag or its contents."

"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) (citation omitted). The motion to dismiss should 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, 265 S.E.2d 164 (1980). Exclusive possession need not be shown where other incriminating evidence supports constructive possession. *See State v. Mitchell*, 104 N.C. App. 514, 410 S.E.2d 211 (1991). Here, Murray admitted the book bag was his, it was within his reach when Ms. Smith walked into the classroom, and no one else was in the room. Murray's other conduct, detailed above, is consistent with guilty knowledge. There was no evidence that anyone other than Murray possessed the book bag or that there was an opportunity for someone to put the pellet gun into it. Consequently, we hold that the State presented sufficient evidence for a reasonable mind to conclude that Murray knowingly possessed a pellet gun on educational property. This assignment of error is overruled.

Affirmed.

Judges McGEE and HORTON concur.

IN THE MATTER OF: HEATHER E. CHURCH AND KENDRA MARYE CHURCH, MINOR CHILDREN; CALDWELL COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER/APPELLEE v. MICHELLE RENAE JOPLIN, RESPONDENT/APPELLANT; ROBERT CHARLES CHURCH, RESPONDENT/APPELLANT

No. COA99-231

(Filed 15 February 2000)

1. Termination of Parental Rights— standard of proof—clear and convincing evidence—statement required in order

The order of the trial court terminating respondents' parental rights is vacated and remanded because N.C.G.S. § 7A-289.30(e) (now N.C.G.S. § 7B-1109(f)) requires the trial court to affirmatively state in its order the clear and convincing evidence standard of proof utilized in the termination proceeding, and the order failed to do so.

2. Termination of Parental Rights— sufficiency of evidence

Although there was competent evidence before the trial court to support a finding that statutory grounds existed under N.C.G.S. § 7A-517 (now N.C.G.S. § 7B-100 et seq.) to terminate parental rights based on neglect, dependence, and the children being placed in foster care for a period of twelve months, this case must be remanded for the trial court to determine whether the evidence satisfies the required standard of proof of clear and convincing evidence under N.C.G.S. § 7A-289.30(e) (now N.C.G.S. § 7B-1109(f)).

Appeal by respondents from order entered 26 August 1998 and filed 17 September 1998 by Judge Jonathan L. Jones in Caldwell County District Court. Heard in the Court of Appeals 5 October 1999.

Caldwell County Department of Social Services, by Darrell Pope, Staff Attorney, for petitioner-appellee.

Joseph C. Delk, III for respondent-appellant Church.

Scott D. Conrad for respondent-appellant Joplin.

No brief filed by Guardian Ad-Litem Dewey Keller.

WALKER, Judge.

Respondents' parental rights were terminated in the Caldwell County Juvenile Court on 26 August 1998. Respondents Robert

Charles Church and Michelle Renae Joplin, although never married, are the biological parents of the minor children K.M.C. and H.E.C. Caldwell County Department of Social Services (DSS) has been involved with the respondents since July 1994.

After petitions alleging neglect and dependency were filed on 20 February 1996, the children were ordered into non-secure custody with DSS and were returned to the home of respondent Joplin on 13 March 1996 after temporary improvements made by respondent Joplin. Respondent Church moved from respondent Joplin's house on or about 1 April 1996. After conditions at respondent Joplin's house deteriorated, another non-secure custody order placing the children with DSS was entered 23 April 1996 and continued in effect until the children were adjudicated to be neglected and dependant at the 29 May 1996 hearing when DSS took custody of the children. Pending the next hearing on 28 August 1996, respondents showed little improvement and custody remained with DSS. However, by the next review on 27 November 1996, respondents exhibited substantial improvements and the children were returned to respondents' home on 24 December 1996. At the court ordered review on 26 February 1997, reunification efforts were continued and at the next review on 28 May 1997, full legal custody was returned to the respondents and no further reviews were scheduled.

The children remained in respondent Joplin's home until 18 July 1997, when the children were found unsupervised at 10:00 p.m. walking down the road in the mobile home park in which they lived. The children were transported to DSS later that night and were placed with respondent Church's mother, the paternal grandmother, until some time after the adjudication. Respondent Church was residing with his mother at the time.

On 5 August 1997, a petition was filed alleging abuse, neglect, and dependency. The trial court adjudicated the children neglected and dependent at the adjudication hearing and returned custody of the children to DSS on 8 October 1997. On 31 October 1997, a petition to terminate respondents' parental rights was filed, which was granted by the trial court at the 26 August 1998 hearing.

[1] Respondents assign as error the trial court's failure to recite the standard of proof relied upon in terminating parental rights. Specifically, the trial court's failure to state that the findings of fact adduced from the 26 August 1998 adjudicatory hearing were based upon clear, cogent, and convincing evidence is reversible error.

The North Carolina termination statute establishes a two-stage termination proceeding. N.C. Gen. Stat. § 7A-289.30[1], governs the adjudication stage and provides in part:

> (d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.
>
> (e) All findings of fact shall be based on clear, cogent, and convincing evidence.

N.C. Gen. Stat. § 7A-289.30 (1995).

N.C. Gen. Stat. § 7A-289.31[2] governs the disposition stage of a termination proceeding and provides in pertinent part that:

> (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

N.C. Gen. Stat. § 7A-289.31(a) (1995). Our Supreme Court, in addressing these two sections, has stated:

> in the adjudication stage, the petitioner must prove clearly, cogently, and convincingly the existence of one or more of the grounds for termination listed in N.C. Gen. Stat. § 7A-289.32. Once the petitioner has proven this ground by this standard, it has met its burden within the statutory scheme of N.C. Gen. Stat. § 7A-289.30(d) and (e) and § 7A-289.31(a). The petitioner having met his burden of proof at the adjudication stage, the court then moves on to the disposition stage, where the court's decision to terminate parental rights is discretionary.

In re Montgomery, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). Sections 7A-289.30 and 7A-289.31 "provide that the court exercises its discretion in the dispositional stage only after the court has found that there is clear and convincing evidence of one of the statutory

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1. Repealed by Session Law 1998-202, s. 5, effective July 1, 1999. See now § 7B-1109.

2. Repealed by Session Law 1998-202, s. 5, effective July 1, 1999. See now § 7B-1110.

grounds for terminating parental rights during the adjudicatory stage." *In re Carr*, 116 N.C. App. 403, 407, 448 S.E.2d 299, 302 (1994).

Although the termination statute does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized. Furthermore, we note the legislature has specifically required the standard of proof utilized by the trial court be affirmatively stated in the context of delinquent, undisciplined, abuse, neglect and dependent proceedings. N.C. Gen. Stat. § 7A-637 (1995)[3]. Because termination proceedings and delinquent, undisciplined, abuse, neglect, and dependent proceedings are all contained in a single chapter of the General Statutes and relate to the same general subject matter, we construe these statutes together to determine legislative intent. *See Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984). Accordingly, we read section 7A-289.30(e) (now section 7B-1109(f)) to require the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding.

Here, in its adjudicatory order, the trial court concluded in part:

> 2. Statutory grounds pursuant to Chapter 7A of the General Statutes of North Carolina exist to terminate the parental rights of both named parents as set forth below:
>
> a. With respect to both parents, both children are neglected within the meaning of N.C. Gen. Stat. § 7A-517(21);
>
> b. With respect to both parents, they are incapable of providing for the proper care and supervision of these children such that the children are dependent within the meaning of N.C. Gen. Stat. § 7A-517(13) and that there is a reasonable probability that such incapability will continue in the foreseeable future;
>
> c. Pursuant to N.C. Gen. Stat. § 7A-289.32(3), the children were in the full legal and physical custody of the Caldwell County Department of Social Services on three separate occasions totaling over sixteen months (at time petition was filed) or 26 months (at time of hearing on this petition) and neither parent has shown to the satisfaction of

3. Repealed by Session laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-807 and § 7B-2411.

> the Court that reasonable progress under the circumstances has been made to correct the conditions which led to the removal of the children.

The trial court failed to recite the standard of proof applied in its adjudication order and its failure to do so is error. Petitioner contends that even if the trial court erred by not stating the standard of proof, the error should be deemed "harmless error where the Respondent-Appellant is not prejudiced and the trial court in fact based its decision upon sufficient evidence and testimony which was clear, cogent, and convincing to the trial court." However, since the trial court is required to state that the proper standard of proof has been applied, we cannot conclude the error here was harmless.

[2] Next, respondents argue that the trial court's conclusions that statutory grounds existed to terminate parental rights based on neglect, dependence, and the children's being placed in foster care for a period of twelve months were not supported by sufficient evidence.

A review of the record reveals there was competent evidence before the trial court to support a finding that any of the above three statutory grounds existed for termination of parental rights. However, the case must be remanded for the trial court to determine whether the evidence satisfies the required standard of proof of clear and convincing evidence.

Vacated and remanded.

Judges GREENE and HUNTER concur.

PERSON EARTH MOVERS, INC. v. CARL D. BUCKLAND, SR.

No. COA99-444

(Filed 15 February 2000)

Statute of Limitations— tolling—bankruptcy

In an action to recover for work completed by plaintiff on defendant's property on 16 August 1989, the trial court erred in denying defendant's motion to dismiss based upon expiration of the three-year statute of limitations under N.C.G.S. § 1-52(1)

because: (1) even though the statute of limitations was suspended in March 1992 when defendant filed for Chapter 13 bankruptcy, defendant's bankruptcy petition was dismissed on 4 March 1994, at which point the statute of limitations began to run again, and plaintiff did not commence this action until 1 December 1994; and (2) even though an acknowledgment of the existence of a debt may renew a statute of limitations in some circumstances, the bankruptcy trustee's installment payments to plaintiff do not warrant a clear inference that defendant acknowledged the existence of the debt, nor do these payments indicate defendant's willingness to pay such debt, in light of the facts that defendant did not list plaintiff as a creditor and objected to plaintiff's claim.

Appeal by defendant from judgment entered 1 October 1998 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 12 January 2000.

Ronnie P. King, P.A., by Ben S. Holloman, Jr., for plaintiff-appellee.

Smith, James, Rowlett & Cohen, L.L.P., by J. David James, for defendant-appellant.

MARTIN, Judge.

Plaintiff Person Earth Movers, Inc., filed this action to recover monies allegedly owed it by defendant Carl D. Buckland, Sr. The matter was heard by the trial court sitting without a jury. The evidence tended to show that plaintiff performed work on defendant's property in August 1989, for which plaintiff submitted a bill totaling $7,140. Defendant contested the amount owed and did not pay the bill.

In March 1992, defendant filed a petition for bankruptcy under Title 11, Chapter 13 of the Bankruptcy Code, 11 U.S.C.A. 13, s.1 *et seq.* Defendant did not list plaintiff as a creditor. Plaintiff filed its claim subsequently in the amount of $10,722.76, which was allowed by the Bankruptcy Court over defendant's objection. Plaintiff was paid installments totaling $1,627.42 by the trustee in bankruptcy through February 1994. The petition in bankruptcy was dismissed on 4 March 1994.

On 1 December 1994, plaintiff filed this action alleging "[t]he plaintiff provided services to the Defendant in the amount of

$13,242.87 plus interest and Defendant has failed to pay Plaintiff for same according to the statement of account annexed hereto as Exhibit 'A'." Defendant moved to dismiss, raising the statute of limitations as an affirmative defense. The motion to dismiss was denied, and judgment was entered against defendant in the amount of $14,864.63 plus prejudgment interest at the rate of 18% from 25 September 1995 until the date of judgment and at the legal rate thereafter. Defendant appealed.

Defendant assigns error to the denial of his motion to dismiss based upon the statute of limitations.

The statute of limitations applicable to plaintiff's claim is three years. N.C. Gen. Stat. § 1-52(1) (1996), *see Coe v. Highland School Associates Ltd. Partnership*, 125 N.C. App. 155, 479 S.E.2d 257 (1997). The obligation to pay in this case arose when plaintiff completed the work for defendant, on 16 August 1989; the statute of limitations would normally have expired three years thereafter, on 16 August 1992. Defendant's Chapter 13 bankruptcy petition, filed in March 1992, however, suspended the operation of the statute of limitations. A bankruptcy petition suspends the statute of limitations for any state law claims involving debts protected by the bankruptcy petition which are pending at the time the petition is filed. Title 11, U.S.C.A. Chapter 1, s. 108 reads:

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; . . .

The statute of limitations for a state law claim therefore expires at the end of the limitations period described by the appropriate state law, and is extended only by that amount of time the debtor is in bankruptcy. The statute of limitations in the present case was suspended in March 1992 when defendant filed a petition for bankruptcy, two years and 267 days from the start of the three year limitations

period. The bankruptcy proceeding was dismissed on 4 March 1994, at which point the statute of limitations began to run again, leaving plaintiff 98 days to commence its action. Plaintiff did not commence the action until 1 December 1994, well beyond the 98 day period. Plaintiff contends, however, that payments made by the bankruptcy trustee operated to renew the entire statutory period, allowing it three years from the date of the last payment within which to file a claim.

It is true that an acknowledgment of the existence of a debt may renew a statute of limitations in some circumstances, and that a partial payment by the debtor may constitute such an acknowledgment:

> A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. Such a payment is given this effect on the theory that it amounts to a voluntary acknowledgment of the existence of the debt. From this acknowledgment the law implies a new promise to pay the balance.

Whitley's Electric Service, Inc. v. Sherrod, 293 N.C. 498, 505, 238 S.E.2d 607, 612 (1977).

Plaintiff contends the payments made by the bankruptcy trustee support a "clear inference" that defendant recognized and acknowledged his debt. We disagree. In *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895), our Supreme Court stated: "[i]t is settled that a payment by assignees in bankruptcy and for the benefit of creditors does not take the case out of the statute of limitations." *Id.* at 164, 21 S.E. at 177. The Court's holding in *Battle* was reaffirmed in 1913 in *Shelby National Bank v. Hamrick*, 162 N.C. 216, 78 S.E. 12 (1913).

Plaintiff argues that Battle was decided at a time when bankruptcy proceedings were involuntary; where the proceeding is forced upon the debtor, no acknowledgment could possibly occur. Petitions under Chapter 13, however, are voluntary. *See* David A. Moss, Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 Am.Bankr.L.J. 311 (Spring 1999) (detailing the historical evolution of consumer bankruptcy law). Plaintiff contends that by voluntarily filing for bankruptcy protection, a debtor essentially acknowledges his or her indebtedness, and any payments by the bankruptcy trustee therefore revive the entire limitations

period. If plaintiff's argument were true, there would be no need for the rule regarding statutes of limitations described in Title 11, U.S.C.A. Chapter 1, s. 108, as each payment by the bankruptcy trustee would start the statute of limitations afresh for each creditor's claim against the debtor. This rule would have to be replaced by one which measured the statute of limitations against the date of the final payment made by the bankruptcy trustee. Obviously, such is not the case.

Moreover, current bankruptcy law carefully delineates the role of the bankruptcy trustee and does not empower a trustee to act on behalf of the bankrupt. The bankruptcy trustee is not the agent or employee of the bankrupt but merely manages the estate of the bankrupt; as such, the trustee has no authority to make promises on behalf of the bankrupt. *See* Title 11, U.S.C.A. Chapter 11, s. 1 *et seq.*, Title 11, U.S.C.A. Chapter 13, s. 1, 1302; *see also First Nat. Bank v. Signs*, 73 P.2d 1109 (1937). As stated by the Kansas Supreme Court in *First National*: "Neither [the trustee's] duty nor power includes authority to promise that the bankrupt will pay the residue of the debt, and a payment by him on account of a claim against the bankrupt is not such an acknowledgment of the debt as will stop the running of the Statute of Limitations," and "[t]he fact that the bankruptcy was precipitated by the maker's voluntary petition therefore does not supply any sound basis for taking the case out of the general rule." *Id.* at 1109-10.

In the present case, the bankruptcy trustee's installment payments to plaintiff do not warrant a "clear inference" that defendant acknowledged the existence of the debt, nor do these payments indicate defendant's willingness to pay such debt. This is especially true where defendant did not list plaintiff as a creditor and objected to plaintiff's claim.

Accordingly, plaintiff's action was not filed within the applicable period of limitations and defendant's motion to dismiss should have been granted. Therefore, we must remand this action to the trial court for entry of a judgment dismissing the action.

Reversed and remanded.

Judges TIMMONS-GOODSON and HORTON concur.

PATRICIA LIN MARSH, PLAINTIFF v. WILLIAM R. MARSH, DEFENDANT

No. COA99-40

(Filed 15 February 2000)

1. Divorce— postseparation support—separation agreement

The trial court erred by terminating defendant-husband's obligation to pay postseparation support under the party's separation agreement based on their divorce because postseparation support may continue despite a judgment of divorce if the postseparation support order does not specify a termination date and there is no court order awarding or denying alimony. N.C.G.S. § 50-16.1A(4).

2. Divorce— postseparation support—separation agreement—contempt

In light of the trial court's erroneous conclusion that defendant's postseparation support obligation terminated upon divorce, on remand the trial court must consider whether defendant-husband was in contempt of court for failing to pay his postseparation support obligations under the parties' incorporated separation agreement.

Appeal by plaintiff from order entered 25 September 1998 by Judge C. E. Donaldson in Cumberland County District Court. Heard in the Court of Appeals 3 January 2000.

The Law Firm of Brown & Neier, L.L.P., by Bryce D. Neier, for plaintiff-appellant.

No brief filed for defendant-appellee.

EAGLES, Chief Judge.

[1] This case presents the question of whether postseparation support may continue after a judgment of divorce.

Plaintiff Patricia Lin Marsh and Defendant William R. Marsh were married to each other on 25 June 1977 and separated in August of 1996. On 13 May 1997, the parties entered into a separation agreement that the trial court later incorporated into its judgment for divorce.

The agreement provided in pertinent part: "The Husband shall pay to the Wife, as **postseparation support/alimony without**

divorce, one-half (1/2) of his military retirement . . . The Husband's obligation for **the payment of postseparation support/alimony without divorce shall terminate upon the death of the Husband, the death or remarriage of the Wife.**" (Emphasis added). There is no other language within the separation agreement concerning termination of postseparation support/alimony without divorce. Further, the agreement does not contain any language concerning permanent alimony. Separately, the incorporated agreement requires the defendant to pay the other one-half of his retirement benefits to plaintiff as part of a property settlement.

On 19 March 1998, plaintiff filed a Motion For Contempt and To Show Cause against defendant for failure to pay his obligations under the incorporated agreement. On 4 June 1998, defendant responded and filed his own motion seeking to terminate his obligations for postseparation support/alimony without divorce and to recover $3640.00 as overpayment. After hearing testimony, the trial court issued an order terminating defendant's obligations for postseparation support. In its order, the court found that there were no provisions for permanent alimony within the agreement. The trial court then concluded that "the terms of the Separation Agreement only provided for postseparation support until the granting of a divorce." Plaintiff appeals.

It is a well-established tenet of statutory construction that the intent of the General Assembly controls. *In re Arthur*, 291 N.C. 640, 641, 231 S.E.2d 614, 615 (1977). In ascertaining this intent, we "assume that the Legislature comprehended the import of the words it employed." *State v. Baker*, 229 N.C. 73, 77, 48 S.E.2d 61, 65 (1948). G.S. § 50-16.1A(4) (1999) defines postseparation support as "spousal support to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony." According to this definition, postseparation support ends only by a prescribed date in the order for postseparation support or in an order awarding or denying alimony. *See id.* This is in contrast to the old law of alimony pendente lite (APL). The old statute defined APL as "alimony ordered to be paid pending the final judgment of divorce." G.S. § 50-16.1(2) (repealed). Accordingly, APL terminated upon a judgment of divorce.

Under the current support scheme, the General Assembly has created a window that may allow postseparation support to continue indefinitely. This is not the first time that this Court has discussed

this potential opening. In addressing the distinction between the APL and postseparation support statutes, this Court stated:

> [I]f an effective date of termination for postseparation support payments is specified in neither the postseparation support order, nor in the order awarding or denying alimony, the postseparation support payments may continue indefinitely if the dependent spouse never sues for alimony (or at least until an effective alimony award would have terminated, that is, when the dependent spouse remarried, cohabitated, or died).

Wells v. Wells, 132 N.C. App. 401, 414, 512 S.E.2d 468, 476 (1999) (citing Nancy E. LeCroy, Note, *Giving Credit Where Credit is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements*, 74 N.C. L. Rev. 2128, 2144 n.105 (1996)). While not directly addressing the present issue, this Court in *Wells* recognized that the statute *may* allow for the indefinite payment of postseparation support. *Id.* Under the plain language of G.S. 50-16.1A(4), we now hold that postseparation support may continue despite a judgment of divorce if the postseparation support order does not specify a termination date and there is no court order awarding or denying alimony.

Here, the Separation Agreement provides for only three possible instances in which defendant's obligation to pay postseparation support terminates. The Agreement explicitly states that "The Husband's obligation for the payment of postseparation support/alimony without divorce shall terminate upon the death of the Husband, the death or remarriage of the Wife." There is no evidence in the record that any of these events has occurred. No other provision of the agreement deals with termination of postseparation support. Additionally, the record does not contain evidence that the trial court has awarded or denied alimony. G.S. 50-16.1A (1999). In fact, it appears from the record that the plaintiff has never even sued for alimony. Accordingly, defendant's obligation to pay postseparation support did not automatically terminate upon the judgment of divorce. The trial court erred by terminating defendant's obligation and we now reverse.

In making this ruling it is important to note that we understand that the General Assembly may have intended postseparation support to be a temporary measure. *See Wells*, 132 N.C. App. at 410, 512 S.E.2d at 474 (citing Sally B. Sharp, *Step By Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C.L.Rev. 2017, 2090 (1998)). However, we are bound to interpret

statutes as they are written. If the General Assembly feels that the policy of this State should be that postseparation support ends upon a judgment of divorce then it is within its power to amend the statute. Indeed, the General Assembly did so under the old APL statute. Here, however the statutory definition of postseparation support provides for only three possible termination dates. In this case, none of these events took place. Accordingly, here we are bound to allow postseparation support to continue even after a judgment of divorce.

[2] Plaintiff also assigns error to the trial court's failure to find defendant in contempt for failing to pay his obligations and alleges that the evidence was insufficient to prove a substantial change of circumstances. The trial court based its order on its conclusion that defendant's obligation terminated upon divorce. The trial court should now reconsider these issues in light of this opinion. We therefore remand for its re-consideration.

Reversed and remanded.

Judges WYNN and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 1 February 2000

BATTLE v. WALKER No. 99-268	Nash (97CVS2281)	Affirmed in part, Reversed in part and Remanded
ENGLEHART v. BAILEY No. 99-885	Johnston (97CVS01439)	No Error
FIELDS v. NORFOLK S. RY. CO. No. 99-85	Mecklenburg (96CVS13692)	Affirmed
FORTE v. FORTE No. 99-951	Guilford (93CVD1030)	Affirmed
HALL v. EMPLOYMENT SEC. COMM'N OF N. C. No. 99-781	Guilford (98CVS11649)	Affirmed
HICKS v. MITCHINER No. 98-1582	Johnston (97CVS890)	Affirmed in part Reversed in part and Remanded
HILL v. BERNARD No. 98-1550	Guilford (98CVS887)	Affirmed
IN RE FRADY No. 99-881	Buncombe (98J291)	Reversed and Remanded
IN RE SHERLIN No. 99-448	Buncombe (95J415)	Affirmed
JOINES v. ROYALE COMFORT SEATING No. 99-10	Alexander (97CVS375)	Affirmed
LITTLEJOHN v. KIRBY No. 99-359	Johnston (98CVS603)	Reversed and Remanded
MOTSINGER v. MOTSINGER No. 99-858	Guilford (97CVD828)	Dismissed
STATE v. AUSTIN No. 99-891	Buncombe (99CRS50841)	No Error
STATE v. BROWN No. 99-974	Mecklenburg (98CRS25697) (98CRS25698) (98CRS148297) (98CRS148298)	No Error
STATE v. BUSH No. 99-912	Mecklenburg (97CRS1155)	No Error

STATE v. CALHOUN No. 99-820	Davidson (97CRS12134) (97CRS12135) (97CRS12136) (97CRS12137)	No Error
STATE v. CHAVIS No. 99-903	Moore (96CRS6061) (96CRS6062) (96CRS6066)	No Error
STATE v. COOPER No. 99-859	Beaufort (96CRS5906)	No Error
STATE v. CRUMP No. 99-875	Buncombe (98CRS54619) (98CRS59087)	No Error
STATE v. DAVIS No. 99-139	Cleveland (98CRS841)	No Error
STATE v. ENNIS No. 99-827	Pitt (97CRS20184) (97CRS20185) (97CRS20186)	No Error
STATE v. FERRELL No. 99-849	Wake (98CRS36664)	No Error
STATE v. FULMORE No. 99-37	Craven (94CRS11958) (94CRS13309) (94CRS14942)	No Error
STATE v. JACKSON No. 99-809	Forsyth (98CRS45784)	Remanded for resentencing
STATE v. JAMES No. 99-928	Guilford (98CRS48764)	No error, remanded for correction of clerical error
STATE v. McDONALD No. 99-630	Durham (97CRS103063) (97CRS103064) (97CRS103065)	Affirmed
STATE v. MEYST No. 99-760	(Forsyth (96CRS22654)	Affirmed
STATE v. RICE No. 99-850	Buncombe (96CRS61037) (96CRS61038)	Affirmed
STATE v. STOKES No. 99-915	Forsyth (98CRS21493) (98CRS21494) (98CRS25057)	No Error

STATE v. TAPP No. 99-689	Forsyth (97CRS48239) (97CRS48240) (97CRS48241) (97CRS48242) (97CRS48243) (97CRS48244) (97CRS48245) (97CRS48246) (98CRS4157) (98CRS4158) (98CRS4177) (98CRS4178) (98CRS4179)	No Error
STATE v. TEW No. 99-596	Alamance (98CRS4002)	No Error
STATE v. WATT No. 99-904	Rockingham (98CRS7484) (98CRS7487)	No Error
STATE v. WEBSTER No. 99-787	Surry (97CRS9601) (97CRS9602) (97CRS9604) (97CRS9605) (98CRS5063)	No Error
STATE ex rel. DURKIN v. WISEMAN No. 99-978	Harnett (93CVD1187)	Vacated and Remanded
WILSON v. ATKINSON No. 99-428	Stanly (97SP69)	Affirmed
YARBROUGH v. ZONING BD. OF ADJUST. OF NEW HANOVER COUNTY No. 99-245	New Hanover (97CVS2293)	Affirmed

FILED 15 FEBRUARY 2000

BOVIS CONSTR. CORP. v. WESTERN MASS. LIFE CARE CORP. No. 99-419	Mecklenburg (98CVS7980)	Reversed and Remanded
CURRIE v. FAY BLOCK CO. No. 99-414	Cumberland (97CVS6822)	Affirmed
ELK RIVER CLUB v. BELL No. 99-361	Avery (97CVS193)	Affirmed

GLADDEN v. PAYSOUR No. 99-344	Gaston (97CVS4787)	Dismissed
GREENE v. FIRST BANK No. 99-381	Stanly (95CVS769)	Affirmed
IN RE HARDIN No. 99-464	Burke (98J100)	Affirmed
KIRK v. GREAT AM. INS. CO. No. 99-303	Ind. Comm. (628621)	Affirmed
McCRACKEN v. STANDARD PRODS. No. 99-286	Ind. Comm. (339501)	Affirmed
SMITH v. N. C. DIV. OF MOTOR VEHICLES No. 99-314	Wake (98CVS9098)	Affirmed
STATE v. ENGLAND No. 99-47	Cherokee (97CRS2435) (97CRS2436)	No Error
STATE v. HUDSON No. 99-153	Mecklenburg (97CRS18572) (98CRS8790) (98CRS8792)	No Error
STATE v. INGRAM No. 99-143	Mecklenburg (95CRS70408) (95CRS70409 (95CRS70411) (95CRS70413)	No Error
STATE v. JOHNSON No. 99-117	Cleveland (97CRS9868) (97CRS9869)	No Error
WEATHERSBY v. WEATHERSBY No. 99-276	Edgecombe (96CVD408)	Affirmed
WILLIAMS v. FAMILY DOLLAR STORES OF N.C. No. 99-347	Wake (97CVS6421)	Affirmed
WILLIAMS v. MAIDENFORM, INC. No. 99-26	Ind. Comm. (471881)	Affirmed
WOOD v. WOOD No. 99-338	Lee (97CVD30)	Vacated and remanded for additional findings of fact

HUGH A. WELLS, JUDGE OF THE NORTH CAROLINA COURT OF APPEALS (RETIRED), PLAINTIFF v. CONSOLIDATED JUDICIAL RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA99-566

(Filed 7 March 2000)

1. Pensions and Retirement— judicial benefits—return to state employment

The trial court did not err in concluding that N.C.G.S. §§ 135-3(8)c and 135-3(8)d apply to plaintiff, thus forfeiting plaintiff's contractual right to his judicial monthly service retirement benefit for the period of time when he served as Chairman of the Utilities Commission, because: (1) the prohibition within N.C.G.S. § 135-3(8)(d), providing that plaintiff's benefits would cease if he returned to employment with the State of North Carolina following his retirement from the Court of Appeals, was in effect in 1984 when plaintiff's right to Consolidated Judicial Retirement System benefits vested, although it was contained in the predecessor statute of N.C.G.S. § 135-3(8)(c); and (2) even though N.C.G.S. § 135-3(8)(d) is located within Article 1 of Chapter 135, since 1982 the legislature has made clear its intent that the provisions of Article 1 of Chapter 135, the Teachers' and Employees' Retirement System, apply to the Retirement System as a whole.

2. Pensions and Retirement— judicial benefits—return to state employment—constitutionality

The Retirement System's interpretation of N.C.G.S. § 135-3(8)(d), providing that plaintiff's benefits would cease if he returned to employment with the State of North Carolina following his retirement from the Court of Appeals, does not violate the taking clause and the equal protection clause because: (1) plaintiff did not have a property interest in the Consolidated Judicial Retirement System benefits while he was employed by the Utilities Commission; and (2) plaintiff was not treated differently than similarly situated persons since all retired officers and employees are subject to the provisions of N.C.G.S. § 135-3(8)(d).

3. Civil Procedure— affidavit—served after hearing—harmless error

Although the trial court abused its discretion in admitting an affidavit served after the hearing on the parties' motions for summary judgment in a case concerning plaintiff's rights to retirement benefits in the Consolidated Judicial Retirement System, the error was harmless in light of the fact that the trial court would likely have reached the same result by identifying and applying the relevant statutes. N.C.G.S. § 1A-1, Rule 61.

Judge HORTON dissenting.

Appeal by plaintiff from judgment entered 29 March 1999 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 5 January 2000.

Marvin Schiller and Boyce & Isley, P.L.L.C., by G. Eugene Boyce, for plaintiff petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for defendants respondents-appellees.

TIMMONS-GOODSON, Judge.

The facts of the present case are undisputed. In August of 1979, Judge Hugh A. Wells ("plaintiff") began serving on the North Carolina Court of Appeals, became a member of the Consolidated Judicial Retirement System ("CJRS") and made regular contributions to it. His right to retirement benefits vested in August of 1984. On 30 June 1994, plaintiff retired from the bench, at which time he qualified for a CJRS monthly benefit. He received one check from CJRS. One month after plaintiff retired from the Court of Appeals, Governor James B. Hunt, Jr. appointed him Chairman of the Utilities Commission. As a result of this appointment, plaintiff became a member of the Teachers' and State Employees' Retirement System of North Carolina. The CJRS terminated plaintiff's monthly CJRS benefit. On 31 December 1996, plaintiff resigned from the Utilities Commission. While the CJRS restored plaintiff's monthly benefit effective 1 January 1997, the CJRS did not pay plaintiff his benefit from 1 August 1994 through 31 December 1996.

On 12 March 1998, plaintiff filed a petition for a case hearing in the Office of Administrative Hearings wherein he sought payment of

his CJRS benefit from 1 August 1994 through 31 December 1996. Senior Administrative Law Judge Fred G. Morrison, Jr. filed a decision on 5 June 1998, recommending that plaintiff be denied relief. The Board of Trustees of the Teachers' and State Employees' Retirement System adopted the recommended decision as the final agency decision on 4 August 1998. Plaintiff filed a petition for judicial review in Superior Court, Wake County. On 29 March 1999, Superior Court Judge Narley L. Cashwell entered judgment affirming the final agency decision and granting summary judgment for defendants. Plaintiff appeals.

On appeal, plaintiff argues that: (I) the Retirement System applied the wrong statute; (II) the Retirement System's interpretation of North Carolina General Statutes section 135-3(8) is unconstitutional; and (III) the trial court erred in admitting the affidavit of Timothy S. Bryan into evidence.

The relationship between State employees and the Retirement System is contractual in nature. *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 223, 363 S.E.2d 90, 93 (1987), *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). In North Carolina, contractual rights vest in the Retirement System after five years of membership. N.C. Gen. Stat. § 135-57(c) (1997). The contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee's contractual rights vested. *Id.* at 224, 363 S.E.2d at 94. "[Members of the Retirement System] had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." *Id.*

Plaintiff became a member of the CJRS in August of 1979. Therefore, his right to retirement benefits vested in August of 1984. At that time, the relationship between plaintiff and the Retirement System became contractual in nature. Said contract was governed by the provisions of Chapter 135 as they existed in 1984.

[1] By his first assignment of error, plaintiff argues that neither North Carolina General Statutes section 135-3(8)c nor section 135-3(8)d applies to him. N.C. Gen. Stat. § 135-3(8)c (1984); N.C. Gen. Stat. § 135-3(8)d (1994). As a consequence, plaintiff asserts that he did not forfeit his contractual right to his judicial monthly service retirement benefit for the period of time when he served as Chairman of the Utilities Commission. We cannot agree.

The CJRS based its decision to suspend plaintiff's benefits on North Carolina General Statutes section 135-3(8)d, which provides:

> Should a beneficiary who retired on an early or service retirement allowance under this Chapter be restored to service as an employee or teacher, then the retirement allowance shall cease as of the first of the month following the month in which the beneficiary is restored to service and the beneficiary shall become a member of the Retirement System and shall contribute thereafter as allowed by law at the uniform contribution payable by all members.

N.C.G.S. § 135-3(8)d. According to plaintiff, the above prohibition does not apply to him because section 135-3(8)d was not in effect when plaintiff's contractual right to CJRS benefits vested in 1984. However, the prohibition within North Carolina General Statutes section 135-3(8)d was in effect when plaintiff's right to CJRS benefits vested; the prohibition was contained in North Carolina General Statutes section 135-3(8)c, the predecessor statute to North Carolina General Statutes section 135-3(8)d, which provided:

> Should a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the uniform contribution rate payable by all members. . . .

N.C.G.S. § 135-3(8)c. By relying on section 135-3(8)d as the basis for its decision to suspend plaintiff's benefits, the CJRS merely cited the statute which currently contains the prohibition that was in effect when plaintiff's benefits vested.

Before examining section 135-3(8)d, we note that the CJRS' interpretation of the provisions in issue is entitled to deference. *Taylor v. City of Lenoir*, 129 N.C. App. 174, 497 S.E.2d 715 (1998). "While it is not controlling, the construction given a statute by the agency charged with administering it is relevant evidence of the statute's meaning." *Id.* at 181, 497 S.E.2d at 721.

Plaintiff further argues that section 135-3(8)d does not apply to him because it is located within Article 1 of Chapter 135, the Teachers' and Employees' Retirement System, while his benefits vested under Article 4 of Chapter 135, the Consolidated Judicial Retirement System. However, since 1982 the legislature has made

clear its intent that the provisions of Article 1 apply to the Retirement System as a whole.

> [E]xcept as otherwise provided in this Article, the provisions of Article 1 are applicable and shall apply to and govern the administration of the Retirement System established hereby. Not in limitation of the foregoing, the provisions of G.S. 135-5(h), 135-5(n), 135-9, 135-10, 135-12 and 135-17 are specifically applicable to the Retirement System established hereby.

N.C. Gen. Stat. § 135-52(a) (1994).

At oral argument, plaintiff conceded that Article 1 of Chapter 135 applies to Article 4 of Chapter 135 for the limited purpose of administration. Plaintiff argued that Article 1 merely contains "administrative requirements" for Article 4 and that those provisions within Article 1 which pertain to "benefits" rather than "administration" do not apply to Article 4. We cannot agree.

While section 135-52(a) states that the provisions of Article 1 "shall apply to and govern the administration of the Retirement System," it also states more broadly that the provisions of Article 1 "are applicable." *Id.* Pursuant to section 135-52(a), certain provisions are specifically applicable to the whole Retirement System, namely sections 135-5(h), 135-5(n), 135-9, 135-10, 135-12, and 135-17. N.C.G.S. § 135-52(a). However, the list of provisions within section 135-52(a) is not an exhaustive one; the statutory language provides that the list of specifically applicable provisions is "[n]ot in limitation of" the general rule that the "provisions of Article 1 are applicable." *Id.*

Furthermore, while plaintiff argues an "administration"/"benefits" dichotomy, he offers no definition of said terms. An examination of Articles 1 and 4 does not reveal any relevant statutory definitions. In interpreting words in a statute, we rely on their common meaning absent a definition or contextual cue to the contrary. *Abernethy v. Commissioners*, 169 N.C. 631, 86 S.E. 577 (1915). Applying the same principle here, we note that "administration" is commonly understood to be "the practical management and direction" of the operations of the various agencies. Black's Law Dictionary 44 (7th ed. 1999).

Upon examination of those provisions of Article 1 which the legislature has explicitly deemed applicable to Article 4, we are not convinced that they are merely administrative in nature. For example, North Carolina General Statutes section 135-9 provides that retire-

ment benefits "are exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Chapter specifically otherwise provided." N.C. Gen. Stat. § 135-9 (1997). Section 135-9 does not pertain to practical management, but instead pertains to the nature of benefits. Therefore, we hold that section 135-9 is not merely administrative in nature. Accordingly, we reject plaintiff's arguments that only those provisions of Article 1 which are administrative in nature apply to Article 4.

Plaintiff further argues that section 135-3(8)d does not apply to him because statutory terms within the section exclude him. More specifically, plaintiff argues that he is not a "member" for purposes of North Carolina General Statutes section 135-3(8). Section 135-3(8) states that "[t]he provisions of this subsection (8) shall apply to any *member*[.]" N.C.G.S. § 135-3(8) (emphasis added). The term "member" is defined as "any teacher or State employee." N.C. Gen. Stat. § 135-1(13) (1994). The definition of the term "employee" excludes any members of CJRS. N.C. Gen. Stat. § 135-1(10) (1994). Plaintiff argues that given he is neither a teacher nor an employee, section 135-3(8) does not apply to him.

However, the legislature has indicated that Article 1 provisions which refer to "members" may apply to CJRS members. North Carolina General Statutes sections 135-5(n), 135-9, 135-10, and 135-17 all employ the term "member" and have all been held specifically applicable to Article 4. N.C.G.S. § 135-52(a).

Similarly, plaintiff argues that he is excluded by the terms of section 135-3(8)d because he did not retire on an "early" or "service retirement" allowance. N.C.G.S. § 135-3(8)d. North Carolina General Statutes section 135-1(23) defines "service" as "service as a teacher or State employee as described in subdivision (10) or (25) of this section." N.C. Gen. Stat. § 135-1(23) (1994). Plaintiff is not a teacher for purposes of section 135-1(25), and section 135-1(10) defines "employee" so as to exclude members of the CJRS.

Plaintiff relies on the statutory definition of "employee" of section 135-1(10) in an effort to show that he was not on "service retirement." However, we have already determined that section 135-1(10) does not preclude application of section 135-3(8)d to plaintiff. The legislature indicated that the term "member" applies to Article 4 even while "member" is defined as a teacher or State employee. N.C.G.S. § 135-1(13). It follows that "service" may apply to Article 4 even while

"service" is defined as service as a teacher or State employee. N.C.G.S. § 135-1(23).

In sum, after giving deference to the CJRS' interpretation of the provisions in issue and noting the general rule of section 135-52 that the provisions of Article 1 are applicable to Article 4, we are not convinced that the language of section 135-3(8)d prohibits application of the statute to plaintiff.

We conclude that the prohibition contained within section 135-3(8)d existed when plaintiff's rights vested in the Retirement System and that the prohibition applies to plaintiff. Therefore, plaintiff's contract under Chapter 135 provided that his benefits would cease if he returned to employment with the State of North Carolina following his retirement from the court.

[2] By his second assignment of error, plaintiff argues that the Retirement System's interpretation of North Carolina General Statutes section 135-3(8)d violates the Taking Clause and the Equal Protection Clause of both the United States and the North Carolina Constitutions. We cannot agree.

As discussed above, plaintiff's contract under Chapter 135 provided that his benefits would cease if he returned to employment with the State of North Carolina following his retirement from the court. Therefore, plaintiff did not have a property interest in the CJRS benefits while he was employed by the Utilities Commission. We conclude that there was no violation of plaintiff's rights under the Taking Clause of either the United States or the North Carolina Constitution. *See Woods v. City of Wilmington*, 125 N.C. App. 226, 480 S.E.2d 429 (1997).

Furthermore, all retired officers and employees are subject to the provisions of North Carolina General Statutes section 135-3(8)d. Therefore, plaintiff was not treated differently than similarly situated persons. We conclude that the Retirement System's interpretation of North Carolina General Statutes section 135-3(8)d does not violate the Equal Protection Clause of either the United States or the North Carolina Constitution. *See Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980).

[3] By his third assignment of error, plaintiff argues that the trial court erred in admitting the affidavit of Timothy S. Bryan into evidence. We agree.

"[S]upporting affidavits should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing." *Battle v. Nash Tech. College*, 103 N.C. App. 120, 127, 404 S.E.2d 703, 706-07 (1991) (quoting *Insurance Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974), *cert. denied*, 287 N.C. 465, 215 S.E.2d 624 (1975)). Once an affidavit has been served, the trial court has broad discretion under North Carolina Rule of Civil Procedure 56(e) to permit affidavits to be supplemented or opposed. *Id.*

In the present case, a hearing on the parties' motions for summary judgment was held on 8 February 1999. The affidavit of Timothy Bryan was filed with the court and served on plaintiff on 10 February 1999. In other words, the affidavit was not served prior to the day of hearing. Therefore, the trial court abused its discretion in failing to exclude the affidavit of Timothy Bryan. However, even if the affidavit had been excluded, the trial court would likely have reached the same result in this case by identifying and applying the relevant statutes. *See* N.C. Gen. Stat. § 1A-1, Rule 61 (1990). *See also Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985). We conclude that the error was harmless.

For the reasons stated herein, the decision of the trial court is affirmed.

Affirmed.

Judge McGEE concurs.

Judge HORTON dissents.

Judge HORTON dissenting.

In 1973, the North Carolina General Assembly created a uniform retirement system for "all justices and judges of the General Court of Justice who are so serving on the effective date of this act [1 January 1974], or who become such thereafter." 1973 Sess. Laws ch. 640, § 1. By direction of the General Assembly, the provisions of the Uniform Judicial Retirement Act (the Act) were codified as Article 4 of Chapter 135 of our General Statutes. The Act provided that the "retirement benefits of any person who becomes a justice or judge on or after the effective date of this act shall be determined solely in

accordance with the provisions of this Article." 1973 Sess. Laws ch. 640, § 1(c). Although it is not pertinent to this appeal, the Uniform Judicial Retirement Act is now the Consolidated Judicial Retirement Act, and includes clerks of superior court, district attorneys, and the Administrative Officer of the Courts as members.

Judge Hugh A. Wells became a member of the North Carolina Court of Appeals on 20 August 1979, and made contributions to the Judicial Retirement System. Judge Wells' retirement benefits vested on 20 August 1984, after five years of continuous service. Members of the Retirement System have a contractual relationship with that System and may rely on the terms of that contract as set out in the applicable statutes on the date the members become vested in the retirement plan. *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 224, 363 S.E.2d 90, 94 (1987), *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). Judge Wells served on the Court of Appeals until his retirement on 30 June 1994. By reason of his service, which began after 1 January 1974, Judge Wells was eligible for retirement benefits in accordance with the provisions of Article 4 of Chapter 135. On 20 August 1984, the date Judge Wells became fully vested for retirement purposes, the Act under which his retirement benefits were determined provided that "[i]n the event that a retired former member should at any time return to *service as a justice or judge*, his retirement allowance shall thereupon cease and he shall be restored as a member of *the Retirement System*." 1973 Sess. Laws ch. 640, § 1 (emphasis added). The Act then defined "Retirement System," as "the 'Uniform [now, Consolidated] Judicial Retirement System' of North Carolina, as established in this Article." *Id.* Thus, had Judge Wells returned to service as a justice or judge in North Carolina following his retirement, he would have resumed both his membership and contributions to the Judicial Retirement System, and his retirement allowance would have ceased.

Judge Wells did not, however, return to employment as a judge, but was appointed Chairman of the North Carolina Utilities Commission. In that position, he became a member of the Teachers' and State Employees' Retirement System of North Carolina (TSERS), a retirement system created by the General Assembly in 1941 to provide "retirement allowances and other benefits . . . for teachers and State employees . . . ." N.C. Gen. Stat. § 135-2. Statutory provisions relating to TSERS are codified in Article 1 of Chapter 135 of the General Statutes. At the time Judge Wells became vested in the Judicial Retirement System, Article 1 provided in part that "[s]hould

a beneficiary who retired on an early or service retirement allowance be restored to service for a period of time exceeding six calendar months, his retirement allowance shall cease, he shall again become a member of the Retirement System and he shall contribute thereafter at the uniform contribution rate payable by all members." 1983 Sess. Laws ch. 556, § 1(c). The 1983 amendment set out above was effective on 17 June 1983, and was codified as N.C. Gen. Stat. § 135-3(8)(c) [now N.C. Gen. Stat. § 135-3(8)(d) (1999)]. The Board erroneously applied the "restored to service" provisions of N.C. Gen. Stat. § 135-3(8)(c) to Judge Wells, and stopped the vested payments due him under the provisions of the Judicial Retirement Act during the period he served on the Utilities Commission.

The Board erred in its construction of the applicable statutory provisions for several reasons. First, by its plain language, N.C. Gen. Stat. § 135-3(8)(c) referred to a person being "restored" to "service". The common definition of "restored" is "[t]o put (someone) back in a former position." The American Heritage College Dictionary (3d Edition). Second, "service" is defined in N.C. Gen. Stat. § 135-1(23) as "service as a teacher or State employee . . . ." A judge is obviously not a "teacher" as defined in N.C. Gen. Stat. § 135-1(25) nor an "employee" as defined in N.C. Gen. Stat. § 135-1(10). Significantly, N.C. Gen. Stat. § 135-1(10) specifically provides that "the term 'employee' shall not include any person who is a member of the Consolidated Judicial Retirement System . . . ." *Id.* Even more significantly, the General Assembly amended N.C. Gen. Stat. § 135-1(10) to exclude any member of the judicial retirement system from the definition of "employee" in the same legislation by which it established the Judicial Retirement System [Chapter 640 of the 1973 Session Laws]. 1973 Sess. Laws ch. 640, § 2.

In Chapter 640, the amendment to the definition of "employee" in Article 1 immediately follows the "restored to service" provision of Article 4 relating to justices and judges, and makes it clear that the legislature not only intended to remove justices and judges from the definition of "employee" in N.C. Gen. Stat. § 135-1(10), but also from the "restored to service" provisions of Article 1 of Chapter 135, as now found in N.C. Gen. Stat. § 135-3(8)(d). Having been neither a state employee nor a teacher prior to his appointment to the Utilities Commission, Judge Wells could not be *restored* to his "former position." Yet the Board specifically relied on the language of N.C. Gen. Stat. § 135-3(8)(c), now N.C. Gen. Stat. § 135-3(8)(d), in denying benefits to Judge Wells.

The Board argues that the provisions of N.C. Gen. Stat. § 135-3(8)(d) apply to Judge Wells, and other persons similarly situated, by reason of N.C. Gen. Stat. § 135-52, as codified in Article 4 (Consolidated Judicial Retirement Act). The statute reads:

§ 135-52. Application of Article 1; administration.

> (a) References in Article 1 of this Chapter to the provisions of "this Chapter" shall not necessarily apply to this Article. However, *except as otherwise provided in this Article*, the provisions of Article 1 are applicable and shall apply to and govern *the administration of the Retirement System* established hereby. Not in limitation of the foregoing, the provisions of G.S. 135-5(h), 135-5(n), 135-9, 135-10, 135-12 and 135-17 are specifically applicable to the Retirement System established hereby.
>
> (b) The provisions of this Article shall be *administered* by the Board of Trustees of the Teachers' and State Employees' Retirement System.

Id. (emphasis added); 1973 Sess. Laws ch. 640, § 1. This provision clearly does not support the interpretation of the Board. First, by its plain language it relates primarily to the *administration* of both retirement systems, the Uniform [now, Consolidated] Judicial Retirement System and The Teachers and State Employees' Retirement System, by the same Board of Trustees. The General Assembly wisely set out in N.C. Gen. Stat. § 135-52 six specific statutory provisions to be certain that they were applied to both systems. It would have been a simple matter for the General Assembly to include specifically the provisions of N.C. Gen. Stat. § 135-3(8)(c), now (d), in N.C. Gen. Stat. § 135-52 if it wanted the provision to apply to judges, and it is significant that the Assembly did not do so. Second, and even more persuasive, N.C. Gen. Stat. § 135-52 provides that the provisions of Article 1 apply "except as otherwise provided in this Article [4]." As set out above, the legislature included a specific "restoration to service" provision in N.C. Gen. Stat. § 135-71, and made that provision applicable to justices and judges who were members of the Judicial Retirement System. If the legislature intended that the "restored to service" provisions now contained in Article 1 of Chapter 135, and codified as N.C. Gen. Stat. § 135-3(8)(d), also apply to judges and other members of the Judicial Retirement System, then why enact N.C. Gen. Stat. § 135-71 at all? We may assume that our legislature did not perform a meaningless act in doing so. "It is always presumed that the legislature acted with care and deliberation and

with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (citations omitted).

Further, if we give N.C. Gen. Stat. § 135-52 the broad reading for which the Board argues, we render the specific provisions of N.C. Gen. Stat. § 135-71 nugatory, in violation of our accepted principles of statutory construction. As a general rule, two statutory provisions dealing with the same subject matter should be read together and harmonized, if possible; where they cannot be harmonized, however, the more specific provision controls over the more general provision, and the later enactment generally controls over an earlier statute. *See Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966); *State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971). Here, the Board argues that N.C. Gen. Stat. § 135-3(8)(d) is a general statute dealing with the restoration to service of any person entitled to retirement benefits under either the TSERS or the CJRS. N.C. Gen. Stat. § 135-71, by its very terms, is a restoration to service statute *specifically* directed at members of the Judicial Retirement System who return to service in a position included in the Act.

This decision does not result in a "windfall" to Judge Wells. During the period in question, he was a member of TSERS and was making contributions as required by law. Further, he was undoubtedly taxed by the state and federal governments on his earnings as Chairman of the Utilities Commission, and was subject to other lawful deductions from his salary. It does not offend public policy to allow him also to receive vested retirement benefits to which he was entitled from another retirement system during the same period of time.

The commonality of administration and the relative proximity of Articles 1 and 4 of Chapter 135 apparently contributed to the erroneous conclusion reached by the able trial court. There being no question of material fact, the plaintiff, Judge Hugh A. Wells, is entitled to entry of summary judgment in his favor. In light of my conclusion, I need not consider the serious constitutional question which also arises on these facts.

I respectfully dissent from the majority opinion, and vote to reverse the judgment of the trial court.

STATE OF NORTH CAROLINA v. TYDIS JOHNSON

No. COA98-359

(Filed 7 March 2000)

1. Confessions and Incriminating Statements— initiation of conversation—nodding of head

In a first-degree murder and robbery with a dangerous weapon case where defendant-juvenile stated he did not wish to answer any questions, his mother interjected that "we need to get this straightened out today and we'll talk with him anyway," defendant thereafter nodded affirmatively to the detective after considering his mother's statement, and then the detective asked if defendant wanted to answer questions without a lawyer or parent being present, the trial court did not err by denying defendant's motion to suppress his statement to the Shelby Police where he confessed to shooting the victim because defendant initiated the conversation in which he made the incriminating statement by nodding his head to the officer. N.C.G.S. § 7A-595.

2. Discovery— statements of defendant—juvenile rights form—synopsis of oral statements

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's objection to a detective's testimony elicited from the juvenile rights form, on the basis that it was a statement of defendant and had not been provided to defendant by the district attorney in response to defendant's request prior to trial, because: (1) the State provided defendant with copies of the completed juvenile rights and waiver of rights form, and the bottom of the form provides handwritten notation of the answers given by defendant in response to questions as to waiving his juvenile and Miranda rights; and (2) the State provided defendant with copies of the four-page written statement of defendant, which complies with the "substance" requirement of N.C.G.S. § 15A-903(a).

3. Evidence— lay opinion—personal perception

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by refusing to sustain defendant's objection to the State's questioning of the detectives as to their opinions of defendant's understanding of the juvenile rights form because the opinions were based on the detectives' personal

perceptions of defendant at the time of the confession and helped the trial court determine the issue of the voluntariness of defendant's statement. N.C.G.S. § 8C-1, Rule 701.

4. Evidence— expert—exclusion of testimony—no prejudicial error

The trial court did not commit prejudicial error in a first-degree murder and robbery with a dangerous weapon case by refusing to allow the testimony of a certified school psychologist and a child psychologist, concerning whether someone with attention deficit disorder would be able to sit in a room at a table for over an hour with full attention and at what reading level a certain statement was written, because: (1) defendant did not place in the record the testimony which was propounded; and (2) defendant has failed to show that a different result would probably have occurred at trial if the answers to the two questions had been permitted.

5. Accomplices and Accessories— jury instruction—accessory after the fact—tried as a principal

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by refusing to instruct the jury on the charge of accessory after the fact because a defendant tried as a principal may not be convicted of the crime of accessory after the fact since it is a substantive crime and not a lesser degree of the principal crime.

Appeal by defendant from judgments entered 21 May 1997 by Judge Chase B. Saunders in Cleveland County Superior Court. Heard in the Court of Appeals 26 January 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Francis W. Crawley, for the State.

Bridges & Gilbert, P.A., by R. L. Gilbert, III and William C. Young, for defendant-appellant.

HUNTER, Judge.

Tydis Johnson ("defendant") appeals his conviction for the offenses of first degree murder and robbery with a dangerous weapon of Danny Ray Pack ("Pack") which occurred on 23 August 1996 in Shelby, North Carolina. We affirm.

The State presented evidence at trial which showed that Michael Page ("Page") was working as the dispatcher for United Cab in Shelby, North Carolina during the early morning hours of Friday, 23 August 1996. At 4:31 a.m., Page received a telephone call in which a male voice asked for a taxi cab to come to Apartment D, the Meadows Apartments, 1501 Eaves Road in Shelby. Taxi driver Pack was dispatched to this address at 4:36 a.m. and eight to ten minutes later called on his car radio and asked the dispatcher to call the requesting party as he was waiting outside. Page's return telephone call was answered by a woman who said she lived at Apartment J-5, Holly Oak Apartments. While Page was speaking to the woman, Pack called by radio and said "[g]ive me a ten thirteen out here. I think I've been shot." Page asked the woman to hang up and then called 911, informing the operator that a cabdriver had been shot at 1501 Eaves Road, Apartment D. Pack radioed again, and in a gurgling voice said that he had been shot. In less than a minute, Pack called in a third time.

Responding to the 911 call, Shelby police officer T. L. Green arrived at the parking lot of the 1501 building at the Meadows Apartments at 4:46 a.m. Officer Green observed that Pack, who was still breathing, was lying partially in the taxi with his head on the carpeted area by the driver's seat. A large pool of blood was underneath Pack. When the emergency medical personnel moved Pack to the emergency vehicle, Officer Green observed an empty holster on Pack's left side. It was subsequently discovered that he had been carrying a Lorcin nine-millimeter pistol that night.

Pack subsequently died. At trial, Dr. Steve Tracy testified that Pack had incurred two gunshot wounds to the head on the morning of 23 August 1996. His cause of death was the wound that caused a depressed skull fracture and bruising of the brain.

Shelby Police Detective Jim Glover talked to suspects Eric Wright ("Wright") and Keith Hamilton ("Hamilton") within two days following the murder of Pack. Both indicated that defendant was involved in the robbery and murder of Pack. On 26 August 1996, Shelby Police Officer Wacaster saw defendant sitting in the front passenger seat of a car that was stopped at a gasoline pump at Super Dave's Convenience Store, located several blocks from the Meadows Apartments. After obtaining the driver's consent, Officer Wacaster searched the glove box and seized a silver .32 caliber pistol and eight cartridges wrapped inside a plastic bag. Detective Glover approached

defendant in the presence of other police officers at Super Dave's and informed defendant that the police were investigating a shooting incident and asked defendant to go the police department. Defendant stated that he did not wish to do so, and Detective Glover placed defendant under arrest for the homicide of Pack. Defendant was 15 years of age at the time of his arrest.

Defendant was then driven to the police department, where, in his mother's presence, defendant was advised of his Miranda rights, which defendant said he understood. Defendant then said that he did not want to answer questions. At that point, defendant's mother interjected and told the defendant that "we need to get this straightened out today and we'll talk with him anyway." Defendant then nodded affirmatively to Detective Glover, who then asked if defendant wanted to answer questions without a lawyer or parent being present. Defendant answered "yes" and signed a waiver of rights form, which was also signed by defendant's mother, Detective Glover and Detective Jeff Ledford.

Defendant was then questioned about the incident. Defendant first indicated that he did not know anything about the murder of Pack; however, defendant became emotional after being told that other persons had been interviewed, and the reasons why he was being interviewed. Defendant indicated that he wanted to talk without his mother being present, and she and Detective Ledford then left the room. Defendant then said he was involved and wanted to talk about the incident. Approximately five minutes later, defendant's mother returned, and defendant told her what he had just said to Detective Glover. In his mother's presence, defendant made a statement to Detective Glover describing the circumstances surrounding the shooting of Pack on 23 August 1996.

Defendant's statement indicated that on the evening of 22 August 1996, defendant had been in the company of Wright and Hamilton at defendant's brother's apartment at Holly Oak Apartments, number J-1. Wright called the taxi from Nancy Dawkins' apartment, number J-5 at Holly Oak Apartments, and then the boys walked to the Meadows Apartments. As they saw the cab approaching the Meadows Apartments, the boys ran towards it and Hamilton pointed a .22 rifle at the cab driver, who tried to pull the rifle away. When the cab driver reached for his own pistol, defendant shot him in the jaw on the right side of the head. Defendant reached in the passenger side door and tried to take the radio scanner which would not come loose. Hamilton picked up Pack's fallen pistol and defendant dropped his gun and

began to run. Defendant left Wright at the car and heard another shot as he turned to run. Several minutes later at defendant's brother's apartment in Holly Oak Apartments, Wright came in holding a bloody towel, and said, "I blasted that fool." Defendant said that Wright later sold Pack's nine-millimeter pistol for one hundred dollars.

The State's evidence regarding weapons showed that police officers subsequently executed a search warrant and seized a .22 rifle from under a couch in apartment J-1 of the Holly Oak Apartments and also two .38 caliber bullets and an amplifier. Melvin Jamerson purchased a nine-millimeter pistol from defendant after 23 August 1996 for one hundred dollars. The transaction occurred in the Holly Oak Apartments and Jamerson asked defendant if the gun was hot or had any bodies on it. Defendant answered "no." The silver .32 caliber pistol and cartridges obtained from the vehicle in which defendant was a passenger on 26 August 1996 and two fired bullets from the murder scene were submitted to the North Carolina State Bureau of Investigation ("SBI") for comparison. SBI Special Agent Ronald Marrs compared the fired bullets found at the murder scene and those taken from Pack's scalp and determined that both were fired from the .32 caliber pistol to the exclusion of all other firearms.

Defendant, Hamilton, and Wright all had conflicting accounts of the shooting. Hamilton stated that he inflicted Pack's first wound. Wright admitted calling the cab company and walking with Hamilton and defendant to meet the cab, but denied seeing who actually shot Pack. Hamilton pleaded guilty to second degree murder for the killing of Pack. Wright pleaded guilty to robbery with a dangerous weapon and accessory to the murder of Pack. Defendant was tried and found guilty of first degree murder and robbery with a dangerous weapon, and was sentenced to a term of life imprisonment without parole.

[1] First, defendant contends that the trial court erred in its denial of his motion to suppress his statement to the Shelby Police in which he confessed to shooting Pack. Defendant argues his statement should have been suppressed because the evidence shows that after his interrogation had begun, defendant indicated to the police that he did not wish to answer any questions and at this point, questioning should have ceased.

N.C. Gen. Stat. § 7A-595 regarding interrogation procedures for juveniles, provides in pertinent part:

(a) Any juvenile in custody must be advised prior to questioning:

(1) That he has a right to remain silent; and

(2) That any statement he does make can be and may be used against him; and

(3) That he has a right to have a parent, guardian or custodian present during questioning; and

(4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

. . .

(c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that he does not wish to be questioned further, the officer shall cease questioning.

N.C. Gen. Stat. § 7A-595 (1989).

As is required, the trial court in the present case issued an order stating how it resolved the conflicts in evidence presented by the State and defendant as to whether the defendant wished to be interrogated. *See State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983); *State v. Braxton*, 343 N.C. 120, 468 S.E.2d 59, *opinion after remand*, 344 N.C. 702, 477 S.E.2d 172 (1996). The trial court made the following findings of fact, in pertinent part:

5. The interrogation of the defendant took place in the law library. . . . Present during most of the interrogation were the defendant, his mother, Detective Glover and [Detective] Ledford who was there to serve as a witness;

. . .

7. After the [Miranda] rights were read, Glover asked the defendant the questions that appear in the waiver section of the rights form. He first asked the defendant, "Do you understand each of these rights I have explained to you?"[] The defendant initially responded by nodding his head affirmatively as he had done previously. Detective Glover instructed the defendant that he had to respond verbally by answering either "yes" or "no". The defendant said "yeah". Detective Glover then asked the defendant the next question—"Having these rights in mind, do you wish to

answer questions?" The defendant answered "No". Immediately after the defendant gave that response, his mother turned to him and said "No, we need to get this straightened out today. We'll talk with him anyway." The defendant looked at his mother. He lowered his head and appeared to be considering what his mother had said. He then turned to Detective Glover and nodded his head affirmatively. Detective Glover then asked the defendant the third question, "Do you now wish to answer questions without a lawyer present?"[] The defendant responded, "Yes." Detective Glover next asked him the fourth and last question, "Do you wish to answer the questions without a parent, guardian or custodian present?" The Defendant answered, "Yes." At that point, Detective Glover handed the waiver form to the defendant's mother who read the form then signed it. The form was then passed to the defendant who simply signed the form without reading it;

8. After the defendant had been advised of his rights, Glover proceeded to interrogate the defendant. Initially Glover engaged the defendant in casual conversation that was unrelated to the events that led to the defendant's arrest. Detective Glover then asked the defendant if he wanted to talk about the robbery and murder of Danny Pack. The defendant indicated a willingness to talk to Glover about the murder. Glover handed the defendant a pen and paper and asked him to write down what had occurred. The defendant made a few marks on the paper, appeared to become frustrated, pushed the paper across the table to Glover and asked Glover to record his statement. . . .

While defendant initially stated that he did not want to answer any questions, within a few moments, he rescinded this decision by nodding his head affirmatively to Detective Glover. When asked, defendant stated that he would answer questions without an attorney present.

This Court has stated: "[W]hen a person in custody indicates he does not wish to make a statement, the officers may not take an inculpatory statement from him unless the defendant initiates the conversation in which he waives his rights." *State v. Bragg*, 67 N.C. App. 759, 760, 314 S.E.2d 1, 1 (1984). When a defendant indicates he does not wish to answer questions but later responds to further questioning, "the crucial issue is who initiated the conversation in which the defendant made the incriminating statement." *State v. Crawford*, 83 N.C. App. 135, 137, 349 S.E.2d 301, 302 (1986), *cert. denied*, 319 N.C.

106, 353 S.E.2d 115 (1987); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1043, 77 L. Ed. 2d 405, 411 (1983) (an accused in custody is not subject to further interrogation after requesting counsel until counsel has been made available to him unless the accused himself initiates further *communication, exchanges, or conversations* with the authorities).

In the present case, defendant stated that he did not wish to answer any questions, but then, upon considering his mother's statement, he turned to the police officer and nodded his head affirmatively. In response to defendant's nod indicating "yes," Detective Glover asked defendant if he then wished to answer questions without a lawyer present and defendant answered "yes." By turning to the detective and nodding his head affirmatively to him, defendant communicated with him and thus initiated further conversation. If defendant had not made this gesture to the detective, the detective could not have continued questioning him. Because defendant initiated communication, we hold that defendant's subsequent statement was admissible. Accordingly, this assignment of error is overruled.

[2] Defendant next contends that the trial court committed reversible error by denying defendant's objection to testimony of Detective Glover elicited from the juvenile rights form on the basis that it was a statement of the defendant and had not been provided to defendant by the district attorney in response to defendant's request prior to trial. N.C. Gen. Stat. § 15A-903(a) provides, in pertinent part:

> (a) Statement of Defendant.—Upon motion of a defendant, the Court must order the prosecutor:
>
> . . .
>
> (2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial . . . .

N.C. Gen. Stat. § 15A-903(a)(2) (1999). The State contends that it properly "responded to defendant's request for voluntary discovery by providing copies of the completed [j]uvenile rights and waiver of rights form and the four-page written statement of defendant," to

defendant during discovery and that the substance of defendant's statements were shown on this form.

The completed juvenile rights and waiver of rights form, which was provided to defendant, provides, in pertinent part:

> [I]t [is] clear to me that I have the following rights:
>
> (1) You have the right to remain silent.
>
> (2) Anything you say can be and may be used against you.
>
> (3) You have the right to have a parent, guardian or custodian present during questioning.
>
> (4) You have the right to talk with a lawyer for advice before questioning and to have that lawyer with you during questioning. If you do not have a lawyer and want one, a lawyer will be appointed for you.
>
> (5) If you consent to answer questions now, without a lawyer, parent or guardian present, you still have the right to stop answering at any time.
>
> WAIVER
>
> (1) Do you understand each of these rights I have explained to you?
>
> Answer "yeah" (handwritten)
>
> (2) Having these rights in mind do you now wish to answer questions?
>
> Answer "no" (handwritten)
>
> (3) Do you now wish to answer questions without a lawyer present?
>
> Answer "yes" (handwritten)
>
> (4) Do you now wish to answer questions without a parent, guardian or a custodian present?
>
> Answer "yes" (handwritten)

The form was signed by defendant, his mother, Detective Ledford and Detective Glover.

The trial transcript reveals that during trial, Detective Glover testified as to answers the defendant gave in response to questions

about locating his mother and his Miranda and juvenile rights under N.C. Gen. Stat. § 7A-595, which are combined together and listed (1)-(5) on the form. A "check" mark is handwritten beside each number from (1) to (5). Detective Glover testified that the check by each number was written by him after he read the corresponding right to defendant and after each was read, defendant either indicated non-orally that he understood the right or did nothing to indicate that he did not understand. He testified that after he read right number one, "[defendant] indicated that it was all right, and I made a check on the one or the number beside it, that he indicated that he understood that right." Detective Glover testified that defendant made no statement in response to any of the Miranda rights read to him, and indicated that defendant did not make a non-oral assertion for any right except the first one. Thus, Detective Glover did not testify as to any oral statement defendant made in response to the reading of defendant's rights. Our review indicates that the bottom of the form clearly provides handwritten notation of the answers given by the defendant in response to questions as to waiving his juvenile and Miranda rights.

The sanctions for failure to comply with statutory discovery requirements are permissive and a trial court's decision may be disturbed only upon a showing of abuse of discretion. *State v. Bearthes*, 329 N.C 149, 405 S.E.2d 170 (1991). The ruling on defendant's motion will not be disturbed on appeal "absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986). Additionally, defendant must demonstrate he was prejudiced by the State's noncompliance and that, if the substance of the oral statements had been provided earlier, the outcome of the trial would have differed. *Id.* Our Supreme Court has held that delivery of a synopsis of a defendant's oral statements in response to discovery requests complies with the "substance" requirement of N.C. Gen. Stat. § 15A-903(a)(2). *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). Because Detective Glover did not testify that defendant made a statement in response to the reading of his rights at the top of the juvenile rights and waiver of rights form, the State could not have provided a recorded statement by the defendant in response to the reading of these rights. Thus, the State did not fail to comply with discovery under N.C. Gen. Stat. § 15A-903(a)(2). Likewise, defendant has failed to show an abuse of discretion through bad faith by the State during discovery. Accordingly, this assignment of error is overruled.

[3] Next, defendant contends that the trial court erred in refusing to sustain defendant's objection to the State's questioning of Detective Glover and Detective Ledford as to their opinion of the defendant's understanding of the juvenile rights form. Defendant argues that the question asked for more than the officers' perception of him and that the officers did not have sufficient expertise to form an opinion.

First, we note that juvenile is defined as a "person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States." N.C. Gen. Stat. § 7A-517(20) (1989). It is uncontroverted that defendant was a juvenile at the time of his interrogation. The trial court must find that the juvenile knowingly, willingly, and understandingly waived his rights before admitting into evidence any statement resulting from custodial interrogation. N.C. Gen. Stat. § 7A-595(d) (1989). The determination of whether a waiver is knowingly and intelligently made is dependent on the specific facts and circumstances of each case, including background, experience, and conduct of the accused. *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996). The burden rests on the State to show the juvenile defendant made a knowing and intelligent waiver of his rights. *Id.*

Opinion testimony by a lay witness is allowed if "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.R. Evid. 701. The State contends that the detectives' opinions that defendant understood his Miranda rights were based upon their personal perception of defendant and was helpful to the trial court in determining the ultimate fact at issue—whether defendant understandingly, knowingly, and willingly waived his rights.

In *State v. Jones*, 342 N.C. 523, 467 S.E.2d 12 (1996), a police officer's opinion of the defendant's mental capacities at the time of the confession was properly admitted because his opinion

> was rationally based on his perception of defendant at the time of the confession. Furthermore, it was necessary that he give his opinion as to defendant's mental state at the time of the confession to help determine a crucial fact in issue, that is, that defendant voluntarily gave the statement to police.

Id. at 538, 467 S.E.2d at 21.

In the case at bar, Detective Glover read the juvenile rights and waiver form to defendant and noted defendant's responses on the

form. Detective Glover expressed his opinion at trial that defendant understood his rights and the waiver of those rights. Detective Ledford was present while the juvenile rights and waiver of rights were read to defendant and testified that his opinion was that defendant understood his rights and the waiver. If a police officer's opinion is not based upon his own perception, then it would not qualify as lay opinion under N.C. Gen. Stat. § 8C-1, Rule 701. However, as was the case in *Jones*, the opinions of Detective Glover and Detective Ledford were based upon their personal perception of defendant at the time of the confession and helped the trial court determine the issue of the voluntariness of the defendant's statement. *See also State v. Westall*, 116 N.C. App. 534, 449 S.E.2d 24, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994). Accordingly, their testimony on this issue was properly admitted.

[4] Defendant's next assignment of error concerns the trial court's disallowance of testimony by Jo Bralley, a certified school psychologist, and Dr. Ben J. Williams, a child psychologist.

During trial, defendant asked Bralley her opinion as to whether "someone with [attention deficit disorder] would you expect them to be able to sit in a room at a table for well over an hour and maintain full attention?" Defendant contends "this is a question within the purview of Ms. Bralley's experience and expertise and she should have been allowed to answer." However, once the State objected, defendant did not place in the record the testimony which was propounded. Likewise, defendant did not place in the record testimony elicited from Dr. Williams by the question "[d]o you have an idea at what reading level that statement was written on?" A reviewing court cannot determine whether the exclusion of the evidence sought to be presented is prejudicial error without knowing what the evidence would have been. *State v. King*, 326 N.C. 662, 392 S.E.2d 609 (1990). We cannot determine what the evidence defendant propounded would have indicated. Therefore, we cannot determine if prejudicial error occurred. Defendant has failed to show that a different result would probably have occurred at trial if the school psychologist and child psychologist had been permitted to answer the above-mentioned questions, and has failed to carry his burden of showing prejudicial error under N.C. Gen. Stat. § 15A-1443(a). Accordingly, this assignment of error is overruled.

[5] Next, defendant contends that the trial court committed reversible error by refusing to instruct the jury on the charge of accessory after the fact when there was ample evidence supporting

such instruction. A defendant charged and tried as a principal may not be convicted of the crime of accessory after the fact. *State v. McIntosh*, 260 N.C. 749, 133 S.E.2d 652 (1963), *cert. denied*, 377 U.S. 939, 12 L. Ed. 2d 302 (1964). Accessory after the fact "is a substantive crime—not a lesser degree of the principal crime." *Id.* at 753, 133 S.E.2d at 655. Based on the foregoing, this assignment of error is overruled. Defendant has abandoned all other assignments of error.

No error.

Judges GREENE and JOHN concur.

SOUTHERN FURNITURE HARDWARE, INC., AND JOE W. REYNOLDS, PLAINTIFFS v. BRANCH BANKING AND TRUST COMPANY D/B/A BB&T, DEFENDANT

No. COA99-181

(Filed 7 March 2000)

1. Appeal and Error— appealability—motion in limine

Although plaintiffs contend the trial court erred in granting defendant's motion in limine to exclude testimony of an expert witness expected to provide testimony as to plaintiffs' losses as a result of defendant's actions regarding plaintiffs' bank loans, motions in limine are not appealable.

2. Emotional Distress— intentional—negligent—behavior did not exceed all bounds tolerated by decent society

The trial court did not err by directing verdict in favor of defendant on the issues of intentional or negligent infliction of emotional distress because the evidence, that an officer of defendant BB&T continued to discuss the bank loan with plaintiff Reynolds and implied that the loan would be forthcoming even after internal approval of the loan had been withdrawn, fails to establish that BB&T's behavior exceeded all bounds usually tolerated by decent society.

3. Civil Procedure— judgment notwithstanding the verdict—alternatively and additionally granting new trial—legally inconsistent

The trial court erred in granting defendant's motion for judgment notwithstanding the verdict (JNOV) because: (1) the trial court's order is legally inconsistent since its granting of the JNOV is a judicial determination in this case that defendant did not act fraudulently, while the order alternatively and additionally granting a new trial simultaneously returned the issue of fraud to a new jury; and (2) the trial court did not follow the dictates of N.C.G.S. § 1A-1, Rule 50(c)(1) when it granted a new trial, both as an alternative to and in addition to the JNOV, because the statute requires that a new trial be granted if the JNOV is thereafter vacated or reversed.

4. Damages and Remedies— remittitur—refusal to accept—new trial granted—abuse of discretion

The trial court abused its discretion in granting a new trial following plaintiffs' refusal to accept the trial court's suggested remittitur because the trial court improperly attempted to compel the parties to accept a remittitur, which is not permitted without the consent of the prevailing party.

5. Appeal and Error— appealability—order vacated—new trial—issues not considered

Although defendant challenges the trial court's denial of his motions for summary judgment, directed verdict, and judgment notwithstanding the verdict (JNOV) on the issues of fraud, (1) a trial court's denial of a motion for summary judgment need not be addressed when the moving party thereafter makes a motion for directed verdict; (2) defendant's appeal on the issues regarding fraud is interlocutory since the trial court's post-trial orders have been vacated and a new hearing has been ordered on defendant's motion for JNOV or new trial; and (3) defendant's motion for a directed verdict will be addressed on rehearing.

6. Appeal and Error— notice of appeal—sufficient

Although defendant filed a motion to dismiss plaintiffs' appeal on grounds that the notices of appeal were not timely and failed to provide sufficient notice of the orders from which the appeal was taken, the notices were sufficient to satisfy the requirements of N.C. R. App. P. 3(d).

Appeal by plaintiffs from orders entered 27 March 1998 and 4 May 1998 by Judge Ben F. Tennille in Catawba County Superior Court. Appeal by defendant from order entered 3 January 1996 by Judge Beverly T. Beal and orders entered 27 March 1998 and 4 May 1998 by Judge Ben F. Tennille in Catawba County Superior Court. Heard in the Court of Appeals 4 January 2000.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiff-appellants/appellees.

Adams Kleemeier Hagan Hannah & Fouts, by W. Winburne King, III, and Benjamin A. Kahn, for defendant-appellee/appellant.

EDMUNDS, Judge.

Plaintiff Joe W. Reynolds (Reynolds) is the president and sole shareholder of plaintiff Southern Furniture Hardware (SFH), a North Carolina corporation. In March 1990, Reynolds began discussing with T. Scott Bain (Bain), Vice-President of defendant Branch Banking and Trust Company (BB&T), the possibility of obtaining a loan for SFH in the amount of $1,000,000. Part of this loan would be used to pay off SFH's existing indebtedness to Figgie Acceptance Corporation (Figgie), and the remainder would be earmarked for working capital.

During their discussions, Reynolds informed Bain that time was of the essence because Figgie was discontinuing its asset-based lending. On 20 June 1990, Bain delivered a loan commitment letter to Reynolds, and on 13 July 1990, Reynolds signed an acceptance of the terms and conditions of the commitment letter. During the next three and one-half weeks, Reynolds provided to Bain all requisite information and documentation and obtained the pay-off amount necessary to extinguish its loan from Figgie. On 7 September 1990, Bain was notified by Don B. Beam, Jr. (Beam), BB&T's vice president who had authority to approve the loan, that Beam had decided not to issue final co-approval of the loan. As a result, by January 1991, even though Bain repeatedly had assured Reynolds that the loan was being processed without complications, no closing date had been set, and the loan from Figgie had not been funded within the time prescribed in the estoppel letter Reynolds received from Figgie.

The loan was still unfunded in May 1991. Figgie performed an audit and increased pressure on Reynolds to complete payment on

the loan. Plaintiffs employed counsel, who contacted Bain requesting immediate response from BB&T. Bain answered with further assurances the loan was proceeding smoothly. On 22 July 1991, BB&T requested a second mortgage on Reynolds' home in order to complete the loan processing. Reynolds accepted the new terms, which included a requirement of substantially more collateral. On 22 August 1991, defendant finally funded plaintiffs' loan, which was to mature on 1 September 1992. On 26 August 1991, plaintiffs' obligation to Figgie was paid off.

Although Bain repeatedly had assured plaintiffs they would be able to renew the loan on more favorable terms, as the time to renew the loan approached, on 10 August 1992, plaintiffs received from BB&T a letter of commitment substantially different from the original agreement between the parties, including a higher interest rate, increased collateral, and only a six-month extension of credit terms. Plaintiffs agreed to the unfavorable terms. Although Bain assured plaintiffs in a 22 January 1993 letter that the parties were in a long-term relationship, on 14 September 1993, BB&T called plaintiffs' note.

On 15 April 1994, plaintiffs filed suit against BB&T alleging *inter alia* fraud, negligent or intentional misrepresentation, breach of contract, unfair and deceptive trade practices, negligence, and intentional or negligent infliction of emotional distress. Defendant answered on 15 June 1994, asserting the defenses of contributory negligence, lack of consideration, misrepresentation, statute of limitations, and antecedent breach of contract. On 22 August 1995, defendant moved for summary judgment. On 3 January 1996, the trial court entered an order granting defendant's motion as to plaintiffs' claims of tortious interference with contract and breach of contract, and denying defendant's motion as to the remainder of plaintiffs' claims.

Trial began on 11 August 1997. At the close of plaintiffs' evidence, defendant moved for a directed verdict. The trial court orally granted defendant's motion as to plaintiffs' claim for intentional and/or negligent infliction of emotional distress and denied the motion on the remaining claims. Defendant presented no evidence, and the following issues were presented to the jury:

1. Did Defendant BB&T demand payment of or "call" Southern Furniture Hardware's loan for one million dollars at the

September 13, 1993 meeting between Joe Reynolds, Scott Bain, and Lance Sellers?

ANSWER: YES __X__ NO _____

2. Could Southern Furniture Hardware have obtained a loan from another lender in August of 1991 at prime plus 1.75% without the additional collateral requirement of a $10,000 deed of trust on his residence and without a cap of $175,000 being placed on inventory?

ANSWER: YES __X__ NO _____

3. Was Southern Furniture Hardware induced to execute the August 1991 loan documents . . . by the fraudulent representations of BB&T?

ANSWER: YES __X__ NO _____

ANSWER THIS ISSUE ONLY IF YOU HAVE ANSWERED "YES" TO ISSUE NUMBER 3. IF YOU ANSWERED "NO" TO ISSUE NUMBER 3, LEAVE THIS ISSUE BLANK AND PROCEED TO ISSUE NUMBER 5.

4. In what amount, if any, has Southern Furniture Hardware been injured as a result of the acts and/or omissions of Defendant?

ANSWER: $ 137,500

5. Could Southern Furniture Hardware have obtained a loan from another lender in August of 1992 of prime plus 1.75% without the additional collateral requirement of deeds of trust on the four warehouses and without the additional equipment collateral?

ANSWER: YES _____ NO __X__

6. Was Southern Furniture Hardware induced to execute the August 1992 commitment letter and the December 1992 loan documents by the fraudulent representations of BB&T?

ANSWER: YES __X__ NO _____

ANSWER THIS ISSUE ONLY IF YOU HAVE ANSWERED "YES" TO ISSUE NUMBER 6. IF YOU ANSWERED "NO" TO ISSUE NUMBER 6, LEAVE THIS ISSUE BLANK AND PROCEED TO ISSUE NUMBER 8.

7. In what amount, if any, has Southern Furniture Hardware been injured as a result of the acts and/or omissions of Defendant?

   ANSWER: $ 383,000

   ANSWER THIS ISSUE ONLY IF YOU HAVE ANSWERED "YES" TO EITHER ISSUE NUMBER 5 OR ISSUE NUMBER 6. IF YOU ANSWERED "NO" TO BOTH ISSUE NUMBER 5 AND ISSUE NUMBER 6, LEAVE THIS ISSUE BLANK AND DO NOT PROCEED.

8. Was the Defendant's fraudulent inducement accompanied by outrageous or aggravated conduct?

   ANSWER: YES _X_ NO ____

   ANSWER THIS ISSUE ONLY IF YOU HAVE ANSWERED "YES" TO ISSUE NUMBER 8. IF YOU ANSWERED "NO" TO ISSUE NUMBER 8, LEAVE THIS ISSUE BLANK AND DO NOT PROCEED.

9 What amount of punitive damages, if any, does the jury in its discretion award Southern Furniture Hardware?

   ANSWER: $ 325,000

On 28 August 1997, the jury answered the issues as indicated above, awarding plaintiffs $520,000 in compensatory and $325,000 in punitive damages.

On 5 September 1997, defendant filed a "Motion For Judgment Notwithstanding The Verdict, Together With Conditional Grant Of New Trial, Or, In The Alternative, For A New Trial," pursuant to N.C. Gen. Stat. § 1A-1, Rules 50 and 59 (1999). In an order dated 27 March 1998, the trial court granted defendant's motion with respect to jury issues 2, 3, and 4, relating to plaintiffs' claims on the 1991 loan agreement. On the remaining issues, the trial court's order stated:

> [T]he Court, in its discretion, is prepared to enter a judgment for Plaintiff Southern Furniture Hardware awarding a total amount of $360,000 (representing $120,000 in actual damages and $240,000 in punitive damages). Plaintiffs shall have twenty days from the date of this order to notify the Court and Defendant in writing if it accepts or rejects entry of judgment in the amount of $360,000. If Plaintiffs decline to accept entry of a judgment in that amount, the Court will set the verdict aside and order a new trial

pursuant to Rule 59. The Court will enter a further order with regard to the grounds for new trial of these issues, if necessary. If Plaintiffs accept entry of judgment in the amount of $360,000, Defendant shall have ten days in which to notify the Court whether it will pay the judgment. If Defendant declines to pay the judgment, the motion for new trial will be denied and Judgment entered with respect to these issues on the jury's verdict.

Plaintiffs rejected the trial court's proposed remittitur, and the court, on 7 May 1998, ordered a new trial on the remaining issues. Plaintiffs filed notices of appeal with respect to both orders. Defendant filed notice of appeal as to the trial court's orders partially denying its motion for summary judgment, motion for directed verdict, and motion for judgment notwithstanding the verdict.

I.

[1] We first address the issue that arose prior to trial. On 13 January 1997, defendant filed a motion *in limine* to exclude testimony of J. Finley Lee, Ph.D., a witness for plaintiffs who was expected to provide expert testimony as to plaintiffs' losses. The trial court granted the motion, and Dr. Lee prepared a new analysis to address the concerns that had led the trial court to grant defendant's motion. Before trial began, defendant again objected to Dr. Lee's testimony, and the trial court again ruled that Dr. Lee would not be permitted to testify.

Plaintiffs contend the trial court erred in granting defendant's motion *in limine*. However, North Carolina appellate courts have held that motions *in limine* are not appealable:

> While the North Carolina Rules of Evidence do not explicitly provide for motions *in limine*, their use in North Carolina is well recognized. Rulings on these motions, however, are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion "is insufficient to preserve for appeal the question of the admissibility of evidence." A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted). On appeal the issue is not whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead

> whether the evidentiary rulings of the trial court, made during the trial, are error.

T&T Development Co. v. Southern Nat. Bank of S.C., 125 N.C. App. 600, 602-03, 481 S.E.2d 347, 348-49 (1997) (internal citations omitted); *see also State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999); *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 504 S.E.2d 102 (1998). Because plaintiffs' brief only challenges the trial court's grant of defendant's motion *in limine*, this assignment of error is overruled.

II.

[2] Plaintiffs also contend the trial court erred by directing a verdict in favor of defendant on the issue of intentional or negligent infliction of emotional distress. Initially, we note that there is no written order granting in part and denying in part defendant's motion for a directed verdict. When an oral order is not reduced to writing, it is non-existent, *see State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388, *cert. denied*, 350 N.C. 312, — S.E.2d — (1999), and thus cannot support an appeal, *see Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 148, 189 S.E.2d 655, 657 (1972); *see also West v. Marko*, 130 N.C. App. 751, 504 S.E.2d 571 (1998). However, the trial court's 27 March 1998 order stated, "Except for the claims for fraudulent inducement of two loan agreements and a Chapter 75 claim based on those claims, Defendant's motion [for directed verdict] was granted with respect to all of the remaining claims, including the individual Plaintiff's claims for intentional infliction of emotional distress." Because neither party addressed the invalidity of the trial court's oral order, we treat this language as sufficient to support plaintiffs' appeal on the issue of emotional distress, but nonetheless find plaintiffs' argument without merit.

To prove a claim for intentional infliction of emotional distress, a plaintiff must show that the defendant: "(1) engaged in extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 6-7, 437 S.E.2d 519, 522 (1993) (citation omitted). "The tort may also lie where a 'defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress.' " *Id.* at 7, 437 S.E.2d at 522-23 (quoting *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)). Plaintiffs must then show a resulting "emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of

severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

In this case, Reynolds offered evidence of intentional or recklessly indifferent conduct by defendant, including evidence that even after internal approval of the loan had been withdrawn, Bain continued to discuss the loan with Reynolds and imply to Reynolds that the loan would be forthcoming soon. Reynolds also presented evidence that defendant's conduct had an impact on his emotional and physical well-being. However, this evidence fails to establish that BB&T's behavior " 'exceed[ed] all bounds usually tolerated by decent society.' " *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (citation omitted). In light of this standard, we cannot say the court erred in granting a directed verdict on this issue. This assignment of error is overruled.

III.

[3] We turn next to post-trial proceedings. Plaintiffs contend the trial court erred in granting defendant's motion for judgment notwithstanding the verdict (JNOV). Following a jury verdict awarding damages to plaintiffs, defendant filed a "Motion For Judgment Notwithstanding The Verdict, Together With Conditional Grant Of New Trial, Or, In The Alternative, For A New Trial," pursuant to Rules 50 and 59. As to issues 2, 3, and 4, the court entered an order stating in pertinent part:

1. Defendant's Motion for Judgment Notwithstanding the Verdict, or a new trial pursuant to Rule 50 with respect to Issues No. 2, 3 and 4 is granted. Judgment is hereby entered dismissing Plaintiffs [sic] claims under the 1991 loan agreements. Alternatively, and additionally, the Court finds that Defendant is entitled to a new trial on Issues No. 2, 3, and 4 under Rule 59.

Although the court's apparent intent was to grant defendant a JNOV and order a new trial if the JNOV were not upheld on appeal, we have held that the content of such an order must be specific. *See Streeter v. Cotton*, 133 N.C. App. 80, 514 S.E.2d 539 (1999). Rule 50(c)(1) states in pertinent part:

> If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule

> on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.

N.C. Gen. Stat. § 1A-1, Rule 50(c)(1). The order in the case at bar, which grants both a JNOV and a new trial, fails to conform to this Rule.

We find *Streeter* instructive. In that case, the plaintiff sued for damages as a result of an automobile accident, and the jury returned a verdict in favor of the defendant, finding no negligence. The plaintiff moved for JNOV pursuant to Rule 50 and for a new trial pursuant to Rule 59. The trial court allowed both motions, stating that the issues of the defendant's negligence and the plaintiff's injuries were to be recalendered. We vacated and remanded, holding that by granting the JNOV, the trial court found that defendant was negligent as a matter of law, but that by granting a new trial, the court returned the issue of negligence to a jury; therefore, the court's order was "legally inconsistent." *Streeter*, 133 N.C. App. at 83, 514 S.E.2d at 542.

In the case at bar, the trial court's order granting JNOV is a judicial determination that defendant did not act fraudulently, while the order "[a]lternatively, and additionally" granting a new trial simultaneously returned the issue of fraud to a new jury. Thus, the order in the case at bar, like that in *Streeter*, is legally inconsistent. Further, by granting a new trial both as an alternative to, and in addition to, the JNOV, the trial court did not follow the dictates of Rule 50(c)(1), which requires that a new trial be granted "if the [JNOV] is thereafter vacated or reversed." N.C. Gen. Stat. § 1A-1, Rule 50(c)(1). Accordingly, we vacate the court's order and remand for a rehearing on defendant's motion for JNOV and new trial as to issues 2, 3, and 4. On remand, the trial court may either (1) grant defendant's JNOV motion and conditionally grant or deny defendant's motion for new trial in the event the trial court's JNOV judgment is thereafter vacated or reversed on appeal, or (2) deny defendant's motion for JNOV and grant or deny defendant's motion for new trial. *See Streeter*, 133 N.C. App. at 83, 514 S.E.2d at 542.

[4] Finally, plaintiffs contend the court erred in granting a new trial on issues 1, 5, 6, 7, 8, and 9 following plaintiffs' refusal to accept the trial court's suggested remittitur. Although grant of a new trial is reviewed for abuse of discretion, *see Williams v. Randolph*, 94 N.C.

App. 413, 423, 380 S.E.2d 553, 560 (1989), in the case at bar, the court granted a new trial on these issues only after it had attempted to compel a certain result. The court forthrightly stated in its 27 March 1998 order that it was prepared to enter judgment for plaintiffs in an amount less than that returned by the jury. If plaintiffs declined the court's suggestion, the court stated it would order a new trial as to issues 1, 5, 6, 7, 8, and 9; if plaintiffs accepted but defendant declined, the court stated it would enter judgment against defendant in accordance with the jury verdict. When plaintiffs rebuffed the court's suggestion, the court on 4 May 1998 ordered a new trial as to those issues.

We are aware that trial judges can and often do provide valuable off-the-record guidance to litigants during the course of a trial, and such guidance may be entirely proper. *See, e.g., Griffin v. Sweet*, 120 N.C. App. 166, 461 S.E.2d 32 (1995). In the case at bar, the court appropriately could have conducted informal discussions with the parties as to defendant's "Motion For Judgment Notwithstanding The Verdict, Together With Conditional Grant Of New Trial, Or, In The Alternative, For A New Trial." However, the trial court went further and delivered an ultimatum: the parties were to reach a particular result or suffer the consequences. The court's attempt to impose the resolution suggested in its 27 March 1998 order was improper. Assuming the parties were at loggerheads, the court should have ruled on defendant's motion as a question of law applied to the facts. Instead, the court attempted to compel a remittitur, which is not permitted without the consent of the prevailing party. *See Gardner v. Harriss*, 122 N.C. App. 697, 471 S.E.2d 447 (1996). Therefore, we hold that the trial court abused its discretion when it ordered a new trial as to issues 1, 5, 6, 7, 8, and 9 as a result of plaintiffs' withholding consent to the proposed remittitur, and, therefore, remand for a new hearing on defendant's motion as to these issues.

To summarize, we vacate the trial court's orders on "Defendant's Motion For Judgment Notwithstanding The Verdict, Together With Conditional Grant Of New Trial, Or, In The Alternative, For A New Trial." As to issues 2, 3, and 4, the order fails because it is internally inconsistent and fails to comply with the strict requirements of Rule 50(c)(1). As to the remaining issues, although we have no doubts about the objectivity of the trial court in this matter, we are compelled to acknowledge that the trial court's order gives the appearance that the court was actively involved in seeking a particular outcome to this case. Accordingly, to avoid any appearance of impro-

priety, we suggest that a different superior court judge be assigned to conduct the reconsideration of defendant's motion.

IV.

[5] Defendant also filed an appeal. Although a number of issues have been abandoned, *see* N.C. R. App. P. 28(b)(5), defendant purports to challenge (1) the trial court's denial of defendant's motion for summary judgment on the issues of fraud, (2) the trial court's denial of defendant's motion for a directed verdict on the issues of fraud, and (3) the trial court's denial of defendant's motion for JNOV as to jury issues 1, 5, 6, 7, 8, and 9. This Court previously has observed that a trial court's denial of a motion for summary judgment need not be addressed when the moving party thereafter makes a motion for directed verdict. *See Davidson and Jones, Inc. v. N.C. Dept. of Administration*, 69 N.C. App. 563, 569, 317 S.E.2d 718, 722 (1984), *aff'd in part, rev'd in part on other grounds*, 315 N.C. 144, 337 S.E.2d 463 (1985); *see also Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1980). Because we have vacated the trial court's post-trial orders regarding fraud and have ordered a new hearing on defendant's motion for JNOV or new trial, defendant's appeal is interlocutory as to those issues and is therefore dismissed. Likewise, because we are remanding for a new hearing on defendant's motion for JNOV and because defendant's motion for a directed verdict encompassed the same issues as will be addressed on rehearing, we decline to address defendant's challenge of the denial of its motion for a directed verdict.

V.

[6] Finally, defendant has filed a motion to dismiss plaintiffs' appeal on grounds that the notices of appeal were not timely and failed to provide sufficient notice of the orders from which the appeal was taken. Upon review of plaintiffs' notices, we hold that while the notices of appeal were not models of clarity, they were sufficient to satisfy the requirements of N.C. R. App. P. 3(d). The motion to dismiss is denied.

Plaintiffs' appeal is affirmed in part, vacated in part, and remanded.

Defendant's appeal is dismissed.

Judges GREENE and SMITH concur.

REGINALD B. INMAN, PLAINTIFF-APPELLANT v. SYLVIA M. INMAN, DEFENDANT-APPELLEE

No. COA98-1029

(Filed 7 March 2000)

Appeal and Error— preservation of issues—denial of motion to dismiss—no formal objection required—new theory—lost benefit of objection

Although N.C.G.S. § 1A-1, Rule 46(b) preserved plaintiff-husband's objection and he was not required to formally object or except to the trial court's order which partially denied his motion to dismiss defendant-wife's counterclaim for equitable distribution on the ground that the parties had entered into a separation agreement and property settlement that settled any equitable distribution claims under N.C.G.S. § 50-20(d), (1) plaintiff thereafter lost the benefit of his objection by developing another theory of defense when the issues were set out in a pretrial order to which plaintiff freely consented while represented by competent counsel; and (2) even if the trial court erred in its ruling on plaintiff's motion to dismiss, plaintiff has not been prejudiced since he assigned no error to any action of the trial court during trial of this case, nor does he object or except to any of the findings of fact and conclusions of law.

Judge GREENE concurring in the result.

Appeal by plaintiff from judgment entered 17 April 1998 by Judge V. Bradford Long in Randolph County District Court. Originally heard in the Court of Appeals 17 August 1999. An opinion affirming the judgment of the trial court was filed on 7 September 1999. Plaintiff's Petition for Rehearing was filed on 12 October 1999, granted on 3 November 1999, and heard after the filing of additional briefs but without oral argument. This opinion supersedes in all respects the previous opinion of this Court.

Reginald B. Inman (plaintiff) and Sylvia M. Inman (defendant) were married on 18 October 1987 and separated on 14 April 1991. On 19 April 1991, the parties entered into a settlement of all matters arising from their marriage. In the portion of their "Separation Agreement and Property Settlement" (the Agreement) labeled "Separation Agreement," the parties agreed to live separate and apart from each other; and in the portion labeled "Property Agreement," they agreed on a division of their real and personal property. In a portion of the

Agreement labeled "Final Provisions" the parties agreed that they were making a settlement under the North Carolina Equitable Distribution Act and were executing the Agreement pursuant to the provisions of N.C. Gen. Stat. § 50-20(d) (1995). The Agreement contained the following provision relating to the effect of a reconciliation on the property settlement portion of the Agreement:

> 11. EFFECT OF RECONCILIATION ON PROPERTY SETTLEMENT. In the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this Agreement for settlement of property rights shall nevertheless continue in full force and effect without abatement of any term or provision hereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of reconciliation.

The parties reconciled in April 1992 and lived together as husband and wife until April or May 1995, at which time they again separated. The plaintiff filed for absolute divorce in September 1996. The defendant filed a verified answer, in which she asserted counterclaims for equitable distribution, postseparation support, permanent alimony, and attorney fees. The plaintiff then filed a reply to the defendant's counterclaims, pleading the Agreement in bar, and praying that the defendant's counterclaims be dismissed with prejudice.

On 11 February 1997, a judgment of absolute divorce was entered without prejudice to the other pending claims. On 10 June 1997, the trial court considered plaintiff's motion to dismiss and concluded that the portion of the Agreement "purporting to waive the Defendant's rights to future alimony and/or support is void as against public policy." The trial court further concluded that the defendant's counterclaim for equitable distribution was barred by the Agreement as to property acquired before the reconciliation of the parties; however, as to property acquired after the parties reconciled the trial court ruled that equitable distribution was not barred. The order was signed by the trial court on 10 June 1997 and filed on 11 June 1997 in the Office of the Clerk of Court for Randolph County. The record reflects no objection to the order by either party.

After numerous continuances, a pretrial order was executed by all parties and counsel on 3 February 1998. The order provided in pertinent part as follows:

2. Plaintiff and Defendant were married October 18, 1987 then separated April, 1991 and entered into a Separation Agreement and Property Settlement. Plaintiff contends that he and the Defendant reconciled on or about May 1, 1992, the Defendant contends that she and the Plaintiff reconciled sometime in April, 1992. Only property acquired after the reconciliation and improvements made to Plaintiff's property after the date and time of reconciliation are included.

3. The Plaintiff and Defendant again separated May 19, 1995.

4. The date of valuation is May 19, 1995.

5. An equal division is an equitable division.

The pretrial order then set out several issues with regard to classification, valuation, and distribution of those items of property acquired after the parties' reconciliation. Following a bench trial on 18 March 1998, the trial court concluded that the parties had acquired marital property valued at a total of $13,909.65 after their reconciliation. The trial court further found that all marital property was in the possession of the plaintiff and distributed all items of marital property to plaintiff. Plaintiff was ordered to pay a distributive award of $6,954.82 (one-half of the value of the marital estate) to the defendant within ten days.

On 15 April 1998, plaintiff caused a notice of appeal to be filed with the Clerk and served a copy of the same on counsel for defendant. No written judgment had been entered at that time. The Notice of Appeal read as follows:

> NOW COMES the Plaintiff by and through counsel, and excepts and gives Notice of Appeal to the North Carolina Court of Appeals from the Judgment of the Court on March 18, 1998, entered in this cause on ____________________, and filed on _________________, the Honorable V. Bradford Long presiding.
>
> The Plaintiff, by and through his counsel of record, specifically objects and takes exception to those parts of the judgment entered in this cause as aforesaid to wit, the Plaintiff's Motion to Dismiss.
>
> The Plaintiff reserves further exceptions to be served with the Case on Appeal in this cause.

A written equitable distribution judgment was entered on 17 April 1998.

C. Orville Light for plaintiff appellant.

O'Briant, Bunch, Robins & Stubblefield, by Julie H. Stubblefield, for defendant appellee.

HORTON, Judge.

On appeal, plaintiff argues one question: "Does the separation agreement and property settlement as written bar the defendant from claiming equitable distribution in property acquired after a reconciliation?"

We first note that plaintiff did not object to the 11 June 1997 order of the trial court ruling that the separation and property settlement agreement did not bar defendant from seeking equitable distribution of property acquired by the parties after their reconciliation. Our Supreme Court has recently ruled that, if an interlocutory order is entered during the pendency of litigation, a party can later seek appellate review of that interlocutory order under the provisions of N.C. Gen. Stat. § 1-278, which provides that, " '[u]pon an appeal from a *judgment*, the court may review any *intermediate order* involving the merits and necessarily affecting the judgment.' " *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 159 (quoting N.C. Gen. Stat. § 1-278 (1996), *disc. review denied*, 350 N.C. 830, — S.E.2d — (1999)). In *Floyd*,

> *plaintiffs duly objected to the election of remedies order at trial* and gave timely notice of appeal from the 19 May 1995 final judgment entered by the trial court. Accordingly, pursuant to N.C.G.S. § 1-278, we find that the interlocutory order compelling election of remedies entered on 1 May 1995 was reviewable on appeal along with the final judgment of 19 May 1995. Furthermore, we note that it is quite clear from the record that plaintiffs sought appeal of the election order. *The objection at trial to the election order properly preserved the question for appellate review. See* N.C.R. App. P. 10(b)(1).

Id. at 52, 510 S.E.2d at 159 (emphasis added).

Rule 10(b)(1) of the Rules of Appellate Procedure provides in part that

> [i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. . . . Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal *by objection noted or which by rule or law was deemed preserved or taken without any such action,* may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10(b)(1) (emphasis added). In the case before us, plaintiff made no objection to the ruling of the trial court which partially denied his plea in bar. He contends, however, that his objection to the order of the trial court was preserved by operation of Rule 46 of the North Carolina Rules of Civil Procedure. We agree. Rule 46(b) provides that

> [w]ith respect to rulings and orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor . . . .

N.C.R. Civ. P. 46(b) (1999). In *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978), defendants moved to dismiss, pursuant to Rule 12(b)(6), plaintiffs' claim for declaratory judgment on the grounds that no genuine controversy existed at that time. The trial court in *Barbour* entered an order denying the motion to dismiss, and defendants did not except to entry of the order. Later, defendants sought to raise on appeal the validity of the trial court's denial of their motion to dismiss, and plaintiffs objected on the grounds that defendants had not properly excepted to the entry of the order denying the motion to dismiss. In holding that the defendants' cross-assignment of error with regards to the denial of their motion to dismiss was properly before this Court, we stated:

> Under G.S. 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to pre-

> serve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor. This the defendants did when they filed their motion to dismiss under Rule 12(b)(6). No further action by defendants in the trial court was required to preserve their exception. In the record on appeal defendants properly set out their exception to Judge Lee's order, as they were expressly permitted to do by Rule 10(d) of the Rules of Appellate Procedure. We find that the question of the validity of Judge Lee's order denying defendants['] motion to dismiss under Rule 12(b)(6) has been properly preserved by defendants' cross assignment of error and is before us on this appeal.

Barbour, 37 N.C. App. at 692-93, 247 S.E.2d at 256. In the present case, the plaintiff's motion to dismiss was based on the separation agreement and property settlement. The motion made clear what action plaintiff wanted the trial court to take and the grounds for that action. Therefore, we hold that the plaintiff was not required to formally object or except to the order of the trial court which partially denied his motion to dismiss.

Although plaintiff's objection to the order of the trial court with regard to the effect of the Agreement on defendant's counterclaim for equitable distribution was preserved by the operation of Rule 46(b), he thereafter lost the benefit of his objection by developing another theory of defense. Prior to the trial of this matter, plaintiff entered into a pretrial order in which he and defendant stipulated that the eight items set forth on Schedules A and B of the pretrial order, including the plaintiff's retirement plan, were marital property. The parties disagreed as to the value of seven of the items. The trial court valued the items listed in Schedules A and B at a total of $12,654.65.

The parties further disagreed as to whether eleven additional items listed on Schedule E of the pretrial order were marital property. Defendant relinquished her claim to three of the eleven items. With regard to the remaining eight items enumerated on Schedule E, plaintiff contends that five of the items were his separate property, because they were acquired prior to the first separation of the parties; that one item was acquired prior to the reconciliation of the parties; and that two of the items represented work done to improve the former marital residence prior to the first separation. The trial court

found that four of the Schedule E items were the separate property of the plaintiff, and found that the remaining four items on Schedule E were marital property. The four items found to be marital property were as follows:

2. Glass enclosure for the fireplace

4 Antique sideboard

6. Antique China Cabinet

7. Wishing Well.

Plaintiff's contention in the pretrial order was that each of these four items was acquired *prior* to the first separation of the parties and was therefore his separate property pursuant to the 1991 property settlement. Plaintiff does not complain on this appeal about the trial court's classification of the items of property as marital property. Furthermore, the items on Schedules A and B were admittedly acquired after the reconciliation of the parties, yet plaintiff at no time contended that equitable distribution of the items on Schedules A and B was barred because of the Agreement the parties entered into following their first separation. Instead, plaintiff stipulated that an equal division of the marital property would be equitable. Therefore, once the court determined that the items were marital rather than separate property, they became subject to an equal division between the parties in accordance with their pretrial stipulations.

Furthermore, the parties stipulated in the pretrial order that "he or she agrees with the facts and issues classified as agreed upon and stipulates that the facts and issues classified as being in dispute are accurately reflected and that there are no other issues to be determined by the Court . . . ." The pretrial order sets out the issues to be ruled upon by the trial court, but does not include any issue relating to the effect of the Agreement.

When a conference is held prior to the trial of a matter in an effort, among other things, to simplify and formulate the issues, the trial court is to make an order following the conference

> which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; *and such order when entered controls the subsequent*

course of the action, unless modified at the trial to prevent manifest injustice.

N.C. Gen. Stat. § 1A-1, Rule 16(a)(7) (1999) (emphasis added).

The record does not reflect any motion to modify the terms of the pretrial order. At no time did plaintiff contend that he was entering into stipulations contained in the pretrial order subject to a later appeal of the trial court's ruling on his motion to dismiss the equitable distribution action. There is no contention by plaintiff that the stipulations were not freely and voluntarily entered into by the parties. The pretrial order was signed by the parties and the trial court, and the case was tried in reliance on the pretrial order and its stipulations.

Thus, even if we assume for the purpose of argument that the trial court erred in its ruling on plaintiff's motion to dismiss defendant's counterclaim for equitable distribution, which we do not concede, plaintiff has not been prejudiced by that error under the facts of this case. Although plaintiff appealed from the judgment of equitable distribution, he assigns no error to any action of the trial court in the trial of this case, nor does he object or except to any of the findings of fact and conclusions of law made by the trial court. Pursuant to the "stipulations, contentions, and disclosures of the parties," and the evidence adduced at trial, the trial court classified as marital certain property acquired by the parties following their reconciliation, valued that property, and distributed it equally between the parties.

In his effort to complain on appeal about the trial court's partially unfavorable ruling on his motion to dismiss defendant's counterclaim for equitable distribution, plaintiff seeks to advance a theory entirely different from the theory on which this case was tried. The issues before the trial court, however, were set out in a pretrial order to which plaintiff freely consented while represented by competent counsel, and plaintiff may not now take an inconsistent position on appeal. "The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions." *Parrish v. Bryant*, 237 N.C. 256, 259, 74 S.E.2d 726, 728 (1953); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court[]"), and *In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (where respondents stipulated to the use of "recording machines in lieu of a court reporter," they waived on appeal any

objection about the quality of the recording equipment used in the trial court).

We find no prejudicial error in the trial of this case. The judgment of the trial court is

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs in the result with separate opinion.

Judge GREENE concurring in the result.

I do not agree with the majority that plaintiff "lost the benefit of his objection [to the trial court's order denying his motion to dismiss] by developing another theory of defense" during the equitable distribution hearing.

The North Carolina Rules of Civil Procedure allow a party to plead "as many separate claims or defenses as he has regardless of consistency," N.C.G.S. § 1A-1, Rule 8(e)(2) (1999), and a party may "prove inconsistent or alternative theories" at trial, *Hall v. Mabe*, 77 N.C. App. 758, 760, 336 S.E.2d 427, 429 (1985).

In this case, plaintiff made a motion to dismiss defendant's counterclaim for equitable distribution on the ground the parties had entered into the Agreement settling any equitable distribution claims pursuant to N.C. Gen. Stat. § 50-20(d). The trial court, however, denied plaintiff's motion in part, finding "[d]efendant's equitable distribution as to property acquired before the . . . Agreement is barred," and "[d]efendant's Counterclaim for equitable distribution as to property acquired after the previous reconcil[iation] or for improvements to any of the property previously owned by the parties, is allowed." Defendant then proceeded with her equitable distribution claim as to property acquired subsequent to the reconciliation. Because the trial court had denied, in part, plaintiff's motion, plaintiff could not raise the Agreement as a defense during the equitable distribution hearing. Plaintiff, however, was entitled to raise alternative theories of defense during the equitable distribution hearing, including theories inconsistent with his motion to dismiss, without waiving his right to appeal the trial court's partial denial of his motion to dismiss. To hold otherwise would require a plaintiff to make a choice between abandoning alternative theories at trial or waiving his right to appeal the

trial court's adverse ruling. *See* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 22, at 93 (5th ed. 1998) (rule allowing party to explain evidence admitted over that party's objection without waiving objection "rescue[s] objecting counsel from the dilemma . . . of leaving the objectionable evidence unexplained and unrebutted or losing the benefit of his objection by pursuing the matter further on cross-examination or by other evidence").

I, nevertheless, agree with the majority that plaintiff waived his right to appeal the trial court's partial denial of his motion to dismiss. Plaintiff entered into a pretrial order which, in essence, stipulated property acquired subsequent to reconciliation was included in defendant's equitable distribution claim. This stipulation is inconsistent with plaintiff's contention that the Agreement barred defendant's equitable distribution claim, and plaintiff is bound by his stipulations. *See Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E.2d 482, 486 (1971) ("[a]dmissions in the pleadings and stipulations by the parties have the same effect as a jury finding . . . and nothing else appearing, they are conclusive and binding upon the parties and the trial judge"). I, therefore, would affirm the trial court's judgment on these facts.

STATE OF NORTH CAROLINA v. JOHNNIE LOCKLEAR

No. COA98-1638

(Filed 7 March 2000)

1. Evidence— document—sufficient indicia of trustworthiness

The trial court did not err in an assault with a firearm on a law enforcement officer case by accepting into evidence a mutual aid agreement between Robeson County and the town of Red Springs to show that the assaulted officer was acting as a government officer at the time of the incident because: (1) the State laid a sufficient foundation under N.C.G.S. § 8C-1, Rule 901(a) to establish the trustworthiness of the document by getting an officer to testify that the document was a fair and accurate copy of the agreement; (2) even though the jury never saw the detailed provisions of the agreement, neither party moved to pass the agreement among the jurors; and (3) defendant had the opportunity to cross-examine on the contents of the agreement, but chose not to do so.

2. Assault— firearm on a law enforcement officer—sufficiency of evidence

The trial court did not err in an assault with a firearm on a law enforcement officer case by denying defendant's motion to dismiss at the end of the State's evidence, based on the theory that the assaulted officer was not a government officer at the time of the incident since he was outside the jurisdiction of the Red Springs Police Department, because: (1) Robeson County's Mutual Aid Agreement allowed for police assistance to be made on an emergency basis, which in this case was a reported stabbing; (2) the Robeson County officer was transporting a prisoner when he received the order to investigate the stabbing, and thus needed emergency assistance from Red Springs Police Department; and (3) the Red Springs officer was in uniform at the time of the incident, and he was clearly attempting to enforce the law by assisting the Robeson County officer.

3. Criminal Law— instructions—requested—officer beyond jurisdiction—not justified in using deadly force

The trial court did not err in an assault with a firearm on a law enforcement officer case by failing to give defendant's requested special jury instruction, that the officer was beyond his jurisdiction and defendant had a right to resist, because even if defendant were correct that the entry was illegal or the arrest was unauthorized, N.C.G.S. § 15A-401(f) states that a person is not justified in using deadly force to resist arrest when the person knows or has reason to know that the officer is a law enforcement officer attempting to make an arrest.

4. Criminal Law— instructions—taken out of context

The trial court did not err in an assault with a firearm on a law enforcement officer case by overruling defendant's objection to the jury charge that a Red Springs police officer had the duty to assist the Robeson County Sheriff's Department because defendant has taken a portion of the jury charge out of context since the trial court was not stating his opinion, but rather what the State was required to prove.

5. Evidence— lay opinion—intoxication

The trial court did not err in an assault with a firearm on a law enforcement officer case by allowing an officer to answer whether defendant appeared to be intoxicated because N.C.G.S. § 8C-1, Rule 701 allows a lay witness to give an opinion as to the

intoxication or sobriety of another, and the evidence reveals the officer was close enough to observe defendant's actions.

6. Criminal Law— instructions—intoxication—relevant to conduct and motives

The trial court did not abuse its discretion in an assault with a firearm on a law enforcement officer case by denying defendant's objection, motion to strike, and request for a jury instruction that an officer's answer, concerning whether defendant appeared to be intoxicated, had no substantive value because: (1) evidence of defendant's intoxication is relevant to an understanding of his conduct and motives, and the conduct and motives of the police officers who were observing defendant's behavior; and (2) the relevant evidence is not substantially outweighed by the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403.

7. Evidence— witness directed to answer yes or no—no prejudicial error

The trial court did not err in an assault with a firearm on a law enforcement officer case by directing an officer to answer yes or no to the question of whether he had any information that defendant had committed a crime, based on the theory that the jury was unfairly prevented from hearing that the witness had no personal knowledge of the assault, because: (1) the officer's testimony on cross-examination indicated he had no personal knowledge of the assault; and (2) defendant concedes this error would not tend to prejudice the outcome of the case.

8. Evidence— hearsay—not an out-of-court statement

The trial court did not err in an assault with a firearm on a law enforcement officer case by allowing the State to ask an officer whether he had any information that defendant had committed a crime, based on the information allegedly being hearsay since it was relayed to the officer by a third party, because the witness did not testify about an out-of-court statement but merely testified that he did have information that defendant committed a crime. N.C.G.S. § 8C-1, Rule 801(c).

Appeal by defendant from judgment entered 9 September 1997 by Judge Robert Frank Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 3 January 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Gaines M. Weaver, for the State.

Donald W. Bullard for defendant-appellant.

EAGLES, Chief Judge.

The defendant, Johnnie Locklear, Jr., was tried and convicted of assault with a firearm on a law enforcement officer at the 8 September 1997 criminal session of Robeson County Superior Court.

On 15 October 1994, a Red Springs police dispatcher, Linda Stone, received a call about the alleged stabbing of Tessie Locklear by her husband, Johnnie Locklear, at their home three to four miles outside the Red Springs city limits. Ms. Stone transmitted a message over the Red Springs frequency telling all Red Springs police units to stand by because she had received an emergency call for Robeson County. Ms. Stone then transmitted the message about the emergency call over the Robeson County frequency. She stated, "I have a subject on the line, advised he was at a residence. There was a stabbing in progress . . . [H]e could hear the female subject, in the residence, screaming . . . ." The Robeson County Sheriff's Department radioed Deputy Davis instructing him to investigate the call. Captain Jerry Parker of the Red Springs Police Department heard the dispatch over the scanner and knew Deputy Davis was alone in the area. Captain Parker sent one of the Red Springs officers, Officer Chavis, to assist Deputy Davis. Meanwhile, Deputy Davis radioed for assistance from the Red Springs Police Department because he was transporting a prisoner when he had been instructed to investigate the stabbing. Officer Chavis heard Deputy Davis' request for assistance and answered the call. The two police officers met at the driveway leading to the Locklear residence. Deputy Davis then secured the prisoner in his patrol car. Together, the officers entered defendant's home. Defendant Locklear repeatedly told them to leave.

At this point, Officer Chavis followed Locklear into a dark room. Officer Chavis thought he heard a shotgun shell being chambered into a shotgun, and he felt something like a shotgun on his neck. The officer knocked the shotgun away and drew his own weapon. Officer Chavis followed Defendant Locklear out of the room. Then the two police officers went outside and walked toward the back of the residence where they found Tessie Locklear with a torn, bleeding lip. She was taken by ambulance to Laurinburg Hospital where she was treated.

Once the two officers were outside, defendant went out on the porch and waved his shotgun in the air telling everyone to leave the premises. Terrie McNeill, a dispatcher from Red Springs Police Department who had been riding with Officer Chavis, called for backup. Officers from Red Springs responded, gathering in front of the house. Captain Parker testified that defendant "was out in the front yard with a shotgun, pointing it at us . . . ." Officer Victoria Bartch testified that defendant aimed his shotgun at the police officers in front of the house. She further testified that defendant walked towards Officer Chavis while carrying his shotgun, saying "F---- you, I am going to kill you." The defendant was arrested forty-five minutes later.

The jury found defendant guilty of assault with a firearm on a law enforcement officer in violation of N.C.G.S. § 14-34.2. The trial court imposed a sentence of imprisonment for a minimum of fifteen months and a maximum of eighteen months. The defendant appeals.

[1] We first consider whether the trial court erred by accepting into evidence State's exhibit 1, the "Robeson County Inter-Governmental Mutual Aid Agreement" with the town of Red Springs. The State sought to introduce the agreement in order to show that Officer Chavis was acting as a government officer at the time of the incident. This agreement provides that the two law enforcement agencies may request temporary law enforcement assistance from each other. The agreement states "[t]he head law enforcement officer of each of the parties hereto is empowered to request assistance under this agreement." Additionally, the agreement provides "that where a request is made on an emergency basis, the execution of this contract shall be deemed the required written request . . . ."

The defendant contends that the trial court admitted the document into evidence before the State laid sufficient foundation and properly authenticated the document. Additionally, defendant argues that he was prejudiced by the admission of the document into evidence without an explanation of its contents. According to defendant, the jury never saw the detailed provisions of the mutual aid agreement; rather, they only saw that the agreement existed. Consequently, defendant contends, the jurors were unable to determine whether the Red Springs Police Department violated the agreement.

We conclude that the trial court did not err in admitting the agreement into evidence. Under North Carolina Rules of Evidence, Rule 901(a), "[t]he requirement of authentication or identification as a con-

dition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a). Here, the transcript indicates that the State asked Captain Parker, a Red Springs officer, whether he recognized the exhibit. He identified it as a copy of the Mutual Aid Agreement between Robeson County and all police departments in the county. Captain Parker then confirmed that it was a fair and accurate copy of that agreement. The State laid a sufficient foundation to establish the trustworthiness of the document. We conclude that the document was properly authenticated before it was admitted into evidence. Additionally, we note that neither party moved to pass the agreement among the jurors. Further, defendant had the opportunity to cross-examine on the contents of the agreement. Defendant chose not to do so. Defendant cannot now complain that the jury never saw the detailed provisions of the agreement.

[2] We next consider whether the trial court erred by denying the defendant's motion to dismiss at the end of the State's evidence. The defendant argues that the State did not meet its burden of showing that Officer Chavis was a government officer at the time of the incident because the officer was outside the jurisdiction of the Red Springs Police Department. Under N.C.G.S. § 15A-402, "[l]aw enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city." Here, the Locklear home was three to four miles outside the boundary of Red Springs. However, N.C.G.S. § 160A-288 provides that the head of any law enforcement agency may temporarily provide assistance to another agency in enforcing the laws of North Carolina. This may be done "in accordance with rules, policies, or guidelines officially adopted by the governing body of the city or county . . . ." Defendant argues that the State failed to show that the provisions of N.C.G.S. § 160A-288 and the Mutual Aid Agreement were followed.

The defendant acknowledges that the Mutual Aid Agreement provides that the request for assistance may be made on an emergency basis. However, defendant contends that there was no emergency here. Consequently, the defendant asserts that Officer Chavis was acting outside his proper jurisdiction, and the defendant's actions were legal because Officer Chavis was a trespasser.

In response, the State relies on *State v. Gaines*, 332 N.C. 461, 421 S.E.2d 569 (1992), *cert. denied*, 507 U.S. 1038, 123 L. Ed. 2d 486 (1993), a first-degree murder case in which the victim was an off-duty, in uniform, Charlotte police officer working as a night security guard.

The North Carolina Supreme Court held that the victim's status as a law enforcement officer could properly be used as an aggravating factor. Even an off-duty deputy is considered to be acting under the color of state law when the nature of his actions involve official police action to enforce the law. *See id.* at 473, 421 S.E.2d at 575. Additionally, the State relies on *State v. Williams*, 31 N.C. App. 237, 229 S.E.2d 63 (1976), in which a police officer made a DUI arrest outside of the city in which he had jurisdiction. This Court held that the evidence he gathered during the arrest was admissible. *See id.*

After carefully reviewing the record, transcript, and arguments, we conclude that the State did show that Officer Chavis was acting in the course of his official duties as a governmental officer at the time of the incident. Under the Mutual Aid Agreement, the head of the Robeson County law enforcement agency could request assistance from the Red Springs law enforcement agency. However, where a request for assistance is made on an emergency basis, "the execution of this contract shall be deemed the required written request [for assistance]." Here, Deputy Davis of the Robeson County Police was responding to a reported stabbing. He was the only Robeson County officer in the vicinity of the Locklear residence. Because the deputy was transporting a prisoner when he received the order to investigate the stabbing, he called Red Springs and asked for assistance. This situation constitutes an emergency under the Mutual Aid Agreement. Finally, we note that the evidence showed Officer Chavis was in uniform at the time of the incident, and that he was clearly attempting to enforce the law by assisting the deputy sheriff. Defendant knew that but proceeded to assault him. For these reasons, we conclude that the State did produce sufficient evidence that Officer Chavis was acting as a governmental officer at the time of the incident. Accordingly, we conclude the trial court did not err in denying the defendant's motion to dismiss.

[3] We next consider whether the trial court erred in failing to give defendant's requested special jury instruction. Defendant contends that the trial court was obligated to instruct the jury that if Officer Chavis was beyond his jurisdiction, the defendant had a right to resist. According to defendant, when an officer makes an illegal entry into a person's home, anyone "who resists an illegal entry is not resisting an officer in the discharge of the duties of his office." *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 906 (1970). Defendant asserts that Officer Chavis entered the defendant's residence without a legal warrant or probable cause. Defendant argues that the trial

court's failure to give this requested instruction was reversible error entitling defendant to a new trial.

We are not persuaded. Under N.C.G.S. § 15A-401(f), a person is not justified in using deadly force to resist arrest when the person knows or has reason to know that the officer is a law enforcement officer attempting to make an arrest. The statute further provides: "[t]he fact that the arrest was not authorized under this section is no defense to an otherwise valid criminal charge arising out of the use of such deadly weapon or deadly force." N.C.G.S. § 15A-401(f). *See also State v. Guevara*, 349 N.C. 243, 254-55, 506 S.E.2d 711, 719 (1998), *cert. denied*, — U.S. —, 143 L. Ed. 2d 1013 (1999). Here, the defendant used a deadly weapon when he loaded a shotgun and placed it against Officer Chavis' neck. Even if defendant were correct in his argument that the entry was illegal or the arrest unauthorized, which we do not accept, defendant was not justified in using a deadly weapon against a law enforcement officer attempting to effect an arrest. Accordingly, we conclude that the trial court did not err in refusing to give defendant's requested special jury instruction.

[4] Next we consider whether the trial court erred in overruling defendant's objection to the charge to the jury. Defendant contends that the trial judge charged the jury that a Red Springs police officer has the duty to assist the Robeson County Sheriff's Department. Defendant argues that the duty to assist may arise only if the Mutual Aid Agreement and N.C.G.S. § 160A-288 have been fully complied with.

"When reviewing a trial court's charge to the jury, the instructions must be considered in their entirety." *State v. Parker*, 119 N.C. App. 328, 339, 459 S.E.2d 9, 15 (1995) (*citing State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987)). Our inspection of the transcript indicates that the defendant has taken a portion of the jury charge out of context. The trial judge charged the following:

> Now I charge that for you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt. First, . . . Second, . . . Third,. . . And Fourth, that the victim was in the performance of his duties, assisting the Robeson County Sheriff's Department in response to a call concerning an alleged stabbing, is a duty of a Red Springs police officer.

The trial judge was not stating his opinion, but rather what the State was required to prove. In order to find the fourth element proven, the

jury would have to find: first, that the victim was in the performance of his duties, and second, that assisting the Robeson County Sheriff's Department is a duty of a Red Springs Police Officer. We have carefully considered the charge to the jury and find no misstatement of the law or expression of opinion prejudicial to defendant. Accordingly, defendant's assignment of error is overruled.

[5] Next, we consider whether the trial court erred in allowing Officer Bartch to answer whether the defendant appeared intoxicated. Defendant argues that Officer Bartch was not in a position to perceive whether the defendant was intoxicated and that her testimony is speculative. We conclude that the trial court did not err in allowing Officer Bartch to answer the question.

Under N.C.G.S. § 8C-1, Rule 701, a lay witness may testify in the form of opinions or inferences if "those opinions or inferences [] are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." In general, a lay witness may give an opinion as to the intoxication or sobriety of another. *See State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988). *See also* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 181 (5th ed. 1998). Here, defendant argues that Officer Bartch was not able to perceive whether the defendant was intoxicated. Officer Bartch arrived at the Locklear residence after Johnnie Locklear came out on the porch. She positioned herself behind the patrol car, near the front tire. From this vantage point, Officer Bartch was close enough to the defendant to hear what defendant was saying and the manner and tone with which he spoke. At trial, Officer Bartch testified, that she heard defendant say "I am going to kill that Chavis son of a bitch." She also stated, "[t]he whole time he was using profane language . . . ." Additionally, Officer Bartch was close enough to observe the defendant's actions. The officer testified that she "observed the defendant pump his shotgun. A round flew out of his shotgun. The defendant kind of fell over, picked up the round, and put it back into the shotgun." The officer stated that the defendant staggered as he walked on the porch, chambering the dropped round. This evidence indicates that Officer Bartch's opinion that the defendant appeared intoxicated was rationally based on her perception. Accordingly, we conclude that the trial court did not err in allowing the police officer to answer the question.

[6] We next consider whether the trial court erred in denying defendant's objection, motion to strike, and request for a jury instruction

that Officer Bartch's answer had no substantive value. Defendant argues that the officer's testimony regarding defendant's intoxication was not relevant to a determination of any element of the crime charged, and that its probative value is substantially outweighed by the danger of unfair prejudice.

Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rule 403. The court must balance the probative value of the evidence against its prejudicial effect. *See State v. Moseley*, 338 N.C. 1, 33, 449 S.E.2d 412, 432 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial judge. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

In *State v. Davis*, 265 N.C. 720, 145 S.E.2d 7 (1965), *cert. denied*, 384 U.S. 907, 16 L. Ed. 2d 360 (1966), the Supreme Court of North Carolina held that evidence of the defendant's intoxication was properly admitted in his trial for assault with attempt to commit rape. The Court stated, "[i]t is not required that evidence bear directly on the question in issue, but it is competent if it shows circumstances surrounding the parties necessary to an understanding of their conduct and motives . . . ." *Id.* at 723, 145 S.E.2d at 10. Here, evidence of defendant's intoxication is relevant to an understanding of defendant's conduct and motives, and the conduct and motives of the police officers who were observing defendant's behavior. The trial court concluded that the prejudicial effect of the evidence did not substantially outweigh the probative value. We conclude that the trial court did not abuse its discretion in admitting this evidence.

[7] Defendant next argues that the trial court erred in directing Deputy Davis to answer yes or no to the question of whether he had any information that defendant had committed a crime. Defendant argues that by directing Deputy Davis to answer yes or no, the trial court prevented the witness from explaining himself. The defendant's argument arises from the following excerpt from the transcript:

> STATE: Did you have any information at this point that he had committed a crime?
>
> DEFENDANT'S COUNSEL: Your Honor, we object to such a conclusion. We object to the question.

THE COURT: Overruled.

. . . .

STATE: Did you have any information at that time that he had committed a crime?

WITNESS: According to—

THE COURT: Answer the question, please, yes or no.

WITNESS: Yes.

Here, defendant contends that the witness was likely to respond to the question by saying "according to what Officer Chavis told me, I was aware that a crime had been committed. However, I did not see the assault take place." The defendant asserts that the trial court unfairly prevented the jury from hearing that the witness had no personal knowledge of the assault.

We note at the outset that Deputy Davis' testimony on cross-examination indicated that he had no personal knowledge of the assault. Deputy Davis testified, "I went around to the corner, which appeared to be the living room. I think Officer Chavis went behind Johnnie Locklear to the bedroom. There was a wall there. I really couldn't see what was going on." We conclude that the trial court did not err in directing the witness to answer yes or no. "[R]emarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant . . . ." *State v. Byrd*, 10 N.C. App. 56, 60, 177 S.E.2d 738, 741 (1970). Here, the comments of the trial judge do not prejudice the defendant in any way. The defendant concedes this in his brief when he states, "this error would not tend to prejudice the outcome of this case." We find that the defendant's assignment of error is without merit.

[8] We next consider whether the trial court erred by allowing the State to ask Deputy Davis whether he had any information that the defendant had committed a crime. After arguing that the trial court improperly stopped the witness from recounting what Officer Chavis had told him, defendant now complains that the trial court should not have allowed the State to ask this question because the answer is hearsay. According to defendant, any information Deputy Davis had would have been relayed to him by a third party because Deputy Davis was not in the room with the defendant and Officer Chavis.

We conclude that the trial court did not err. 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.G.S. § 8C-1, Rule 801(c). Here, the witness' testimony is not hearsay. Deputy Davis merely testified that he did have information that the defendant had committed a crime. The witness did not testify about an out of court statement. Accordingly, this assignment of error is overruled.

No error.

Judges WYNN and WALKER concur.

LILLIAN FULLER, EMPLOYEE, PLAINTIFF v. MOTEL 6 (SELF-INSURED), EMPLOYER; GALLAGHER BASSETT SERVICES, SERVICING AGENT, DEFENDANT

No. COA99-281

(Filed 7 March 2000)

1. Workers' Compensation— credibility—determination by full Industrial Commission

Even though N.C.G.S. § 97-85 places the ultimate fact-finding function with the full Industrial Commission and not the hearing officer, the Commission did not err in a workers' compensation case by accepting the credibility determination of a deputy commissioner because the Commission is not precluded from accepting the deputy commissioner's credibility determinations if it elects to do so.

2. Workers' Compensation— disability—burden on employee

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff-employee failed to prove she was unable to earn the same wages she earned before her neck injury and that she is not entitled to a presumption of disability upon proof she sustained an injury as a consequence of an accident arising out of and in the course of her employment, because: (1) there is competent evidence to support the findings that plaintiff was released four days after her injury to return to work without restrictions, and she was capable of earning her

regular wages and performing her regular duties; and (2) the employee has the burden of proving a disability exists.

3. Workers' Compensation— occupational disease—carpal tunnel syndrome—ganglion cyst

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff-employee did not meet her burden of proving she sustained a compensable occupational disease since there was competent evidence to show that plaintiff's carpal tunnel syndrome and ganglion cyst were not due to causes and conditions which were characteristic and peculiar to her employment as a housekeeper, and which excluded all ordinary diseases of life to which the general public was equally exposed.

Appeal by plaintiff from Opinion and Award filed 11 December 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 January 2000.

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

Teague, Campbell, Dennis & Gorham, L.L.P., by Mallory A. Taylor, for defendant-appellee.

GREENE, Judge.

Lillian Fuller (Plaintiff) appeals from a 11 December 1998 Opinion and Award of the North Carolina Industrial Commission (Commission) concluding Plaintiff's left carpal tunnel syndrome and ganglion cyst were not occupational diseases and Plaintiff had not proved she had a disability as a consequence of a 15 July 1996 injury by accident arising out of and in the course of her employment with Motel 6 (Employer).

The record reveals on 30 November 1994, Plaintiff began working as a housekeeper for Employer. Plaintiff testified she squeezes a cleaning spray bottle with her left hand 20-to-30% of each day, but Curtis Rufty (Rufty), a manager for Employer, testified it constituted about only 5% of a housekeeper's time on the job.

On 9 May 1996, Plaintiff was seen by James Barber, M.D. (Dr. Barber) at Doctor's Urgent Care Center (DUCC) for a wrist strain and a mass on her left wrist. Dr. Barber noted Plaintiff's "fingers [had] the crooked appearance of [a] patient with rheumatoid arthritis," Plaintiff

had a wrist strain due to repetitive motion at work, but the left arthritic cyst was not work related.

Dr. Barber referred Plaintiff to Edward L. Hines, M.D. (Dr. Hines), an orthopedic surgeon who, on 12 June 1996, removed Plaintiff's ganglion cyst and performed a carpal tunnel release on her left wrist. This surgery kept Plaintiff out of work for two weeks until 27 June 1996, when she was released to return to work without restriction.

On 15 July 1996, Plaintiff slipped and fell on both of her hands while cleaning a bathtub at work. Plaintiff returned to DUCC that afternoon complaining of injuries to both of her wrists and her right breast as a result of the fall. Dallas A. Smith, M.D. (Dr. Smith) diagnosed bilateral contusions and sprains to both of Plaintiff's wrists, with the left wrist worse than the right. Dr. Smith released Plaintiff to return to work, but he told her not to use her left arm.

Dr. Hines examined Plaintiff on 19 July 1996, found Plaintiff's healing progress was satisfactory for one month after surgery, and told her she could anticipate four-to-six months of progressive improvement. Dr. Hines released Plaintiff to work without restriction during this visit.

On 29 July 1996, Plaintiff returned to DUCC complaining of left thumb and arm pain. Dr. Smith released her to return to work with the restrictions of no lifting of greater than ten pounds and no repetitive use of her left arm. On 1 August 1996, Plaintiff told her supervisor James Gross (Gross) that her pain continued to worsen and she could not handle it anymore. Gross told Plaintiff, if she could not work, she should go home. Plaintiff remains out of work.

On 2 August 1996, Plaintiff returned to DUCC with complaints of left arm pain. Dr. Smith released her to work with the aforementioned restrictions and later referred her to Mark W. Roy, M.D. (Dr. Roy) for a neurological consultation. During her visit with Dr. Roy, Plaintiff complained of left-hand pain and pain radiating up to her elbow ever since the surgery on her ganglion cyst, and reported bilateral arm pain and neck pain ever since she sustained her fall at work. Plaintiff, however, did not tell Dr. Roy she had prior problems with arthritis, chronic pain in her shoulder for five years, or any family history of arthritis.

Dr. Roy diagnosed Plaintiff with carpal tunnel syndrome, median neuropathy, and spondylitis, a bone degeneration in her neck. He testified Plaintiff's problems were probably caused by her 15 August

1996 fall, "because she did not have any complaints before that," and the fall probably exacerbated her spondylitis. Dr. Roy further testified Plaintiff's ganglion removal exacerbated or contributed to her problems because "before she had the ganglion cyst operated on[,] she did not have the left hand pain and afterwards she did."

Dr. Hines testified the exact cause of ganglion cysts has never been substantiated. There are a "myriad" of causes for carpal tunnel syndrome, such as "ganglions, . . . trauma, . . . rheumatoid arthritis[,] . . . [and] hypothyroidism." He noted Plaintiff had hypothyroidism, but stated if someone is "adequately managed" medically for the problem, "they really don't have hypothyroidism." Dr. Hines, in his continuing testimony, stated he did not have an opinion as to whether Plaintiff's job duties made her more likely to be at an increased risk to develop carpal tunnel syndrome or a ganglion cyst as anyone else, but said "[t]here are people who, for various reasons, are probably predisposed to having carpal tunnel syndrome, and in all likelihood repetitive, heavy use of that hand makes them even more likely to have it." Dr. Hines further testified that usually people who have a carpal tunnel release surgery "recover pretty normal strength and function[, and] it's rare that they have much disability and very often no long-term permanent disability."

Waiving oral arguments, the full Commission, in its Opinion and Award, made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

2. The [P]laintiff began working as a housekeeper for [Employer] on 30 November 1994. Her job . . . required constant use of both hands. Although the [P]laintiff testified that she spent twenty to thirty percent of her time at work constantly squeezing a spray bottle with her left hand, [Rufty] . . . testified that squeezing a spray bottle accounted for only five percent of the time on the job. The Deputy Commissioner found the testimony of [Rufty] more credible on this issue due to the parties' descriptions of the job duties. Therefore, the Full Commission declines to reverse the credibility determination by the Deputy Commissioner and finds that five percent of the [P]laintiff's time on the job was spent squeezing a spray bottle with her left hand.

. . . .

11. At the time the [P]laintiff quit working for [Employer], Dr. Hines . . . had examined her and released her to return to work without restrictions. However, Dr. Smith . . . released her to return to work lifting no greater than ten pounds and no repetitive use of the left arm. The Commission gives more weight to the opinion of Dr. Hines than to Dr. Smith because of Dr. Hines' expertise and because he had treated her wrist problem extensively. Therefore, the Commission finds that, at the time she quit working for [Employer], the [P]laintiff was capable of earning her regular wages and performing her regular duties.

. . . .

17. In light of Dr. Hines [sic] limited information about the [P]laintiff's job duties and the equivocal testimony he gave regarding any increased risk to the [P]laintiff, the [P]laintiff has failed to present sufficient evidence to establish by its greater weight that her job duties with [Employer] placed her at an increased risk of contracting carpal tunnel syndrome or a ganglion cyst than the general public.

18. The exact etiology of a ganglion cyst has not been substantiated . . . . Dr. Hines . . . noted that [Plaintiff] had some thyroid problem that could be contributory to carpal tunnel syndrome. He provided no further opinion regarding the causation of the [P]laintiff's ganglion cyst. However, Dr. Barber's notes reflect, and the Commission finds, that the ganglion cyst was not work-related.

. . . .

21. . . . Dr. Roy's opinion was based upon the mistaken impression that [Plaintiff's] wrist and arm pain did not begin until sometime after the surgery in June of 1996. He was apparently not aware that [she] had carpal tunnel syndrome prior to the surgery and that she had a carpal tunnel release, only that she had the ganglion cyst removed. Therefore, the [P]laintiff failed to prove by the greater weight of the evidence that her median nerve damage was caused by the 15 July 1996 fall.

22. There was insufficient medical evidence to establish that the [P]laintiff's 15 July 1996 fall caused any injury to her wrists.

23. . . . [Plaintiff's] 15 July 1996 fall exacerbated [her] pre-existing spondylitic changes in her neck.

24. Although the [P]laintiff was able to work her regular duties in August 1996, as of 23 September 1996, when Dr. Roy first saw the [P]laintiff, she was only able to work with restrictions. . . .

. . . .

27. The [P]laintiff failed to establish that she made a reasonable effort to secure other employment.

28. The [P]laintiff failed to establish that it would have been futile to have attempted to look for work.

. . . .

CONCLUSIONS OF LAW

1. The [P]laintiff's left carpal tunnel syndrome and ganglion cyst were not occupational diseases . . . . She is therefore not entitled to any compensation . . . for her carpal tunnel syndrome and ganglion cyst. . . .

2. On 15 July 1996, the [P]laintiff sustained an injury by accident arising out of and in the course of her employment with [Employer]. . . .

3. At the time the [P]laintiff quit her job with [Employer] and up until September 1996, she was capable of earning her regular wages and performing her regular duties. Around September 1996, the [P]laintiff was capable of returning to work with restrictions. However, she did not return to work in any capacity, did not make a reasonable effort to obtain gainful employment and did not prove it would have been futile to seek employment. She has failed to prove that she was unable to earn the same wages she earned before the injury. . . . Therefore, she is not entitled to any disability benefits . . . [for the injury to her neck].

4. The [P]laintiff is entitled to have [Employer] provide all medical compensation arising from the 15 July 1996 injury by accident. . . .

The issues are whether: (I) the Commission may accept the credibility determinations of a deputy commissioner when the Commission waives oral arguments; (II) an employee is entitled to a presumption of disability upon proof she sustained an injury as a consequence of an accident arising out of and in the course of her

employment; and (III) there is competent evidence to support the Commission's findings of fact and conclusions of law that Plaintiff did not meet her burden of proving she sustained a compensable occupational disease.

I

[1] Plaintiff argues that *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), precludes the Commission from accepting the credibility determinations made by a deputy commissioner. We disagree.

As "the sole judge of the credibility of the witnesses and the weight to be given their testimony," *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965), N.C. Gen. Stat. "§ 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer," *Adams*, 349 N.C. at 681, 509 S.E.2d at 413. This ultimate determination may be made "from a cold record or from live testimony." *Id.* "In reviewing the findings found by a deputy commissioner . . . , the Commission may review, 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), and if the full Commission rejects the deputy commissioner's findings, it is "not required to demonstrate . . . 'that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one,' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 413 (citation omitted). We do not read *Adams* as precluding the Commission from accepting the deputy commissioner's credibility determinations, if it elects to do so.

In this case, the Commission elected in several instances to accept the deputy commissioner's credibility determinations and this was within their province.

II

Neck Injury

[2] Plaintiff argues that once the Commission determined she had sustained an injury by accident to her neck on 15 July 1996, arising out of and in the course of her employment, a "presumption of disability attaches to her and she has demonstrated that she is disabled" within the meaning of the Workers' Compensation Act (Act). Once this presumption is established, Plaintiff continues, "the burden shifts to the employer-defendant to show that [P]laintiff is employable." We disagree.

An employee is entitled to compensation under the Act upon a showing she has sustained an injury by accident arising out of and in the course of her employment *and* she has sustained a disability as a consequence of that injury.[1] *Rhinehart v. Market*, 271 N.C. 586, 588, 157 S.E.2d 1, 2 (1967). The employee has the burden of proving each of these essential elements. *Loflin v. Loflin*, 13 N.C. App. 574, 577, 186 S.E.2d 660, 662, *cert. denied*, 281 N.C. 154, 187 S.E.2d 585 (1972). A disability exists if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (1999). The employee is not entitled to a presumption of disability upon proof she has sustained some injury by accident arising out and in the course of her employment.[2]

In this case, the Commission concluded Plaintiff had "failed to prove that she was unable to earn the same wages she earned before the injury." This conclusion is supported by findings by the Commission. The Commission found Plaintiff was released, four days after her 15 July 1996 injury, "to return to work without restrictions" and that she "was capable of earning her regular wages and performing her regular duties." There is competent evidence in the record to support these findings and we are bound by them. *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) (appellate court bound by findings if supported by competent evidence). Thus, Plaintiff has not met her burden of showing she sustained a disability as a consequence of her 15 July 1996 injury.

III

Wrist Injuries

[3] Plaintiff finally argues she has met her burden of proving she sustained a compensable occupational disease. We disagree.

> [T]here are three elements necessary to prove the existence of a compensable "occupational disease": (1) the disease must be

1. If the injury sustained is within the schedule of injuries listed in section 97-31, there is no requirement there be a showing of a disability. *Hollman v. City of Raleigh*, 273 N.C. 240, 250, 159 S.E.2d 874, 881 (1968).

2. We acknowledge the law which provides that " 'once the *disability* is proven, there is a presumption that it continues until "the employee returns to work at wages equal to those he was receiving at the time his injury occurred." ' " *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) (citations omitted) (emphasis added). In this case, Plaintiff did not prove her disability.

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

Hansel v. Sherman Textiles, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981). Plaintiff bears this burden of proof. *Morrison v. Burlington Industries*, 304 N.C. 1, 12, 282 S.E.2d 458, 466-67 (1981).

In this case there is conflicting evidence as to whether Plaintiff's ganglion cyst and carpal tunnel syndrome are compensable occupational diseases. The Commission resolved this conflict and determined by the entry of findings of fact, Plaintiff did not prove her carpal tunnel syndrome and ganglion cyst were due to causes and conditions which were characteristic of and peculiar to her employment with Employer and which excluded all ordinary diseases of life to which the general public was equally exposed. We are bound by those findings, as there is competent evidence in the record to support them. *Clark v. American & Efird Mills*, 82 N.C. App. 192, 196, 346 S.E.2d 155, 157, *disc. review denied*, 318 N.C. 413, 349 S.E.2d 591 (1986). As these findings support the Commission's conclusions, we affirm the Opinion and Award of the Commission.

Affirmed.

Judges LEWIS and EDMUNDS concur.

STATE OF NORTH CAROLINA v. KENNETH WIGGINS

No. COA99-284

(Filed 7 March 2000)

1. Evidence— direct examination—leading questions

The trial court did not abuse its discretion in a first-degree kidnapping and first-degree rape case by sustaining the State's objections to defendant's leading questions on direct examination, in an effort to show the victim made a prior inconsistent statement about defendant's use of a knife, because: (1) defendant did not tender the witness as a hostile witness at trial, and a

review of the record does not reveal that she was unwilling or biased against defendant, N.C.G.S. § 8C-1, Rule 611(c); (2) defendant abandoned his argument that the witness was called to contradict the testimony of a prior witness, since he did not make this argument at trial, N.C. R. App. P. 28(b)(5); and (3) even if the trial court erred, there was no prejudicial error since the witness testified her memory of her conversation with the victim was unclear.

2. Sentencing— double punishment—first-degree kidnapping—first-degree rape—improper

Although the trial court did not err in instructing on first-degree kidnapping based on sexual assault and on first-degree rape, defendant's sentence is vacated and remanded since he was improperly convicted of and sentenced to double punishment for first-degree kidnapping and first-degree rape because: (1) the verdict sheet is ambiguous as to whether the jury relied on the theory that the victim was not released in a safe place or the theory that the victim had been sexually assaulted to elevate the kidnapping charge to first-degree; and (2) construing the ambiguous verdict in favor of defendant reveals the first-degree kidnapping conviction arose from the same sexual assault which was the basis of the first-degree rape conviction.

3. Evidence— impeachment—specific instance of conduct—direct examination—inadmissible—not probative of truthfulness

The trial court did not err in a first-degree kidnapping and first-degree rape case by excluding evidence of the victim's theft of money and cocaine from defendant and defendant's reaction to the alleged theft, which defendant attempted to elicit on direct examination from a witness to impeach the credibility of the victim by inquiring into a specific instance of conduct of the victim, because: (1) defendant's inquiry into the specific instance of conduct did not occur on cross-examination of a witness but rather on direct examination, and therefore, the witness's voir dire testimony was not admissible under N.C.G.S. § 8C-1, Rule 608(b); and (2) the voir dire testimony is not probative of the victim's truthfulness or untruthfulness.

Appeal by defendant from judgment entered 9 April 1998 by Judge Ernest B. Fullwood in Superior Court, New Hanover County. Heard in the Court of Appeals 26 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Edwin L. Gavin, II, for the State.

Nora Henry Hargrove for defendant-appellant.

TIMMONS-GOODSON, Judge.

Kenneth Wiggins ("defendant") was indicted for attempted first degree sexual offense, first degree rape, first degree kidnapping, and assault on a female. The court dismissed the charges of attempted first degree sexual offense and assault on a female. Following a jury verdict of guilty of first degree kidnapping and first degree rape, the trial court imposed an active sentence of 230 months with the corresponding maximum of 285 months. Defendant appeals.

The State's evidence at trial tended to show the following. Teresa Ann Pearson ("the victim") and defendant initially had a dating relationship. After the dating relationship ended, defendant continued to contact the victim. On 9 August 1997, the victim alleged before a magistrate that defendant was communicating threats to her.

On 13 August 1997 at 8:30 p.m., the victim drove her car to Russell's Quick Mart in Wilmington, North Carolina accompanied by two friends, Joyce Barnett and Nita McKeithan. Defendant jumped into the backseat of the car, put a knife to the victim's throat, and instructed her to drive. The victim drove to Rankin Street, where defendant ordered Barnett and McKeithan to exit the car. Barnett reported the incident to the police and advised the police to search for defendant and the victim in Currie, North Carolina. Defendant forced the victim to move to the passenger seat. While brandishing the knife in his right hand, defendant drove to his aunt's home in Currie where he occasionally lived. Defendant told the victim she was going to die. After arriving at his aunt's home, defendant drove the car into the woods, opened the hood and disabled the engine.

Defendant led the victim to the house, took her to a bedroom, and ordered her to undress. When the victim hesitated, defendant again asked her if she wanted to die. The victim indicated that she did not want to die and complied with the demand. Defendant undressed and told the victim to perform fellatio on him. She hesitated and defendant engaged in vaginal intercourse with her while continuing to hold the knife. Defendant led the victim to the living room and forced her to lie on the couch. He told her he could cut her breasts off and proceeded to cut her left breast with the knife. He also cut her left leg.

Law enforcement officers from the Wilmington Police and the Pender County Sheriff's Departments arrived at the house at approximately 11:00 p.m. Defendant saw the automobile lights in the driveway and acknowledged that they had come for him. The victim told defendant to calm down and that she would send them away. She wrapped herself in a sheet and opened the door while defendant stood behind her with the knife. Corporal Andrew Paluck of the Pender County Sheriff's Department asked the victim to identify herself and she did so. The victim was crying. Corporal Paluck asked her to step outside of the house. She stepped onto the porch and told Corporal Paluck that defendant was trying to kill her. Corporal Paluck escorted the victim to his car and entered the house with another officer to question defendant. Defendant denied that there existed any problem. Corporal Paluck found a knife on a mantle just inside the door and noted that some activity had occurred in the bed.

A hospital examination revealed that the victim suffered a linear abrasion to her left breast, another to her left thigh, and several more on her upper back. All of the linear abrasions were consistent with knife wounds. The victim gave written and oral statements consistent with the above facts recited.

On appeal, defendant argues that the trial court erred in: (I) sustaining the State's objections to leading questions on direct examination asked by defendant to his witness; (II) instructing on first degree kidnapping based on sexual assault and on first degree rape; and (III) excluding evidence of the victim's theft from the defendant and the defendant's reaction to the alleged theft.

[1] By his first assignment of error, defendant argues that the trial court abused its discretion in sustaining the State's objections to leading questions asked by defendant to his witness on direct examination. According to defendant, as a result of the trial court's ruling, the jury was prevented from hearing evidence of a prior inconsistent statement by the victim, thereby depriving defendant of his right of confrontation, right to present a defense, and right to due process, contrary to the state and federal constitutions. We cannot agree.

A leading question is one which suggests the desired response and often may be answered "yes" or "no." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974). Whether to allow leading questions is in the sound discretion of the trial court and the ruling of the trial court will not be disturbed on appeal absent an abuse of discre-

tion. *State v. White*, 349 N.C. 535, 556, 508 S.E.2d 253, 267 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Abuse of discretion occurs when the ruling of the trial court is manifestly unsupported by reason. *State v. York*, 347 N.C. 79, 90, 489 S.E.2d 380, 387 (1997).

Leading questions should not be used on direct examination except to develop the testimony of a witness. N.C. Gen. Stat. § 8C-1, Rule 611(c) (1992). "It is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination." *Greene*, 285 N.C. at 492, 206 S.E.2d at 235. The purpose of the general rule is to prevent counsel from suggesting the desired answer to an eager, friendly witness. *State v. Hosey*, 318 N.C. 330, 334, 348 S.E.2d 805, 808 (1986). Nonetheless, counsel should be permitted to ask leading questions on direct examination when the witness is:

> (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth.

Greene, 285 N.C. at 492-93, 206 S.E.2d at 236.

In the present case, defendant called Phyllis Gibson as a witness in an effort to show that the victim had made a prior inconsistent statement about defendant's use of a knife. The following exchange took place:

> Q: Did you and I meet over at the jailhouse last week?
>
> A: Yes, sir, yes, we did.
>
> Q: Did you tell me that you had actually talked to [the victim]?
>
> [THE STATE]: Objection to the leading.
>
> THE COURT: Sustained.
>
> . . .
>
> Q: Did you tell me you talked to [the victim]?

[THE STATE]: Objection.

THE COURT: Sustained.

Defendant then made the following offer of proof:

> Q: Miss Gibson, did you tell me last week that you had talked to [the victim] about these events after they allegedly occurred?
>
> A: Yeah, yeah, yeah. She had come to my house and we had like talked about it but, word for word, I don't remember everything we said, 'cause I mean, it wasn't nothing that we dwell on it. Yes, I did, yes.
>
> Q: Did she tell you she was attacked by [defendant]?
>
> A: I'm not sure she did or didn't.
>
> Q: Did you hear her say anything about a knife?
>
> A: They said he was crazy, something like that.
>
> Q: Did she say anything about him having a knife?
>
> A: Not to my knowledge, no.

Defendant argues that he should have been allowed to ask leading questions of Gibson because she was a hostile witness. However, defendant did not tender Gibson as a hostile witness at trial, and our examination of the transcript does not reveal that she was unwilling or biased against defendant.

While defendant failed to discuss *Greene* in his brief, a *Greene* exception to the general rule that leading questions are not allowed on direct examination arguably applies in the present case. Gibson was called to contradict the testimony of a prior witness. However, defendant failed to argue the exception at trial and failed to cite any case law in support of its application in his brief on appeal. The argument that defendant should have been allowed to ask leading questions on direct examination because the witness was called to contradict the testimony of a prior witness is therefore abandoned. N.C.R. App. P. 28(b)(5). In any event, the exceptions listed in *Greene* are mere guidelines; whether to allow leading questions is ultimately in the sound discretion of the trial court. The trial court did not abuse its discretion where the court sustained the timely objection of the State to a leading question posed by counsel on direct examination of a non-hostile witness.

Moreover, even if the trial court had erred, such error would not have been prejudicial. On *voir dire*, Gibson testified that her memory of her conversation with the victim was unclear. Gibson was not certain whether the victim had told her that defendant attacked the victim. Gibson further testified that to her knowledge, the victim did not say anything about the defendant wielding a knife. Defendant's offer of proof failed to establish conclusively that the victim made a prior inconsistent statement.

We hold that the trial court did not abuse its discretion in sustaining the State's objections to leading questions asked by defendant to his witness on direct examination. As such, defendant was not deprived of his rights under the state and federal constitutions.

[2] By his second assignment of error, defendant argues that the trial court erred in instructing on first degree kidnapping based on sexual assault and on first degree rape. Defendant contends that said instruction permitted him to receive multiple punishments for the same offense contrary to the state and federal constitutions. While we are not convinced that the trial court erred in its instruction to the jury, we agree that defendant was improperly convicted of and sentenced to first degree kidnapping and first degree rape.

Under the Double Jeopardy Clause of the United States Constitution, a defendant may not be subjected to trial and possible conviction more than one time for an alleged offense. *Missouri v. Hunter*, 459 U.S. 359, 365, 74 L. Ed. 2d 535, 542 (1983). A first degree kidnapping occurs where the person kidnapped was not released in a safe place, was seriously injured, or was sexually assaulted. N.C. Gen. Stat. § 14-39(b) (1993). The North Carolina legislature "did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault." *State. v. Freeland*, 316 N.C. 13, 23, 340 S.E.2d 35, 40-41 (1986). A verdict which is ambiguous must be construed in favor of the defendant. *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986).

In the present case, the trial court instructed the jury that in order to find defendant guilty of first degree kidnapping, it had to find that the victim was not released in a safe place or that the victim had been sexually assaulted. The jury returned a verdict of guilty of first degree kidnapping and guilty of first degree rape. However, the verdict sheet did not specify on which theory the jury relied in reaching the guilty verdict on first degree kidnapping. Thus, the verdict is ambiguous. Given that the trial court instructed on both theories, the jury may

have relied on the sexual assault to elevate the kidnapping to the first degree. Construing the ambiguous verdict in favor of defendant, the first degree kidnapping conviction arose from the same sexual assault which was the basis of the first degree rape conviction.

Having concluded that defendant was erroneously subjected to double punishment, we vacate the sentence and remand this case to the trial court for a new sentencing hearing. On remand, the trial court may: (1) arrest judgment on the first degree kidnapping conviction and resentence for second degree kidnapping and first degree rape; or (2) arrest judgment for the first degree rape conviction and sentence on first degree kidnapping. *Id.* at 124, 347 S.E.2d at 408-09; *State v. Young*, 319 N.C. 661, 356 S.E.2d 347 (1987).

[3] By his third assignment of error, defendant argues that the trial court erred in excluding evidence of the victim's theft from defendant and defendant's reaction to the alleged theft in that the trial court deprived defendant of his right to confrontation, right to present a defense, and right of due process, contrary to the state and federal constitutions. We cannot agree.

According to our Rules of Evidence, a specific instance of conduct may be inquired into on cross-examination where it is probative of the credibility of a witness.

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting [her] credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning [her] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b) (1992).

In the present case, defendant called Carolyn Hasty to the stand. Hasty testified without objection that she saw the victim steal defendant's money and cocaine. When counsel for defendant asked Hasty the date of the theft, the State objected and the trial court sustained the objection. Counsel for defendant made an offer of proof during which Hasty described the theft and stated that defendant was not angry with the victim following the theft. According to defendant, Hasty's testimony was competent evidence of the victim's credibility

in that it tended to disprove the victim's assertion that she was afraid of defendant.

Through his direct examination of Carolyn Hasty, defendant attempted to impeach the credibility of the victim by inquiring into a specific instance of conduct of the victim. Hasty had not testified as to the truthfulness or untruthfulness of the victim prior to defense counsel's inquiry into the specific instance of conduct. Defense counsel's inquiry into the specific instance of conduct did not occur on cross-examination, but rather on direct examination. Therefore, Hasty's *voir dire* testimony was not admissible under Rule 608(b).

Furthermore, we are not convinced that the *voir dire* testimony is probative of the victim's truthfulness or untruthfulness. Even if the victim stole from defendant in one instance, she may have felt afraid of defendant in a second instance in which, according to her testimony, defendant entered her car without her permission while brandishing a knife. We conclude that the trial court did not err in excluding evidence of the victim's theft from the defendant and the defendant's reaction to the alleged theft.

For the reasons stated herein, we hold that defendant received a fair trial, free of prejudicial error, but the sentence is vacated and the case is remanded to the trial court for a new sentencing hearing.

Remanded for a new sentencing hearing.

Judges MARTIN and HORTON concur.

NORTH BOULEVARD PLAZA, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF v. NORTH BOULEVARD ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP; SEBY B. JONES; ROBERT L. JONES; AND KEITH R. HARROD, DEFENDANTS

No. COA99-172

(Filed 7 March 2000)

Arbitration and Mediation— modification of award—"evident miscalculation of figures"—incorrect formula does not qualify

Although the arbitrators attempted to modify their award under N.C.G.S. § 1-567.14(a)(1) based on committing an "evident

miscalculation of figures," the trial court did not err in denying plaintiff's motion to confirm the modified award and in granting defendants' motion to set aside the modified award because the arbitrators did not have the authority under N.C.G.S. § 1-567.10 to modify the award since: (1) an "evident miscalculation of figures" is defined as "mathematical errors committed by arbitrators which would be patently clear"; and (2) the use of an incorrect formula to determine the award is not an "evident miscalculation of figures."

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiff from order filed 5 November 1998 by Judge B. Craig Ellis in Wake County Superior Court. Heard in the Court of Appeals 26 October 1999.

Boxley, Bolton & Garber, L.L.P., by Ronald H. Garber, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Charles E. Nichols, Jr., for defendant-appellees.

GREENE, Judge.

North Boulevard Plaza, a North Carolina General Partnership (Plaintiff), appeals a 5 November 1998 order denying Plaintiff's motion to confirm a Modification of Report of Arbitrators (Modified Award), and granting a motion by North Boulevard Associates, A North Carolina General Partnership, Seby B. Jones, Robert L. Jones, and Keith R. Harrod (collectively, Defendants), to set aside the Modified Award.

The evidence shows that on 31 December 1977, Plaintiff leased a parcel of real estate located in Wake County to Defendants, and on 27 June 1996, Plaintiff filed an action against Defendants to recover rent due under the parties' lease agreement. The dispute was submitted to binding arbitration under the terms of the Uniform Arbitration Act, N.C.G.S. ch. 1, art. 45A, as required by the lease agreement, and the parties selected three arbitrators. On 15 June 1998, the arbitrators issued a Report of Arbitrators (Arbitration Award) finding Defendants, based on a rent formula in the lease, were entitled to an 8.5% return on certain investments made for capital improvements to the property. The arbitrators then determined "what adjustments were necessary for additional amounts due either [Plaintiff] or

[Defendants]," and calculated interest at 8.5% per annum on these amounts to "arrive at the total amount due to the respective party for each year involved." Based on these figures, the arbitrators awarded Plaintiff $80,712.00 in rent due under the lease.

On 24 June 1998, Plaintiff submitted to the arbitrators an Application to Modify or Correct the Arbitration Award pursuant to N.C. Gen. Stat. §§ 1-567.14(a)(1) and 1-567.14(a)(3). Plaintiff argued the arbitrators used an improper method to calculate the amount of rent due. According to Plaintiff, the arbitrators "front-end loaded" all funds due to Defendants, based on Defendants' investments for capital improvements, into the year in which the expenditures were made. Plaintiff stated in its application:

> [W]hen the eight and one-half percent per year interest is not front-end loaded, there are less deductions from the rent due to . . . [P]laintiff and a greater amount of rent is due year by year; consequently, as the greater amount of unpaid rent accrues interest from the due date to the date of the [Arbitration Award], . . . there is significantly more owed from . . . [D]efendant[s] to . . . [P]laintiff.

Plaintiff, therefore, sought to increase the Arbitration Award to $166,123.00.

In their response to Plaintiff's application, Defendants objected to any modification on the ground the arbitrators had no authority under the Uniform Arbitration Act to award Plaintiff the relief sought.

On 21 July 1998, the arbitrators issued the Modified Award, which increased Plaintiff's award to $154,532.00. The Modified Award stated, in pertinent part:

> 1. The [a]rbitrators have determined that they committed an evident miscalculation of figures when they included all interest deductions through the date of arbitration for the year in which the investment was made. Instead, the [a]rbitrators should have allowed a deduction or credit for each year from the year in which the investment was made through the date of arbitration.

Defendant then filed a motion in the superior court, pursuant to N.C. Gen. Stat. § 1-567.13(a)(3), to set aside the Modified Award on the ground the arbitrators "exceeded their authority under [N.C. Gen. Stat.] § 1-567.10 and § 1-567.14," and Plaintiff filed a motion in the superior court, pursuant to N.C. Gen. Stat. § 1-567.12, to confirm the

Modified Award. In an affidavit dated 29 October 1998, Richard E. Proctor (Proctor), one of the arbitrators, stated the Arbitration Award was modified because he had "inserted the wrong formula [when determining the amount due Plaintiff in the Arbitration Award] which did not achieve the intent of the [a]rbitrators."

On 5 November 1998, the trial court entered an order setting aside the Modified Award and confirming the Arbitration Award on the ground the arbitrators did not have the authority to modify the Arbitration Award.

The dispositive issue is whether the arbitrators based their determination of funds due to Plaintiff in the Arbitration Award on an "evident miscalculation of figures," pursuant to N.C. Gen. Stat. § 1-567.14(a)(1).

The powers of arbitrators are set forth in the Uniform Arbitration Act, N.C.G.S. ch. 1, art. 45A. This Act provides an arbitrator may, upon the application of a party made within twenty days of the delivery of an arbitration award or upon a court order, modify or correct the award, in pertinent part, for the grounds stated in N.C. Gen. Stat. § 1-567.14(a)(1).[1] N.C.G.S. § 1-567.10 (1999). Section 1-567.14(a)(1) states an award may be modified or corrected where "[t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award." N.C.G.S. § 1-567.14(a)(1) (1999). This Court has defined an "evident miscalculation of figures" as "mathematical errors committed by arbitrators which would be patently clear." *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 413, 255 S.E.2d 414, 419 (1979).

In this case, the Arbitration Award stated Defendants were entitled to an 8.5% return on certain investments used to make capital improvements to the property, and the arbitrators, based on these investments, awarded Plaintiff $80,712.00. Plaintiff then sought a modification of the Arbitration Award on the grounds stated in N.C. Gen. Stat. §§ 1-567.14(a)(1) and 1-567.14(a)(3), essentially arguing the arbitrators used the wrong formula to calculate the award. The arbitrators subsequently issued the Modified Award, stating they had

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1. The Uniform Arbitration Act also states an arbitrator may modify an award for the grounds stated in N.C. Gen. Stat. § 1-567.14(a)(3) ("award is imperfect in a matter of form, not affecting the merits of the controversy"), or for the purpose of clarifying the award. N.C.G.S. § 1-567.10. Plaintiff does not contend in his brief to this Court that these additional grounds exist for modifying the Arbitration Award, and we, therefore, do not address this issue. N.C.R. App. P. 28(b)(5).

"committed an evident miscalculation of figures." The statement of the arbitrators that they "committed an evident miscalculation of figures," however, is not controlling. The record shows the Arbitration Award was modified because the arbitrators used the wrong formula to calculate the amount due to Plaintiff. Indeed, Proctor's affidavit states he "inserted the wrong formula" when calculating the Arbitration Award. The use of an incorrect formula to determine an award is not an "evident miscalculation of figures." *See Fashion Exhibitors*, 41 N.C. App. at 413, 255 S.E.2d at 419 (use of improper formula by arbitrators is not an "evident miscalculation of figures"); *Cyclone Roofing Co. v. LaFave*, 312 N.C. 224, 235-36, 321 S.E.2d 872, 880 (1984) (erroneous decisions made by arbitrators when calculating award is not an "evident mathematical error[]").[2] The arbitrators, therefore, did not have the authority under section 1-567.10 to modify the Arbitration Award. Accordingly, the trial court properly denied Plaintiff's motion to confirm the Modified Award and granted Defendants' motion to set aside the Modified Award.

Affirmed.

Judge EDMUNDS concurs.

Judge TIMMONS-GOODSON dissents.

Judge TIMMONS-GOODSON dissenting.

This is a case of first impression. At issue is whether arbitrators, on application of a party, have the authority to modify their own award when the arbitrators are satisfied that they employed the wrong mathematical formula to arrive at the award.

Pursuant to North Carolina General Statutes section 1-567.14(a)(1), arbitrators may modify or correct an award where

2. The dissent states the teachings of *Gunter* and *Cyclone* are not applicable to modifications to an arbitration award when those modifications are made by an arbitrator and not by the court. We disagree because section 1-567.10, which provides the sole method by which arbitrators may modify an award, states an arbitrator may modify an award, in pertinent part, pursuant to N.C. Gen. Stat. § 1-567.14(a)(1). N.C.G.S. § 1-567.10. Section 1-567.14(a)(1), which also governs modifications made by a court, does not provide an arbitrator with any additional authority to modify an award than the authority provided to a court. *See* N.C.G.S. § 1-567.14(a)(1). The rules from *Gunter* and *Cyclone*, which interpret the meaning of "evident miscalculation of figures" under section 1.567.14(a)(1), are, therefore, equally applicable to modifications made by arbitrators and courts.

"[t]here was an evident miscalculation of figures . . . in the award[.]" N.C. Gen. Stat. § 1-567.14(a)(1) (1996). This Court has held that an "evident miscalculation of figures" occurs only when the arbitrators have committed a mathematical error. *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 413, 255 S.E.2d 414, 419 (1979); *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984).

In the present case, plaintiff argues that the arbitrators used the wrong method to calculate the interest allowed to defendants in preparing the Report of Arbitrators. According to plaintiff, the arbitrators erroneously included all interest deductions through the date of arbitration for the year in which the investment was made. Clearly, plaintiff does not argue that the arbitrators merely committed a mathematical error but instead argues that the arbitrators employed the wrong mathematical formula.

However, the line of cases holding that an "evident miscalculation of figures" occurs only when there has been a mathematical error does not control in the case at bar. While previous cases have treated *judicial* review of an award of arbitrators, the present case concerns a modification by the arbitrators of their own award.

The policies underlying *Gunter* and *LaFave Co.* have no bearing on the case at bar. In *Gunter*, this Court held that the trial court may not substitute its interpretation of the evidence for that of the arbitrators, who heard the testimony and reviewed the exhibits. According to *Gunter*, the true intent of the arbitrators should be given effect and reflected in the award because they heard the evidence. The language of *Gunter* makes it clear that it is the reviewing court, and not the arbitrators themselves, whose tendency to modify an award must be checked. "G.S. 1-567.14(a)(1) is not an avenue for *litigants* to persuade *courts* to review the evidence and then reach a different result because it might be interpreted differently." *Gunter*, 41 N.C. App. at 413, 255 S.E.2d at 419 (emphasis added). "[O]nly awards reflecting mathematical errors . . . shall be modified or corrected *by the reviewing courts*. *Courts* are not to modify or correct matters affecting the merits which reflect the intent of the arbitrators." *Id.* at 414, 255 S.E.2d at 419 (emphasis added). Similarly, in *LaFave Co.*, our Supreme Court held that the trial court properly refrained from revising the decision of the arbitrators in light of the fact that the arbitrators are judges of the parties' choosing. *LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872.

In the present case, a reviewing court did not substitute its will for that of the arbitrators. On the contrary, the arbitrators settled the matter in controversy without judicial intervention by modifying their report once they realized it was in error. The Modification of Report reflected the true intent of the arbitrators who reviewed the evidence. I do not believe that North Carolina General Statutes section 1-567.14 (a)(1) requires arbitrators to refrain from modifying an award which does not reflect their intent and which the arbitrators themselves recognize to be erroneous and unjust.

Another policy underlying the decisions in *Gunter* and *LaFave Co.* is to avoid litigation. According to *Gunter*, the reviewing court may modify an award of arbitrators in limited situations because "[t]he purpose of arbitration is to settle matters in controversy and avoid litigation." *Gunter* at 410, 255 S.E.2d at 417.

In the present case, the parties were not subjected to litigation or any lengthy, costly review. The arbitrators, on motion of a party, issued a Modification of Report, thereby settling the matter in controversy without intervention from a reviewing court. I would conclude that this Court's interpretation in *Gunter* of the statutory language "evident miscalculation of figures" is not applicable in the case at bar.

Unlike the majority, I believe that North Carolina General Statutes section 1-567.14(a)(1) permits arbitrators to modify their own award on motion of a party when the arbitrators acknowledge that they employed the wrong mathematical formula to arrive at the award. Where the wrong mathematical formula is employed, and the arbitrators modify the award so as to reflect their true intent, the trial court commits reversible error in refusing to confirm the modification of report. I would hold that the arbitrators in the present case made an "evident miscalculation of figures" within the meaning of North Carolina General Statutes section 1-567.14(a)(1), because to hold otherwise would nullify the intent of the parties to have the arbitrators decide the case.

KENYA PAYLOR THOMAS, PLAINTIFF v. OLANDO ELLIOT WASHINGTON AND DARRELL A. CAMPBELL, DEFENDANTS

No. COA99-442

(Filed 7 March 2000)

1. Statute of Limitations— uninsured motorist coverage—tort statute of limitations applies

In an action against an unnamed defendant insurance company for damages arising out of an automobile accident with an uninsured motorist, the three-year tort statute of limitations for automobile negligence actions applies to a claim against an uninsured motorist carrier instead of the three-year contract statute of limitations.

2. Process and Service— service on insurance company—strict compliance required

The trial court did not err in a case arising out of an automobile accident with an uninsured motorist by granting summary judgment for the unnamed defendant insurance company based on improper service of process prior to expiration of the three-year statute of limitations because: (1) plaintiff did not keep her action alive under N.C.G.S. § 1A-1, Rule 4(d) through the issuance of a chain of alias or pluries summonses, since both individual defendants were served personally with the original summons; (2) plaintiff did not attempt to serve a "copy" of the summons and complaint on the insurer, as required by the Financial Responsibility Act; and (3) in addition to the methods of service of process on a corporation set out in N.C.G.S. § 1A-1, Rule 4(j)(6), plaintiff could have served the insurance company under N.C.G.S. § 58-16.30, by delivering a copy of the process to the Office of the Commissioner of Insurance, or mailing it to the Commissioner by registered or certified mail, return receipt requested.

3. Appeal and Error— preservation of issues—failure to cite authority

Although plaintiff contends the trial court erred in considering the affidavit filed on behalf of the unnamed defendant and subsequently converting the unnamed defendant's motion to dismiss into a hearing on a motion for summary judgment, plaintiff abandoned this assignment of error under N.C. R. App. P. 28(b)(5) by failing to cite any authority.

Appeal by plaintiff from summary judgment entered 22 January 1999 by Judge Sanford L. Steelman, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 12 January 2000.

On 31 March 1995, Kenya Paylor Thomas (plaintiff) was injured in an automobile accident when her vehicle was struck by an uninsured vehicle driven by defendant Olando Elliot Washington and owned by defendant Darrell A. Campbell. At the time of the accident, plaintiff's vehicle was insured by the unnamed defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). The Farm Bureau policy provided uninsured motorist coverage to plaintiff.

On 2 March 1998, plaintiff instituted this action against the defendants by filing a complaint and having a summons issued for defendants Washington and Campbell. Defendant Washington was personally served with summons and complaint on 10 March 1998 and defendant Campbell was personally served on 16 March 1998. Neither defendant filed an answer. On 25 March 1998, plaintiff issued an alias or pluries summons directed to defendants Washington and Campbell. A second alias or pluries summons was issued on 18 June 1998, again directed to defendants Washington and Campbell. Additional alias or pluries summonses were issued on 19 August 1998, 2 October 1998, 16 November 1998, and 8 December 1998. It does not appear from the record that any of the enumerated alias or pluries summonses were ever delivered to the Sheriff for service, or were served on either defendant.

On 14 August 1998, plaintiff issued a summons directed to "H. Julian Philpott, Jr., Registered Agent for North Carolina Farm Bureau Agency, 5301 Glenwood Avenue, Raleigh, NC 27612." Copies of the summons and complaint were mailed to Mr. Philpott by certified mail, return receipt requested, and were received by him on 17 August 1998. On 21 August 1998, an alias or pluries summons was issued directed to "H. Julian Pilpott [*sic*], Jr." The 21 August 1998 summons was apparently not delivered to the Sheriff or served in any other fashion, and bears a notation that it was "Retained by Atty."

On 17 September 1998, Farm Bureau filed an answer to the complaint, pleading the three-year statute of limitations in bar, and moving to dismiss the action pursuant to the provisions of Rules 12(b)(4), (5) & (6), for "insufficiency of process, insufficiency of service of process, and failure to state a claim upon which relief can be granted." Plaintiff then mailed a copy of a summons and complaint by certified mail, return receipt requested, to "H. Julian Philpott, Jr.,

Registered Agent for North Carolina Farm Bureau Agency, 5301 Glenwood Avenue, Raleigh, NC 27612." Mr. Philpott received the mailing on 6 October 1998.

Plaintiff issued yet another alias or pluries summons on 16 November 1998, again directed to H. Julian P[h]ilpott, Jr., as registered agent for "NC Farm Bureau Agency." The record on appeal does not indicate that there was an effort to serve the 16 November 1998 summons. A final alias or pluries summons was issued on 8 December 1998 and directed to "H. Julian Pilpott [*sic*], Jr., Registered Agent for North Carolina Farm Bureau Mutual Insurance Company." The 8 December 1998 summons was mailed to P[h]ilpott by certified mail, return receipt requested, and was received by him on 10 December 1998. A copy of the 8 December 1998 alias or pluries summons with the complaint attached was also mailed to Gary K. Sue, as the attorney for Farm Bureau.

The trial court heard Farm Bureau's motion to dismiss on 4 January 1999. The trial court considered the affidavit of the litigation supervisor for Farm Bureau and converted the hearing on the motion to dismiss into a hearing on a motion for summary judgment. The trial court entered summary judgment for the unnamed defendant, Farm Bureau, by order filed on 22 January 1999. Plaintiff appealed, assigning error to the grant of summary judgment. In the order settling the record on appeal, the trial court certified pursuant to Rule 54(b) that there was no just cause for delay and that its judgment "should be immediately appealable."

Maddox & Gorham, P.A., by Thomas Maddox, Jr., and J. Dale Shepherd, for plaintiff appellant.

Burton & Sue, L.L.P., by Gary K. Sue and Kurt A. Seeber, for the unnamed defendant North Carolina Farm Bureau Mutual Insurance Company appellee.

HORTON, Judge.

At the time of the accident from which this litigation arose, the plaintiff had a valid policy of automobile liability insurance issued by Farm Bureau. In addition to providing plaintiff with liability coverage, the policy also provided her with uninsured motorist coverage. However, in order for an uninsured motorist carrier to be bound by a judgment against the uninsured motorist, the insurer must be "served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return

receipt requested, or in any manner provided by law . . . ." N.C. Gen. Stat. § 20-279.21(b)(3)(a) (1999). Once the insurer is served, it "shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name." *Id.*

Here, the accident in question occurred on 31 March 1995. Thus, the three-year statute of limitations applicable to automobile negligence actions ran on 31 March 1998. Prior to the expiration of the limitations period, plaintiff instituted an action to recover for her personal injuries against the allegedly negligent driver and owner of the uninsured vehicle with which she collided. A summons was properly issued and both individual defendants were personally served with the summons and complaint. The record does not, however, reveal any attempt by plaintiff to serve a copy of the original summons and complaint on Farm Bureau, her uninsured motorist carrier within the statutory time limit. Instead, a series of alias or pluries summonses were issued and directed to the named defendants. Plaintiff states in her brief to this Court that the additional summonses were issued "to keep the action alive and in the event it became necessary to serve the uninsured motorist (UM) carrier."

Eventually, on 14 August 1998, a summons was issued and directed to "H. Julian Philpott, Jr., Registered Agent for North Carolina Farm Bureau Agency," and delivered to Mr. Philpott by certified mail, return receipt requested, on 17 August 1998. As a result of that delivery, the unnamed defendant filed an answer but also pled the statute of limitations in bar and moved to dismiss for insufficiency of process. The affidavit filed by the litigation supervisor for the unnamed defendant states that North Carolina Farm Bureau Agency is not a subsidiary of, nor affiliated with, North Carolina Farm Bureau Mutual Insurance Company. However, it does appear that H. Julian Philpott, Jr., serves as the registered agent for both entities. Process was first served on Mr. Philpott as registered agent for North Carolina Farm Bureau Mutual Insurance Company on 10 December 1998.

[1] Plaintiff contends that, since her action against Farm Bureau arises from a contract of insurance, the three-year tort statute of limitations does not apply. Plaintiff argues that the three-year contract statute of limitations applies, but "the time for the [contract] limitations period to start is either when the UM carrier rejects payment or otherwise breaks the contract or else when the . . . plaintiff knew or,

by the exercise of reasonable diligence, should have known that the tortfeasor was uninsured." Although we have carefully considered plaintiff's arguments, we must disagree, as both our Supreme Court and this Court have rejected the application of a contracts statute of limitations in this situation.

In *Brown v. Casualty Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974), plaintiff sought to recover for the wrongful death of his intestate. Plaintiff did not institute an action against the allegedly uninsured motorist within two years, but did bring his action against the uninsured motorist carrier within three years of the accident. Our Supreme Court held in pertinent part that a plaintiff's right to recover against an insurer under an uninsured motorist endorsement is "derivative and conditional." Thus, said the Court, despite the contractual nature of the relationship between plaintiff and plaintiff's insurer, the "action is actually one for the tort allegedly committed by the uninsured motorist." *Id.* at 319, 204 S.E.2d at 834. The Supreme Court then applied the two-year statute of limitations applicable to wrongful death actions, rather than the three-year contract statute of limitations, and held that as plaintiff did not institute an action against the alleged tortfeasor within two years, his action against the insurer was not commenced in time.

Furthermore, this Court has recently made it clear that the three-year tort statute of limitations, which begins running on the date of an accident, also applies to the uninsured motorist carrier. *Fulton v. Mickle*, 134 N.C. App. 620, 518 S.E.2d 518 (1999) (accident occurred on 24 April 1994, and Court stated plaintiff had three years from that date [24 April 1997] to properly serve insurer).

[2] Plaintiff argues, however, that she kept her action alive through the chain of alias or pluries summonses. Again, we cannot agree. The date an action is commenced becomes crucial when a statute of limitations is pled in bar of the action. Rule 3 of our Rules of Civil Procedure provides that a civil action is commenced when a complaint is filed with the court. N.C. Gen. Stat. § 1A-1, Rule 4(a) then provides that "[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." To provide for the exigency in which a defendant cannot be served with the summons within the allotted time, Rule 4(d) provides in pertinent part that:

> When any defendant in a civil action is not served within the time allowed for service, the action may be continued in exist-

> ence as to such defendant by either of the following methods of extension:
>
> . . . .
>
> (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses . . . .

N.C. Gen. Stat. § 1A-1, Rule 4(d) (1999).

Here, the provisions relating to issuance of alias or pluries summonses did not apply, as both individual defendants were served personally with the original summons. "The Rule 4(d) provisions for an endorsement on the original summons or issuance of an alias or pluries summons *apply only when the original summons was not served*, and their purpose is to keep the action alive until service can be made." *Roshelli v. Sperry*, 57 N.C. App. 305, 307, 291 S.E.2d 355, 356 (1982) (emphasis added).

The Financial Responsibility Act does not expressly require that separate process be issued for an uninsured motorist carrier, but does specifically require that a "copy" of the summons and complaint be served on the insurer. In addition to the methods of service of process on a corporation set out in Rule 4(j)(6), N.C. Gen. Stat. § 58-16.30 provides an alternative manner of service on insurance companies by providing that a copy of the process may be delivered to the Office of the Commissioner of Insurance, or mailed to the Commissioner, registered or certified mail, return receipt requested. Thus, it appears that the unnamed defendant was amenable to service of process at all times pertinent hereto.

Our appellate courts have required strict compliance with the statutes which provide for service of process on insurance companies in similar situations. For example, in *Fulton v. Mickle* this Court held that mailing a copy of the summons and complaint by *regular mail to a claims examiner for the insurer* did not comply with the requirement of Rule 4(j)(6)(c) of the Rules of Civil Procedure that a copy of the summons and complaint be mailed by "registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served . . . ."

[3] Finally, plaintiff argues that the trial court erred in considering the affidavit filed on behalf of the unnamed defendant and subse-

quently converting the hearing on Farm Bureau's motion to dismiss into a hearing on a motion for summary judgment. Plaintiff states that she did not have adequate time to prepare for a hearing on the motion for summary judgment, but does not support her brief argument by "reason or argument . . . or authority cited[;]" thus this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(5).

We are aware that some of our sister states provide different limitation periods for claims against uninsured motorist carriers. However, we are not writing on a clean slate but are bound by the prior decisions of our Supreme Court and this Court. The judgment of the trial court is

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. STEVEN LEE CUTSHALL

No. COA99-185

(Filed 7 March 2000)

Search and Seizure— warrant for premises—search of individual—probable cause

Even though police officers had a warrant to search a mobile home and all outbuildings at the residence for crack cocaine and other controlled substances, the search of a defendant not named in the warrant but found on the premises named therein that he neither owned nor controlled and the seizure of a rock of crack cocaine and crack pipes from his jacket violated defendant's Fourth Amendment right to be free from unreasonable search and seizure because (1) the right to search defendant under N.C.G.S. § 15A-256, which allows the search of persons on the premises who were not named in the warrant when the items sought were not found, ended when officers found crack cocaine in an outbuilding, and (2) there was no evidence of probable cause particularized to this defendant.

Appeal by defendant from judgment entered 25 September 1998 by Judge Raymond A. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2000.

Attorney General Michael F. Easley, by Associate Attorney General C. Ruffin Poole, for the State.

Allen W. Boyer for the defendant.

EAGLES, Chief Judge.

This case presents the issue of whether under G.S. § 15A-256 (1999) the State may properly search an individual not named in the search warrant but found on premises named therein that he neither owns nor controls.

Defendant was convicted for possession of cocaine and drug paraphernalia. The State's evidence showed that on 11 November 1997 Officer Keith Caviness of the Charlotte-Mecklenburg Police Department and a paid informant went to 5516 Cross Street to make a controlled drug buy. Shortly after their arrival, a white male came out of a mobile home on the premises and immediately walked to the left toward an old shack adjacent to the mobile home. After a brief period, the white male approached the vehicle and handed crack cocaine to the informant. After examining the drugs, the officer and informant made the purchase.

Officer Caviness left the scene and obtained a search warrant for the premises from a Mecklenburg County Magistrate. Though the search warrant is not in the record before us, testimony from officers established that the search warrant authorized officers to search the mobile home and all outbuildings at 5516 Cross Street for crack cocaine and other controlled substances. Additionally, the warrant explicitly provided the officers with the right to search the white male who sold crack cocaine to the informant. The warrant described him as a white male, twenty to twenty-five years old, six foot one inches tall, weighing approximately one hundred fifty to one hundred sixty pounds and having dark hair and mustache. Officer Caviness testified that the defendant was not the same individual that had earlier sold them the crack cocaine and that the defendant did not match the description in the search warrant.

Several hours after the controlled buy, Caviness and other officers served the search warrant at 5516 Cross Street. Upon entry, Officer Caviness testified that they found six or seven people in the

mobile home. Caviness found the defendant in the living room area and immediately "assisted" him to the floor. While on the floor, Caviness handcuffed the defendant. The defendant remained on the floor while police "secured" the mobile home. The trial court found that "the defendant was not immediately searched." After the police "secured" the mobile home, Officer Caviness searched the defendant. Caviness found one rock of crack cocaine and three crack pipes in defendant's right front jacket pocket. Additionally, police searched the mobile home and the outside buildings. The police found drug paraphernalia inside the residence and found crack cocaine in a "shack" adjacent to the residence.

Prior to trial, defendant moved to suppress the rock of crack cocaine and the crack pipes the police obtained from his jacket. After a pretrial hearing, the court denied the motion. The trial court made findings of fact and concluded that the search of defendant's person was "without constitutional violation." Defendant appeals and claims that the search violated his Fourth Amendment rights to be free from an unreasonable search and seizure. We agree.

The Fourth Amendment to the United States Constitution and Article I of the North Carolina Constitution protect individuals against unreasonable searches and seizures. U.S. Const. Amend. IV, N.C. Const. Art. I, § 20. The U.S. Supreme Court in *Ybarra v. Illinois*, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 245 (1979) stated that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." In *Ybarra*, the Court held that a warrant authorizing officers to search a tavern did not entitle the officers to search every individual found on the premises. Rather, the Fourth Amendment requires that officers have probable cause particularized to an individual prior to searching that individual. *Id.* Since the officers in *Ybarra* did not have probable cause particularized to the defendant, the Court held that the search violated the Fourth Amendment. *Id.* at 96, 62 L. Ed. 2d at 248.

Here, State argues that notwithstanding *Ybarra*, G.S. 15A-256 justifies Officer Caviness' search of defendant's person. This Court has stated that a search conducted pursuant to G.S. § 15A-256 complies with the requirements of probable cause and does not conflict with the U.S. Supreme Court's ruling in *Ybarra*. *State v. Brooks*, 51 N.C. App. 90, 96, 275 S.E.2d 202, 206 (1981). G.S. 15A-256 states:

> An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. **If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person,** but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section all controlled substances are the same type of property. (Emphasis added).

The State contends that we should consider the "shack" and mobile home as separate units under G.S. § 15A-256. According to the State, the warrant focused on the mobile home and not the outbuildings. Therefore, it contends that the only relevant area for purposes of G.S. § 15A-256 was the mobile home. The State asserts that the officers' discovery of crack cocaine in the outbuilding is of no consequence although the warrant specifically allowed the police to search those structures. Since police failed to find crack cocaine in the mobile home, the State claims that G.S. § 15A-256 authorized the officers to search the defendant.

In enacting G.S. § 15A-256, the General Assembly intended to authorize the search of an individual who is not in control of the designated premises but is found there when a search warrant is executed, **only** after a search of the premises did not reveal the items sought in the search warrant. The State's argument here would allow officers to search the adjacent outbuildings pursuant to the search warrant but not consider evidence found in those buildings in order to justify the search of an unnamed individual under G.S. § 15A-256. We find the State's argument unpersuasive.

G.S. § 15A-256 does not distinguish between different units on premises. Indeed, our cases have uniformly allowed searches of outbuildings within the curtilage under authority of a search warrant for the premises address. *State v. Travatello*, 24 N.C. App. 511, 211 S.E.2d 467 (1975) (tool shed); *State v. Trapper*, 48 N.C. App. 481, 269 S.E.2d 680 (1980) (shed); *State v. Courtright*, 60 N.C. App. 247, 298

S.E.2d 740, *disc. review denied*, 308 N.C. 192, 302 S.E.2d 245 (1983) (parked car within curtilage). This Court has stated that "**the premises of a dwelling house include, for search and seizure purposes, the area within the curtilage** and a search pursuant to a warrant describing a dwelling does not exceed its lawful scope when outbuildings or vehicles located within the curtilage are also searched." *Courtright*, 60 N.C. App. at 249, 298 S.E.2d at 742 (citations omitted). To follow the State's argument here would require us to overrule those cases authorizing search of buildings within the curtilage. So long as probable cause exists to search the buildings within the curtilage, then those buildings must be included within the term "premises" under G.S. § 15A-256. This is especially true here where the warrant explicitly authorized the search of the outbuildings. Accordingly, we now hold that the outbuildings were included within the premises authorized to be searched pursuant to the search warrant.

The State's argument, followed to its logical conclusion, would arguably render G.S. § 15A-256 unconstitutional. In *Brooks*, 51 N.C. App. at 96, 275 S.E.2d at 206, this Court stated:

> Probable cause "particularized" to those present on the premises being searched can be clearly inferred from the circumstances under which the limited search pursuant to G.S. § 15A-256 is authorized: Police officers have reason to believe that criminal activity has been or is occurring on the premises, the search pursuant to the warrant fails to uncover any evidence of such activity and such evidence of the criminal activity could be concealed upon the person of those present at the time of the officer's entry.

Therefore, probable cause exists from the fact that a search pursuant to a search warrant failed to yield the items sought and that the defendant found on the premises could have concealed those items on his person. Probable cause does not arise from defendant's mere presence on the premises. The State's reading of the statute would eliminate the requirement that "the search pursuant to the warrant fails to uncover evidence of such activity." *Id.* Without this statutory requirement, G.S. § 15A-256 would entitle officers to search individuals merely because they were found on the premises. The U.S. Supreme Court has already held that proposition unconstitutional. *See Ybarra*, 444 U.S. at 91, 62 L.Ed.2d at 245.

Officer Caviness testified that the warrant named crack cocaine as the object of the search. Additionally, the search warrant allowed

officers to search the adjacent "shack" as well as the mobile home described. Upon searching the shack, officers discovered crack cocaine. G.S. § 15A-256 justifies the search of an individual found on the premises only when a search pursuant to a search warrant does not produce the items described in the warrant. Here, the officers' search yielded the exact object of the officers' investigation, crack cocaine. After the officers discovered cocaine in the "shack," their statutory authority to search the defendant ceased to exist. Accordingly, we hold that G.S. § 15A-256 is inapplicable and does not justify the officers' search of the defendant.

In its order, the trial court concluded as a matter of law

> 1. That the Police Officers entered the residence located at 6516 Cross Street pursuant to a lawful Search Warrant and the entry into the premises was lawful and based on the common law as outlined in the case of *[State v. Brooks* 51 N.C.App. 90] search of a person found in or upon the premises pursuant to the execution of a valid search warrant is proper.

Brooks is distinguishable. In *Brooks*, the warrant gave the officers the right to search the premises for "ready to sell" hashish. *Brooks*, 51 N.C.App. at 92, 275 S.E.2d at 203. Upon conducting the search, the officers found no hashish that was ready for immediate sale, though they found hashish not yet ready to sell. *Id.* The officers then searched the defendant and found an envelope of hashish. *Id.* The *Brooks* Court sustained the search based on G.S. § 15A-256, reasoning that the officers' search of the premises did not disclose the intended items, namely "ready to sell" hashish. *Id.* at 94, 275 S.E.2d at 204. Unlike *Brooks*, here the officers in searching the adjacent "shack" did locate crack cocaine, the exact item that the warrant sought. Accordingly, we hold that the trial court's reliance on *Brooks* was error.

The State also relies on *State v. Watlington*, 30 N.C. App. 101, 226 S.E.2d 186, *disc. review denied*, 290 N.C. 666, 228 S.E.2d 457 (1976). In *Watlington*, the police obtained a warrant authorizing them to search the vehicle of a third party. *Id.* The defendant was a passenger in the vehicle. *Id.* After the search of the automobile proved fruitless, the police searched the defendant's person and found four packets of heroin in her jacket. *Id.* at 102, 226 S.E.2d at 187. This Court upheld the search based on G.S. § 15A-256. *Id.* In *Watlington*, like *Brooks*, the police failed to locate the object of their search by searching the vehicle. In the instant case, the police did locate the exact item specified

in the warrant. Therefore, *Watlington* is distinguishable and does not bind us here.

The State has failed to show that the officers' search complies with the requirements of G.S. § 15A-256. Additionally, the record does not indicate any evidence of probable cause particularized to this defendant. Therefore, the trial court's conclusion that the officers' search was "without constitutional violation" was error. In the absence of probable cause or another warrant exception, the trial court should have suppressed the evidence the officers seized during the search of the defendant's person.

Reversed and remanded.

Judges WALKER and WYNN concur.

ED T. GRIFFIN, d/b/a ED T. GRIFFIN BUILDERS, Plaintiff v. JAMES H. SWEET, JR. and wife, DEBRA H. SWEET, Defendants

No. COA99-95

(Filed 7 March 2000)

Pleadings— Rule 11 sanctions—time for filing motion

By waiting over thirteen months after our Supreme Court denied defendants' petition for discretionary review, plaintiff failed to file his motion for N.C.G.S. § 1A-1, Rule 11 sanctions within a reasonable time of detecting the alleged impropriety because the record reveals plaintiff was put on notice of any alleged sanctionable conduct when defendants filed an answer to the supplemental complaint, when the trial court granted summary judgment in favor of plaintiff, and when the Court of Appeals affirmed the summary judgment.

Appeal by defendants from judgment entered 31 July 1998 by Judge Quentin T. Sumner in Halifax County Superior Court. Heard in the Court of Appeals 3 January 2000.

Dill, Fountain, Hoyle, Pridgen, Stroud & Naylor, L.L.P., by William S. Hoyle, for plaintiff-appellee.

Smith Helms Mulliss & Moore, L.L.P., by Paul K. Sun, Jr. and Hampton Dellinger, for defendants-appellants.

WALKER, Judge.

Defendants Sweet contracted with plaintiff Ed T. Griffin, d/b/a/ Ed T. Griffin Builders, in 1989 to construct a house in Halifax County. Defendants subsequently obtained a construction loan through Centura Bank, which required plaintiff and his wife to sign a personal guaranty for the construction loan. Plaintiff began work on the residence in early 1990, but during that summer, a disagreement arose between the parties regarding the construction. Defendants notified Centura Bank that plaintiff was no longer authorized to make construction draws on the account. Plaintiff then filed a notice of lien on the real property and a complaint seeking payment for the work completed. Defendants filed an answer and counterclaim, alleging that plaintiff failed to construct the house in accordance with the contract, to comply with the State building code, and to perform the construction in a workmanlike manner.

The trial began on 25 January 1993. On the next day, the trial judge interrupted the testimony and urged the parties to settle the case. Thereafter, settlement negotiations were held, and defendants had contact with their attorneys at various times during the process. After a settlement was reached, both of the parties and their attorneys returned to the courtroom where the trial court reviewed the proposed terms of the settlement. The trial judge stated, "I am going to recite what I consider to be the settlement, and if it varies from what you perceive the settlement to be, counsel, you should inform me." The trial judge then read into the record his understanding of the settlement agreement. The attorneys for both parties were given an opportunity to add any additional terms which had been omitted and to object to any provisions. Although some terms were added, no other objections were made by either party.

Under the settlement agreement, plaintiff agreed to release the lien on defendants' property and to pay defendants $10,000—$5,000 due within ten days and $5,000 due on or before 1 June 1993. In exchange, defendants agreed to return plaintiff's ladder within ten days and to indemnify plaintiff from any payment that he might be required to make to Centura Bank as a result of plaintiff's guaranty of the construction loan. The parties agreed to sign a consent judgment which was to be held by plaintiff's attorney until the conditions of the settlement agreement were met.

Plaintiff canceled the lien on defendants' property and tendered the two $5,000 installment payments within the designated time.

Although the checks were accepted by defendants' attorney, they were never negotiated by defendants. Defendants returned plaintiff's ladder but refused to indemnify him for the construction loan guaranty.

By the end of October 1993, defendants' attorney notified plaintiff that defendants did not intend to comply with the settlement. Plaintiff then filed a supplemental complaint against defendants on 16 November 1993 for breach of the settlement agreement alleging that there had been an accord and satisfaction. Defendants retained new counsel, Malvern F. King, Jr., who returned the non-negotiated checks to plaintiff's attorney and filed an answer to the supplemental complaint on 7 December 1993. In their answer, defendants argued that they did not understand the indemnification provision.

Plaintiff filed a motion for summary judgment, and defendants filed a response on 19 January 1994, arguing that they never understood the settlement agreement and did not agree to the indemnification provision. After hearing the arguments of counsel, the trial court granted summary judgment to plaintiff on 28 January 1994. Defendants' attorney then withdrew, and defendants retained attorney Charles T. Francis to appeal the trial court's entry of summary judgment. This Court affirmed summary judgment in favor of plaintiff in an opinion filed on 5 September 1995. *See Griffin v. Sweet*, 120 N.C. App. 166, 461 S.E.2d 32 (1995). Defendants then filed a petition for rehearing, which was denied by this Court and a petition for discretionary review to our Supreme Court, which was also denied by an order filed 22 February 1996. *See Griffin*, 342 N.C. 655, 467 S.E.2d 712 (1996).

On 27 March 1997, plaintiff filed a motion in the cause seeking sanctions under N.C. Gen. Stat. § 1A-1, Rule 11 against defendants and their attorneys, King and Francis. A hearing was held on 27 July 1998, after which the trial court imposed sanctions against defendants Sweet ordering them to pay $15,000 and costs. The trial court found that there was no basis for the imposition of sanctions against attorneys King and Francis.

Defendants assign as error the trial court's judgment and order: (1) granting plaintiff's Rule 11 motion for sanctions since it was not filed within a reasonable amount of time; (2) sanctioning them for appellate conduct under Rule 11 instead of Rule 34; and (3) sanctioning them for their responsive pleadings since the record does not

support the trial court's findings that the pleadings were not well grounded in fact or were interposed for an improper purpose.

Defendants contend that plaintiff failed to file his Rule 11 motion within a reasonable time; therefore, it is barred. Although Rule 11 does not specify a time limit for filing a sanctions motion, this Court has held that "a party should make a Rule 11 motion within a reasonable time after he discovers an alleged impropriety." *See Rice v. Danas, Inc.*, 132 N.C. App. 736, 514 S.E.2d 97 (1999) and *Renner v. Hawk*, 125 N.C. App. 483, 481 S.E.2d 370, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997). A trial court's order imposing Rule 11 sanctions is reviewable *de novo* under an objective standard. *Id.* Plaintiff argues that this Court, in *Taylor v. Collins*, 128 N.C. App. 46, 493 S.E.2d 475 (1997), found that the imposition of sanctions was not untimely although more than two years had lapsed between the entry of summary judgment and the filing of the motion for sanctions. Defendants, however, contend that the holding in *Taylor* only establishes that trial courts can entertain a motion for sanctions after the case has been appealed. In *Taylor*, this Court found that "respondents have pointed to no authority which suggests that it was error for the trial court to entertain a motion for sanctions after their appeal to this Court." *Id.* at 49, 493 S.E.2d at 477. However, this Court in *Taylor* did not address whether the motion for sanctions was brought within a reasonable time after summary judgment was affirmed by this Court. Furthermore, defendants argue that *Taylor* is factually distinguishable since the motion for sanctions in that case was filed only five months after our Supreme Court denied discretionary review and two months after our Supreme Court dismissed the plaintiff's motion for reconsideration of the petition for discretionary review.

Defendants further rely on the recent decision of *Rice v. Danas, Inc.*, 132 N.C. App. 736, 514 S.E.2d 97 (1999), where the defendant waited almost seven months after judgment was entered before filing its motions for sanctions. In *Rice*, a jury verdict was entered on 5 December 1996. *Id.* On 10 December 1996, the defendant moved to recover costs; however, there was no further action in the case until 30 June 1997 when the defendant moved to amend its motion for costs and filed a separate motion for Rule 11 sanctions. *Id.* This Court stated:

> Defendant obviously formed an opinion of the alleged impropriety of plaintiff's pleadings long before the filing of its motion for sanctions. Indeed, the suspect pleadings were signed months

> before trial by plaintiff and/or her counsel. Yet, no motion for sanctions was filed until well after the verdict of the jury was rendered.

Id. at 741, 514 S.E.2d at 101. Therefore, this Court found as a matter of law that the motion for Rule 11 sanctions was not filed within a "reasonable time of detecting the alleged improprieties." *Id.*

In *Renner v. Hawk*, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375 (1997), the defendant asserted that "the alleged impropriety became apparent not when the complaint was filed, but only during the course of discovery." The defendant in *Renner* was deposed on 23 May 1995, after which settlement discussions occurred. *Renner*, 125 N.C. App. 483, 481 S.E.2d 370. Plaintiff was scheduled to be deposed on 11 July 1995; however, on 10 July 1995, plaintiff moved to voluntarily dismiss the action without prejudice. *Id.* One month later, the defendant filed a motion for sanctions, and this Court found that the defendant's motion for Rule 11 sanctions was filed within a reasonable time. *Id.*; *See also Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989) (holding that the motion for sanctions was timely since it was filed prior to trial, on 17 July 1987 and was based on conduct alleged to have occurred during discovery, between May and July 1987).

After hearing plaintiff's motion for sanctions, the trial court here made findings, which include the following:

> 7. That the record in this case, including pleadings filed on behalf of the Defendants, James H. Sweet, Jr., and wife Debra H. Sweet, and a transcript of a hearing on November 5, 1993, before Judge Robert Hobgood indicate that the Plaintiff fully complied with the terms of the settlement announced by Judge Butterfield; after the said compliance by the Plaintiff, the Defendants refused to comply with the terms of the settlement and, in fact, repudiated the settlement and refused to indemnify the Plaintiff with respect to the guaranty on the construction loan, and gave as their reasons for refusing to comply with the settlement that they were not included in the settlement negotiations by their trial attorneys and did not understand the terms of the settlement, including their agreement to indemnify the plaintiff, even though they were present in Court and the presiding Judge announced their agreement to indemnify the Plaintiff against any losses incurred as a result of the guaranty agreement executed by the Plaintiff and his wife.

8. Subsequent to the settlement announced in this Court [in] January, 1993, Defendants discharged their trial attorneys, Michael Strickland and William Black, and employed Malvern F. King, Jr., to be their attorney of record; that subsequent to Mr. King's appearance in the case, the Plaintiff filed a Motion for Leave to File Supplemental Pleadings to allege accord and satisfaction, and the Defendants, through counsel King, filed a Response to said Motion; that said Plaintiff's Motion for Leave to File Supplemental Pleadings came on for hearing on or about November 5, 1993 before Judge Robert Hobgood, at which hearing the Defendants['] trial attorneys, Strickland and Black testified and the Defendants, James H. Sweet, Jr., and wife Debra H. Sweet testified; after said hearing, Judge Hobgood entered an Order allowing the Plaintiff to file supplemental pleadings and the Plaintiff did, in fact, file a supplemental Complaint to which the Defendants, through counsel King, filed a Supplemental Answer.

The trial court then concluded in part:

3. The pleadings filed by and on behalf of the Defendants, James H. Sweet, Jr., and wife Debra H. Sweet, were not factually sufficient and failed the factual certification required by N.C. Gen. Stat. § 1A-1, Rule 11.

4. That the pleadings, including the Defendants['] Supplemental Answer to the Plaintiff's Supplemental Complaint, the brief filed on the Defendants['] behalf of Summary Judgment Motion and other documents filed by the Defendants, were filed for improper purpose.

Thus, it is apparent from the record in this case that plaintiff was put on notice of any alleged sanctionable conduct when defendants filed an answer to the supplemental complaint on 7 December 1993 and again when the trial court granted summary judgment for plaintiff on 28 January 1994. However, we are not suggesting that plaintiff's motion for Rule 11 sanctions should have been filed at the summary judgment stage.

Additionally, when this Court affirmed summary judgment in plaintiff's favor on 5 September 1995, that decision only reinforced plaintiff's position that an agreement between the parties had been reached in 1993. Therefore, based on the rationale of *Rice v. Danas, Inc., supra*, we conclude that by waiting over thirteen months after

our Supreme Court denied defendants' petition for discretionary review, plaintiff failed to file his motion for Rule 11 sanctions within a reasonable time of detecting the alleged impropriety. Based on this finding, we need not address defendants' remaining assignments of error.

Reversed.

Chief Judge EAGLES and Judge WYNN concur.

LINWOOD K. STEPHENSON, EXECUTOR, ESTATE OF IRENE J. STEPHENSON, PLAINTIFF v. JAMES S. WARREN, HILDA S. WARREN, DOUGLAS P. LEARY, REV. THOMAS A. JACKSON, MICHAEL K. PERRY, CHAIRMAN OF THE BOARD OF TRUSTEES OF WAKE FOREST BAPTIST CHURCH, AND WAKE FOREST BAPTIST CHURCH AS GRANTEE IN THE PURPORTED DEED RECORDED IN BOOK 6945, PAGE 0568, WAKE COUNTY REGISTRY, DEFENDANTS

No. COA99-13

(Filed 7 March 2000)

1. Deeds— execution—undue influence

The trial court erred in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the issue of undue influence because plaintiff's forecast of evidence demonstrates factors bearing on undue influence, including that the owner of the property was eighty-seven years old, her mental health had begun to fail noticeably earlier that year, the deed executed in favor of defendants contravened the prior contract of sale executed in favor of Ten Oaks Partners, and defendants alone procured the deed's execution with neither attorney nor family present on behalf of plaintiff.

2. Fraud— constructive—deed execution—no special relationship of trust and confidence

The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the issue of constructive fraud because plaintiff's forecast of evidence fails to establish a special relationship of trust and confidence with those present at the execution of the deed.

3. Unfair Trade Practices— deed execution—private sale of residence—not an act "in or affecting commerce"

The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the unfair and deceptive trade practices claim, and on plaintiff's request for treble damages, because plaintiff's claim is beyond the purview of N.C.G.S. § 75-1.1 since: (1) the private sale of a residence by an individual is not an act "in or affecting commerce;" and (2) plaintiff was not engaged in the business of selling real estate.

4. Deeds— execution—malicious and tortious interference with contractual relationship

The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the malicious and tortious interference with a contractual relationship claims because these claims require that defendant intentionally induce a third person not to perform the contract, instead of defendant intentionally inducing the plaintiff not to perform the contract.

5. Deeds— execution—undue influence—punitive damages

The trial court erred in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the issue of punitive damages because punitive damages may be submitted to the jury on a claim of undue influence.

6. Deeds— execution—double damages

The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the double damages claim because plaintiff fails to indicate any claims which would support such recovery.

Appeal by plaintiff from order entered 21 July 1998 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 20 October 1999.

Boyce & Isley, P.A., by Eugene Boyce, for the plaintiff-appellant.

Tharrington Smith, L.L.P., by Randall M. Roden and E. Hardy Lewis, for the defendant-appellees.

LEWIS, Judge.

Irene J. Stephenson brought this action to have set aside a deed by which she conveyed a 16-acre tract of land and accompanying residence ("the property") to the Wake Forest Baptist Church ("the church"). After filing the complaint, but before trial, Ms. Stephenson died and her executor was substituted. For purposes of this opinion, Irene Stephenson will be referred to as plaintiff.

The complaint sets forth claims for unfair and deceptive trade practices, malicious and tortious interference with a contractual relationship, and prays for double, treble and punitive damages. On 27 January 1998, both parties filed motions for summary judgment. The trial court granted defendants' motion and denied plaintiff's motion. Plaintiff appeals from this order.

Upon the death of her husband in 1991, plaintiff became the sole owner of the property. In early 1994, plaintiff left the property and began to reside at the Wake Forest Rest Home. She executed a power of attorney designating Linwood Stephenson as her attorney-in-fact.

In the summer of 1995, Dr. Manning, a neighbor with an established business adjoining the property, got permission, though not legally necessary, from Linwood Stephenson to discuss with plaintiff the purchase of the property by his partnership, Ten Oaks Partners. The property was her only marketable tangible asset but produced no income. On 11 August 1995, plaintiff executed as grantor an "Offer to Purchase and Contract" a 12.44-acre tract of the property to Ten Oaks Partners. The Offer was not recorded.

Linwood Stephenson's affidavit states that in "early" 1996, the plaintiff's mental health began to decline, and she became lucid only part of the time. In April 1996, a general warranty deed in the name of the plaintiff, Ms. Stephenson, as grantor conveying the property to the church but reserving unto herself a life estate, was recorded in the Wake County Registry. The deed was executed by plaintiff at the Wake Forest Rest Home with two witnesses present, Hilda Warren and Douglas Leary, as well as an attorney, James Warren, all members of defendant church. Plaintiff had never hired Mr. Warren to perform any legal services, and he was not acting as her attorney in this transaction. Linwood Stephenson, plaintiff's attorney-in-fact, was not present at the execution of the deed, nor was he informed of the church's intent to procure a transfer of real estate from plaintiff. The deed recites that valuable consideration was paid by the grantee;

however, no consideration was ever tendered or paid by any defendant or any other party to or for plaintiff.

Plaintiff argues on appeal that the deed here should be set aside because plaintiff did not have an intent to convey the property and because the conveyance was procured without consideration. Both of these facts are alleged in the complaint. As to plaintiff's claim that she lacked intent, although a grantor's intent is necessary to a valid conveyance, its absence in and of itself does not establish a cause of action to set aside a deed. Instead, the fact there was no intent must underlie some claim, such as fraud, mistake or undue influence, which will support a cause of action to set aside a deed. *Carwell v. Worley*, 23 N.C. App. 530, 532, 209 S.E.2d 340, 342, *cert. denied*, 286 N.C. 334, 212 S.E.2d 167 (1974). As to plaintiff's claim that the deed was procured without consideration, defendants argue the transaction was a gift, making the issue of consideration immaterial. We feel it is unnecessary, however, to address this argument, as plaintiff's forecast of evidence in regard to setting aside the deed is far more persuasive.

Plaintiff also argues on appeal claims for undue influence and constructive fraud, both of which are viable theories which will serve as a basis to set aside a deed. *Id.* Defendant counters, however, that the complaint does not allege either of these claims, barring our consideration of them. While we agree that the complaint fails to set forth either a claim for undue influence or constructive fraud, we are mindful that our courts have established very liberal rules regarding amendments to pleadings. Where the evidence presented at a summary judgment hearing would justify an amendment to the pleadings, we will consider the pleadings amended to conform to the evidence raised at the hearing. *Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 90, 231 S.E.2d 891, 894 (1977). We conclude that it is both proper and fair that the complaint in this case be treated as amended to conform to the evidence reviewed on the motion for summary judgment, noting that "it is the better procedure at all stages of a trial to require a formal amendment to the pleadings." *Id.* As such, the claims for undue influence and constructive fraud will be reviewed.

[1] This Court's standard of review on appeal from summary judgment requires a two-step 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 en-

titled to judgment as a matter of law. N.C.R. Civ. P. 56(c) (1999). Once the movant 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, establishing at least a prima facie case at trial. *Gaunt v. Pittaway*, 135 N.C. App. 442, 447, 520 S.E.2d 603, 607 (1999). Undue influence is defined as "the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result." *Lee v. Ledbetter*, 229 N.C. 330, 332, 49 S.E.2d 634, 636 (1948). Although there is no definitive test for establishing undue influence, several factors have been identified as bearing on the question, including:

1. Old age and mental weakness of a party executing the instrument.

2. That the instrument is different from and revokes a prior instrument.

3. That the instrument favors one of no blood relation.

4. That the beneficiary has procured its execution.

5. That it disinherits the natural objects of the grantor's bounty.

6. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

7. That others have little or no opportunity to see the grantor.

Caudill v. Smith, 117 N.C. App. 64, 66, 450 S.E.2d 8, 10 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995).

The evidence supporting plaintiff's claim in this case tended to show that in April 1996, the date of the deed's execution, Ms. Stephenson was aged eighty-seven, and her mental health had begun to fail noticeably earlier that year. In addition, the deed executed in favor of the church contravened the prior contract of sale executed in favor of Ten Oaks Partners. Further, defendants alone procured the deed's execution, with neither attorney nor family present on behalf of plaintiff. Plaintiff has raised evidence of undue influence upon defendant's motion for summary judgment sufficient to justify an amendment to the pleadings. We conclude that plaintiff's forecast of evidence demonstrates facts which would satisfy several of the factors bearing on undue influence. The motion for summary judgment on the issue of undue influence was erroneously granted.

[2] The plaintiff also contends that her claim of constructive fraud should be heard; that summary judgment was granted in error. The elements of a constructive fraud claim are proof of circumstances in which (1) the parties to a transaction have a special confidential or fiduciary relationship, and (2) this special relationship surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of this position of trust to the plaintiff's detriment. *Estate of Smith v. Underwood*, 127 N.C. App. 1, 10, 487 S.E.2d 807, 813 (1997). The forecast of evidence here fails to establish a special relationship of trust and confidence with those present at the execution of the deed. In a conversation with her attorney, plaintiff stated that she was not sure if she knew Mr. Warren. She admitted to knowing Ms. Warren and Mr. Leary, but there are no facts indicating the nature of their relationship. Plaintiff has not demonstrated sufficient evidence of constructive fraud, and we therefore conclude that summary judgment was properly granted on that issue.

Because this case must be remanded on the issue of undue influence, we will also address the viability on remand of plaintiff's remaining claims. The complaint sets forth claims for unfair and deceptive trade practices, malicious and tortious interference with a contractual relationship, and requests for double, treble and punitive damages.

[3] First, we address plaintiff's unfair and deceptive trade practices claim under N.C. Gen. Stat. § 75-1. In order to establish such a claim, a claimant must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to the claimant. *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 155, 520 S.E.2d 570, 579 (1999). Any person injured within the meaning of G.S. 75-1 can collect treble damages. N.C. Gen. Stat. § 75-16 (1999). Our courts have established that the private sale of a residence by an individual is not an act "in or affecting commerce," and is thus beyond the purview of G.S. 75-1.1. The law is otherwise as to persons who offer or sell real estate for a business. *Adams v. Moore*, 96 N.C. App. 359, 361, 385 S.E.2d 799, 801 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990). Because plaintiff was not engaged in the business of selling real estate, her claim falls beyond the purview of section 75-1.1. As such, we conclude that the trial court properly granted summary judgment as to the unfair and deceptive trade practices claim, as well as to plaintiff's request for treble damages.

[4] Plaintiff's complaint also alleges a claim for malicious and tortious interference with a contractual relationship. The elements of this claim are: (1) a valid contract between plaintiff and a third person that confers upon plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) the defendant acts without justification; and (5) the defendant's conduct causes actual pecuniary harm to plaintiff. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). Plaintiff should note that the third element of this claim requires that the defendant intentionally induce a *third person* not to perform the contract—not that the defendant intentionally induced the *plaintiff* not to perform the contract. We hold summary judgment as to plaintiff's claim for malicious and tortious interference with a contractual relationship was properly granted.

[5] Turning to plaintiff's claim for punitive damages, this Court has recently held that a request for punitive damages may be submitted to the jury on a claim of undue influence. *Mehovic v. Mehovic*, 133 N.C. App. 131, 136-37, 514 S.E.2d 730, 734 (1999). The court's granting the defendant's motion for summary judgment as to punitive damages is reversed.

[6] Plaintiff also requested double damages, but fails to indicate any claims which would support such recovery. Summary judgment on the issue of double damages was properly granted.

We affirm the trial court's grant of summary judgment on the issues of constructive fraud, unfair and deceptive trade practices, malicious and tortious interference with a contractual relationship and double damages. The order granting summary judgment in favor of defendants on the issues of undue influence and punitive damages is reversed.

Affirmed in part, reversed in part and remanded.

Judges JOHN and McGEE concur.

COUNTY OF JOHNSTON, PLAINTIFF v. CITY OF WILSON, DEFENDANT

No. COA98-1017

(Filed 7 March 2000)

1. Judges— recusal—no evidence or personal bias, prejudice, or interest

The trial court did not err in denying defendant's motion for the presiding judge's recusal, based solely on the fact that the plaintiff is Johnston County and the judge is the Resident Superior Court Judge of that county, because the record reveals no evidence of personal bias, prejudice, or interest on the part of the presiding judge.

2. Eminent Domain— subject matter jurisdiction—condemnation

The trial court did not err in failing to dismiss a county's challenge of a city's condemnation proceeding based on lack of subject matter jurisdiction because: (1) the county's board of commissioners granted the county the substantive right to protect its citizens from unlawful takings by contiguous local governments, N.C.G.S. § 153A-15; (2) the county was potentially aggrieved by the affect on its ad valorem tax base; and (3) N.C.G.S. § 153A-15 provides that a condemnor must have the approval of the county board of commissioners of the county where the land to be condemned is located before final judgment may be entered in any action of condemnation.

3. Jurisdiction— final judgment—condemnation

The trial court lacked jurisdiction to review two consent judgments previously entered in condemnation proceedings because: (1) a final judgment fully determines the action, and a court has no jurisdiction at a subsequent term to proceed further on issues already determined; and (2) there were no pending motions to set aside the two consent judgments by either of the landowners or the city.

4. Injunction— permanent—trial pending—error

Even though the county may ultimately prevail and receive the relief requested after full consideration on the merits, the trial court erred in granting the county a permanent injunction instead of a preliminary injunction to restrain the city from exercising its power of eminent domain because the permanent injunction actu-

ally determined the final rights of the parties before a final trial of the action.

Appeal by defendant from orders and judgment entered 18 May 1998 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County. Heard in the Court of Appeals 28 April 1999.

J. Mark Payne for plaintiff-appellee.

Rose, Rand, Orcutt, Cauley, Blake & Ellis, P.A., by James P. Cauley, III, and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by V. Randall Tinsley, for defendant-appellant.

James B. Blackburn, III and Paul A. Meyer for the North Carolina Association of County Attorneys, amicus curiae.

Andrew L. Romanet, Jr. and John M. Phelps, II for the North Carolina League of Municipalities, amicus curiae.

TIMMONS-GOODSON, Judge.

This complex appeal arises from condemnation proceedings initiated by the City of Wilson ("City") for land located in Johnston County. On 29 October 1997, Johnston County ("County") filed a complaint in the Superior Court, Johnston County, seeking a preliminary injunction restraining the City from proceeding with condemnations and a writ of mandamus requiring that the actions already filed be dismissed. The City timely answered on 29 December 1997 and moved to dismiss the County's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 4 May 1998, the date of the hearing, the City filed an additional motion requesting that the presiding judge recuse himself from the proceedings. Judge Knox V. Jenkins, Jr. denied the City's motion for recusal, denied the City's Rule 12(b)(6) motion and granted the County a permanent injunction and writ of mandamus. The City filed its notice of appeal on 18 May 1998.

The pertinent facts underlying this appeal are as follows: Over twelve years ago, in an effort to solve its ongoing public water supply shortage, the City began the necessary proceedings to add twelve feet of water to the Buckhorn Reservoir on Contentnea Creek in Wilson County by replacing the existing dam with a larger one. On 21 February 1997, the City received a federal permit from the United States Army Corps of Engineers. The permit imposed various Clean Water Act and Endangered Species Act requirements on the City

including the acquisition and preservation of land. A portion of the affected area is located in the County.

Anticipating this requirement, the City approached the County Board of Commissioners ("Board") in 1991 and expressed its desire to proceed with condemnation of approximately 400 acres of land surrounding the Buckhorn Reservoir. On 22 April 1991, the Board notified the City that it did not support the proposal. At a subsequent hearing, the Board informed the City of its concerns that the property owners be justly compensated for the taking of their land and that the County be justly compensated for the loss of the affected properties from its *ad valorem* tax base. Following this hearing, the County consented to the City's proposal, contingent upon reasonable compensation to the County in lieu of taxes and earnest efforts by the City to negotiate fair settlements with the affected landowners. The County maintains it never authorized condemnation of the property by the City.

However, on 20 October 1997, the City initiated condemnation proceedings against thirty-four County landowners. In two of these proceedings, the property was conveyed to the City pursuant to court-approved consent judgments. The City asserted that its condemnation authority arose from its charter which reads, in pertinent part, as follows:

> The City of Wilson shall possess the power of eminent domain and may acquire . . . any real estate . . . either within or without the city limits, for any lawful public use or purpose. In the exercise of the power of eminent domain, the city is hereby vested with all power and authority now or hereafter granted by the laws of North Carolina applicable to the City of Wilson, and the city shall follow the procedures now or hereafter prescribed by said laws[.] . . . The powers herein granted to the City of Wilson for the purpose of acquiring property by eminent domain shall be in addition to and supplementary to those powers granted in any other local act or in any other General Statute[.]

1989 N.C. Sess. Laws ch. 348, § 17.7.

Nine days later, the County, relying on section 153A-15 of the North Carolina General Statutes, filed suit seeking injunctive relief. The statute provides, in pertinent part:

> (a) Notwithstanding the provisions of Chapter 40A of the General Statutes or any other general law or local act conferring

> the power of eminent domain, before final judgment may be entered in any action of condemnation initiated by a county, city or town, special district, or other unit of local government which is located wholly or primarily outside another county, whereby the condemnor seeks to acquire property located in the other county, the condemnor shall furnish proof that the county board of commissioners of the county where the land is located has consented to the taking.

N.C. Gen. Stat. § 153A-15 (Cum. Supp. 1998).

I. City's Motion for Recusal

[1] First, we address the City's contention that the trial court erred in denying its motion for the presiding judge's recusal. On 4 May 1998, the day of the hearing of this matter, the City filed a motion for Judge Jenkins' recusal based solely on the fact that the plaintiff is Johnston County and Judge Jenkins is the Resident Superior Court Judge of said county and is duly elected by the citizens thereof. The City's argument is without merit.

Canon 3(C)(1) of the Code of Judicial Conduct directs that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]" *See also* N.C. Gen. Stat. § 15A-1223 (1999). The burden is on the party moving for recusal "to demonstrate objectively that grounds for disqualification actually exist." *In re Nakell*, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *appeal dismissed and disc. review denied and stay dissolved*, 330 N.C. 851, 413 S.E.2d 556 (1992) (citation omitted). The moving party, supported by affidavits, may meet his burden by presenting "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *Id.* at 647, 411 S.E.2d at 164.

The City presented no affidavits supporting its motion. The record reveals no evidence of personal bias, prejudice or interest on the part of Judge Jenkins. We are not inclined to set a standard that resident superior court judges cannot participate in proceedings in which the county where the judge resides, and not the judge himself, has a potential interest in the proceedings. This assignment of error is overruled.

II. City's 12(b)(6) Motion to Dismiss

[2] We next address the City's argument that the trial court erred in failing to dismiss the action because it lacked subject matter jur-

isdiction. The City asserts that the trial court should have granted its motion to dismiss because: (1) the County lacked jurisdiction to file the action; (2) the trial court lacked jurisdiction to hear the action purporting to challenge pending condemnation proceedings; and (3) the trial court lacked appellate jurisdiction to review prior Superior Court judgments. We find these arguments to be without merit.

In its first contention, the City asserts that the County was not the real party in interest and, therefore, had no standing to bring this action. We disagree.

It is well settled that an appeal may only be taken by an aggrieved real party in interest. *Insurance Co. v. Ingram, Comr. of Insurance*, 288 N.C. 381, 218 S.E.2d 364 (1975). A " 'person aggrieved' " is one " 'adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.' " *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 104 N.C. App. 216, 218, 408 S.E.2d 876, 877 (1991) (quoting *In re Wheeler*, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987) (citation omitted)), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 95 (1992). In the case *sub judice*, the County, through its Board of Commissioners, was statutorily granted the substantive right to protect its citizens from unlawful takings by contiguous local governments. *See* N.C.G.S. § 153A-15. Furthermore, the County itself was potentially aggrieved by the affect on its *ad valorem* tax base. *See Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E.2d 890, *disc. review denied*, 301 N.C. 94 (1980). As such, the County had standing to proceed as an aggrieved real party in interest.

The City also contends the trial court lacked subject matter jurisdiction since the City's charter does not authorize a separate action to review the condemnation actions. However, section 153A-15 of the General Statutes clearly provides that the condemnor (here, the City) must have the approval of the county board of commissioners of the county where the land to be condemned is located *before* final judgment may be entered in any action of condemnation initiated. Therefore, the City's alleged failure to obtain such approval from the County's Board of Commissioners establishes the right of the County to seek review under the statute.

The City further argues that the trial court erred in reviewing the Superior Court consent judgments which had been entered in two of

the thirty-four condemnation proceedings. Since the County had standing to bring the action on its own accord, full dismissal was inappropriate.

[3] However, we agree with the City's contention that the trial court lacked jurisdiction to review the two consent judgments previously entered. Since a final judgment fully determines the action, the court has no jurisdiction at a subsequent term to proceed further on the issues already determined. *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957). This is true especially when, as here, there were no pending motions to set aside the two consent judgments by either of the landowners or the City.

III. Permanent Injunction

[4] Lastly, we address the City's contention that the trial court erred in permanently enjoining the City from exercising its power of eminent domain. In its complaint, the County moved for a preliminary injunction restraining the City from proceeding with condemnations in violation of state law. At the hearing, the trial court determined that the County was "entitled to a permanent injunction, prohibiting the City of Wilson from proceeding in Johnston County, without the prior consent of the Commissioners of Johnston County, pursuant to [the applicable statute]."

"The term, 'preliminary injunction' refers to an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits." *Pruitt v. Williams*, 288 N.C. 368, 371, 218 S.E.2d 348, 350 (1975). "The issuing court, after weighing the equities, and the advantages and disadvantages to the parties, determines in its sound discretion whether an interlocutory injunction should be granted or refused." *Id.* at 372, 218 S.E.2d at 351. "The court cannot go further and determine the final rights of the parties, which must be reserved for the final trial of the action." *Id.*

In the present case, the trial court improperly granted the County the extreme remedy of a permanent injunction. While the County may ultimately prevail and receive the relief requested after full consideration of the merits, it was error to grant permanent injunctive relief based solely on the pleadings, motions and arguments of counsel. "The judgment entered in this cause was a final judgment, entered in equity, and should have been granted only by the judge at the final trial of the action." *Smith v. Rockingham*, 268 N.C. 697, 699, 151

S.E.2d 568, 569 (1966) (emphasis omitted). The trial court erred by issuing a permanent injunction which actually determined the final rights of the parties, rather than a preliminary injunction.

We decline to address the City's remaining assignments of error, because of the likelihood they will not recur during the final stages of this proceeding.

For the foregoing reasons, we affirm the trial court's denial of the motion to recuse and the majority of the 12(b)(6) motion to dismiss; we vacate the trial court's review of the previously entered consent judgments for lack of subject matter jurisdiction and the trial court's granting of final judgment on the pleadings. We remand for further proceedings on the motions for permanent injunction not inconsistent with this opinion.

Affirmed in part; reversed in part and remanded.

Judges LEWIS and HORTON concur.

STATE OF NORTH CAROLINA v. TROY ALJIERNON BATTLE

No. COA99-184

(Filed 7 March 2000)

Constitutional Law— procedural due process—motion to suppress—opportunity to be heard

The trial court's failure to allow defendant to be heard on a motion to suppress cocaine seized without a warrant violated defendant's right to due process and his right under N.C.G.S. § 15A-975 to make a motion to suppress evidence, and defendant is entitled to a new trial on a charge of trafficking in cocaine by transportation where: (1) the record does not reveal that the State gave defendant notice it intended to offer the cocaine into evidence at trial; (2) the record does not indicate whether defendant had a reasonable opportunity to make a motion to suppress prior to trial, and this supports the conclusion that defendant was entitled to make his motion to suppress during trial; and (3) defendant attempted to be heard on his motion to suppress numerous times during trial, but the trial court denied defendant

the opportunity to state his grounds or present evidence in support of his motion.

Appeal by defendant from judgment entered 28 August 1998 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 6 January 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Etheridge, Sykes & Britt, L.L.P., by Raymond M. Sykes, Jr., for defendant-appellant.

HUNTER, Judge.

Troy Aljiernon Battle ("defendant") appeals from his conviction for trafficking in cocaine by transportation. We grant defendant a new trial on the basis that the trial court should have heard and ruled on defendant's motion to suppress.

The State's evidence at trial indicated that on 29 August 1997, Rocky Mount Police Officers Anthony Styles and James Carlton were on patrol and observed a blue minivan whose left brake light was not functioning properly. Officers Styles and Carlton activated their blue light and pulled the vehicle over. After the vehicle stopped, Officer Styles approached the driver's side of the vehicle and Officer Carlton approached the passenger side. Officer Styles testified that he asked defendant, who was driving the vehicle, to produce his driver's license and vehicle registration. Defendant replied that he did not have a driver's license. At that point, Officer Styles asked defendant to exit the vehicle and defendant complied. Officer Styles proceeded to search defendant for weapons, and testified that he did so because he intended to place defendant under arrest for driving without a license. While being searched, defendant then fled from the scene and Officer Styles pursued him.

At that point, Officer Carlton testified that he ordered Percival Gallimore ("Gallimore"), who was seated in the front passenger seat, out of the van and placed him in handcuffs. He then asked David Lewis ("Lewis"), who was seated in the rear, to exit the vehicle. Officer Carlton testified that Lewis attempted to dash out of the van on the driver's side. Officer Carlton grabbed Lewis' right arm and Lewis pushed him away. Officer Carlton then jumped across the passenger seat of the van and grabbed Lewis. They scuffled onto the floor of the driver's side of the van and out onto the ground. While on

the ground, Officer Carlton was able to get Lewis under control and then place him in handcuffs. Officer Carlton then conducted a search of the van, whereupon he found a package of cocaine on the driver's side just in front of the driver's seat.

Defendant was subsequently apprehended and he, along with Gallimore and Lewis, was indicted on 13 July 1998 for trafficking in cocaine by possession and trafficking in cocaine by transportation. Defendant's case was tried at the 25 August 1998 criminal session of Edgecombe County Superior Court. Defendant made a motion for continuance on the day his trial began on the grounds that he had just found out that his co-defendants would not testify on his behalf, and he needed time to call additional witnesses listed on his witness list. The trial court denied his motion. Defendant was subsequently convicted of trafficking in cocaine by transportation and sentenced to a minimum of 70 months and a maximum of 84 months imprisonment and ordered to pay a fine of $100,000.00.

Defendant appeals on the basis that he was denied his right to due process afforded him by the United States Constitution by the trial court's refusal to hear his motion for suppression of evidence. We agree.

It is uncontroverted that a search warrant was not obtained prior to the search and seizure which produced the State's physical evidence in the present case. The Fourth Amendment of the United States Constitution guarantees the right to be secure against unreasonable searches and seizures of "persons, houses, papers, and effects." U.S. Const. amend. IV. "The United States Supreme Court has stated that searches and seizures conducted outside the judicial process are *per se* unreasonable, subject to only a few specific, well delineated exceptions." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993). Our Supreme Court has held that under the exclusionary rule, "[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992).

Our statutory rule regarding a motion to suppress before and during trial provides, in pertinent part:

> (a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have rea-

sonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).

(b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

. . .

(2) Evidence obtained by virtue of a search without a search warrant[.]

N.C. Gen. Stat. § 15A-975 (1999). The record does not reveal any evidence that the State gave defendant notice it intended to offer into evidence at trial the cocaine which was obtained without a search warrant. Also, the record does not indicate whether or not defendant had a reasonable opportunity to make a motion to suppress prior to trial. Thus, the record supports the conclusion that defendant was entitled to make his motion to suppress during trial.

The trial transcript in the present case shows that the defendant attempted to be heard on his motion to suppress at numerous times, first during the State's questioning of Officer Styles:

Q. Okay. And you stated that the defendant, Troy Battle, complied with cutting the engine off?

A. Correct, he did.

Mr. Sykes: Objection.

The Court: Overruled.

Q. Okay. What happened then?

Mr. Sykes: Your Honor, I object and would like to be heard. And I have a motion to make at this time.

The Court: Objection overruled.

. . .

A. At that particular time, I asked him to step outside the vehicle.

Mr. Sykes: Your Honor, I'd like to object again at this time, and I'd like to be heard. I have a motion—

The Court: The objection is overruled and your request is denied.

Mr. Sykes: May I preserve it and have the opportunity to be heard?

The Court: You can have a seat and let the State examine this witness. I overruled your objection.

. . .

Q. Okay. Did Officer Carlton show you anything when you got back to the scene?

A. Yes, sir, he did.

Q. Okay. What is it that he showed you?

Mr. Sykes: Objection and I move to suppress.

The Court: Overruled.

Mr. Sykes: I'd like to be heard, your Honor.

The Court: Your motion is denied.

Defendant next attempted to be heard on his motion to suppress during Officer Carlton's testimony for the State:

Q. Okay. And did you find anything in the van?

A. Yes, I did.

Mr. Sykes: Objection.

The Court: Overruled.

Mr. Sykes: I'd like to make a motion to suppress, your Honor. I'd like to be heard under 18-975—

The Court: Motion is denied.

Defendant next attempted to be heard during testimony of SBI Agent Jim Daniel:

The State: That would be the State's evidence.

The Court: Are you going to introduce your exhibits?

The State: Yes, sir.

Mr. Sykes: I object, your Honor.

The Court: Objection is overruled. If he wants to offer it, the court will receive it.

Mr. Sykes: I'd like to move to suppress it and I'd like to be heard.

The Court: The motion is denied.

Thus, it is evident that although defendant attempted several times to make his motion to suppress, the trial court denied it without giving defendant the opportunity to even fully state his grounds or the basis for the motion.

The requirement of " 'procedural due process applies only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. . . .' " *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417, 417 S.E.2d 277, 281 (1992) (*quoting Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972)). "Due process of law requires that no one shall be condemned in his person or property without notice and an opportunity to be heard in his defense." *State v. Moore*, 100 N.C. App. 217, 223, 395 S.E.2d 434, 437 (1990), *disc. review denied as to additional issues*, 328 N.C. 335, 402 S.E.2d 825, *rev'd on other grounds*, 329 N.C. 245, 404 S.E.2d 845 (1991). The fundamental requirement of due process is the opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " *State v. Thompson*, 349 N.C. 483, 498, 508 S.E.2d 277, 286 (1998) (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965)). " 'It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement.' " *Goodwin v. Walls*, 118 N.C. App. 341, 345, 455 S.E.2d 473, 477, *review allowed*, 342 N.C. 419, 461 S.E.2d 757 (1995) (*quoting Coach Co. v. Burrell*, 241 N.C. 432, 436, 85 S.E.2d 688, 692 (1955)). "It is basic to due process that a defendant in a criminal action be allowed to offer testimony." *State v. Pike*, 273 N.C. 102, 107, 159 S.E.2d 334, 338 (1968). The trial court must give defendant an opportunity to offer evidence and present his version of the search and seizure or to contradict, amplify, or explain the testimony offered by the State on *voir dire*. *Id.*

Based on the foregoing, we hold that due process requires that defendant should have been given a reasonable opportunity to be

heard on his motion to suppress " 'at a meaningful time and in a meaningful manner.' " *State v. Thompson*, 349 N.C. at 498, 508 S.E.2d at 286. The trial court here barely allowed defendant to state his motion and denied defendant any opportunity to state his grounds or present evidence in support of his motion. Defendant was not only denied his constitutional rights, but also his statutory right to make a motion to suppress under N.C. Gen. Stat. § 15A-975. Accordingly, we reverse and remand for a new trial. Due to our holding, we need not reach defendant's additional assignments of error.

New trial.

Judges JOHN and McGEE *concur.*

SHIRLEE ICE, PLAINTIFF v. EDWARD L. ICE, DEFENDANT

EDWARD L. ICE, PLAINTIFF v. SHIRLEE ICE, DEFENDANT

No. COA99-424

(Filed 7 March 2000)

1. Civil Procedure— Rule 59(e)—post-trial error of law—not a proper ground

Defendant-husband's appeal in an equitable distribution case from the trial court's order denying his Rule 59(e) motion for relief is dismissed because: (1) a Rule 59(e) motion must be based on one of the grounds listed in Rule 59(a); (2) defendant bases his motion on a purported post-trial error of law; and (3) post-trial errors of law are not among those grounds listed in Rule 59(a).

2. Civil Procedure— Rule 60(a)—error of law—determined by appellate courts

Defendant-husband's appeal in an equitable distribution case from the trial court's order denying his Rule 60(a) motion for relief based on a purported error of law is dismissed because Rule 60(a) only governs the granting of relief based upon clerical mistakes, fraud, and newly discovered evidence, and errors of law are determined by the appellate courts.

3. Interest— accrual date—amended judgment

Although defendant did not specifically appeal from the underlying amended equitable distribution judgment for his challenge of the trial court's ability to change the date at which interest on his equitable distribution award accrued, the Court of Appeals granted certiorari and determined that the trial court did not err because interest runs from the date of an amended judgment when a judgment is reversed or vacated on appeal.

4. Civil Procedure— Rule 60(a)—changing accrual date of interest—incidental matter

Rule 60(a) was a proper mechanism for the trial court to change the interest accrual date of the equitable distribution award since interest is an incidental matter which does not alter the effect of the original order dealing with the substantive matter of the distributive award.

Appeal by defendant Edward L. Ice from order filed 8 December 1998 by Judge Mark E. Powell in Transylvania County District Court. Heard in the Court of Appeals 11 January 2000.

Jackson & Jackson, by Phillip T. Jackson, for defendant-appellant.

Ingrid Friesen for plaintiff-appellee.

LEWIS, Judge.

This is the second appeal between these parties stemming from an equitable distribution order. The narrow issue presented in this appeal involves the date at which interest on the distributive award accrued. Although narrow in nature, this issue is complicated by the myriad motions and orders filed in this case. Consequently, a brief outline of the procedural history is necessary in order to understand the parties' specific arguments on appeal.

Plaintiff Shirlee Ice and defendant Edward L. Ice were married on 22 July 1980 and divorced on 15 December 1994. The trial court filed an equitable distribution order on 26 November 1996. That order, among other things, required plaintiff to pay defendant a distributive award of $50,000. Defendant then appealed to this Court, arguing that some of the parties' property had been classified incorrectly. In an unpublished opinion filed 7 April 1998, we agreed that some of the

property had been improperly classified and remanded the case to the trial court for a new classification and distribution.

On 30 June 1998, the trial court filed its amended equitable distribution order ("amended order"). In light of the reclassification, this amended order increased defendant's distributive award to $80,544.93. Neither party disputes the amount of this amended award. Plaintiff, however, filed a Rule 60(a) motion in an attempt to correct some perceived clerical errors in the amended order. Specifically, plaintiff sought two corrections: (1) that the phrase "this order" be replaced with the more precise phrase "this corrected judgment"; and (2) that interest on defendant's distributive award not accrue until 30 June 1998, the date of the amended equitable distribution order, as opposed to 26 November 1996, the date of the original equitable distribution order. In response to her motion, the trial court filed an order on 5 October 1998 ("the corrected order") correcting its earlier amended order. This corrected order decreed:

> It is therefore ordered that the judgment, as corrected and amended, is additionally corrected so that the phrase "this order" is stricken wherever it appears in decretal paragraph #2 and is replaced with "this corrected judgment," so that the year's time for the Plaintiff to pay the distributive award will run from June 30, 1998.

Unclear as to what this decree meant in terms of the date interest accrued, defendant thereafter filed a motion for clarification with the trial court. Contemporaneously, he also filed his own Rule 59(e) and Rule 60(a) motions for relief, claiming that, if the corrected order was intended to change the date of accrual to 30 June 1998, such a change could not be effectuated through plaintiff's Rule 60(a) motion, but could only be accomplished through appellate review. In an order filed 8 December 1998, the trial court first clarified that its 5 October 1998 corrected order was intended to change the date of accrual to 30 June 1998. The trial court then concluded that an error with respect to the date of accrual was the type of error that could be corrected through plaintiff's Rule 60(a) motion. Accordingly, it denied defendant's own Rule 59(e) and Rule 60(a) motions for relief. From this order, defendant now appeals.

[1] At the outset, we must determine whether this appeal is properly before us. Defendant has only appealed from the 8 December 1998 order denying his Rule 59(e) and Rule 60(a) motions for relief. However, these motions were not properly before the trial court. A

Rule 59(e) motion for relief from a judgment must be based on one of the grounds listed in Rule 59(a). *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 554 (1997). Defendant bases his motion on a purported post-trial "error of law," namely the trial court's changing of the date interest accrued. Post-trial errors of law are not among those grounds listed in Rule 59(a). Accordingly, defendant's Rule 59(e) motion was improper. As such, his appeal from the denial of that motion must be dismissed. *See Dusenberry v. Dusenberry*, 87 N.C. App. 490, 492, 361 S.E.2d 605, 606 (1987).

[2] Defendant's Rule 60(a) motion for relief from judgment was also improper. Rule 60(a) only governs the granting of relief based upon clerical mistakes, fraud, newly discovered evidence, and the like. Purported errors of law are not the appropriate basis for a Rule 60(a) motion—such errors are for our appellate courts. *See Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 431, 391 S.E.2d 211, 216, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990) ("Erroneous judgments may be corrected only by appeal, and a motion under [Rule 60(a)] cannot be used as a substitute for appellate review."). Because defendant's Rule 60(a) motion was improper to begin with, his appeal from a denial of that motion must necessarily be dismissed.

[3] Although his notice of appeal only references the 8 December 1998 order denying his motions for relief, defendant is really contesting the propriety of the underlying 5 October 1998 corrected order. Specifically, he is challenging the trial court's ability to change the date at which interest on his distributive award accrued. However, "[n]otice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). The defendant has not properly preserved for review the 5 October 1998 corrected judgment, and his appeal challenging that corrected judgment is dismissed.

Nonetheless, in our discretion, and due to the procedural complexities of this case, we choose to grant defendant's petition for certiorari and reach the merits of his appeal. Essentially, defendant's appeal boils down to two inquiries: (1) was it proper for the trial court to change the date of accrual from 26 November 1996 to 30 June 1998; and (2) if so, could the trial court make this change pursuant to plaintiff's Rule 60(a) motion? We answer both questions in the affirmative.

In equitable distribution actions, interest on any distributive award accrues from the date of entry of judgment, not from the date of separation. *Appelbe v. Appelbe*, 76 N.C. App. 391, 394, 333 S.E.2d 312, 313 (1985). Here, we have two equitable distribution judgments, the 26 November 1996 original judgment and the 30 June 1998 judgment modifying the original one following defendant's first appeal. Our task is thus to analyze which judgment sets the date of accrual.

Where a judgment is undisturbed on appeal, interest runs from the date of the original judgment. *See Anderson v. City of Bessemer City*, 619 F. Supp. 153, 154 (W.D.N.C. 1985); *see also Teich & Co., Inc. v. LeCompte*, 222 N.C. 602, 603, 24 S.E.2d 253, 253 (1943) (stating that the reversal of defendant's recovery on its counterclaim did not disturb plaintiff's recovery on its own claim and thus interest on plaintiff's recovery ran from the original judgment). Logic dictates the opposite result where a judgment is reversed or vacated on appeal. In that situation, interest runs from the date of the amended judgment. *See, e.g., Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir. 1977); *Riha v. Int'l Tel. & Tel. Corp.*, 533 F.2d 1053, 1054 (8th Cir. 1976).

Here, defendant appealed the initial equitable distribution judgment and won, resulting in the 30 June 1998 amended judgment. Accordingly, interest on his distributive award did not accrue until the date of that amended judgment. The trial court thus properly changed the date of accrual to 30 June 1998.

[4] Having concluded that the trial court was correct in changing the date of accrual, we now must determine whether this change could be made by the trial court through plaintiff's Rule 60(a) motion or whether such a change could only be effectuated through appellate review.

Rule 60(a) provides a limited mechanism for trial courts to amend erroneous judgments. Specifically, that rule provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

N.C.R. Civ. P. 60(a). In construing this rule, our courts have drawn a distinction between changes that remedy clerical errors or omissions

and changes that affect the substantive rights of the parties. The former is permissible under Rule 60(a), whereas the latter is not. *Vandooren v. Vandooren*, 27 N.C. App. 279, 281, 218 S.E.2d 715, 717 (1975). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993). We conclude that the 5 October 1998 corrected order that changed the date of accrual did not alter the effect of the earlier 30 June 1998 order.

We find this Court's prior decision in *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 157 (1984), to be most closely analogous to the present situation. In that case, the trial court, purportedly pursuant to Rule 60(a), amended a previous order by allowing the surveyor to recover his costs associated with the surveying work he had done for trial. *Id.* at 76-77, 314 S.E.2d at 818. In holding that this was a proper exercise of Rule 60(a), we stated, "[T]he court's [initial] failure to allow and tax costs may be considered an 'oversight or omission' in an order." *Id.* at 80, 314 S.E.2d at 819-20. Furthermore, because costs arise only incidentally to the subject of the litigation itself, we held that they do not affect the substantive rights of the parties. *Id.* at 80, 314 S.E.2d at 820.

We conclude that interest on a distributive award is much like costs associated with surveying. The subject of the litigation here was the amount of the distributive award; interest was only incidental and tangential to this matter. Furthermore, changing the date at which interest accrued did not alter the underlying distributive award itself. Defendant nonetheless maintains that his substantive rights were altered by the trial court's change because he lost approximately $10,000 in interest. However, the amount of money involved is not what creates a substantive right; rather, it is the source from which this money is derived. Here, the $10,000 at stake stemmed from the incidental matter of interest, not the underlying substantive matter of the distributive award. Accordingly, we hold that a change in the date at which interest begins to accrue is something that the trial court could effectuate through Rule 60(a).

Affirmed.

Judges GREENE and EDMUNDS concur.

KAREN R. ROBBLEE, EXECUTRIX OF THE ESTATE OF JOHN R. ROBBLEE; ANTHONY JONES, ADMINISTRATOR OF THE ESTATE OF FLORA WINSTEAD JONES; F. MICHAEL BROWN ELAINE GORDON BROWN; CARMEN ELIZABETH DAVIS; JOHN WESLEY DAVIS, III; JULIETTE PERRY SHIPLEY; AND JOAN STEVENS SHEPHERD v. BUDD SERVICES, INC.; SUMITOMO ELECTRIC LIGHTWAVE CORP., AND LITESPEC INC.

No. COA99-348

(Filed 7 March 2000)

Emotional Distress— negligent infliction—concern for own welfare—foreseeability

The trial court did not err in granting summary judgment in favor of defendant security company on plaintiff Shipley's negligent infliction of emotional distress claim, based on her concern for her own welfare when an enraged former co-worker came back to plaintiff's workplace and killed two people, because plaintiff's emotional distress was not a reasonably foreseeable consequence of any negligent conduct resulting from defendant's failure to retrieve the former co-worker's temporary access card to the workplace building.

Appeal by plaintiff from order entered 18 November 1998 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 8 December 1999.

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

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb and John W. Minier, for defendant-appellee.

MARTIN, Judge.

On 13 April 1994, Ladislav Antilak, a former employee of Sumitomo Electric Lightwave Corp. and Litespec, Inc., (hereinafter collectively referred to as "Sumitomo") returned to his former workplace with a firearm, killed two Sumitomo employees, and wounded others before ending his own life. Antilak had been employed at Sumitomo as a fiber optic cable inspector and had frequent difficulties with fellow employees, including Flora Jones and Juliette Shipley. These difficulties culminated in August 1993 with Antilak's indication that he was going to resign and a decision by Craig Stoke, a Sumitomo manager, to immediately accept the resignation.

Budd Services, Inc., ("Budd") provided security services for Sumitomo, including issuance and control of ID badges and electronic access cards. Budd was notified that Antilak was not to be allowed to enter the Sumitomo premises on 9 August 1993. On the morning of 9 August, Stoke was at the gate with a Budd guard when Antilak arrived. When Stoke told Antilak that his resignation was effective immediately, Antilak revved his engine and drove the car through the gate. Stoke, accompanied by sheriff's deputies, approached Antilak, demanded that he surrender his Sumitomo ID, and escorted Antilak out of the building.

Eight months later, on 13 April 1994, Antilak returned to the Sumitomo facility, and, using a temporary access card, entered the building where he had previously worked. He approached Flora Jones from behind and shot her in the back of the head, killing her instantly. Joan Shepherd, who was sitting across from Flora Jones, yelled to Juliette Shipley, who was in another room, to run. Both Joan Shepherd and Juliette Shipley ran through the building; Shipley hid in a large machine and heard the shots, but did not witness any of the shootings. Antilak continued through the building, shooting into the walls and ceilings, until he encountered Carmen Davis, whom he shot in the shoulder and back. Mike Brown, another employee, attempted to help Ms. Davis and was shot in the abdomen, hand, and neck. Antilak then went to the second floor, where he shot and killed John Robblee. Antilak then shot himself in the head and died. A working temporary access card to the building was found on his body.

Seven plaintiffs, including Juliette Shipley, filed suit against Sumitomo and Budd, alleging various claims arising out of the shooting incident. All of the plaintiffs' claims against Sumitomo were settled and dismissed with prejudice. In addition, all plaintiffs except Juliette Shipley voluntarily dismissed their claims against Budd. Budd's motion for summary judgment as to Juliette Shipley's remaining claim was allowed; she appeals.

Juliette Shipley seeks damages from Budd for emotional distress suffered by reason of Budd's negligence. Plaintiff Shipley alleges that Budd negligently performed its contractual duty to provide security at Sumitomo, and this negligence caused her to suffer severe emotional distress. The issue presented by her appeal is whether it was reasonably foreseeable that she would suffer emotional distress as a result of Budd's negligent failure to retrieve a temporary access card from Antilak and to otherwise prevent his entry into the Sumitomo

plant. We hold that it was not and affirm the entry of summary judgment in favor of Budd.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The evidence and all reasonable inferences which can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Norris v. Zambito*, 135 N.C. App. 288, 520 S.E.2d 113 (1999). Summary judgment is proper " 'where the evidence fails to establish negligence on the part of defendant . . . or establishes that the alleged negligent conduct was not the foreseeable and proximate cause of plaintiff's injury.' " *Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 327 (1993) (quoting *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985)).

An action for the negligent infliction of emotional distress may arise from a concern for one's own welfare, or concern for another's. *Id.* No physical impact or injury is necessary in order to pursue this type of action. *Id.* An action for the negligent infliction of emotional distress has three elements: (1) defendant engaged in negligent conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) defendant's conduct, in fact, caused plaintiff severe emotional distress. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). The plaintiff must show that the distress suffered was "a proximate and foreseeable result of the defendant's negligence." *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (quoting *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97). In *Ruark* and in *Gardner*, the Supreme Court discussed factors to be considered in measuring foreseeability where emotional distress is alleged as a result of one's concern for another's welfare. However, "[t]he factors set out in *Gardner* logically apply only when a plaintiff brings a negligent infliction of emotional distress claim based on concern for the welfare of another." *Chapman v. Byrd*, 124 N.C. App. 13, 21, 475 S.E.2d 734, 740 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 50 (1997). Thus, these factors are of little assistance in a case such as this one where plaintiff alleges severe emotional distress, not as a result of her concern for others, but as a result of her concern for her own welfare. In her complaint, plaintiff Shipley alleges that "[a]s a direct and proximate result of the negligence by Budd Services, Inc., resulting in the

shootings by Ladislav Antalik and *his attempt to kill Juliette Shipley*, Ms. Shipley suffered severe emotional distress" (emphasis supplied). The complaint does not allege that Shipley suffered severe emotional distress as a result of her concern for others, but for her own welfare as a result of Antilak's attempt on her life.

Thus, the inquiry in the present case must focus on whether Shipley's emotional distress was a foreseeable and proximate result of Budd's negligence. Though the following cases involve damages incurred because of one's concern over another's welfare, the holdings in each case, in whole or in part, are based on the presence or absence of proximate cause and are helpful to our analysis.

In *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993), the parents of a son who died in a car accident sued a bartender who negligently served alcohol to their son for the negligent infliction of emotional distress. The Court considered whether the emotional distress suffered was a proximate and foreseeable result of the bartender's act of negligently serving their son alcohol. The Court found that "the possibility (1) the defendant's negligence in serving alcohol to Travis (2) would combine with Travis' driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause Travis' parents (if he had any) not only to become distraught, but also to suffer 'severe emotional distress,' . . . was a possibility too remote to permit a finding that it was reasonably foreseeable." *Id.* at 674, 435 S.E.2d at 323. We read *Sorrells* as holding that while it might be foreseeable that (1) negligently serving alcohol to an intoxicated person would cause that person to suffer harm should they attempt to drive, (2) that a drunk driver would get in an accident, and (3) that a parent of one in such an accident would suffer emotional distress, the initial and final events in this instance are not so proximately related that the result could have been foreseeable to the bartender.

In *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), the plaintiff mother sued the defendant father for damages for emotional distress arising out of the death of their child due to defendant father's negligent operation of a motor vehicle. The plaintiff mother had rushed to the hospital after the accident only to witness a failed attempt to resuscitate the child. The Court held the emotional distress suffered by the mother after witnessing the failed resuscitation attempt was simply "too remote from the negligent act itself to hold defendant liable for such consequences." *Id.* at 668, 435 S.E.2d at 328.

Similarly, in this case we hold that the emotional distress suffered by Shipley was not a reasonably foreseeable consequence of any negligent conduct on Budd's part. Viewed in the light most favorable to plaintiff Shipley as the non-moving party, the evidence shows that Budd provided the temporary access card to Antilak, and negligently failed to retrieve this card from Antilak after his employment at Sumitomo terminated, allowing Antilak to gain entry to the factory where he killed two people and injured several others. The evidence permits a reasonable inference that plaintiff Shipley was at least one of Antilak's targets. Though she did not witness the shootings, she was in close proximity, and heard the shots. She suffered severe emotional distress as a result of the shootings.

These facts are sufficient to support a finding that Budd engaged in negligent conduct, and that plaintiff Shipley suffered severe emotional distress. However, these facts do not support an inference that Shipley's emotional distress was a reasonably foreseeable result of Budd's negligent acts; Budd's negligence in failing to retrieve the access card and Shipley's emotional distress are simply too attenuated to support a finding of reasonable foreseeability. There is no evidence that Budd was told, or had any specific notice of the relationship between Shipley and Antilak which would support an inference that Budd could have taken actions to prevent this specific injury to Shipley. The possibility that (1) defendant's negligence in failing to retrieve the temporary access card (2) would combine with Antilak's rage against his former employer (3) to result in a workplace shooting (4) which would cause Shipley to suffer emotional distress, was, like the situation in *Sorrells*, "too remote to permit a finding that it was reasonably foreseeable." *Sorrells* at 674, 435 S.E.2d at 323. Therefore, an essential element of plaintiff's claim is non-existent and summary judgment in favor of Budd must be affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

RAYMOND B. RUSSELL, PLAINTIFF v. STATE FARM INSURANCE COMPANY, DEFENDANT

No. COA99-527

(Filed 7 March 2000)

Appeal and Error— appealability—interlocutory order—certification erroneous

The trial court's attempt to grant Rule 54(b) certification based on its order compelling arbitration and denying defendant's motion for summary judgment fails because the order is not a final judgment, and defendant has not shown the order deprives it of a substantial right.

Appeal by defendant from order and judgment filed 4 March 1999 by Judge Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2000.

Chandler, deBrun, Fink & Hayes, by Andrew Fink, for plaintiff-appellee.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Wayne P. Huckel and Christopher L. Ekman, for defendant-appellant.

JOHN, Judge.

Defendant State Farm Insurance Company purports to appeal the trial court's order compelling arbitration and denying defendant's motion for summary judgment. Defendant's appeal is interlocutory and must be dismissed.

In view of our disposition, lengthy exposition of the underlying facts is unnecessary. We note plaintiff Raymond B. Russell was injured in a motor vehicle accident (the accident) 6 September 1995 while operating a motorcycle insured by defendant under a policy containing uninsured motorist coverage (the policy). Plaintiff maintains the accident was caused by a second, unidentified vehicle which fled the scene, while defendant contends plaintiff "slid in loose gravel . . . and was involved in a single vehicle accident."

Plaintiff subsequently notified defendant of the accident and his resultant personal injury, requesting compensation under Part C of the policy, "Uninsured Motorists Coverage," which dealt with collisions caused, *inter alia*, by "a hit and run vehicle." The policy provided that

> [a] person seeking Uninsured Motorists Coverage must . . . :
>
> 1. Promptly notify police if a hit and run driver is involved.
>
> Plaintiff concedes he
>
> did not report this accident to a police officer because following the accident he was taken immediately from the scene to the hospital where he spent some time due to the injuries sustained.

Defendant denied coverage 14 March 1997.

Plaintiff thereafter requested arbitration pursuant to the following provision of the policy:

> If we and an insured do not agree:
>
> 1. Whether that person is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle; or
>
> 2. As to the amount of such damages;
>
> the insured may demand to settle the dispute by arbitration.

However, defendant rejected plaintiff's request for arbitration, and plaintiff filed the instant declaratory judgment action 16 February 1998, praying that the trial court "remov[e] this action to binding arbitration." In its answer, defendant asserted that

> plaintiff must commence a civil action against [defendant] to determine whether there is uninsured motorist coverage before it can resort to the arbitration provision,

and that plaintiff's failure to notify police of the accident violated provisions of the policy which constituted "a condition precedent to making an uninsured motorists claim" against defendant.

Defendant moved for summary judgment 6 January 1999. The trial court rendered its decision 4 March 1999, ordering

> that all issues raised herein shall be referred to arbitration . . . with the parties having the right to have a judgment upon any arbitration award entered in any court having jurisdiction. . . .
>
> . . . [P]laintiff's failure to report his accident to a law enforcement officer does not and will not bar his uninsured motorist claim against defendant and, therefore, defendant's motion for summary judgment is denied as a matter of law.

> These decisions constitute a final judgment as to the issues of arbitrability and the continued viability of plaintiff's uninsured motorist claim and there is no just cause or reason for delaying any appeal herefrom under Rule 54 of the North Carolina Rules of Civil Procedure.

Defendant timely appealed.

Although not raised by the parties, we are obliged first to consider *sua sponte* whether defendant's appeal is properly before this Court. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 59 (1998). 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 . . . 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) (citation omitted). 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).

An order compelling arbitration and denying a motion for summary judgment, such as that entered in the instant case, is interlocutory and therefore not immediately appealable. *See The Bluffs v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984) (order compelling arbitration interlocutory); *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (order denying motion for summary judgment interlocutory).

Notwithstanding, interlocutory orders may be appealed in two instances:

> First, a party may appeal where the trial court enters a final judgment with respect to one or more, but less than all of the parties or claims, and the court certifies the judgment as immediately appealable under Rule 54(b) of the North Carolina Rules of Civil Procedure [N.C.G.S. § 1A-1, Rule 54(b) (1999)].

Romig v. Jefferson-Pilot Life Ins. Co., 132 N.C. App. 682, 685, 513 S.E.2d 598, 600, *disc. review denied, cert. denied*, 350 N.C. 836, — S.E.2d — (1999). A party may also appeal an interlocutory order "if it affects a substantial right and will work injury to the appellants if not corrected before final judgment." *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984). Significantly, 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).

The trial court in the instant case attempted to certify defendant's appeal pursuant to Rule 54(b).

> Rule 54(b) certification by the trial court is reviewable by this Court on appeal in the first instance because the trial court's denomination of its decree "a final . . . judgment does not make it so" if it is not such a judgment.

First Atl., 131 N.C. App. at 247, 507 S.E.2d at 60 (citing *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)).

Notwithstanding the trial court's characterization, its order compelling arbitration and denying defendant's motion for summary judgment cannot be classified a final judgment.

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be determined between them . . . .

Cagle, 111 N.C. App. at 246-47, 431 S.E.2d at 803. An order compelling arbitration is not a final judgment, as by its terms it "fails to resolve all issues between all parties," *First Atl.*, 131 N.C. App. at 246, 507 S.E.2d at 60, but rather refers such issues to arbitration to be resolved. Similarly,

> denial of a motion for summary judgment is not a final judgment . . . even if the trial court has attempted to certify it for appeal under Rule 54(b).

Cagle, 111 N.C. App. at 247, 431 S.E.2d at 803. Accordingly, the trial court's order compelling arbitration and denying defendant's motion for summary judgment "did not constitute a 'final' judgment and is . . . not appealable pursuant to Rule 54(b)." *Id.*

As the first avenue of appeal of an interlocutory order was foreclosed, defendant likewise

> did not . . . have a right to appeal the order in this case unless the order affected a substantial right that would work injury to [defendant] if not corrected before appeal from final judgment.

Jeffreys, 115 N.C. App. at 379, 444 S.E.2d at 253-54; *see also First Atl.*, 131 N.C. App. at 247, 507 S.E.2d at 60 (denial of motion for summary judgment not appealable unless substantial right prejudiced); *N.C. Electric Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 127, 381 S.E.2d 896, 899 (order compelling arbitration not appealable unless substantial right affected), *disc. review denied*, 325 N.C. 709, 388 S.E.2d 461 (1989).

Defendant herein has

> presented neither argument nor citation to show this Court that [it] had the right to appeal the [trial court's] order . . . . It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right. . . .

Jeffreys, 115 N.C. App. at 380, 444 S.E.2d at 254.

Based on the precedent cited above, therefore, defendant's appeal must be dismissed.

Appeal dismissed.

Judges McGEE and HUNTER concur.

JOYCE B. BELCHER PLAINTIFF-APPELLEE v. H. ALAN AVERETTE, DEFENDANT-APPELLANT

No. COA99-405

(Filed 7 March 2000)

1. Child Support, Custody and Visitation— child support—consent order—medical expenses and insurance

The trial court did not err in concluding the consent order, fully incorporating the parties' separation agreement but modifying defendant's child support obligation, did not allow plaintiff to recover medical expenses and insurance which she incurred on behalf of the parties' minor children because the order did not provide for medical expenses other than the amount negotiated by the parties.

2. Child Support, Custody, and Visitation— civil contempt—child support arrearages—statute of limitations

Although defendant-father contends plaintiff-mother's claim for child support arrearages are barred by the ten-year statute of limitations under N.C.G.S. § 1-47, the trial court did not err in concluding defendant was in civil contempt of court for failing to pay the entire amount of court ordered child support because the ten-year statute of limitations begins to run against each support payment as it becomes overdue and not from the date the decree ordering support was entered; there is no bar to recovery of unpaid child support payments which came due during the ten years immediately prior to the filing of a claim for past due support; and the trial court properly applied defendant's child support payments to earlier arrearages first, and then to later arrearages.

3. Contempt— civil—child support arrearages—burden of proof

The trial court did not err in concluding defendant-father was in civil contempt of court for failing to pay the entire amount of court ordered child support because the burden of proof is on the party alleged to be delinquent to show that he was not in contempt, and defendant failed to show a lack of means to pay support or an absence of willfulness in failing to pay support.

Appeal by defendant from order entered 19 November 1998 by Judge John L. Whitley in District Court, Wilson County. Heard in the Court of Appeals 10 January 2000.

Farris & Farris, P.A., by Robert A. Farris, Jr. and Caroline F. Quinn for the plaintiff-appellee.

Lederer & Associates, P.A., by William M. Lederer for the defendant-appellant.

WYNN, Judge.

Before divorcing in 1978, Joyce B. Belcher and H. Alan Averette entered into a separation agreement which was fully incorporated into their divorce judgment. The agreement required Mr. Averette to pay Ms. Belcher the sum of $400.00 per month for support of their two minor children. The agreement also required Mr. Averette "to carry hospitalization insurance on said minor children until they reached the age of eighteen (18) years, as well as all medical and dental bills not covered by the insurance on the minor children."

In 1981, Ms. Belcher and Mr. Averette agreed to a consent order which fully incorporated the separation agreement but modified, *inter alia*, Mr. Averette's child support obligation by providing that

> [Mr. Averette] will pay $6,000.00 child support for one year in advance to . . . [Ms. Belcher] and shall pay a like sum for one year in advance on or before September 1, of each year thereafter until further orders of the Court. From said $6,000.00 yearly child support, medical dental and drug bills for said children shall be paid by [Ms. Belcher] together with any of their education, tuition and schooling expenses . . . and if . . . [Mr. Averette] is obligated to pay support for a minor child pursuant to this Order that child incurs a substantial medical or dental bill not covered by insurance, the parties hereto will endeavor to negotiate toward such sum as . . . [Mr. Averette] will pay to . . . [Ms. Belcher] to assist in the payment of such bill.

On 5 August 1998, Ms. Belcher moved the trial judge to hold Mr. Averette in willful contempt of court for allegedly failing to pay the entire amount of court ordered child support.

At the hearing on her motion, Ms. Belcher argued that because the consent order provided that Mr. Averette would "carry hospital

and medical insurance on the two said minor children in such amounts as he presently carries upon them," she was entitled to recover the amount she paid for the children's medical insurance through 1994, in addition to the child support arrearages. District Court Judge John L. Whitley, however, found that the consent order did not provide for or allow the recovery of such sums.

At that same hearing, Mr. Averette argued that: (1) his child support payments made from 1988 through 1992 satisfied his support obligation for the ten years immediately preceding the filing of the motion to show cause and (2) any arrearages before that time period were barred by the ten year statute of limitations. Judge Whitley found, however, that any payments made by Mr. Averette from 1988 through 1992 first should be applied to the arrearages due at the time of the payment and thereafter applied to his child support obligation through June of 1994—arrearages of $21,900.00. Under that application, Judge Whitley concluded that the child support arrearages were within the ten year statute of limitations. Accordingly, Judge Whitley found Mr. Averette to be in willful contempt of the court and ordered him to be taken into the custody of "the Sheriff of Wilson County or the Sheriff of any County of this State, or any other jurisdiction charged with the duty of enforcing [the] Court's Orders".

From that order, both Ms. Belcher and Mr. Averette appeal.

I. MS. BELCHER'S APPEAL

[1] In her appeal, Ms. Belcher contends that Judge Whitley erred in concluding that the consent order did not allow her to recover medical expenses and insurance which she incurred on behalf of the minor children. We disagree.

As Ms. Belcher correctly points out in her brief, the consent order provided that Mr. Averette would carry hospital and medical insurance on the minor children. Nonetheless, the agreement also provided that the separation agreement "shall remain in full force and effect, except as modified herein." One such modification was Mr. Averette's child support obligation which was increased from $400.00 per month to $500.00 per month. The consent order also provided that the child support obligation would cover, *inter alia*, "medical, dental and drug bills" for the children. However, under the terms of the consent order, the parties could negotiate the amount of Mr. Averette's obligation for substantial medical or dental bills incurred for the children which were not covered by the insurance.

Construing these provisions of the consent order, we agree with Judge Whitley's conclusion that the consent order did not provide for medical expenses other than that negotiated by the parties. Because the record does not contain evidence of any such negotiations between the parties, we must uphold the trial judge's conclusions on this issue.

II. MR. AVERETTE'S APPEAL

In his appeal, Mr. Averette contends that Judge Whitley erred in concluding that he was in contempt of court because: (1) the child support arrearages at issue were barred by the ten year statute of limitations and (2) there was insufficient evidence to support the trial judge's conclusion that he was in willful contempt of the court for his failure to abide by the court's prior orders. We disagree with both contentions

[2] First, Mr. Averette contends that the arrearages supporting Ms. Belcher's claim were barred by the ten year statute of limitations under N.C. Gen. Stat. § 1-47 since the arrearages became overdue more than ten years immediately preceding the filing of the motion to show cause.

A judgment awarding child support is a judgment directing the payment of money usually in future installments. *See Lindsey v. Lindsey*, 34 N.C. App. 201, 203, 237 S.E.2d 561, 563 (1977). Further, this type of judgment falls within the ten year statute of limitations under N.C. Gen. Stat. § 1-47. *See State of Michigan v. Pruitt*, 94 N.C. App. 713, 714, 380 S.E.2d 809, 810 (1989); *see also* N.C. Gen. Stat. § 1-47 (1996). But the ten year statute of limitations "begins to run against each support payment as it becomes overdue, not from the date the decree ordering support was entered." *See Pruitt*, 94 N.C App. at 715, 380 S.E.2d at 810. Thus, "there is no bar to recovery of unpaid child support payments which came due during the ten years immediately prior to the filing of a claim for past due support." *Id.*

The trial judge in this case properly applied Mr. Averette's child support payments to earlier arrearages first and then to later arrearages. Under that application, the arrearages supporting Ms. Belcher's child support claim are within the ten year statute of limitations. Therefore, Ms. Belcher's child support claim is not barred by N.C.G.S. § 1-47.

[3] Next, Mr. Averette argues that there was insufficient evidence to support the trial judge's conclusion that he acted willfully in fail-

ing to make the support payments. He asserts that Ms. Belcher failed to prove his ability to pay support and his willful refusal to pay support.

However, the "statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent." *See Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985); *see also Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1990) (stating that in "civil contempt the defendant has the burden of presenting evidence to show that he was not in contempt"). After a civil contempt proceeding is initiated by an interested party who files a motion in the cause, the opposing party must then show cause why he should not be found in contempt. *See Hartsell*, 99 N.C. App. at 387, 393 S.E.2d at 575. (stating that a motion in the cause for a civil contempt proceeding "must be based on a sworn statement or affidavit from which the court determined there is 'probable cause to believe that there is civil contempt.' G.S. 5A-23."). To show such cause, a party must establish a lack of means to pay support or an absence of willfulness in failing to pay support. *See Id.* at 85-86, 327 S.E.2d at 275; *see also Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966) (stating that a "failure to obey an order of a court cannot be punished by contempt proceedings unless, the disobedience is wilful, which imports knowledge and stubborn resistance"); *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E.2d 403, 404 (1948) (stating that "[m]anifestly, one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered").

Here, Ms. Belcher filed a motion in the cause initiating the civil contempt proceeding. But Mr. Averette neither argued nor presented any evidence at the civil contempt hearing that: (1) he was unable to pay the child support arrearages or (2) he did not act willfully in failing to pay the arrearages. Therefore, he failed to carry his burden of proof. Consequently, Judge Whitley properly held him in contempt of court for failing to comply with his child support obligation.

Accordingly, the trial court's order is

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

J. KENNETH LEE AND MICHELE P. LEE, CO-EXECUTORS OF THE ESTATE OF MICHAEL E. LEE, DECEASED, AND SANDRA H. LEE, (WIDOW OF MICHAEL E. LEE, DECEASED), PLAINTIFFS v. MUTUAL COMMUNITY SAVINGS BANK, SSB (SUCCESSOR BY MERGER TO AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF GREENSBORO), J. STEVEN LEE AND THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY, DEFENDANTS

No. COA99-413

(Filed 7 March 2000)

1. Appeal and Error— appealability—interlocutory order— certiorari granted

Although the trial court's grant of defendants St. Paul's and Lee's motion to dismiss under Rule 12(b)(6) is an interlocutory order since plaintiffs did not present any argument to support a conclusion that the order affects a substantial right and the order was not certified pursuant to Rule 54(b), the Court of Appeals exercised its discretionary power under N.C. R. App. P. 21(a)(1) to grant certiorari to address plaintiffs' appeal.

2. Unfair Trade Practices— third-party claimants—insurance company of adverse party

The trial court did not err in granting defendants St. Paul's and Lee's motion to dismiss under Rule 12(b)(6) because North Carolina does not recognize any cause of action for unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party.

Appeal by plaintiffs from order filed 7 December 1998 by Judge Julius A. Rousseau, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 January 2000.

Ronald Barbee, for plaintiff-appellants.

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellees.

GREENE, Judge.

J. Kenneth Lee and Michele P. Lee, co-Executors of the Estate of Michael E. Lee, Deceased, and Sandra H. Lee (Widow of Michael E. Lee, Deceased) (collectively, Plaintiffs) appeal an order filed 7 December 1998 in favor of J. Steven Lee (Lee) and The St. Paul Fire and Marine Insurance Company (St. Paul), granting St. Paul's and

Lee's motion to dismiss Plaintiffs' claim against them pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Plaintiffs allege Michael E. Lee and Sandra H. Lee (collectively, the Borrowers) received a loan in 1977 from the company that is now Mutual Community Savings Bank, SSB (Mutual) to purchase property located at Topsail Island (the property). Plaintiffs allege the Borrowers paid funds to Mutual for the purpose of maintaining an insurance policy on the property, and Mutual allowed the policy to lapse for non-payment of premiums. Plaintiffs suffered a loss when, subsequent to the lapse of the policy, the property was destroyed by a hurricane.

Plaintiffs' complaint also alleges a cause of action against Mutual's liability adjuster, St. Paul, and St. Paul's agent, Lee, for actions "constitut[ing] an unfair and deceptive practice." Plaintiffs' complaint does not state under which statute these claims are brought.

On 7 December 1998, St. Paul and Lee filed a motion to dismiss Plaintiffs' claim against them pursuant to Rule 12(b)(6), and the trial court granted the motion in a 7 December 1998 order. The order was not certified for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b).

The issues are whether: (I) the trial court's order granting St. Paul's and Lee's motion to dismiss Plaintiffs' complaint is appealable; and (II) Plaintiffs' claim against St. Paul and Lee for actions "constitut[ing] an unfair and deceptive practice," which does not allege a violation of N.C. Gen. Stat. § 58-63-15, is barred as a complaint against a third-party insurance agency of an adverse party.[1]

I

[1] Although neither party has raised the interlocutory nature of this appeal, we deem it appropriate to raise this issue *sua sponte*. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). "An order is interlocutory if it does not determine the entire controversy between

1. Plaintiffs' sole assignment of error states: "The trial court committed error when it dismissed [Plaintiffs'] claim with prejudice against DEFENDANTS, [Lee] and [St. Paul] under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." 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. Plaintiffs' assignment of error does not state the legal basis upon which it is assigned; nevertheless, in our discretion, we address Plaintiffs' appeal. N.C.R. App. P. 2.

all of the parties." *Abe v. Westview* Capital, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citing *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950)).

In this case, the trial court dismissed Plaintiffs' claims against St. Paul and Lee, but there is no evidence in the record that the trial court dismissed or otherwise adjudicated Plaintiffs' claims against Mutual. The dismissal order, therefore, is interlocutory because it did not determine the entire controversy between all of the parties.

Although there is generally no right to immediate appeal from an interlocutory order, *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881 (citation omitted), an interlocutory order is appealable in two instances. First, pursuant to N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27(d), an interlocutory order is appealable if the order "affects a substantial right." *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). "A substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment." *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 112, 332 S.E.2d 90, 92 (1985) (citation omitted). Second, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an interlocutory order is appealable in an action with multiple parties and multiple claims "if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay." *DKH Corp.*, 348 N.C. at 585, 500 S.E.2d at 668. When an interlocutory order is appealed, "it is the appellant's burden to present argument in his brief to this Court to support acceptance of the appeal." *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881.

In this case, Plaintiffs do not present any argument in their brief to this Court to support a conclusion that the trial court's order affects a substantial right. Moreover, although the trial court's order is a final judgment as to Plaintiffs' claims against St. Paul and Lee, the order was not certified pursuant to Rule 54(b). The order, therefore, is interlocutory. Nevertheless, we will exercise our power to grant certiorari to address Plaintiffs' appeal. *See* N.C.R. App. P. 21(a)(1); *Garris v. Garris*, 92 N.C. App. 467, 471, 374 S.E.2d 638, 640 (1988).

II

[2] This Court has held "a private right of action under N.C.G.S. § 58-63[-]15 and N.C.G.S. § 75-1.1 may not be asserted by a third-party claimant against the insurer of an adverse party." *Wilson v. Wilson*,

121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996). The *Wilson* court reasoned "allowing such third-party suits against insurers would encourage unwarranted settlement demands" and "may result in a conflict of interest for the insurance company." *Id.* at 666-67, 468 S.E.2d at 498.

In this case there is no dispute Plaintiffs are third parties asserting a claim against the insurer, St. Paul, of an adverse party, Mutual. Plaintiffs contend their claim is nonetheless valid because they have not made any claim under section 58-63-15. Instead, they are relying solely upon section 75-1.1. This is a distinction without a difference. The teaching of *Wilson* is that North Carolina does not recognize *any* cause of action for unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party.[2]

In this case, Plaintiffs asserted claims against St. Paul and Lee for unfair or deceptive trade practices. The rule from *Wilson* bars these claims and they were, therefore, properly dismissed.

Affirmed.

Judges LEWIS and HUNTER concur.

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2. An unfair or deceptive trade practice claim against an insurance company can be based on violations of either section 75-1.1 or section 58-63-15. A violation of section 58-63-15, however, constitutes a violation of section 75-1.1. *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 302, 435 S.E.2d 537, 542 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). Furthermore, *the* remedy for a violation of section 58-63-15 is the filing of a section 75-1.1 claim. *Id.* (citation omitted). There is no requirement, however, that a party bringing a claim for unfair or deceptive trade practices against an insurance company allege a violation of section 58-63-15 in order to bring a claim pursuant to section 75-1.1. *See U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co.*, 735 F. Supp. 1320, 1327 (E.D.N.C. 1990) (noting North Carolina courts have not held that a party must allege a violation of Chapter 58 of the North Carolina General Statutes prior to bringing a claim for unfair or deceptive trade practices against an insurance company pursuant to section 75-1.1).

IN THE MATTER OF: REYES, A MINOR CHILD DOB: 1-22-95

No. COA99-743

(Filed 7 March 2000)

Termination of Parental Rights— past adjudication of neglect—probability of repetition

The trial court did not err in terminating respondent mother's parental rights under former N.C.G.S. § 7A-289.32(2) because even if there is no evidence of neglect at the time of the termination proceeding, parental rights may be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents.

Appeal by respondent from order entered 1 December 1998 and signed 16 December 1998 by Judge Samuel S. Stephenson in Lee County District Court. Heard in the Court of Appeals 15 February 2000.

Lee County Attorney's Office, by K.R. Hoyle, Sr. and Brenda B. White, for petitioner-appellee Lee County Department of Social Services.

Love & Love, P.A., by Jim L. Love, Jr., for respondent-appellant.

Harrington, Ward, Gilleland & Winstead, by Eddie S. Winstead, III, attorney advocate.

GREENE, Judge.

Veronica Reyes (Appellant) appeals a 16 December 1998 order terminating her parental rights as mother of Zenaida Lis Reyes (Reyes), a minor child.

The evidence shows that Tabitha Smith (Smith), a child protective services worker with the Lee County Department of Social Services (Social Services), testified Social Services first came into contact with Appellant in February of 1997 when it received a referral for Reyes. At the time of the referral, Reyes was two years old, and Smith testified she "had received severe and inappropriate discipline that resulted in bruising on her buttocks, thighs, face and ear." As a result of this incident, Reyes was removed from the custody of

Appellant for approximately one month and was adjudicated abused and neglected in an 18 March 1997 order.

On 24 March 1997, Reyes was again taken into protective custody by Social Services when her four-month-old brother received a severe injury. On 25 March 1997, Reyes' brother died "due to shaken baby syndrome" and Appellant later pleaded guilty to involuntary manslaughter as a result of his death. Appellant was then incarcerated, and Reyes remained in the custody of Social Services.

Following her incarceration, Appellant was allowed supervised visitation of Reyes. Smith testified Appellant did not inappropriately discipline Reyes during supervised visitation, and Appellant participated in parenting classes. Smith read into evidence the following statement, made by an instructor of the parenting classes, regarding Appellant's performance in the class:

> "[T]hroughout this series, [Appellant's] responses to situational questions and discussions consistently involved violence. [Appellant] attempted to rationalize her responses by saying that she would handle these situations the way her mother handled them with her. Also, many of the situations that [Appellant] described as making her 'lose it' were everyday types of situations.
>
> For example, [Appellant] said that one of the things that makes her 'lose it' is when her daughter, [Reyes], tells her, 'No.' "

Smith concluded there was a "very high probability" Appellant would engage in violence towards Reyes if she was in Appellant's custody.

Appellant testified on her own behalf that she understood the punishment Reyes had received when Appellant hit Reyes with a shoe and left bruises on her body was "inappropriate," and since that time she has attended two sessions of parenting classes. She also began receiving mental health services subsequent to her release from prison and, at the time of the termination hearing, she was taking Prozac to treat depression. Appellant stated she has been attending nursing assistant classes and classes to assist her with obtaining her General Education Diploma.

On 16 December 1998, the trial court made the following pertinent finding of fact by clear, cogent, and convincing evidence:

> "8. . . . [Reyes] is a neglected child within the meaning of N.C. Gen. Stat. § 7A-517(21), and there is a probability of the repetition of . . . neglect."

The trial court also incorporated into its findings of fact, by reference, an 18 March 1997 order adjudicating Reyes a neglected juvenile. The trial court then concluded[1] as a matter of law Appellant "has neglected [Reyes] within the meaning of N.C. Gen. Stat. § 7A-517(21)," and "sufficient grounds exist to terminate the parental rights of [Appellant]." Appellant's parental rights were then terminated, in pertinent part, pursuant to N.C. Gen. Stat. § 7A-289.32(2).[2]

The dispositive issue is whether the trial court's findings of fact support its conclusion of law that "sufficient grounds exist to terminate the parental rights of [Appellant]"[3] pursuant to N.C. Gen. Stat. § 7A-289.32(2).

Appellant's single argument is "the trial court treated [Reyes'] prior adjudication of neglect as determinative on the ultimate issue before it." We acknowledge that termination of parental rights may not be based solely upon a prior adjudication of neglect, *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231-32 (1984); however, we do not agree with Appellant that the trial court treated the prior adjudication of neglect as determinative in this case.

Neglect, within the meaning of N.C. Gen. Stat. § 7A-517(21),[4] is one of the grounds which can support the termination of parental rights. N.C.G.S. § 7A-239.32(2) (repealed 1999).[5] To prove neglect in a termination case, there must be clear and convincing evidence, N.C.G.S. § 7A-635 (repealed 1999)[6]: (1) the juvenile has not, at the

1. We note the trial court included the neglect determination in both the findings of fact and the conclusions of law. The determination of neglect, requiring application of legal principles, is a conclusion of law. *In re Everette*, 133 N.C. App. 84, 86, 514 S.E.2d 523, 525 (1999).

2. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1111(a)(1) (1999).

3. Appellant does not argue in her brief to this Court that the evidence is insufficient to support the trial court's findings of fact and we, therefore, do not address that issue. *See In re Caldwell*, 75 N.C. App. 299, 301, 330 S.E.2d 513, 515 (1985).

4. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-101(15) (1999).

5. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1111(a)(1) (1999).

6. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-805 (1999).

time of the termination proceeding, "receive[d] proper care, supervision, or discipline from the juvenile's parent," N.C.G.S. § 7A-517(21); *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232; and (2) the juvenile has sustained "some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision[,] or discipline,' "[7] *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (quoting N.C.G.S. § 7A-517(21)). If there is no evidence of neglect at the time of the termination proceeding, however, parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232. Thus, the petitioner need not present evidence of neglect subsequent to the prior adjudication of neglect. *See In re Caldwell*, 75 N.C. App. 299, 302, 330 S.E.2d 513, 516 (1985).

In this case, the trial court incorporated into its findings of fact a prior order adjudicating Reyes neglected, and the trial court found as fact "there is a probability of the repetition of . . . neglect." These findings of fact support the trial court's conclusion of law that "sufficient grounds exist to terminate the parental rights of [Appellant]" pursuant to section 7A-289.32(2), and we, therefore, affirm the trial court's order terminating Appellant's parental rights.

Because we affirm the trial court's order terminating Appellant's parental rights pursuant to section 7A-289.32(2), we need not address Appellant's contention her parental rights were improperly terminated under N.C. Gen. Stat. § 7A-289.32(3)[8] and N.C. Gen. Stat. § 7A-289.32(4).[9]

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

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7. Although not applicable to this case, section 7A-517(21) provides grounds for neglect in addition to the failure to receive "proper care, supervision, or discipline from the juvenile's parent." N.C.G.S. § 7A-517(21). A petitioner seeking termination of parental rights based on these additional grounds would have the burden of proving the same elements as stated in this case in the context of the portion of the statute upon which the petitioner relies.

8. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1111(a)(2) (1999).

9. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-1111(a)(3) (1999).

BROADUS A. CRABTREE, PLAINTIFF v. CITY OF DURHAM, MICHAEL WAYNE ELLIS AND NATIONWIDE INSURANCE COMPANY, DEFENDANTS

No. COA99-244

(Filed 7 March 2000)

Process and Service— service of process—in-hand delivery not required

The trial court erred in a negligence case by granting defendant city's motion to dismiss for insufficient service of process under N.C.G.S. § 1A-1, Rule 4(j)(5)(a) and lack of personal jurisdiction because the circumstances of this case reveal that there was no requirement of in-hand delivery to effect proper service since two affidavits show the deputy informed the employee at the reception area that he needed to see the acting city manager; the deputy was informed that the acting city manager was in a meeting in his office; the deputy said he had legal papers to deliver to the acting city manager; the deputy went to the acting city manager's office door and directed the acting city manager's attention indicating to him that he was being served with legal papers; and without objection or indication of rejection, the deputy handed the papers to the employee from the reception area.

Appeal by plaintiff from order entered 2 October 1998 by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 17 November 1999.

Thomas, Ferguson & Charns, LLP, by Jay H. Ferguson, for the plaintiff-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr. and Keith D. Burns, for the defendant-appellee.

LEWIS, Judge.

Plaintiff appeals from an order granting defendant City of Durham's ("City") motion to dismiss for insufficient service of process and resulting lack of personal jurisdiction. We reverse.

On 9 May 1997, plaintiff filed this negligence action against defendants City, Michael Wayne Ellis and Nationwide, alleging that while driving a truck owned by the City, Ellis backed into plaintiff's truck. Two summonses were issued the same day, addressed to acting

"City Manager, Cecil Brown," and "City Clerk, Margaret Bowers," respectively. On 9 May 1997, Deputy J.E. Brooks served the complaint and summonses in the offices of Mr. Brown and Ms. Bowers. The parties dispute, however, who actually was served and whether the personal service was sufficient. On 4 August 1997, plaintiff again attempted to serve Ms. Bowers by certified mail, return receipt requested. The certified mail was properly addressed to Ms. Bowers at City Hall, but the return receipt indicated that upon arrival, the summons and complaint were "unclaimed."

On 18 September 1997, the City filed an answer to the complaint alleging as its first defense insufficient service of process and lack of personal jurisdiction over the City and responded to the allegations of the complaint. On 29 May 1998, the City filed a motion to dismiss the complaint, alleging failure to institute proper service of process and failure to obtain personal jurisdiction over the City. The motion was granted by the trial court. In its order and judgment, the court concluded the summonses and complaint were improperly served and the court lacked personal jurisdiction pursuant to *Johnson v. City of Raleigh*, 98 N.C. App. 147, 389 S.E.2d 849 (1990). Plaintiff appeals.

The City argues that Deputy Brooks personally served process on Mr. Brown's secretary, Ila Newton, and the Deputy City Clerk, D. Ann Gray, both of whom are improper persons for personal service of process under our statutes and accompanying case law.

Rule 4 of the North Carolina Rules of Civil Procedure provides the methods in which a summons and complaint must be served in order to obtain personal jurisdiction over the defendant. N.C.R. Civ. P. 4. Rule 4(j)(5)(a) applies to cities and provides that the service upon a city is properly effectuated "by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk." Rule 4 is strictly enforced to insure that a defendant receives actual notice of a claim against him. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94, *reh'g denied*, 343 N.C. 128, 468 S.E.2d 774 (1996). In *Johnson v. City of Raleigh*, this Court held that Rule 4(j)(5)(a) "does not provide for substituted personal process on any persons other than those named in [Rule 4] (j)(5)(a)." 98 N.C. App. at 150, 389 S.E.2d at 851.

N.C. Gen. Stat. § 1-75.10(4) provides that notice given by registered mail is effective when actually received. Since the return

receipt reveals that the City did not actually receive the registered mail, we will consider whether service by personal delivery in this case was sufficient. As such, we must determine whether either the Acting City Manager, Mr. Brown, or the City Clerk, Ms. Bowers, was properly served through personal delivery.

Under G.S. 1-75.10(1)(a), where a defendant challenges personal service of the summons, proof of service shall be "by the [serving] officer's certificate thereof, showing place, time and manner of service." When this return of service on its face shows legal service by an authorized officer, that return is sufficient, at least *prima facie*, to show service in fact. *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 462, 265 S.E.2d 633, 635 (1980). The *prima facie* evidence established by a valid return of service may be rebutted only by producing affidavits of *more than one* person showing *unequivocally* that proper service was *not* made upon the person stated in the return of service. *Grimsley*, 342 N.C. at 545, 467 S.E.2d at 94.

In an attempt to rebut plaintiff's *prima facie* evidence of valid service in this case, the City has produced two affidavits relevant to personal delivery to the acting city manager and two affidavits relevant to personal delivery to the city clerk. We conclude, however, that this evidence establishes *valid* service of process on the City. Because we need only find that service on one of the public servants mentioned in Rule 4 was proper to effect valid service on the City, we will only consider the evidence relevant to service upon Mr. Brown.

Ms. Newton's affidavit states:

> 4. On Wednesday, May 14, 1997, at approximately 9:37 a.m., a Deputy Sheriff of Durham County came to City Hall and to [the] reception area of the City Manager's suite of offices, and asked to see Mr. Brown, who at that time was in a meeting in his office.
>
> 5. I greeted the deputy, and informed him that Mr. Brown was in a meeting in his office.
>
> 6. The deputy said he had some legal papers to deliver to Mr. Brown. The deputy went to the door of Mr. Brown's office, which was open, and got Mr. Brown's attention to let Mr. Brown know he was delivering some legal papers. The deputy then handed those papers to me.

In order to establish valid service of process, the plaintiff is not precluded from offering his own proof in addition to the officer's return of service. *Williams*, 46 N.C. App. at 462, 265 S.E.2d at 635. The plaintiff in this case produced an affidavit of Deputy Brooks in which he admitted to having no independent recollection of serving process in this case, but stated:

> 4. It was my unvarying practice when serving process on the [c]ity [m]anager or [c]ity [c]lerk to seek out the person to be served and to serve him or her personally. On occasions when the person was in a meeting, I might send the papers into the meeting by the hand of a secretary after getting the person's attention, but I always watched to be sure that the person to be served personally received the papers in my sight.
>
> 5. I never simply left papers to be served on a person in the care of another person . . . .

From Ms. Newton's affidavit, it appears that Deputy Brooks entered the office suite of the acting city manager, realized Mr. Brown was occupied, directed Mr. Brown's attention indicating to him that he was being served, and without objection or indication of rejection, handed the papers to Ms. Newton. Under the circumstances appearing from the affidavits of Ms. Newton and Deputy Brooks, there was no requirement of in-hand delivery to effect proper service in this case—the fact that Mr. Brown acknowledged the deputy's presence with knowledge that he was serving him was adequate. While we are mindful of our holding in *Johnson* that "delivery of the summons to a person other than the named official [is] insufficient to give the court personal jurisdiction over the City," 98 N.C. App. at 150, 389 S.E.2d at 851, we conclude that under the circumstances appearing from the affidavits of Ms. Newton and Deputy Brooks, process was properly served upon Mr. Brown. We therefore conclude that the trial court erred in granting defendants' motion to dismiss for insufficient service of process and resulting lack of personal jurisdiction.

Reversed and remanded.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIE WILLIS

No. COA99-289

(Filed 7 March 2000)

Evidence— subsequent crime or act—impermissible character evidence

Defendant is granted a new trial under N.C.G.S. § 15A-1443(a) because the trial court erred in a common law robbery case by admitting, over defendant's objection, evidence that defendant had been convicted of common law robbery in Guilford County for an incident occurring eight days after the events in this case because: (1) there was no showing of similar circumstances sufficient to render evidence of the Guilford County robbery relevant to show defendant's identity as the perpetrator of the robbery at issue, a common plan or scheme, or motive to commit the crime at issue; and (2) the only relevance of the evidence was to impermissibly show the character of defendant to commit common law robbery. N.C.G.S. § 8C-1, Rule 404(b).

Appeal by defendant from judgment entered 21 October 1998 by Judge Jerry Cash Martin in Forsyth County Superior Court. Heard in the Court of Appeals 26 January 2000.

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

L. Jayne Stowers for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of common law robbery and his plea of guilty to being an habitual felon. Briefly summarized, the evidence admitted at trial tended to show that on 13 October 1997, Michael Odell Stone, a district manager for a convenience store chain, was accosted in the parking lot as he was leaving one of the chain's stores on Martin Luther King Boulevard in Winston-Salem. Stone was carrying deposit bags containing the store receipts. As Stone put the bags in his car, the man sprayed Stone in the face with pepper spray. The two men struggled and the perpetrator took one of the deposit bags and ran. Although Stone testified that several other people were outside the store and witnessed the robbery, no other eyewitness was called to

testify. Delmarco Smith, an employee of the store, testified that he had seen defendant in the store shortly before the robbery, though Smith did not witness the robbery. Stone identified defendant as the perpetrator after viewing a photographic lineup, and identified defendant at trial.

The dispositive issue in this appeal is whether the trial court erred by admitting, over defendant's objection, evidence that defendant had been convicted, on 8 April 1998, of common law robbery occurring in Guilford County on 21 October 1997, eight days after the events at issue in this case. We hold the admission of such evidence was prejudicial error requiring that defendant be granted a new trial.

G.S. § 8C-1, Rule 404(b) 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, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). The Rule has been described as a "rule of inclusion" generally allowing evidence of other crimes or acts to be admitted so long as this evidence is relevant for some purpose other than to show defendant's propensity or disposition to commit an offense similar to that for which he is being tried. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), *appeal after remand*, 336 N.C. 412, 444 S.E.2d 431 (1994); *State v. Mac Cardwell*, 133 N.C. App. 496, 516 S.E.2d 388 (1999); *State v. Blackwell*, 133 N.C. App. 31, 514 S.E.2d 116, *cert. denied*, 350 N.C. 595, — S.E.2d — (1999).

In the present case, the evidence that defendant committed the 21 October 1997 common law robbery consisted of the following statement by the prosecutor:

> Members of the jury, this State's number 11 is a certified copy of court records from High Point, Guilford County, North Carolina. I have four documents here. The first is an indictment for the offense of common law robbery. The offense occurring October 21st, 1997. The jurors of Guilford County stated that on or about that date the defendant then known as Kinard Willis

> unlawfully, willfully, and feloniously did steal, take and carry away another's personal property, a purse containing things of value, from the person or presence of Easter Mae Alford by violence and putting the victim in fear of bodily harm by threat of violence.
>
> This indictment was rendered on January 20th, 1998 by the High Point Grand Jury.
>
> The other things attached is a judgment and commitment which shows the defendant to be Kinard Willis a/k/a Willie Lee Willis. Been found guilty or pled guilty to the offense of common law robbery, a Class G. felony. Was given a sentence of minimum 36 months, maximum 44 months in North Carolina Department of Correction. That was April 8th, 1998 by the Honorable Russell G. Walker.
>
> Also attached is a transcript of plea signed by the defendant as Willie Lee Willis on April 8th, 1998 pleading guilty to the offense of common law robbery and assault on a female, both occurring on that date. This is the transcript of plea on which the judgment of 36 months in prison was rendered.
>
> The other item Judge Martin has allowed to be included is a court document signed by Kinard Willis in the same court file showing—setting forth his monthly income as zero, his monthly expenses as zero, total assets as zero, his total liabilities as zero. This was the form he applied for counsel with.
>
> Judge, that would complete my summarization . . . .

The evidence was offered by the State and admitted by the trial court to show defendant's identity and *modus operandi*, his motive, and the existence of a common plan or scheme.

For evidence of another crime to be admissible as relevant to the issue of identity under Rule 404(b), the *modus operandi* of the other crime and the crime for which the defendant is on trial must be sufficiently similar to support a reasonable inference that the same person committed both crimes. *State v. Hamilton*, 351 N.C. 14, 20, 519 S.E.2d 514, 518 (1999). "[T]here must be 'some unusual facts present in both crimes or particularly similar acts which would indicate the same person committed both crimes.' " *Id.* (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). Similarly, evidence of another

crime is admissible to prove a common plan or scheme to commit the offense charged. But, the two acts must be sufficiently similar as to logically establish a common plan or scheme to commit the offense charged, not merely to show the defendant's character or propensity to commit a like crime. *State v. Hamrick*, 81 N.C. App. 508, 344 S.E.2d 316 (1986).

The showing required to admit the evidence under the exception for motive is somewhat different. For motive, the prior act must " 'pertain[] to the chain of events explaining the context, motive and set-up of the crime' and 'form[] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.' " *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998), *cert. denied*, 527 U.S. 1026, 144 L.Ed.2d 779 (1999) (citations omitted). In each case, "the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted." *State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994), *cert. denied*, 514 U.S. 1091, 131 L.Ed.2d 738 (1995).

Here, any similarity between the 21 October 1997 robbery in Guilford County and the current charge was so slight as to be virtually non-existent. The only commonality between the two crimes is that the perpetrator of each robbed a stranger and used force to commit the robbery. There was no evidence as to the manner in which the Guilford County robbery was carried out, thus, there was no showing of similar circumstances sufficient to render evidence of the Guilford County robbery relevant to show either defendant's identity as the perpetrator of the robbery at issue in this case or the existence of a common plan or scheme. Likewise, there was insufficient evidence to render the evidence of the Guilford County robbery relevant to show defendant's motive to commit the crime at issue here. The only relevance of the evidence with respect to the 21 October 1997 Guilford County robbery was to show the character of defendant to commit common law robbery, a purpose forbidden by Rule 404(b). The admission of the evidence was error.

Our Supreme Court has cautioned 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) (quoting *State v. McClain*, 240 N.C. 171, 174, 81 S.E.2d 364, 366 (1954)). The evidence of defendant's identity as the perpetrator of the robbery of Michael Stone, though sufficient to support his conviction, was not so overwhelming as to be conclusive. Thus, there is a reasonable possibility that had the evidence of defendant's conviction of common law robbery occurring in Guilford County on 21 October 1997 been excluded, a different result may have been reached in defendant's trial. Therefore, we are required to grant him a new trial. N.C. Gen. Stat. § 15A-1443(a). In view of our decision, we decline to discuss defendant's remaining assignments of error as we deem them either without merit or unlikely to recur at a new trial.

New trial.

Judges TIMMONS-GOODSON and HORTON concur.

JANICE WILSON, PLAINTIFF v. JEFFERSON-GREEN, INC. D/B/A CHOICE REALTY, DEFENDANT AND THIRD PARTY PLAINTIFF v. BEVERLY ROUSE, SONYA DONALDSON-BATES, THIRD PARTY DEFENDANTS

No. COA99-738

(Filed 7 March 2000)

Jurisdiction— matter exceeding magistrate's dollar amount— district court dismissal

The district court erred in dismissing plaintiff's claims based on lack of jurisdiction and venue because plaintiff's claims do not meet the requirements necessary to be heard in small claims court since: (1) plaintiff did not request that her claim be heard by a magistrate as required by N.C.G.S. § 7A-210(3); and (2) the amount in controversy is above the $3,000 monetary amount established in N.C.G.S. § 7A-210(1) for a small claim action, but less than the $10,000 requirement for an action in superior court under N.C.G.S. § 7A-243.

Appeal by plaintiff from orders entered 30 December 1998 and 9 March 1999 by Judge J. Henry Banks in Vance County District Court. Heard in the Court of Appeals 21 February 2000.

Plaintiff Janice Wilson instituted this action on 13 June 1997 against defendant Jefferson-Green, Inc. d/b/a Choice Realty, seeking a rent abatement, consequential damages and lost wages for defendant's alleged violations of the Residential Rental Agreements Act. The alleged violations included failure to comply with the Housing Code of the City of Henderson, failure to make repairs necessary to put and keep the rented premises in a fit and habitable condition, and failure to maintain in a good and safe working order and promptly repair all electrical and plumbing facilities supplied by defendant as required by N.C. Gen. Stat. § 42-42 (1994). Plaintiff also sought to recover treble damages for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-16. Defendant answered, denying the material allegations of the complaint and setting forth several defenses, including the lack of subject matter jurisdiction and improper venue or division pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (3). Defendant amended its answer to include Beverly A. Rouse and Sonya Donaldson-Bates as third-party defendants.

After hearing the arguments of both parties and examining the evidence, the trial court entered an order and dismissed plaintiff's complaint for lack of jurisdiction and lack of venue, concluding:

> 1. That there was a landlord-tenant relationship between the Plaintiff and the Defendant pursuant to N.C.G.S. 42-42.
>
> 2. That N.C.G.S. 7A-210(2) designates the Small Claims Division as the place of original jurisdiction in controversies including landlord-tenant relationship.

On 7 January 1999, plaintiff moved for a new trial pursuant to N.C. R. Civ. P. 59 on the grounds that plaintiff's claims exceeded the monetary requirement of small claim actions in district court. The trial court denied plaintiff's motion on 9 March 1999. Plaintiff appeals.

North Central Legal Assistance Program, by E.N. Bagshawe, for plaintiff-appellant.

No brief filed for defendant-appellee and third-party plaintiff.

No brief filed for third-party defendants.

EAGLES, Chief Judge.

Plaintiff contends the trial court erred in dismissing her claims based on lack of jurisdiction and venue and in not remedying this

error pursuant to N.C.G.S. § 1A-1, Rule 59(a) (1990). We agree and remand this action to the district court.

As a general rule, superior and district courts possess concurrent jurisdiction "of all justiciable matters of a civil nature." N.C. Gen. Stat. § 7A-240 (1995). District court is the proper division for trials of civil actions where the amount in controversy is $10,000.00 or less. N.C. Gen. Stat. § 7A-243 (1995). Furthermore, an action may be brought in the district court as a small claim if:

> (1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed three thousand dollars ($3,000); *and*
>
> (2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; *and*
>
> (3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

N.C. Gen. Stat. § 7A-210 (1995) (emphasis added).

N.C. Gen. Stat. § 7A-243(2) provides, inter alia, that "[w]here monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages." G.S. 7A-243(2). Also, "[w]here there are two or more claims not subject to aggregation the highest claim is the amount in controversy." G.S. 7A-243(4)d.

Plaintiff's civil action does not meet the three requirements necessary to have her case be heard in small claims court. First, plaintiff did not request that her claim be heard by a Magistrate as required by N.C. Gen. Stat. § 7A-210(3). Second, the amount in controversy for plaintiff's claims is above the monetary amount established in N.C. Gen. Stat. § 7A-210(1). Plaintiff sought monetary damages of $1,051.21 from defendant's alleged failure to fix the apartment's plumbing and $3,105 in lost wages. Thus, the amount in controversy for plaintiff's claims is in excess of the $3,000 requirement for a small claim action, but is less than the $10,000 requirement for an action in the superior court. As such, plaintiff's claims, if proven, are within the jurisdiction of the district court. Accordingly, the district court erred in concluding that it lacked jurisdiction to hear these claims and that they were properly addressed before a magistrate in a small claims proceeding.

Because we reverse and remand the trial court's order dismissing plaintiff's action, we do not find it necessary to discuss plaintiff's assignment of error that the trial court's conclusion that "N.C.G.S. 7A-210(2) designates the Small Claims Division as the place of original jurisdiction in controversies including landlord-tenant relationship" was erroneous. Also, a trial court's conclusions of law are disregarded on appeal, since it is not necessary for the trial court to enter conclusions of law on a motion to dismiss. *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 339 S.E.2d 90 (1986).

Reversed and remanded.

Judges WALKER and SMITH concur.

TONY DALE HOWELL, PLAINTIFF v. JOHN WILSON AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, AN UNNAMED PARTY, DEFENDANTS

No. COA99-408

(Filed 7 March 2000)

Arbitration and Mediation— arbitrator's authority—no additional claims

The trial court erred in overturning the arbitrator's award in a personal injury case arising out of an automobile accident on the ground that the arbitrator exceeded his authority by limiting the award to plaintiff for the reason that causation could not be established without expert medical testimony, although the parties had agreed to have the case decided on the basis of the testimony of the parties and the stipulated medical records, since: (1) an arbitrator exceeds his authority under N.C.G.S. § 1-567.13(a)(3) only when he arbitrates additional claims and matters not properly before him; and (2) plaintiff's claim for personal injuries was properly before the magistrate, and his denial of that claim, regardless of the reason, was not outside the scope of his authority.

Appeal by defendants from order entered 4 February 1998 by Judge Quentin Sumner in Wilson County Superior Court. Heard in the Court of Appeals 11 January 2000.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., for plaintiff-appellee.

Baker, Jenkins, Jones & Daly, P.A., by Bruce L. Daughtry and Roger A. Askew, for defendant-appellant John Wilson.

Poyner & Spruill, L.L.P., by Gregory S. Camp, for defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

LEWIS, Judge.

Plaintiff and defendant John Wilson were involved in an automobile accident on 16 September 1996. The parties orally agreed to submit the case to arbitration on the issues of negligence, contributory negligence, and damages. No written arbitration agreement was ever drafted. In an attempt to save costs, no medical experts were deposed. Rather, the arbitration was to be decided based entirely on the testimony of the parties and on the medical records that were admitted into evidence by stipulation.

In a decision dated 2 October 1997, the arbitrator concluded that defendant Wilson was negligent, plaintiff was not contributorily negligent, and plaintiff was entitled to $3500 in damages. In an accompanying letter, the arbitrator then explained his decision. Among other things, he discussed why he did not award plaintiff more than $3500 in damages. Specifically, the arbitrator explained:

> I concluded that the injury to the Plaintiff was not one which lended [sic] itself to proof of causation without expert testimony (particularly in light of the fact that there was no trauma to the shoulder and there was no immediate pain complaint following the accident) and that the medical evidence which was presented to me at the hearing was insufficient under North Carolina law for me to conclude that the requisite causal connection had been established.

Based upon this letter, plaintiff then filed a motion to vacate the arbitration award on the grounds that the arbitrator exceeded his authority by requiring plaintiff to prove causation through expert medical testimony when the parties never agreed to make this a requirement. The trial court agreed with plaintiff and, in an order entered 4 February 1998, vacated the arbitration award. The trial court then ordered a re-arbitration on the issue of damages, but

required plaintiff's treating physician to be deposed first. From this order, defendants now appeal.

Our state has a strong policy in favor of upholding arbitration awards. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984). N.C. Gen. Stat. § 1-567.13(a) provides the limited and *exclusive* grounds for vacating such awards. *Hooper v. Allstate Ins. Co.*, 124 N.C. App. 185, 189, 476 S.E.2d 380, 383 (1996). Pursuant to subsection (a)(3), an award may be vacated when "[t]he arbitrators exceeded their powers." N.C. Gen. Stat. § 1-567.13(a)(3) (1999). We hold that the arbitrator did not exceed his powers here.

At the outset, we note the inherent inconsistency of the trial court's order. The trial court first concluded that the parties never contemplated expert medical testimony would be required at the arbitration hearing. But in ordering a new arbitration hearing on damages, it then required the parties to depose plaintiff's treating physician. In other words, the trial court required expert testimony at the re-arbitration even though it had just concluded that the parties had never agreed to such a requirement in the first place. In the end, however, this inconsistency is insignificant in light of our ultimate holding.

Arbitrators are not required to articulate reasons for their award. *Carteret County v. United Contractors of Kinston*, 120 N.C. App. 336, 344-45, 462 S.E.2d 816, 822 (1995). In fact, " '[a]rbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigation.' " *Bryson v. Higdon*, 222 N.C. 17, 19, 21 S.E.2d 836, 837 (1942) (quoting *Patton v. Baird*, 42 N.C. (7 Ired. Eq.) 255, 260 (1851)). Here, however, the arbitrator announced his award and then explained it in an accompanying letter. When an arbitrator chooses to do this, that explanatory letter becomes part of the award for purposes of appellate review. *See Severtson v. Williams Constr. Co.*, 173 Cal. App. 3d 86, 92 (Cal. Ct. App. 1985) ("When the arbitrator provides the basis for decision in the form of an opinion or letter, that document becomes part of the award for purposes of review."); *see also Hall v. Nationwide Mut. Ins. Co.*, 629 A.2d 954, 956-57 (Pa. Super. Ct. 1993) (using the arbitrators' explanatory letter to justify confirming their award). Even in light of this letter, however, we still conclude that the arbitrator acted within his authority.

Our research has disclosed only a few cases in which our courts have held that an arbitrator exceeded his powers. In *Wilson Building Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987), we concluded that, because the amount of attorney's fees for debts and obligations is set by statute, the arbitrator exceeded his authority by ordering fees in excess of that amount. *Id.* at 686-88, 355 S.E.2d at 817-18. More instructive, however, is the case of *FCR Greensboro, Inc. v. C&M Investments*, 119 N.C. App. 575, 459 S.E.2d 292, *cert. denied*, 341 N.C. 648, 462 S.E.2d 610 (1995). In that case, the parties submitted for arbitration the amount of liquidated damages caused by the defendant completing construction of a building after the agreed-upon date. *Id.* at 576, 459 S.E.2d at 293. The arbitrator awarded plaintiff these damages, but then also awarded plaintiff two other kinds of damages: (1) liquidated damages caused by delays in starting construction; and (2) reimbursement for certain changes plaintiff made to the sprinkler system that was installed. *Id.* at 577-78, 459 S.E.2d at 294-95. We held that the arbitrator exceeded his powers by making these additional awards. *Id.* at 578, 459 S.E.2d at 294-95.

These two cases illustrate that an arbitrator exceeds his authority when he arbitrates *additional* claims and matters not properly before him. Here, however, we are dealing with a claim for personal injuries that was properly before the arbitrator. Accordingly, he could dispense with it as he saw fit. His *denial* of that claim, regardless of the reason, thus cannot be considered outside his scope of authority. Accordingly, we reverse the trial court's order vacating the arbitrator's award and remand this matter to the trial court for entry of an order confirming the first arbitrator's award.

Reversed and remanded.

Judges GREENE and EDMUNDS concur.

[136 N.C. App. 831 (2000)]

IN RE: DUSTIN ERIC HARRISON, A MINOR CHILD, AND
IN RE: JOHN STANLEY KOROS, III, A MINOR CHILD

No. COA99-834

(Filed 7 March 2000)

Termination of Parental Rights— no right to file *Anders* brief—sufficiency of evidence

Although counsel for a parent appealing from a juvenile court's severance order has no right to file an Anders brief since a parent whose rights are terminated is not equivalent to a convicted criminal, the Court of Appeals exercised its discretion pursuant to N.C. R. App. P. 2 and upheld the trial court's termination of respondents' parental rights because the trial court's findings of fact are supported by clear and convincing evidence.

Respondent Michelle Elaine Harrison and respondent John Stanley Koros, Jr. appeal from order entered 4 December 1998 by Judge Thomas H. Nix in Rutherford County District Court. Heard in the Court of Appeals 21 February 2000.

On 31 March 1997, the Rutherford County Department of Social Services (DSS) filed separate petitions seeking to terminate the parental rights as to Dustin Eric Harrison and John Stanley Koros, III. Respondent Michelle Harrison is the mother of both children. Respondent John Stanley Koros, Jr. is the biological father of Dustin Eric Harrison and legal father of John Stanley Koros, III. DSS alleged that: respondents had willfully left the children in foster care for more than 12 months without reasonable progress under the circumstances in correcting those conditions which led to the children's removal; the children had been in the custody of DSS for a continuous period of six months preceding the filing of the petition; and the respondents had willfully failed for such period to pay any portion of the cost of care for the children although physically and financially able to do so. Neither David Coleman, alleged biological father of John Stanley Koros, III, or John Melvin Grebos, legal father of Dustin Eric Harrison, appeared in court to contest the proceedings. On 4 December 1998, the trial court terminated the respondents' parental rights in their children. Respondents appeal.

David W. Rogers for respondent-appellants.

No response filed by petitioner-appellees.

EAGLES, Chief Judge.

Counsel appointed to represent respondents has filed a brief in which he states that he is "unable to find any error that might have substantially affected the respondent's rights." He asks this Court to conduct its own review of the record for possible prejudicial error 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), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Counsel has not filed documentation with this Court showing that he has complied with the requirements of *Anders*. However, counsel states that he has advised respondents of their right to file written arguments with the Court and provided them with a copy of the documents pertinent to this appeal. As of this date, respondents have not filed any arguments on their own behalf.

"An attorney for a *criminal* defendant who believes that his client's appeal is without merit is permitted to file what has become known as an *Anders* brief." *State v. Mayfield*, 115 N.C. App. 725, 726, 446 S.E.2d 150, 152 (1994) (emphasis added). However, this jurisdiction has not extended the procedures and protections afforded in *Anders* and *Kinch* to civil cases. The majority of states who have addressed this issue have found that *Anders* does not extend to civil cases, including termination of parental rights cases. *See Department of Children and Family Services v. Natural Parents of J.B.*, 736 So.2d 111, 114 (Fla. App. 1999) (*Anders* procedures do not apply in termination of parental rights cases); *County of Kern v. Dillier*, 69 Cal. App. 4th 1412, 1419, 82 Cal. Rptr. 2d 318, 322 (1999) ("*Anders's* 'prophylactic' procedures are designed solely to protect the indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state"); *Denise H. v. Arizona Dept. of Economic Sec.*, 193 Ariz. 257, 259, 972 P.2d 241, 243 (1998) (counsel for a parent appealing from a juvenile court's severance order has no right to file an *Anders* brief). *But see L.C. v. State*, 963 P.2d 761, 348 Utah Adv. Rep. 26 (1998), *cert. denied*, D.C. v. State, 982 P.2d 88 (1999).

In *Denise H.*, counsel for a parent whose parental rights were terminated sought to file an *Anders* brief and have the Arizona Court of Appeals review the record for error. The Court declined, stating:

> [A] severance proceeding is not essentially the same as a criminal proceeding, nor does a parent whose rights are sought to be ter-

> minated enjoy the same rights as a person accused of committing a crime. The right to file an *Anders* brief derives from the Sixth Amendment right to counsel, which applies to persons "accused" in "criminal prosecutions" . . . . A severance proceeding, on the other hand, is clearly civil in nature. It may be filed by the state, . . . or it may be filed by any private person or agency with an interest in the welfare of a child. . . . An indigent parent against whom a petition has been filed has the right to appointed counsel, but that right is afforded by statute and the Due Process Clause, not the Sixth Amendment.
>
> The burden of proof required to terminate a parent's rights, although greater than that required for an ordinary civil proceeding, is still less than that required to convict a person of a crime. The requirement that a person accused of a crime be found guilty beyond a reasonable doubt is based on the common law presumption of innocence. The statutory burden of proof for a severance proceeding, on the other hand, is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, the burdens of proof are neither "very similar" nor do they derive from the same source. Because a parent whose rights are terminated is not equivalent to a convicted criminal, we conclude that counsel for a parent appealing from a juvenile court's severance order has no right to file an *Anders* brief.

Id. at 259, 972 P.2d at 243 (citations omitted). We agree with the Arizona Court of Appeal's reasoning and adopt this majority rule.

Nevertheless, in the exercise of our discretion, see N.C.R. App. P. 2, we have reviewed the record to determine whether the evidence supports the trial court's findings of fact and conclusions of law. We find that the trial court's findings are supported by clear and convincing evidence and therefore affirm the trial court's order terminating the respondents' parental rights.

Affirmed.

Judges WALKER and SMITH concur.

BARBARA V. SHAUT, PLAINTIFF v. AMY CANNON, DEFENDANT

No. COA99-856

(Filed 7 March 2000)

Child Support, Custody, and Visitation— visitation—grandparent—denied

In a case involving a grandmother's attempt to gain visitation rights of her deceased son's two minor children, the trial court did not err in granting defendant's motion to dismiss since a grandparent does not have standing under N.C.G.S. § 50-13.1(a), N.C.G.S. § 50-13.2(b1), N.C.G.S. § 50-13.2A, or N.C.G.S. § 50-13.5(j) when the evidence reveals the parent has been living with her children as an "intact family."

Appeal by plaintiff from order entered 31 March 1999 by Judge Charles T.L. Anderson in Orange County District Court. Heard in the Court of Appeals 28 February 2000.

W. Gregory Duke for plaintiff-appellant.

Chesire & Parker, by D. Michael Parker, for defendant-appellee.

WALKER, Judge.

Plaintiff Barbara V. Shaut filed this action on 10 December 1998 seeking visitation of defendant Amy Cannon's minor children—Alison Cannon, born on 2 November 1987, and William Christopher Cannon, born 18 July 1989. In her complaint, plaintiff alleged that her son, Christopher Ivan Cannon, is the father of the two minor children and that he died on 16 March 1990. Plaintiff further alleged that she had enjoyed a loving relationship with her grandchildren until 24 December 1993. Since then plaintiff has been allowed only very limited contact and visitation with the minor children. Plaintiff asserted that it was in the best interests of the two minor children that she be awarded visitation. Defendant answered and moved to dismiss for failure to state a claim upon which relief can be granted. The trial court granted defendant's motion and dismissed plaintiff's complaint. Plaintiff appeals.

Plaintiff contends the trial court erred in granting defendant's motion to dismiss, and that the complaint adequately states a claim upon which relief can be granted. A motion to dismiss for failure to

state a claim tests the legal sufficiency of the complaint. N.C.R. Civ. P. 12(b)(6); *Stanback v. Stanback,* 297 N.C. 181, 254 S.E.2d 611 (1979). A dismissal of a complaint for failure to state a claim upon which relief can be granted is proper when the complaint on its face reveals that no law supports plaintiff's claim or that facts sufficient to make good claim are absent or when some fact disclosed in that complaint necessarily defeats plaintiff's claim. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986). In passing on this motion, all allegations of the complaint are deemed true and the motion should not be allowed unless the complaint affirmatively shows that the plaintiff has no cause of action. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E.2d 894 (1978).

There are four statutes in North Carolina which permit a grandparent to maintain an action for custody or visitation of a minor child. Plaintiff does not specify under which statute she proceeds; however, it is clear that she has no right to proceed under any of these statutes. Accordingly, we affirm the order dismissing her complaint.

N.C. Gen. Stat. § 50-13.2(b1) permits grandparents 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). N.C. Gen. Stat. § 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). A third statute, N.C. Gen. Stat. § 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 grandparent and the child. Because the situations contemplated by these statutes are not present here, they are inapplicable to establish plaintiff's standing to maintain this action.

Finally, N.C. Gen. Stat. § 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 that grandparents do not have standing, pursuant to N.C. Gen. Stat. § 50-13.1(a) (1995), to seek visitation with their grandchildren when the "natural parents have legal custody of their children and are living with them as an intact family." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749. In *Fisher v. Gaydon*, 124 N.C. App. 442,

445, 477 S.E.2d 251, 253 (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.*"

In her complaint, plaintiff alleged that defendant was living with her two children at the same address from 1 December 1993 until the time the complaint was filed. Thus, defendant had been living with her children as an "intact family" within the meaning of *Fisher.* Plaintiff, therefore, did not have standing to pursue her visitation action under N.C. Gen. Stat. § 50-13.1(a). Furthermore, plaintiff did not allege in her complaint that the current living situation of the minor children was not an "intact family." Accordingly, the trial court properly dismissed plaintiff's complaint.

Affirmed.

Chief Judge EAGLES and Judge SMITH concur.

MARK E. PATE, PLAINTIFF v. STATE FARM FIRE AND CASUALTY COMPANY, DEFENDANT

No. COA99-455

(Filed 7 March 2000)

Appeal and Error— appealability—denial of summary judgment

Plaintiff's appeal of the trial court's denial of his summary judgment motion is dismissed because it is an interlocutory order that is not reviewable since a final judgment has been rendered on the merits.

Appeal by plaintiff from an order entered 23 September 1997 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2000.

Law Offices of Michael J. Bednarik, P.A., by Michael J. Bednarik, for plaintiff-appellant.

Stiles Byrum & Horne, L.L.P., by Ned A. Stiles and Lane Matthews, for defendant-appellee.

HUNTER, Judge.

Mark E. Pate ("plaintiff") appeals from the trial court's denial of his summary judgment motion against State Farm Fire and Casualty Company ("defendant"). This is the only issue before this Court.

Briefly, the facts relevant to this appeal are as follows. Plaintiff sought to repossess a truck owned by defendant's insured, Shawn Brabham ("insured"), when the insured shot several bullets in the air and then on the ground, near plaintiff's feet. One of the bullets fired at the ground, ricocheted and hit plaintiff in the leg, injuring him. In filing the police report, plaintiff told the investigating officer that the insured shot "at him," and that after he was shot, the insured threatened that "the next one will be at your head." The insured was arrested, pled guilty to the criminal charges of (1) assault with a deadly weapon causing serious injury; and (2) communicating threats. Insured was sentenced to three years in prison.

Later, plaintiff filed suit in civil court against insured for personal injury. In his complaint, plaintiff alleged that insured only negligently shot him. Plaintiff did not name defendant as a party to the action, but he did notify defendant of the action pending against its insured. Defendant responded by letter stating that the act in question was not covered under its policy because: (1) plaintiff's injury was not the result of an accident or occurrence as defined by the policy; and (2) any injury sustained by plaintiff was expected or intended by insured. Therefore, defendant refused to defend insured since the incident was not covered by its policy.

Because insured did not respond to plaintiff's complaint, plaintiff motioned the court for a default judgment against him. Plaintiff's motion was granted in the amount of $12,500.00. The trial judge specifically found that insured did not intend to injure plaintiff. Subsequently, plaintiff filed suit against defendant (the case at bar) to have defendant held liable for the default judgment rendered against its insured.

In his motion for summary judgment, plaintiff alleged that because he had gained a default judgment against defendant's insured, and because defendant had "without justification" chosen not to defend its insured in the prior proceeding, defendant had "breached its policy contract and [wa]s now estopped from denying coverage to the Plaintiff . . . ." Since denial of a summary judg-

ment motion is not appealable once the case has gone to trial, we must dismiss plaintiff's appeal because he has brought forward no appealable issues before this Court.

North Carolina law has long been clear on the issue of appealing a denied summary judgment motion after a case has been decided on the merits by the trier of fact:

> Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.
>
> The denial of a motion for summary judgment is an interlocutory order and is not appealable. . . . To grant a review of the denial of the summary judgment motion after a final judgment on the merits . . . would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. . . . [Therefore], we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (citation omitted).

The case at bar went to trial and a properly impaneled jury returned a verdict for defendant. In his brief, plaintiff argues issues of negligence versus intent, policy coverage and defendant's duty to defend the insured in the prior proceeding. However, plaintiff did not preserve the right to argue these issues on appeal where he neither moved the trial court for a directed verdict or judgment notwithstanding the verdict, nor did he give notice of appeal from the jury verdict. N.C.R. App. P. 10(a).

We agree with Judge Sydnor Thompson, formerly of this Court, that "[t]he denial of a motion for summary judgment is not reviewable during appeal [once] a final judgment [has been] rendered in a trial on the merits. Since there was a trial and final judgment in this case, the issue is not before us." *Raintree Homeowners Assn. v. Bleimann*, 116 N.C. App. 561, 564-65, 449 S.E.2d 13, 16 (1994). With no other issue before this Court, we must dismiss plaintiff's appeal.

Dismissed.

Judges JOHN and McGEE concur.

LEISA K. HALL, PLAINTIFF v. KMART CORPORATION, DEFENDANT

No. COA99-209

(Filed 7 March 2000)

Premises Liability— contributory negligence—slip and fall

The trial court did not err in granting summary judgment in favor of defendant-store in a slip and fall case because: (1) plaintiff-customer's testimony demonstrates that the hazard was obvious, making the defense of contributory negligence relevant; and (2) plaintiff did not forecast evidence to indicate that defendant did anything which could or did divert plaintiff's attention from the hazard.

Appeal by plaintiff from order entered 9 November 1998 by Judge W. Douglas Albright in Rowan County Superior Court. Heard in the Court of Appeals 17 November 1999.

Doran and Shelby, P.A., by Michael Doran, for the plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith, for the defendant-appellee.

LEWIS, Judge.

This case arises from a slip-and-fall incident that occurred on 27 March 1997. While shopping in the toy department at defendant's store in Salisbury, North Carolina, plaintiff slipped on an empty Barbie doll box and fell to the floor. She thereafter instituted a negligence action against defendant, claiming pain and suffering, permanent partial disability of her physical faculties, emotional distress and loss of enjoyment of life. On 9 November 1998, the trial court granted defendant's motion for summary judgment. Plaintiff appeals.

Plaintiff first argues that the trial court erred in granting summary judgment in favor of the defendant. Specifically, plaintiff contends

that the defendant's evidence failed to demonstrate contributory negligence as a matter of law.

The standard for summary judgment is aptly stated in *Diorio v. Penny*, 103 N.C. App. 407, 405 S.E.2d 789 (1991), *aff'd*, 331 N.C. 726, 417 S.E.2d 457 (1992). "While issues of negligence and contributory negligence are rarely appropriate for summary judgment, the trial court will grant summary judgment in such matters where the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury." *Id.* More specifically, the doctrine of contributory negligence will preclude a defendant's liability if the visitor actually knew of the unsafe condition or if a hazard should have been obvious to a reasonable person. *Pulley v. Rex Hosp.*, 326 N.C. 701, 705, 392 S.E.2d 380, 383 (1990).

The evidence in this case tends to show that the floor of the aisle contained several empty boxes, but was well lit such that plaintiff actually saw the empty boxes, perceived them as a hazard, and attempted to step around them. During this time, however, plaintiff was engaged in a conversation with another customer. Plaintiff testified as follows:

> A. I was walking down the aisle in the Barbie doll section . . . And there was a lady on the other end, and we was talking about Barbie dolls for [E]aster baskets. And when I walked towards her, I hit one of the boxes that was in the floor and fell. And it slid right out from under me . . .
>
> Q. Were there more than one—was there more than one box on the floor?
>
> A. Yes. There was quite a few boxes all over the aisle . . .
>
> Q. And could you see all these boxes?
>
> A. Yes.
>
> Q. As you were walking toward the lady, with whom you were talking, where were you looking?
>
> A. I was trying to miss the boxes and then, when I was looking up at her talking—and I guess I didn't miss one of them.
>
> Q. Well, when you slipped, were you looking at the floor or were you looking down at this other lady?

A. It all happened so fast, I was looking in the air. I was looking at her when I—I was talking right to her.

Q. So, when you slipped, you were facing her and talking to her?

A. Yeah.

(Hall Dep. at 17-19).

Plaintiff's testimony demonstrates that the hazard here was obvious, making the defense of contributory negligence relevant. Plaintiff argues, however, that this evidence establishes that the *defendant* enticed her eyes away from the obvious hazardous condition in the aisle. Plaintiff is correct in her legal assertion that the defense of contributory negligence cannot be asserted where the defendant diverted the plaintiff's attention, preventing the visitor from discovering the obvious hazard. *Walker v. Randolph County*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960). But plaintiff has presented no forecast of evidence in this case to indicate that defendant did anything which could or did divert plaintiff's attention from the hazard. The forecast of evidence does establish that plaintiff, in choosing to converse with another customer while walking down the aisle, was inattentive because she chose to be. We conclude that the doctrine of contributory negligence bars plaintiff's recovery from the defendant by any measure of reasonableness. The trial court properly granted summary judgment in favor of the defendant.

Because we conclude that the trial court's grant of summary judgment was proper, it is unnecessary to address plaintiff's remaining argument.

Affirmed.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. FREDDIE LUDWIG WAMBACH, DEFENDANT

No. COA99-1095

(Filed 7 March 2000)

Appeal and Error— writ of habeas corpus—effect of Fourth Circuit decision—tax on seized narcotics

Defendant's appeal from the denial of his writ of habeas corpus petition seeking relief from an alleged double jeopardy violation as a result of a tax assessment on drugs and the subsequent conviction for possession with intent to sell and deliver those drugs is dismissed because no appeal lies from an order made in a habeas corpus proceeding instituted under Chapter 17 of the North Carolina General Statutes since the remedy, if any, is by petition for writ of certiorari, and the Court of Appeals declines to address these issues pursuant to a writ of certiorari since: (1) the constitutionality of the assessment and collection of the drug tax has been previously upheld by North Carolina appellate courts; and (2) federal appellate decisions are not binding upon either the appellate or trial courts of this State with the exception of decisions of the United States Supreme Court.

Appeal by defendant from order entered 5 April 1999 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 21 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for the State.

Steven A. Grossman for defendant-appellant.

SMITH, Judge.

On 3 January 1995, the North Carolina Department of Revenue notified defendant of a controlled substance tax assessment of $3,210.67 for thirty-eight dosage units of cocaine. The Department of Revenue on 7 January 1995 garnished $1,874.50 which was in defendant's possession at the time of his arrest. Defendant was subsequently convicted on 16 August 1995 of possession with intent to sell and deliver cocaine, resisting a public officer, and determined to be an habitual felon. The trial court sentenced him to a term of 96 to 125 months' imprisonment, and defendant appealed. This Court found no error on appeal. *State v. Wambach*, 122 N.C. App. 580, 475 S.E.2d 259

(1996) (unpublished), *cert. denied*, 345 N.C. 645, 483 S.E.2d 717 (1997).

On 12 November 1998, defendant filed a *pro se* petition for writ of habeas corpus. Defendant alleged that he had been subjected to double jeopardy as a result of an improperly imposed second punishment. After hearing the matter on 1 April 1999, the trial court determined that defendant had not been placed in jeopardy twice for the same offense and denied defendant's petition. From the trial court's order, defendant appeals.

Defendant contends the trial court committed reversible error by denying his petition for writ of habeas corpus. He argues the trial court erred by not following precedent from the United States Court of Appeals for the Fourth Circuit which found North Carolina's drug tax (N.C. Gen. Stat. § 105-113.105 *et seq.* (1999)) to be a criminal penalty. *See Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied*, 525 U.S. 813, 142 L. Ed. 2d 36 (1998). Defendant asks that his convictions, which were subsequent to his partial payment of the drug tax, be vacated.

As an initial matter, this Court notes that petitioner has no appeal of right from the trial court's order.

> In this jurisdiction the rule is firmly established that no appeal lies from an order made in a habeas corpus proceeding instituted under N.C. Gen. Stats., ch. 17 by a prisoner to inquire into the legality of his restraint. The remedy, if any, is by petition for certiorari addressed to the sound discretion of the appropriate appellate court.

State v. Niccum, 293 N.C. 276, 278, 238 S.E.2d 141, 143 (1977). Accordingly, defendant's appeal is dismissed.

Defendant's counsel requests that "in the event this Court deems appeal inappropriate, to consider the issues herein by way of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, due to their constitutional nature." However, the constitutionality of the assessment and collection of the drug tax has been previously upheld in *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997), and *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). As for the applicability of the *Lynn* decision, "with the exception of decisions of the United States Supreme Court, fed-

eral appellate decisions are not binding upon either the appellate or trial courts of this State." *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589, *disc. review denied*, 350 N.C. 836, — S.E.2d —, *cert. denied*, — U.S. —, 145 L. Ed.2d 414 (1999). We therefore decline to address these issues pursuant to a writ of certiorari.

Dismissed.

Chief Judge EAGLES and Judge WALKER concur.

LINDA MAZZONE WATKINS, PLAINTIFF-APPELLEE v. CLAIBORNE E. WATKINS, JR., DEFENDANT-APPELLANT

No. COA99-622

(Filed 7 March 2000)

Contempt— civil—insufficient findings

The trial court's order purporting to hold defendant in civil contempt is vacated because: (1) the trial court's findings are insufficient to support its holding; and (2) the trial court failed to comply with the provisions of N.C.G.S. § 5A-23 when it did not provide defendant with notice or an order to show cause.

Appeal by defendant from order entered 8 December 1998 by Judge Elaine M. O'Neal in Durham County District Court. Heard in the Court of Appeals 28 February 2000.

No brief for plaintiff-appellee.

Herring McBennett Mill Green & Flexner, PLLC, by Scott E. Allen, for defendant-appellant.

WALKER, Judge.

Defendant appeals from an order of the trial court finding him "in contempt of this court and its order." The record shows that plaintiff Linda Mazzone Watkins and defendant Claiborne E. Watkins, Jr. were married on 18 July 1992 and separated on 28 November 1995. On 12 December 1997, plaintiff and defendant entered into a court-approved consent order, governing issues of custody and visitation of their minor child. Subsequently, defendant filed a motion to show cause

alleging that plaintiff violated the 12 December 1997 consent order. This matter was heard on 2 November 1998 and the trial court entered an order on 8 December 1998 finding in part:

> 2. THAT the [Defendant's] actions in filing this motion and constantly paging the plaintiff on a regular basis since the last hearing in this matter has become overreaching and oppressive.

Accordingly, the trial court concluded that defendant was in contempt of court and ordered that he serve thirty days in jail, with twenty-nine days suspended.

Although the trial court did not indicate whether the order is criminal or civil in nature, it is apparent the order purports to find defendant in civil contempt of the 12 December 1997 order since this is the only order in the record. Proceedings for civil contempt are governed by N.C. Gen. Stat. § 5A-23, which prescribes the steps to be followed by the trial court before a person can be found to be in contempt. Civil contempt orders are properly appealed to this Court. N.C. Gen. Stat. § 5A-24 (Cum. Supp. 1998).

The defendant contends the trial court erred in finding him in contempt of the 12 December 1997 order permitting him to have telephone contact with the minor child.

The 12 December 1997 order provides in part:

> 3(e). The defendant shall be entitled to talk with the minor child on the telephone once per day before 8:00 pm for at least five minutes when the minor child is not with him. Both parties shall try to facilitate this call and the defendant shall only call once a day requesting that call and the plaintiff if she does not accept the call and allow the child to talk at that time shall call the defendant and allow the minor child to talk to his father. The plaintiff shall be aware of the defendant's call by either having an answering machine or something on her phone to show what number is being called so that she can identify the defendant's number.

After reviewing the record, we conclude the trial court's findings are insufficient to support its holding that the defendant is in violation of the 12 December 1997 order in view of provision 3(e) of that order. Furthermore, the trial court failed to comply with the provisions of N.C. Gen. Stat. § 5A-23 in its contempt proceeding against the defendant. In particular, no notice or order to show cause was ever issued to the defendant.

We urge our trial courts to identify whether contempt proceedings are in the nature of criminal contempt as set forth in Article I, Chapter 5A of the North Carolina General Statutes or are in the nature of civil contempt as set forth in Article II, Chapter 5A of the North Carolina General Statutes.

In light of the foregoing, the trial court's order of 8 December 1998 is

Vacated.

Chief Judge EAGLES and Judge SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 MARCH 2000

ALLEN v. GIBBS No. 99-896	McDowell (97CVS806)	Affirmed
BOTTOMS v. COLEMAN No. 99-379	Wilson (97CVS1981)	Affirmed
BOUCVALT v. BD. OF ADJUST., COUNTY OF DURHAM No. 99-349	Durham (97CVS2239)	Reversed
CAVANAUGH v. LEXINGTON FURN. No. 99-122	Ind. Comm. (600965)	Affirmed
CHARLOTTE-MECKLENBURG HOSP. AUTH. v. BOGER No. 99-548	Mecklenburg (98CVD7267)	Affirmed
CRANFORD WOODCARVING, INC. v. MODULAR WOOD SYS. No. 99-396	Catawba (96CVS3225)	Affirmed
DICK v. BRADY No. 98-1320	Rockingham (96CVS1824)	Affirmed
ELIZABETH CITY HOUSING AUTH. v. LEIGH No. 99-377	Pasquotank (98CVD633)	Reversed and Remanded
ESTATE OF JONES v. RAY No. 99-439	Wake (96CVS10462)	Affirmed
FAILE v. GENERAL TIRE & RUBBER CO. No. 99-900	Ind. Comm. (453286)	Affirmed
FANTASY WORLD, INC. v. GREENSBORO BD. OF ADJUST. No. 99-438	Guilford (95CVS5024)	Vacated and Remanded
FELMET v. REYNOLDS METALS CO. No. 98-1616	Ind. Comm. (490145)	Affirmed
FRATE v. NATIONSCREDIT OF ALABAMA No. 99-628	Guilford (97CVS6307)	Affirmed
HARRIS v. TOWN OF ATLANTIC BEACH No. 99-517	Ind. Comm. (671189)	Affirmed

HUNTLEY v. PANDYA No. 99-125	Mecklenburg (97CVS3972)	Reversed and Remanded
IN RE AUGHENBAUGH No. 98-1603	Harnett (97J131)	Affirmed
IN RE CRAWFORD No. 99-943	Gaston (97J469)	Affirmed
IN RE EDDY No. 99-104	Franklin (93J17)	Affirmed
IN RE GATT No. 99-999	Cumberland (96J184) (96J185)	Affirmed
IN RE PEREZ No. 99-744	Lee (98J65)	Affirmed
IN RE STEWART No. 99-902	Durham (99SPC315)	Affirmed
McCOLLOUGH v. N.C. BD. OF DENTAL EXAM'RS No. 98-1500	Jackson (98CVS120)	Affirmed
ONSLOW COUNTY ex rel. ROBERTS v. ROBERTS No. 99-502	Onslow (94CVD2014)	Vacated and Remanded
PARNELL v. HARTSELL, HARTSELL & WHITE, P.A. No. 99-78	Cabarrus (98CVS1880)	Affirmed
PHELPS v. KERLEY No. 99-901	Cumberland (97CVS8898)	Dismissed
SHANNONHOUSE v. WEYERHAEUSER CO. No. 99-307	Ind. Comm. (658951)	Affirmed
STATE v. BARBER No. 99-372	Union (97CRS3431)	No Error
STATE v. BRIDGES No. 99-868	Durham (97CRS23797) (97CRS23799)	No Error
STATE v. BROWN No. 99-157	Guilford (97CRS060993)	No Error
STATE v. COOK No. 99-867	Forsyth (97CRS47644) (98CRS27577)	No Error
STATE v. DAMERON No. 99-59	Cleveland (97CRS12097)	Affirmed

STATE v. HOOD No. 99-791	Forsyth (98CRS18526) (98CRS18891)	No Error
STATE v. LEE No. 99-825	Hertford (98CRS3131) (98CRS4180)	No Error
STATE v. MATTHEWS No. 99-288	Yadkin (96CRS3136) (96CRS3137)	No prejudicial error
STATE v. McCLENDON No. 99-1087	Union (98CRS12638)	No Error
STATE v. McDONALD No. 99-188	New Hanover (98CRS617) (98CRS12282) (98CRS19385)	No prejudicial error
STATE v. McKINNON No. 99-796	Durham (95CRS35211)	No Error
STATE v. MELVIN No. 99-1011	Duplin (98CRS8916) (99CRS8917)	No Error
STATE v. PRICE No. 99-972	Union (94CRS8932) (94CRS8933) (94CRS9146)	No Error
STATE v. REED No. 99-763	Durham (96CRS25953) (96CRS25954)	No Error
STATE v. REYNOSA No. 99-1207	Pamlico (96CRS468)	No Error
STATE v. RIDDLE No. 99-1060	Gaston (98CRS11841)	No Error
STATE v. TODD No. 99-1023	Forsyth (98CRS15211) (98CRS15212)	No Error
STATE v. WARD No. 99-229	Wake (97CRS30103) (97CRS30408)	No prejudicial error
STATE v. WOODARD No. 99-839	Sampson (98CRS4818) (98CRS4819)	No Error
STATE ex re. HOWES v. NICELY No. 99-328	Wake (95CVS2298)	Affirmed

TAZELAAR v. SHUPING No. 99-390	Orange (97CVS1440)	Appeal Dismissed
WALKER v. COBLE No. 99-180	Alamance (98CVS1583)	Affirmed in part; Reversed and remanded in part
ZUBOWICZ v. BROWN No. 99-873	Onslow (96CVS1905)	Affirmed

APPENDIXES

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
THE PRELITIGATION FARM
NUISANCE MEDIATION PROGRAM

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
STATEWIDE MEDIATED
SETTLEMENT CONFERENCES IN
SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS
TO THE RULES IMPLEMENTING
PROCEDURES IN EQUITABLE
DISTRIBUTION AND OTHER
FAMILY FINANCIAL CASES

CREATION OF THE ALTERNATIVE
DISPUTE RESOLUTION COMMITTEE

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

WHEREAS, section 7A-38.3 of the North Carolina General Statutes establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to the bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to implement section 7A-38.3 by adopting rules and standards concerning said program,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e), Rules Implementing the Prelitigation Farm Nuisance Mediation Program are adopted to read as in the following pages. These Rules shall be effective on the 1st day of September, 2000.

Adopted by the Court in conference the 12th day of July, 2000. The Appellate Division Reporter shall publish the Rules Implementing the Prelitigation Farm Nuisance Program in their entirety at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION.

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. EXEMPTION FROM G.S. § 7A-38.1.

A dispute mediated pursuant to G.S. § 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. § 7A-38.1.

RULE 3. SELECTION OF MEDIATOR.

A. Time Period for Selection. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. Selection of Certified Mediator by Agreement. The Clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate farm nuisance disputes in the judicial district encompassing the county in which the request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. Nomination of Non-Certified Mediator by Agreement. The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. Court Appointment of Mediator. If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator and the senior resident superior court judge shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator.

E. Mediator Information Directory. To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

RULE 4. THE PRELITIGATION FARM MEDIATION.

A. When Mediation is to be Completed. The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. Extensions. A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. Where the Conference is to be Held. Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. Recesses. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. Duties of Parties, Attorneys and Other Participants. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. Sanctions for Failure to Attend. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. Authority of Mediator.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose.

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4

shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

RULE 6. COMPENSATION OF THE MEDIATOR.

A. By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. By Court Order. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of ~~$100.00~~ $125.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of ~~$100.00~~ $125.00, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. Postponement Fee. As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business

days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E.~~D~~. Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. Sanctions For Failure To Pay Mediator's Fee. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a resident or presiding superior court judge.

DRC Comments to Rule 6

DRC Comment to Rule 6.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 6.D.

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to post-

ponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 6.E.

If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 6.F.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 6.E. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 7. WAIVER OF MEDIATION.

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party who requested mediation shall file the waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. Contents of Certification. Following the conclusion of mediation or the receipt of a waiver of mediation signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation was held, the certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. Deadline for Filing Mediator's Certification. The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF PRELITIGATION FARM NUISANCE DISPUTES.

Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

RULE 10. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

WHEREAS, section 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of September, 2000.

Adopted by the Court in conference the 12th day of July, 2000. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

RULE 1. INITIATING MEDIATED SETTLEMENT CONFERENCES

A. PURPOSE OF MANDATORY SETTLEMENT CONFERENCES

Pursuant to G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. § 7A-37.1, Arb. Rule 1(b)].

B. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Timing of the Order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.B.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) **Content of Order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed

mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an A.O.C. form.

(4) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) **Motion to Dispense With Mediated Settlement Conference.** A party may move the Senior Resident Superior Court Judge, to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) **Motion to Authorize the Use of Other Settlement Procedures**. A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE

(1) **Order by Local Rule**. In judicial districts in which a system of scheduling orders or scheduling conferences

is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Scheduling Orders or Notices**. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling Conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.~~A.~~B.** The provisions of Rule 1.B(4), (5) and (6) shall apply to Rule 1~~.B.~~ C. except for the time limitations set out therein.

(5) **Deadline for Completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated

settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.~~B.~~ C. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of Mediator.** The parties may select and nominate, and the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.C.

RULE 2. SELECTION OF MEDIATOR

A. **SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES.** The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an A.O.C. form.

B. **NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and

opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an A.O.C. form.

C. **APPOINTMENT OF MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an A.O.C. form. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Superior Court Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified non-attorney mediator, and if so, the Senior Resident Superior Court Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Superior Court Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in local rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

D. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Senior

Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. **DISQUALIFICATION OF MEDIATOR.** Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.~~A.~~B.(1) shall state a deadline for completion of the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. **REQUEST TO EXTEND DEADLINE FOR COMPLETION.** A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any

party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. **RECESSES.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. **THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS.** The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES.

A. **ATTENDANCE.**

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what

terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance Company Representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or

claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. **FINALIZING AGREEMENT.** If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. **PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.

E. **RELATED CASES.** Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(l) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted

against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision which provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, the Senior Resident Superior Court Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to

and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) <u>**Scheduling the Conference.**</u> The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) <u>**Disclosure.**</u> The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.

(4) **Reporting Results of Conference.** The mediator shall report to the court on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(5) **Scheduling and Holding the Conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties

shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

D. **INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. **POSTPONEMENT FEES.** As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

F. **PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.E.

Though MSC Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, *the mediator, may, in* his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and

court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000.

or

(ii) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and

(b) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B. (1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following: (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator:

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the US District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Court; upon the recommendation of the Dispute Resolution Commission and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. § 7A-38.1, implementing mediated settlement conferences in that district.

RULE 11. DEFINITIONS

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution. Commission.

RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

WHEREAS, section 7A-38.4 of the North Carolina General Statutes establishes a pilot program in district court to provide for settlement procedures in equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4(c) provides for this Court to implement section 7A-38.4 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4(c), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of September, 2000.

Adopted by the Court in conference the 12th day of July, 2000. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, as amended through this action, at the earliest practicable date.

Freeman, J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. § 7A-38.4, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. § 7A-37.1, Arb. Rule 1(b)].

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party in an equitable distribution, child support, alimony, or post-separation support action, shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. § 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) **Equitable Distribution Scheduling Conference.** At the scheduling conference mandated by G.S. § 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) **Scope of Settlement Proceedings.** All other financial issues existing between the parties when the equitable

distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from the program.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral; and

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial

settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) **Court-Ordered Settlement Procedures in Other Family Financial Cases.** Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) **Motion to Dispense With Settlement Procedures.** A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have submitted the action to arbitration or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a media-

tor certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. **APPOINTMENT OF CERTIFIED MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where

mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who request appointments in said district.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.A.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. **REQUEST TO EXTEND DEADLINE FOR COMPLETION.** A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. **RECESSES.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. **THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS**. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. **ATTENDANCE.**

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(b) **Attorneys.** At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

B. FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL.

The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the conclusion of the conference unless the parties have executed final documents. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person an appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court upon the recommendation of the Dispute Resolution Commission, which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private Consultation.** The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.~~1(l),~~ .4 (k) which states:

~~Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.~~

~~No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.~~

Evidence of statements made and conduct occurring in a settlement proceeding conducted pursuant to this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No such settlement shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement procedure pursuant to this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in a civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference

(4) Reporting Results of Conference. The mediator shall report to the Court, or its designee, using an AOC form, within 10 days of the conference, whether or not an agreement was reached by the parties. If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case. If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission

explaining the mediated settlement conference process and the operations of the Commission.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment.

C. **PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. **INABILITY TO PAY.** No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7. B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be a practitioner member of the Academy of Family Mediators; or

2. Be certified as a Superior Court mediator prior to December 31, 1998, and have family law or family mediation experience and be recommended by a regular District Court Judge in the applicant's district who has familiarity with the applicant's competence and qualifications in the area of family law or family mediation; or

3. Have completed a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9 and have additional experience as follows:

   (a) as a licensed attorney and/or judge of the General Court of Justice for at least four years; or

   (b) as a licensed psychologist, licensed family counselor, licensed pastoral counselor or other licensed mental health professional for at least four years; or

   (c) as a mediator having mediated in a community center or other supervised setting at least 5 cases each year for four years after first having completed a 20 hour mediation training program; or

   (d) as a certified Superior Court mediator having mediated at least 10 cases in the past two years which may include family mediations, cases in state or federal courts or cases before state or federal administrative agencies; or

   (e) as a certified public accountant for at least four years.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission.

C. Be a member in good standing of the State Bar of one of the United States or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties three mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is a practitioner member of the Academy of Family Mediators, or who is an A.O.C. mediator.

~~To be certified pursuant to these rules within six months of the adoption of these rules,~~ During the period of the pilot program, a person may satisfy the observation requirements of this section by satisfactorily demonstrating that he/she has served as mediator with divorcing parties having custody or family financial disputes in at least five (5) cases or for fifty (50) hours.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Agree to be placed on at least one district's mediator appointment list and accept appointments, unless the mediator has a conflict of interest which would justify disqualification as mediator.

Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child

development and interpersonal relations at any time prior to that recertification.)

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to these rules shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections.

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Knowledge of communication and information gathering skills.

(4) Standards of conduct for mediators.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and postseparation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Academy of Family Mediators may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an AFM approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the AFM approved training or in some other acceptable course.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of the procedure requested unless the Court finds that the parties did not agree upon the procedure to be utilized, the neutral to conduct it and the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) Extensions of Time. A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a

settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(c) **Payment of Neutral's Fee**. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) **Sanctions for Failure to Attend Other Settlement Procedures.** If any person required to attend a settlement proceeding fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) **Selection of Neutrals in Other Settlement Procedures.**

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for autho-

rization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by § G.S. 7A- 38.~~1(l)~~ .4.(k) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) **Disclosure.** The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) **Reporting Results of the Proceeding.** The neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11 and 12 herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. **NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. **PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the parties' case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. **REPLIES TO PRE-CONFERENCE SUBMISSIONS.** No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. **CONFERENCE PROCEDURE.** Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. **MODIFICATION OF PROCEDURE.** Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. **EVALUATOR'S DUTIES.**

(1) **Evaluator's Opening Statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The facts that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Evaluator.** In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) **Report of Evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. **Settlement Judge.** A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge.

B. **Conducting the Conference.** The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. **Confidential Nature of the Conference.** Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. **Report of Judge.** Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, and the name of the person designated to file judgments or dismissals concluding the action.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

(A) The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

(B) The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

CREATION OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

The Supreme Court finds that there is a need in North Carolina for a single forum to provide for ongoing coordination and policy direction for the court-sponsored dispute resolution programs in the state. That is the conclusion of a Task Force on Dispute Resolution appointed by Chief Justice Henry Frye. The Supreme Court under its authority to oversee the operation of the courts and to adopt rules of practice and procedure for the courts that are supplemental to the acts of the General Assembly, adopts the following rule to address the need for such a single forum.

1. There is hereby created the Alternative Dispute Resolution Committee of the North Carolina State Judicial Council. The Committee shall consist of twenty-four members, appointed by the Chief Justice as follows:

- An associate justice of the Supreme Court of North Carolina
- A judge of the North Carolina Court of Appeals, recommended by the Chief Judge of that court
- Two superior court judges, serving staggered terms
- Two district court judges, serving staggered terms
- The Chair of the Dispute Resolution Commission or his designee from among the Commission's members
- Seven attorneys licensed to practice in NC, at least two of whom should be neutrals, recommended by the President of the NC Bar Association, serving staggered terms
- A custody mediator
- A trial court administrator
- A person active in the work of community settlement centers, who shall not be an attorney
- Two professors knowledgeable about dispute resolution, serving staggered terms
- The Director of the Administrative Office of the Courts or his designee
- Two citizens interested in dispute resolution programs, who would not be eligible for appointment in any other category, serving staggered terms

- Two members of the Judicial Council

2. The Chief Justice shall designate a person to serve as chair, and may designate a person to serve as vice-chair or co-chair. Except for ex-officio members (AOC Director, DRC Chair, and Council members), all terms are for four years. No person may serve for more than two successive full terms. The fact that a person serves on the Dispute Resolution Commission or in any other official capacity in an activity related to a dispute resolution program does not disqualify that person from serving on the Committee if the person is otherwise qualified to serve.

3. The Committee shall have the following duties:

   - To provide ongoing coordination and policy direction for court-sponsored dispute resolution programs in the state
   - To provide a forum for the consideration of issues affecting the future direction of the court-sponsored dispute resolution movement within the North Carolina court system
   - To recommend to the Judicial Council guidelines for the appropriate form of dispute resolution to be used as a case management tool in cases heard in the General Court of Justice
   - To monitor the effectiveness of dispute resolution programs and report its findings to the State Judicial Council
   - To provide a forum for the resolution of inter-program issues that arise among the various programs sponsored by the court system
   - To serve as a clearing-house for rules that affect dispute resolution programs before they are submitted to the Supreme Court for review and adoption

4. The Committee may establish subcommittees as necessary.

5. The State Judicial Council may delegate other duties to the Committee and the State Judicial Council may also establish supplemental procedures and policies to regulate the work of the Committee.

6. The Committee may establish liaisons with any groups interested in court-sponsored dispute resolution programs, such as the Fourth Circuit mediation program, the Industrial Commission's mediation program, the Office of Administrative Hearing's mediation program, and the Mediation Network of North Carolina.

Adopted by the Court in conference the 13th day of July, 2000. The Appellate Division Reporter shall publish this order at the earliest practicable date.

Freeman, J.
For the Court

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WORD AND PHRASE INDEX

HEADNOTE INDEX

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ACCOMPLICES AND ACCESSORIES

Jury instruction—accessory after the fact—tried as a principal—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by refusing to instruct the jury on the charge of accessory after the fact because a defendant tried as a principal may not be convicted of the crime of accessory after the fact since it is a substantive crime and not a lesser degree of the principal crime. **State v. Johnson, 683.**

Testimony of one against another—limiting instruction—The trial judge erred in a robbery prosecution by not giving a limiting instruction when a codefendant's testimony was introduced over defendant's objection. The court is required to give a limiting instruction when evidence is introduced at a joint trial against one defendant which is not admissible against a codefendant and the codefendant makes a general objection to the evidence. The objecting defendant must make a timely objection or a specific request for a limiting instruction, but is not required to request a limiting instruction if he makes a general objection. **State v. Robinson, 520.**

ADMINISTRATIVE LAW

Final agency decision—recusal of final decision-maker—The Director of the Division of Facility Services did not err in refusing to recuse herself, upon Bio-Medical Applications' request, from the final agency decision even though she had previously approved the settlement agreement and was in essence reviewing her own decision to award a certificate of need. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res., 103.**

APPEAL AND ERROR

Appealability—denial of summary judgment—Plaintiff's appeal of the trial court's denial of his summary judgment motion is dismissed because it is an interlocutory order that is not reviewable since a final judgment has been rendered on the merits. **Pate v. State Farm Fire & Cas. Co., 836.**

Appealability—denial of summary judgment—res judicata—The denial of a motion for summary judgment on the basis of res judicata affects a substantial right and entitles a party to an immediate appeal. **Wilson v. Watson, 500.**

Appealability—improper venue—The denial of defendants' motion to dismiss for improper venue was immediately appealable because the erroneous denial would work an injury which could not be corrected if an appeal was not allowed before the final judgment. **McClure Estimating Co. v. H.G. Reynolds Co., 176.**

Appealability—interlocutory order—certification erroneous—The trial court's attempt to grant Rule 54(b) certification based on its order compelling arbitration and denying defendant's motion for summary judgment fails because the order is not a final judgment, and defendant has not shown the order deprives it of a substantial right. **Russell v. State Farm Ins. Co., 798.**

Appealability—interlocutory order—certiorari granted—Although the trial court's grant of defendants St. Paul's and Lee's motion to dismiss under Rule 12(b)(6) is an interlocutory order since plaintiffs did not present any argument to support a conclusion that the order affects a substantial right and the order was

APPEAL AND ERROR—Continued

not certified pursuant to Rule 54(b), the Court of Appeals exercised its discretionary power under N.C. R. App. P. 21(a)(1) to grant certiorari to address plaintiffs' appeal. **Lee v. Mut. Community Sav. Bank, 808.**

Appealability—juvenile—adjudication of delinquency—not a final order—A finding that a juvenile was delinquent on four misdemeanor charges of injury to personal property was not immediately appealable and the appeal was dismissed as premature because it was not a final order under N.C.G.S. § 7A-666 since no disposition had been made. **In re J.L.W., 596.**

Appealability—juvenile—finding of probable cause—not a final order—A finding of probable cause that a juvenile had committed felony larceny and felony possession of stolen property was not immediately appealable and was dismissed since it was not a final order under N.C.G.S. § 7A-666. **In re J.L.W., 596.**

Appealability—motion in limine—Although plaintiffs contend the trial court erred in granting defendant's motion in limine to exclude testimony of an expert witness expected to provide testimony as to plaintiffs' losses as a result of defendant's actions regarding plaintiffs' bank loans, motions in limine are not appealable. **Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co., 695.**

Appealability—order vacated—new trial—issues not considered—Although defendant challenges the trial court's denial of his motions for summary judgment, directed verdict, and judgment notwithstanding the verdict (JNOV) on the issues of fraud, (1) a trial court's denial of a motion for summary judgment need not be addressed when the moving party thereafter makes a motion for directed verdict; (2) defendant's appeal on the issues regarding fraud is interlocutory since the trial court's post-trial orders have been vacated and a new hearing has been ordered on defendant's motion for JNOV or new trial; and (3) defendant's motion for a directed verdict will be addressed on rehearing. **Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co., 695.**

Appealability—stay of arbitration—An appeal from a stay of arbitration pending completion of discovery in an action arising from an automobile accident was dismissed as interlocutory where the order neither compelled nor prohibited arbitration but reserved its ruling until the parties had complied with discovery. **McCrary v. Byrd, 487.**

Assignments of error—basis for argument—One of the defendant's arguments on appeal from a cocaine trafficking charge was dismissed where it was based entirely on an assignment of error submitted to the Court of Appeals in a motion to amend the record which the Court of Appeals had denied. **State v. Broome, 82.**

Brief—supporting authority or citation of authority—An assignment of error concerning the sufficiency of the evidence in a robbery prosecution was considered abandoned where defendant did not make any supporting argument or citation of authority. **State v. Hatcher, 524.**

Motion for appropriate relief on appeal—newly discovered evidence—Defendant's motion for appropriate relief for newly discovered evidence in the Court of Appeals was denied where there was no reasonable possibility of a different result, the new evidence merely served to contradict, impeach or discred-

APPEAL AND ERROR—Continued

it other testimony, was not relevant, and there was no showing that it was not available at trial or at the hearing for the first motion for appropriate relief. **State v. Garner, 1.**

Motion for appropriate relief on appeal—prosecutorial misconduct— Defendant's motion in the Court of Appeals for appropriate relief based upon prosecutorial misconduct was denied where it was based upon the same issue overruled in an assignment of error, and where the exculpatory evidence which allegedly should have been furnished to defendant was not of a nature to produce a different result, even if it was in the possession of the State. **State v. Garner, 1.**

Notice of appeal—sufficient—Although defendant filed a motion to dismiss plaintiffs' appeal on grounds that the notices of appeal were not timely and failed to provide sufficient notice of the orders from which the appeal was taken, the notices were sufficient to satisfy the requirements of N.C. R. App. P. 3(d). **Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co., 695.**

Preservation of issues—constitutional issues—failure to raise in trial court—Although defendant in a second-degree murder case contends the trial court's exclusion of evidence violated his Sixth Amendment right to confront his accusers and present a defense, this constitutional argument is not considered because it was neither asserted nor determined in the trial court. **State v. Deese, 413.**

Preservation of issues—denial of motion to dismiss—no formal objection required—new theory—lost benefit of objection—Although N.C.G.S. § 1A-1, Rule 46(b) preserved plaintiff-husband's objection to the trial court's order which partially denied his motion to dismiss defendant-wife's counterclaim for equitable distribution, plaintiff thereafter lost the benefit of his objection by developing another theory of defense when the issues were set out in a pretrial order to which plaintiff freely consented while represented by competent counsel. **Inman v. Inman, 707.**

Preservation of issues—failure to argue assignment of error—Although defendant claims the trial court erred in convicting him for robbery with a dangerous weapon and of being a violent habitual felon by ruling the State must prove beyond a reasonable doubt that defendant was convicted of second-degree murder in Rowan County Superior Court and defendant pled guilty to the violent felony of assault with intent to commit a felony in California, defendant failed to argue this assignment of error, and therefore, it is deemed abandoned. **State v. Stevenson, 235.**

Preservation of issues—failure to argue assignment of error—Although defendant claims the trial court erred in convicting him for robbery with a dangerous weapon and of being a violent habitual felon by admitting into evidence a certified true copy of a record of defendant's conviction in California for assault with intent to commit oral copulation, defendant failed to argue this assignment of error, and therefore, it is deemed abandoned. **State v. Stevenson, 235.**

Preservation of issues—failure to cite authority—abandonment of issue—Although plaintiffs contend the trial court erred in failing to instruct the jury on the doctrine of concurring acts of negligence in regard to its contrib-

APPEAL AND ERROR—Continued

utory negligence instruction, plaintiffs do not cite any legal authority nor do they make an argument for extension of the law in support of their argument as required by N.C. R. App. P. 28(b)(5), and therefore, this issue is abandoned. **Benton v. Hillcrest Foods, Inc., 42.**

Preservation of issues—failure to cite authority— abandonment of issue—Although plaintiff contends the trial court erred in considering the affidavit filed on behalf of the unnamed defendant and subsequently converting the unnamed defendant's motion to dismiss into a hearing on a motion for summary judgment, plaintiff abandoned this assignment of error under N.C. R. App. P. 28(b)(5) by failing to cite any authority. **Thomas v. Washington, 750.**

Preservation of issues—failure to cite authority—failure to indicate prejudicial error—Although defendant claims the trial court erred in convicting him for robbery with a dangerous weapon and of being a habitual felon by admitting into evidence a certified copy of a 1973 plea to second-degree murder, defendant has failed to preserve this issue because he has not cited any authority as required by N.C. R. App. P. 28(b)(5) and he has failed to indicate any prejudicial error. **State v. Stevenson, 235.**

Preservation of issues—failure to object at trial—Although defendant contends the trial court committed reversible error in convicting him for robbery with a dangerous weapon and of being a habitual felon by allowing an officer to testify at trial that he had previously heard a broadcast for defendant's type of vehicle in reference to two armed robberies that had occurred that day and that the house where defendant was going was a drug house, defendant did not preserve this issue under N.C. R. App. P. 10(b)(1) because he failed to object at trial. **State v. Stevenson, 235.**

Preservation of issues—motion for jnov—unstated theory of case—The trial court did not err by denying defendant's motion for a jnov in an action arising from the transfer of church property where defendant sought to have the evidence reviewed as if it had been tried on the theory of equitable mortgage, but the record clearly indicates that defendant did not attempt to raise this issue at any time preceding or during trial. It will not be considered for the first time on appeal. **Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, 493.**

Writ of habeas corpus—effect of Fourth Circuit decision—tax on seized narcotics—Defendant's appeal from the denial of his writ of habeas corpus petition seeking relief from an alleged double jeopardy violation as a result of a tax assessment on drugs and the subsequent conviction for possession with intent to sell and deliver those drugs is dismissed because no appeal lies from an order made in a habeas corpus proceeding instituted under Chapter 17 of the North Carolina General Statutes since the remedy, if any, is by petition for writ of certiorari, and the Court of Appeals declines to address these issues pursuant to a writ of certiorari since: (1) the constitutionality of the assessment and collection of the drug tax has been previously upheld by North Carolina appellate courts; and (2) federal appellate decisions are not binding upon either the appellate or trial courts of this State with the exception of decisions of the United States Supreme Court. **State v. Wambach, 842.**

ARBITRATION AND MEDIATION

Arbitrator's authority—no additional claims—The trial court erred in overturning the arbitrator's award in a personal injury case arising out of an automobile accident on the ground that the arbitrator exceeded his authority by limiting the award to plaintiff for the reason that causation could not be established without expert medical testimony, although the parties had agreed to have the case decided on the basis of the testimony of the parties and the stipulated medical records. **Howell v. Wilson, 827.**

Modification of award—"evident miscalculation of figures"—incorrect formula does not qualify—Although the arbitrators attempted to modify their award under N.C.G.S. § 1-567.14(a)(1) based on committing an "evident miscalculation of figures," the trial court did not err in denying plaintiff's motion to confirm the modified award and in granting defendants' motion to set aside the modified award because the arbitrators did not have the authority under N.C.G.S. § 1-567.10 to modify the award since: (1) an "evident miscalculation of figures" is defined as "mathematical errors committed by arbitrators which would be patently clear"; and (2) the use of an incorrect formula to determine the award is not an "evident miscalculation of figures." **North Blvd. Plaza v. North Blvd. Assocs., 743.**

ASSAULT

Firearm on a law enforcement officer—sufficiency of evidence—The trial court did not err in an assault with a firearm on a law enforcement officer case by denying defendant's motion to dismiss at the end of the State's evidence, based on the theory that the assaulted officer was not a government officer at the time of the incident since he was outside the jurisdiction of the Red Springs Police Department. **State v. Locklear, 716.**

CHILD SUPPORT, CUSTODY AND VISITATION

Civil contempt—child support arrearages—statute of limitations—Although defendant-father contends plaintiff-mother's claim for child support arrearages are barred by the ten-year statute of limitations under N.C.G.S. § 1-47, the trial court did not err in concluding defendant was in civil contempt of court for failing to pay the entire amount of court ordered child support when defendant's payments were first applied to earlier arrearages. **Belcher v. Averette, 803.**

Support—amount—discretion of trial judge—The trial court did not err by ordering $2,350 per month in child support when the prior consent order awarded $2,000 in temporary child support because the amount of temporary child support agreed to by the parties does not bind the trial court as to the amount of permanent child support. **Bookholt v. Bookholt, 247.**

Support—consent order—medical expenses and insurance—The trial court did not err in concluding the consent order, fully incorporating the parties' separation agreement but modifying defendant's child support obligation, did not allow plaintiff to recover medical expenses and insurance which she incurred on behalf of the parties' minor children. **Belcher v. Averette, 803.**

Support—foreign order—comity—The trial court did not err by giving effect to a German court's judgment of paternity and order for child support because

CHILD SUPPORT, CUSTODY AND VISITATION—Continued

North Carolina courts may recognize and enforce orders from foreign countries under the principle of comity of nations so long as the foreign court has jurisdiction over the cause and the parties. **State ex rel. Desselberg v. Peele, 206.**

Support—foreign order—intervening North Carolina order—The trial court erred in a child support action by finding that a North Carolina URESA order superseded and effectively voided an earlier California order. Both orders were prior to the enactment of UIFSA and, under URESA, more than one state could have simultaneous jurisdiction over a case and a subsequent order does not necessarily nullify a prior order. No North Carolina order in this case made any findings pertaining to nullification of the California order or to exclusive jurisdiction. **Twaddell v. Anderson, 56.**

Support—foreign order—statute of limitations—The trial court erred in a child support action by concluding that the statute of limitations precluded enforcement of a 1997 California order which involved arrearages from a prior order. Once the arrearages are reduced to judgment, that judgment is entitled to full enforcement in North Carolina for a period of ten years after its entry. **Twaddell v. Anderson, 56.**

Support—foreign order—UIFSA—registration in North Carolina—The trial court erred by finding that plaintiff had not met the child support registration requirements of UIFSA (the Uniform Interstate Family Support Act) where plaintiff's registration statement was sufficient to satisfy N.C.G.S. § 56C-6-602(a)(1), although some of the information could be found only upon a close reading. **Twaddell v. Anderson, 56.**

Support—full faith and credit—personal jurisdiction of foreign state—A California child support order was entitled to full faith and credit in the courts of North Carolina where the California court had personal jurisdiction over defendant and none of the exceptions allowing collateral attack applied. **Twaddell v. Anderson, 56.**

Support-jurisdiction—foreign order—The trial court's conclusion that North Carolina had sole jurisdiction over a child support action violated the federal Full Faith and Credit for Child Support Order Act (FFCCSOA) even though that act was passed after the arrearages in question accrued under a 1981 California order. The FFCCSOA is remedial and was intended to have retroactive application. **Twaddell v. Anderson, 56.**

Support—needs and expenses—discretion of trial judge—The trial court did not err in computing defendant-father's child support obligation based on the child's reasonable needs and expenses of $3,407 per month because the determination of what constitutes reasonable needs and expenses is within the discretion of the trial judge. **Bookholt v. Bookholt, 247.**

Support—paternity test—not required—parentage previously determined under law—Since an Alaskan decree had adjudged defendant-North Carolina resident to be the father of the subject child, the trial court's order requiring the parties to submit to paternity testing is reversed because North Carolina's enactment of the Uniform Interstate Family Support Act (UIFSA) does not allow a party whose parentage of a child has been previously determined under

CHILD SUPPORT, CUSTODY AND VISITATION—Continued

law to plead nonparentage as a defense in a proceeding to enforce the payment of child support. N.C.G.S. § 52C-3-314. **Reid v. Dixon, 438.**

Support—private school—findings—The trial court did not err by ordering defendant in a child support action to pay one-half of his children's prospective expenses for private schooling without a finding that such costs were necessary for the children's welfare or that he had the ability to pay where the court did not deviate from the Guidelines, but adjusted the Guideline amounts to account for the extraordinary expense of private schooling. Absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses. **Biggs v. Greer, 294.**

Support—private school—tuition—retroactive—The trial court erred by ordering defendant to pay retroactive child support for private school tuition because this constituted child support reimbursement not based upon the Guidelines. In a retrospective increase of an existing child support order, the court must set out a conclusion of law that there was a substantial and material change of circumstances affecting the welfare of the child occasioned by a sudden emergency and there must be specific findings. The record in this case reflects no evidence which could support findings sustaining the conclusion that there existed a sudden and extraordinary emergency. **Biggs v. Greer, 294.**

Visitation—grandparent—denied—In a case involving a grandmother's attempt to gain visitation rights of her deceased son's two minor children, the trial court did not err in granting defendant's motion to dismiss since a grandparent does not have standing under N.C.G.S. § 50-13.1(a), N.C.G.S. § 50-13.2(b1), N.C.G.S. § 50-13.2A, or N.C.G.S. § 50-13.5(j) when the evidence reveals the parent has been living with her children as an "intact family." **Shaut v. Cannon, 834.**

Visitation—grandparents—denied—intact family—Even though plaintiff-paternal grandparents sought visitation rights of their grandchild under N.C.G.S. § 50-13.1(a) based on the theory that the child was not living in an "intact family" since the child's father is deceased and the parents were separated at the time of his death, the trial court did not err in dismissing this action because: (1) an "intact family" is not limited to situations where both natural parents are living with their children; (2) a single parent living with his or her child is an "intact family"; and (3) a grandchild who is living with her natural mother is living in an "intact family." **Montgomery v. Montgomery, 435.**

Visitation—modification—cohabitation—A child visitation order was remanded for further findings where the court modified defendant's visitation privileges upon findings that he was residing with a person of the opposite gender to whom he was not married, but did not make findings as to the effect upon the welfare of the children. **Browning v. Helff, 420.**

CITIES AND TOWNS

Annexation—requirements—governmental purposes—subdivision test of urbanization—The trial court erred in an annexation case by finding that four tracts of land owned by Rowan County and located within Area 1 are in use for governmental purposes and meet the subdivision test of the urbanization requirements under N.C.G.S. § 16A-48C(c)(3). **Arquilla v. City of Salisbury, 24.**

CITIES AND TOWNS—Continued

Annexation—requirements—use of topographic features—The trial court erred in an annexation case by finding that the boundaries of the pertinent annexation areas follow natural topographic features and streets wherever practical. **Arquilla v. City of Salisbury, 24.**

Annexation—requirements—use of topographic features—The trial court erroneously concluded in an annexation case that appellate courts have held that N.C.G.S. § 160A-48(e) is not mandatory. **Arquilla v. City of Salisbury, 24.**

Public duty doctrine—police officers—gross negligence claims barred—no allegation of intentional tort—The trial court did not err in granting defendants' 12(b)(6) motion to dismiss plaintiffs' civil action alleging infliction of emotional distress and gross negligence against the City of Gastonia and three of its police officers based on the public duty doctrine. **Little v. Atkinson, 430.**

Public duty doctrine—police officers—special duty exception inapplicable—The trial court did not err in concluding the "special duty" exception does not preclude application of the public duty doctrine to plaintiffs' claims for infliction of emotional distress and gross negligence against the City of Gastonia and three of its police officers. **Little v. Atkinson, 430.**

CIVIL PROCEDURE

Affidavit—served after hearing—harmless error—Although the trial court abused its discretion in admitting an affidavit served after the hearing on the parties' motions for summary judgment in a case concerning plaintiff's rights to retirement benefits in the Consolidated Judicial Retirement System, the error was harmless in light of the fact that the trial court would likely have reached the same result. N.C.G.S. § 1A-1, Rule 61. **Wells v. Consolidated Jud'l Ret. Sys. of N.C., 671.**

Judgment notwithstanding the verdict—alternatively and additionally granting new trial—legally inconsistent—The trial court erred in granting defendant's motion for judgment notwithstanding the verdict (JNOV) because: (1) the trial court's order is legally inconsistent since its granting of the JNOV is a judicial determination in this case that defendant did not act fraudulently, while the order alternatively and additionally granting a new trial simultaneously returned the issue of fraud to a new jury; and (2) the trial court did not follow the dictates of N.C.G.S. § 1A-1, Rule 50(c)(1) when it granted a new trial, both as an alternative to and in addition to the JNOV, because the statute requires that a new trial be granted if the JNOV is thereafter vacated or reversed. **Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co., 695.**

Rule 59(e)—post-trial error of law—not a proper ground—Defendant-husband's appeal in an equitable distribution case from the trial court's order denying his Rule 59(e) motion for relief is dismissed because: (1) a Rule 59(e) motion must be based on one of the grounds listed in Rule 59(a); (2) defendant bases his motion on a purported post-trial error of law; and (3) post-trial errors of law are not among those grounds listed in Rule 59(a). **Ice v. Ice, 787.**

Rule 60(a)—changing accrual date of interest—incidental matter—Rule 60(a) was a proper mechanism for the trial court to change the interest accrual date of the equitable distribution award since interest is an incidental matter

CIVIL PROCEDURE—Continued

which does not alter the effect of the original order dealing with the substantive matter of the distributive award. **Ice v. Ice, 787.**

Rule 60(a)—error of law—determined by appellate courts—Defendant-husband's appeal in an equitable distribution case from the trial court's order denying his Rule 60(a) motion for relief based on a purported error of law is dismissed because Rule 60(a) only governs the granting of relief based upon clerical mistakes, fraud, and newly discovered evidence, and errors of law are determined by the appellate courts. **Ice v. Ice, 787.**

Voluntary dismissal—taxing of costs—In a case where the parties were initially told by one judge that their medical malpractice case would be continued based on the misplacement of the court file and the estimated lengthy trial time requiring a special session, but later that same day were told by a second judge the case would be tried since changed circumstances revealed the court file was located and a special superior court judge was available, the trial court did not err in ruling that plaintiffs' conditional voluntary dismissal constituted a voluntary dismissal under N.C.G.S. § 1A-1, Rule 41(a)(1), in dismissing the action, and in taxing costs of $23,431.59 against plaintiffs pursuant to Rule 41(d). **Cullen v. Carolina Healthcare Sys., 480.**

CIVIL RIGHTS

1983 action—termination of police officer—The trial court did not err in granting summary judgment in favor of defendants on the 42 U.S.C. § 1983 retaliatory wrongful discharge claim premised upon a Durham Police Department Internal Affairs investigation which resulted in a recommendation for plaintiff-officer's dismissal allegedly in retaliation for his publication of an editorial in a newspaper criticizing the department and for his reporting sexual misconduct incidents up the chain of command. **May v. City of Durham, 578.**

CLERKS OF COURT

Compelling accounting—jurisdiction—The clerk of court had jurisdiction to enter an order denying a request for an accounting from an attorney-in-fact where the power of attorney waived inventories and accounts. The provision relied upon by plaintiff, N.C.G.S. § 32A-11(b), does not address the clerk's jurisdiction to compel inventories and accounts; the relevant provision, N.C.G.S. § 7A-103(15), grants the clerk the jurisdiction to audit the accounts of fiduciaries and by implication to deny a request to audit such accounts as well. **Wilson v. Watson, 500.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Right to appeal waived—new action—The trial court erred by denying defendant's motion for summary judgment in an action to compel an accounting by an attorney-in-fact where the clerk of court had entered an order denying plaintiffs' request, plaintiffs did not appeal from the clerk to superior court, and plaintiffs later filed a complaint in superior court seeking the accounting. Having waived the right of appeal to superior court, the doctrine of res judicata bars the new action. **Wilson v. Watson, 500.**

CONFESSIONS AND OTHER INCRIMINATING STATEMENTS

Initiation of conversation—nodding of head—*In a first-degree murder and* robbery with a dangerous weapon case where defendant-juvenile stated he did not wish to answer any questions, his mother interjected that "we need to get this straightened out today and we'll talk with him anyway," defendant thereafter nodded affirmatively to the detective after considering his mother's statement, and then the detective asked if defendant wanted to answer questions without a lawyer or parent being present, the trial court did not err by denying defendant's motion to suppress his statement to the Shelby Police because defendant initiated the conversation in which he made the incriminating statement by nodding his head to the officer. N.C.G.S. § 7A-595. **State v. Johnson, 683.**

Second-degree murder—motion to suppress—The trial court did not err in a second-degree murder case by denying defendant's motions to suppress his 2 August 1995 and 7 August 1995 statements to law enforcement officers because the officers were not required to give defendant Miranda warnings since defendant was not in custody on either occasion when he made the statements, and the statements were voluntarily and knowingly made. **State v. Deese, 413.**

Voluntariness—promises—The trial court correctly concluded in a first-degree sexual offense prosecution that defendant's confession was voluntary where defendant was not under arrest, he was advised of and waived his rights, the interview lasted approximately forty-five minutes and defendant was allowed to go home, the statements made by the detective were in response to questions asked by defendant, the statement that the detective could not see why defendant would lose his job cannot be construed as a promise to keep his job, and any improper promises that may have been made concerned collateral matters. **State v. Cabe, 510.**

CONSTITUTIONAL LAW

Double jeopardy—controlled substances—keeping and maintaining a dwelling—continuous offense—separate convictions—Two convictions of keeping and maintaining a dwelling for purposes related to use, storage, or sale of controlled substances under N.C.G.S. § 90-108(a)(7) violates the constitutional prohibition against double jeopardy since the offense is a continuing offense. **State v. Grady, 394.**

Double jeopardy—juvenile—adjudicatory hearing—transfer of case—same charges—violation—The juvenile court's transfer of misdemeanor charges to superior court is vacated and remanded to the juvenile court for a final disposition since the binding over for trial in superior court following an adjudicatory hearing on the same charges in the juvenile court constitutes double jeopardy. **In re J.L.W., 596.**

Double jeopardy—punishment for a violent habitual felon—The trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by ruling as a matter of law that the punishment for a violent habitual felon under N.C.G.S. §§ 14-7.7 through 14-7.12 is not double jeopardy. **State v. Stevenson, 235.**

Double jeopardy—waiver—pleas of guilty and no contest—Defendant waived his right to assert a double jeopardy violation because a plea of guilty or no contest waives all defenses other than the sufficiency of the indictment. **State v. Hughes, 92.**

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—There was no error in a cocaine trafficking prosecution where defendant alleged ineffective assistance of counsel but the outcome was not affected by defense counsel's alleged failings. **State v. Broome, 82.**

Procedural due process—motion to suppress—opportunity to be heard— The trial court's failure to allow defendant to be heard on a motion to suppress cocaine seized without a warrant violated defendant's right to due process and his right under N.C.G.S. § 15A-975 to make a motion to suppress evidence, and defendant is entitled to a new trial on a charge of trafficking in cocaine by transportation. **State v. Battle, 781.**

Self-incrimination—different proceeding—The trial court erred by granting a motion to compel defendant Brame's response to deposition questions in this state action involving misappropriation of funds when he had previously given relevant testimony in a deposition as part of federal bankruptcy proceedings. **Staton v. Brame, 170.**

Speedy trial—estoppel—burden to show State negligently or willfully delayed—The trial court did not err in a homicide case by denying defendant's pretrial motion to dismiss on the grounds that his right to a speedy trial was violated under the Sixth and Fourteenth Amendments when his trial began approximately twenty-eight months after he was indicted because defendant was estopped from requesting a speedy trial for twelve of the twenty-eight months by his continued requests for new court-appointed counsel and his failure to accept four of the five counsel appointed for him, and defendant failed to show that the State negligently or willfully delayed the trial. **State v. Brooks, 124.**

Speedy trial—prejudice from delay—The State did not violate defendant's constitutional right to a speedy trial for murder where defendant was charged on 13 July 1992, his first trial ended with a jury unable to reach a verdict and a mistrial in March of 1993, and the case was not again calendared for trial until April of 1998. Defendant failed to show that the delay was due to the neglect or wilfulness of the prosecutor and failed to show prejudice from the delay in that he did not call the missing witnesses at his first trial and did not request a speedy trial during the delay. **State v. Spinks, 153.**

State—unrecorded bench conferences—Unrecorded bench conferences did not violate a first-degree murder defendant's right to be present at every stage of the trial. **State v. Griffin, 531.**

CONTEMPT

Civil—child support arrearages—burden of proof—The trial court did not err in concluding defendant-father was in civil contempt of court for failing to pay the entire amount of court ordered child support because the burden of proof is on the party alleged to be delinquent to show that he was not in contempt, and defendant failed to show a lack of means to pay support or an absence of willfulness in failing to pay support. **Belcher v. Averette, 803.**

Civil—insufficient findings—The trial court's order purporting to hold defendant in civil contempt is vacated because: (1) the trial court's findings are insufficient to support its holding; and (2) the trial court failed to comply with the

CONTEMPT—Continued

provisions of N.C.G.S. § 5A-23 when it did not provide defendant with notice or an order to show cause. **Watkins v. Watkins, 844.**

CONTRACTS

Assignment of rights—withholding consent—reasonableness not required—Defendant-Johnsons' withdrawal or withholding of their consent to defendant-Gwynn's assignment of his rights under an installment contract to plaintiff is not unreasonable and does not violate public policy because: (1) there is no evidence that defendants gave written consent to this assignment as required by the express terms of the contract; and (2) there is no authority in North Carolina that a party may not withhold its consent to an assignment under a valid non-assignment clause unless the party's withholding of consent is reasonable. **Parkersmith Properties v. Johnson, 626.**

COSTS

Attorney fees—abuse of discretion standard—Although plaintiff requested $37,364.88 to cover her attorney fees and costs in a case involving violation of the Electronics Communications Privacy Act under 18 U.S.C. § 2520, the trial court did not abuse its discretion in awarding $1,000 in attorney fees and $140.00 in costs. **Ollo v. Mills, 618.**

Attorney fees—civil rights claim—frivolous—The trial court's taxing of plaintiff with costs, including attorney fees incurred in defending plaintiff's claims asserted under federal civil rights laws 42 U.S.C. §§ 1981 and 1983, was not unjustified under 42 U.S.C. § 1988(b) because the findings support the trial court's conclusion of law that plaintiff's claims were frivolous and groundless. **Okwara v. Dillard Dep't Stores, Inc., 587.**

Attorney fees—federal and other claims—common nucleus of law or fact—Although plaintiff contends the amount of attorney fees awarded to defendants should be reduced by the amount expended in defense of the non-federal claims, the trial court did not abuse its discretion in determining the amount it taxed plaintiff with costs because fees incurred defending both federal civil rights claims and other claims may be fairly charged to the prevailing party under 42 U.S.C. § 1988 so long as all of these claims stem from a common nucleus of law or fact. **Okwara v. Dillard Dep't Stores, Inc., 587.**

Attorney fees—motion to vacate or amend order—no hearing required—The trial court did not abuse its discretion by denying plaintiff's motion to vacate or amend the trial court's order awarding attorney fees and costs without notice and hearing in a case involving violation of the Electronics Communications Privacy Act under 18 U.S.C. § 2520. **Ollo v. Mills, 618.**

Attorney fees—motion to vacate or amend order—specificity required—The trial court did not abuse its discretion when it denied plaintiff's motion to vacate or amend the trial court's order awarding nominal attorney fees and costs in a case involving violation of the Electronics Communications Privacy Act under 18 U.S.C. § 2520. **Ollo v. Mills, 618.**

Attorney fees—no time bar—award at end of litigation—Although plaintiff cites Federal Civil Procedure Rule 54(d)(2)(B) to show defendants' claims for

COSTS—Continued

attorney fees were time barred since the claims were not filed within fourteen days following entry of judgment, the trial court did not err in taxing plaintiff with costs, including attorney fees incurred in defending plaintiff's claims asserted under federal civil rights laws 42 U.S.C. §§ 1981 and 1983, because the usual practice in awarding attorney fees is to make the award at the end of the litigation when all work has been done and all the results are known. **Okwara v. Dillard Dep't Stores, Inc., 587.**

Attorney fees—reasonableness—usual and customary rates—The trial court did not abuse its discretion by determining that the hourly rates charged by defendant Dillard's counsel were reasonable when taxing plaintiff with costs, including attorney fees incurred in defending plaintiff's claims asserted under federal civil rights laws 42 U.S.C. §§ 1981 and 1983, because this conclusion was supported by the trial court's finding, to which plaintiff has not assigned error, that the hourly rates charged by the attorneys who worked on this case were the usual and customary rates. **Okwara v. Dillard Dep't Stores, Inc., 587.**

CRIMINAL LAW

Arraignment—day of trial—There was no prejudice when a first-degree murder defendant was arraigned on the first day of trial after venue of the trial had been moved from Union County, where formal arraignment had not been required because there were not more than 20 scheduled weeks of sessions for the trial of criminal cases. Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. **State v. Griffin, 531.**

Curative instructions—timeliness—Instructions to disregard testimony which were given the day after the testimony was given were not too late to prevent reversible error where the court was specific as to the content of the testimony, gave a curative instruction after discussing the contents of the curative instruction with the defendant, and received assurances from the jurors that they could obey the court's instructions. Moreover, even assuming error, there was no prejudice in light of the copious evidence offered by the State. **State v. Griffin, 531.**

Entrapment—sufficiency of evidence—There was no plain error in a cocaine trafficking prosecution where the trial court did not instruct on entrapment. Viewed in the light most favorable to defendant, the situation described by the evidence amounted to no more than providing opportunity. The invitation to defendant neither rose to the level of persuasion, trickery, or fraud by the police to induce defendant to purchase cocaine nor indicates that the plan to sell the cocaine originated with the State. **State v. Broome, 82.**

Instructions—intoxication—relevant to conduct and motives—The trial court did not abuse its discretion in an assault with a firearm on a law enforcement officer case by denying defendant's objection, motion to strike, and request for a jury instruction that an officer's answer, concerning whether defendant appeared to be intoxicated, had no substantive value. **State v. Locklear, 716.**

Instructions—repetition—judge fulfilling obligation to instruct and clarify—The trial court did not err in a trafficking in cocaine case by clarifying the

CRIMINAL LAW—Continued

possession instruction to the jury three times, as requested by the jury, because the judge was merely fulfilling his obligation to instruct and clarify any source of confusion. **State v. Williams, 218.**

Instructions—requested—exact language not required—given in substance—The trial court did not err in a trafficking in cocaine case by refusing to give two requested jury instructions because the trial court is not required to give a requested instruction in the exact language of the request, so long as the instruction is given in substance. **State v. Williams, 218.**

Instructions—requested—officer beyond jurisdiction—not justified in using deadly force—The trial court did not err in an assault with a firearm on a law enforcement officer case by failing to give defendant's requested special jury instruction, that the officer was beyond his jurisdiction and defendant had a right to resist, because even if defendant were correct that the entry was illegal or the arrest was unauthorized, N.C.G.S. § 15A-401(f) states that a person is not justified in using deadly force to resist arrest when the person knows or has reason to know that the officer is a law enforcement officer attempting to make an arrest. **State v. Locklear, 716.**

Instructions—taken out of context—The trial court did not err in an assault with a firearm on a law enforcement officer case by overruling defendant's objection to the jury charge that a Red Springs police officer had the duty to assist the Robeson County Sheriff's Department because defendant has taken a portion of the jury charge out of context. **State v. Locklear, 716.**

Judge's reference to victim—not plain error—There was no plain error in a first-degree sexual offense prosecution in the court's reference to the prosecuting witness as "the victim." **State v. Cabe, 510.**

Motion for appropriate relief—newly discovered evidence—confession—The trial court did not abuse its discretion by denying defendant's motion for appropriate relief with regard to the confession of a cousin of an accomplice. The trial court is in the best position to judge the credibility of a witness and found in this case that defendant had failed to prove that the cousin's statements to authorities were probably true. **State v. Garner, 1.**

Motion for appropriate relief—recanted testimony—The trial court did not abuse its discretion by denying a motion for appropriate relief based upon recanted testimony where there was not a reasonable possibility that a different result would have been reached in light of other testimony. **State v. Garner, 1.**

Prosecutorial misconduct—use of false testimony—The trial court did not abuse its discretion by denying defendant's motion for appropriate relief based upon the State's use of false testimony where it was implicit in the trial court's order that the testimony was probably not false except in regard to the witness having a cousin named Terence and defendant failed to establish that the witness otherwise perjured himself at trial. **State v. Garner, 1.**

Prosecutorial vindictiveness—additional charge—The trial court did not err in denying defendant's motion to dismiss a charge of first-degree sexual offense based on prosecutorial vindictiveness when defendant was initially charged with taking indecent liberties with a child before plea negotiations broke down because the decision to charge defendant with first-degree sexual offense was

CRIMINAL LAW—Continued

made before trial and defendant's assertions, without more, do not establish a showing of prosecutorial vindictiveness. **State v. Ford, 634.**

DAMAGES AND REMEDIES

Punitives—willful or wanton conduct not shown—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by granting defendant restaurant owner's motion for directed verdict as to the punitive damages claim based on willful or wanton negligence. **Benton v. Hillcrest Foods, Inc., 42.**

Remittitur—refusal to accept—new trial granted—abuse of discretion—The trial court abused its discretion in granting a new trial following plaintiffs' refusal to accept the trial court's suggested remittitur because the trial court improperly attempted to compel the parties to accept a remittitur, which is not permitted without the consent of the prevailing party. **Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co., 695.**

DEEDS

Designation of corporate grantee—erroneous name—The trial court did not err by granting summary judgment for plaintiff on defendant's claim that a deed of church property from defendant to plaintiff was void because plaintiff's name was shown on the deed as "Tomika Investments, Inc." rather than "Tomika Investment Company." A misnomer in the name of a corporate grantee does not render the conveyance void; here, there is only a latent ambiguity in the deed and no evidence that defendant was prejudiced. **Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, 493.**

Execution—double damages—The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the double damages claim because plaintiff fails to indicate any claims which would support such recovery. **Stephenson v. Warren, 768.**

Execution—malicious and tortious interference with contractual relationship—The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the malicious and tortious interference with a contractual relationship claims because these claims require that defendant intentionally induce a third person not to perform the contract, instead of defendant intentionally inducing the plaintiff not to perform the contract. **Stephenson v. Warren, 768.**

Execution—undue influence—The trial court erred in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the issue of undue influence. **Stephenson v. Warren, 768.**

Execution—undue influence—punitive damages—The trial court erred in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the issue of punitive damages because punitive damages may be submitted to the jury on a claim of undue influence. **Stephenson v. Warren, 768.**

Restrictive covenants—doctrine of implied equitable servitudes—doctrine of common servitudes—Although plaintiffs, owners of residential lots in

DEEDS—Continued

the pertinent subdivision, argue the doctrine of implied equitable servitudes applies to this case to show the developer of the subdivision plat intended to impose a common servitude on the unnumbered remnant parcels, North Carolina has not adopted that doctrine and the Court of Appeals declined to extend our similar doctrine of common servitudes. **Harry v. Crescent Resources, Inc., 71.**

Restrictive covenants—negative appurtenant easement—The trial court did not err in concluding plaintiffs, owners of residential lots in the pertinent subdivision, did not have a property right in the nature of a negative appurtenant easement limiting the use of the remnant parcels to undeveloped open space based on their deeds and the deeds of their predecessors in title describing their property with reference to the subdivision plat on which the four remnant parcels appear as open undeveloped space. **Harry v. Crescent Resources, Inc., 71.**

DISABILITIES

Equal Employment Practices Act—definition of handicap—alcoholism—The trial court did not err in an employment termination case by instructing the jury that the term "handicapped" has been defined to exclude active alcoholism or in its definition of active alcoholism. Reading other statutes relating to the same subject with the Equal Employment Practices Act, N.C.G.S. § 143-422.2, "handicap" as used in the Act includes alcoholism but not active alcoholism and, using the common and ordinary meaning, an "active alcoholic" is an alcoholic who is currently engaged in the use of alcohol or was in the immediate past. **McCullough v. Branch Banking & Trust Co., 340.**

DISCOVERY

Statements of defendant—juvenile rights form—synopsis of oral statements—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's objection to a detective's testimony elicited from the juvenile rights form, on the basis that it was a statement of defendant and had not been provided to defendant by the district attorney in response to defendant's request prior to trial, because: (1) the State provided defendant with copies of the completed juvenile rights and waiver of rights form, and (2) the State provided defendant with copies of the four-page written statement of defendant. **State v. Johnson, 683.**

DIVORCE

Alimony—amount—discretion of trial judge—The trial court did not err in awarding $2,400 per month of alimony even though the parties previously agreed that a $2,200 obligation would be sufficient for alimony pendente lite because the amount of alimony is in the sound discretion of the trial court. **Bookholt v. Bookholt, 247.**

Alimony—automatic termination—cohabitation—specific agreement between parties required—In the absence of a specific agreement between the parties, the trial court erred in including a provision in its alimony award that alimony could automatically terminate upon plaintiff-wife's cohabitation with someone of the opposite sex in the absence of explicit statutory authority. **Bookholt v. Bookholt, 247.**

DIVORCE—Continued

Alimony—duration—specific findings not required—The trial court did not err by failing to make findings relative to the duration of the alimony award because the action was filed on 16 July 1993, and N.C.G.S. § 50-16.3A provides that only actions filed on or after 1 October 1995 require specific findings relative to the duration of any alimony award. **Bookholt v. Bookholt, 247.**

Alimony and child support—attorney fees—comparison of separate estates—discretion of trial court—Although a comparison of separate estates is not required in determining the propriety of attorney fees under N.C.G.S. § 50-16.3 (now 50-16.4) and N.C.G.S. § 50-13.6 in an alimony and child support case, on remand the trial court may do so, if it chooses. **Bookholt v. Bookholt, 247.**

Alimony and child support—attorney fees—sufficiency of findings—means to defray litigation expenses—good faith—In an action for alimony and child support, the trial court erred in awarding $4,889 in attorney fees under N.C.G.S. § 50-16.3 (now 50-16.4) and N.C.G.S. § 50-13.6 to plaintiff-wife because the trial court made insufficient findings regarding: (1) whether the dependent spouse has insufficient means to defray her litigation expenses; and (2) whether the party seeking attorney fees is an interested party acting in good faith. **Bookholt v. Bookholt, 247.**

Equitable distribution—deceased plaintiff—The trial court erred in an equitable distribution action by denying the motion of the administratrix of plaintiff's estate to be substituted and by dismissing the action. An action for equitable distribution does not abate at the death of the parties if they were separated as required by N.C.G.S. § 50-21. **Brown v. Brown, 331.**

Postseparation support—separation agreement—The trial court erred by terminating defendant-husband's obligation to pay postseparation support under the party's separation agreement based on their divorce because postseparation support may continue despite a judgment of divorce if the postseparation support order does not specify a termination date and there is no court order awarding or denying alimony. N.C.G.S. § 50-16.1A(4). **Marsh v. Marsh, 663.**

Postseparation support—separation agreement—contempt—In light of the trial court's erroneous conclusion that defendant's postseparation support obligation terminated upon divorce, on remand the trial court must consider whether defendant-husband was in contempt of court for failing to pay his postseparation support obligations under the parties' incorporated separation agreement. **Marsh v. Marsh, 663.**

DRUGS

Constructive possession—automobile—There was sufficient evidence that defendant possessed cocaine within the meaning of N.C.G.S. § 90-95(h) where defendant owned and was present in the car in which the police found the drugs, the drugs were deposited there at defendant's direction, and defendant was the lone occupant of the car at the time the drugs were seized. Regardless of whether defendant was able to escape, there was no plain error in the trial court finding sufficient evidence of defendant's intent and capability to control the disposition and use of the cocaine in his automobile. **State v. Broome, 82.**

DRUGS—Continued

Tax on seized narcotics—effect of Fourth Circuit decision—prior panel decision binding—Even though the Fourth Circuit held that the North Carolina Drug Tax constitutes criminal punishment and defendant claims his double jeopardy rights will be violated if there is further prosecution against him in this case based on the Department of Revenue's prior collection of unpaid taxes on seized drugs under N.C.G.S. §§ 105-113.105 through 105-113.113, the trial court did not err in denying defendant's motion to dismiss the charges of possession of marijuana, maintenance of a building for the purpose of keeping marijuana, possession of marijuana with intent to sell or deliver, and possession of drug paraphernalia. **State v. Woods, 386.**

Trafficking in cocaine—possession—attempt—The trial court did not err in a cocaine trafficking prosecution by refusing to charge the jury on the lesser included offense of attempt where defendant contended that the evidence of possession was equivocal, but the offense was complete at the time of defendant's arrest. **State v Broome, 82.**

Trafficking in cocaine—possession element—sufficiency of evidence—The trial court did not err in a trafficking in cocaine case by denying defendant's motion to dismiss based on insufficient evidence to establish the possession element of the charge, even though defendant did not have actual possession of an illegal substance, because an inference of constructive possession arises when a defendant has exclusive control over the premises where the controlled substance is found. **State v. Williams, 218.**

Trafficking in cocaine—weight of mixture—There was no fatal variance between the indictment and the proof where defendant was indicted for trafficking by possession of 200-400 grams of cocaine, the State introduced a package of cocaine mixture seized from defendant's car weighing 273 grams, and the State's expert testified that the package contained only 27 grams of pure cocaine. N.C.G.S. § 90-95(h)(3)(a) states that it is a felony to possess a substance or mixture that is 200 grams or more and the relevant question is the weight of the total substance seized regardless of the purity. **State v. Broome, 82.**

ELECTIONS

Limitation on fund-raising during legislative sessions—The trial court did not err in addressing the issue of whether part of N.C.G.S. § 163-278.13B (a)(2), the definition of "limited contributee" in a statute addressing limitations on fund-raising during legislative sessions, was unconstitutional because that issue was also properly before the court since plaintiff was seeking a means to obtain contributions from lobbyists and their political committees during the legislative session. **Winborne v. Easley, 191.**

Limitation on fund-raising during legislative sessions—compelling governmental interest—narrowly tailored—The trial court did not err in finding that N.C.G.S. § 163-278.13B, a limitation on fund-raising during legislative sessions, was constitutional as applied to plaintiff candidate for the General Assembly as a challenger because: (1) a compelling governmental interest was addressed in amending the statute to include challengers; (2) the statute is narrowly tailored in its application to challengers, as well as incumbents; and (3) plaintiff has made no showing that the statute invidiously discriminates against him as a challenger. **Winborne v. Easley, 191.**

ELECTIONS—Continued

Limitation on fund-raising during legislative sessions—compelling governmental interest—not narrowly tailored—The trial court did not err in finding N.C.G.S. § 163-278.13B (a)(2), the definition of "limited contributee" in a statute addressing limitations on fund-raising during legislative sessions, to be unconstitutional as applied to independent political committees accepting contributions on behalf of candidates because although the statute was enacted for a compelling governmental interest, the statute was not narrowly tailored to serve a compelling governmental interest. **Winborne v. Easley, 191.**

EMINENT DOMAIN

Condemnation—amount of property affected—pretrial issue—map—Although defendants assign error in a land condemnation case to the trial court's jury instruction that the map used by the parties at trial accurately reflected the entire tract affected by the taking when the map included both the Northern and Southern Tracts, and defendants maintain that only the Southern Tract was actually affected by the taking, this argument is dismissed because the issue of what constitutes the entire tract affected should have been resolved before trial under N.C.G.S. § 136-108. **Department of Transp. v. Tilley, 370.**

Condemnation—amount of property affected—pretrial issue—subject matter jurisdiction not involved—Although defendants contend the jury verdict must be voided in this land condemnation case based on the trial court not having subject matter jurisdiction since plaintiff's Declaration of Taking did not correctly list the requisite entire tract affected, the real issue defendants are arguing involves the amount of affected property, and that issue should have been resolved before trial under N.C.G.S. § 136-108. **Department of Transp. v. Tilley, 370.**

Condemnation—calculation of value—experts not limited by statutory formula—Although the trial court erred in a land condemnation case by requiring defendants' expert real estate appraiser to calculate the value of the 1.25-acre tract taken according to the strict formula set under N.C.G.S. § 136-112(1) since that statute only speaks to the exclusive measure of damages to be used by the "commissioners, jury or judge," it was not prejudicial error. **Department of Transp. v. Tilley, 370.**

Condemnation—calculation of value—jurors limited by statutory formula—Even though defendant contends in a land condemnation case that the jury should have been permitted to use the pre-taking and post-taking fair market values of the 2.99-acre Southern Tract since the 23.99-acre Northern Tract remained unaffected, the trial court did not err by instructing the jury to value the 1.25-acre tract taken by calculating the difference between the pre-taking and post-taking fair market values of the entire 26.98-acre tract because N.C.G.S. § 136-112(1) provides a specific formula that must be used by juries. **Department of Transp. v. Tilley, 370.**

Condemnation—evidence—comparable sales after taking—exclusion not required—Although the trial court abused its discretion in excluding evidence of two voluntary 1997 sales of the property, on the basis that they occurred after the date of taking, when our courts have only required that the similar sales not be too remote in time from the date of the taking and nowhere has there been a

EMINENT DOMAIN—Continued

requirement that the sales also be prior to the taking, defendants were not prejudiced. **Department of Transp. v. Tilley, 370.**

Jury instructions—substantial damages—descriptive term—The trial court did not improperly influence the jurors in a land condemnation case by telling them, as part of its instructions, that defendants were seeking "substantial" damages because as used in the instructions, "substantial" is purely descriptive in nature and does not carry with it the negative connotation defendants suggest. **Department of Transp. v. Tilley, 370.**

Size of taking—three determinations required—In a case arising from plaintiff's exercise of its power of eminent domain under N.C.G.S. § 162-6 for construction of a water supply lake, the trial court's attempt to limit plaintiff's decision to condemn an entire 145-acre tract of land owned by defendant is reversed and remanded. **Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc., 425.**

Subject matter jurisdiction—condemnation—The trial court did not err in failing to dismiss a county's challenge of a city's condemnation proceeding based on lack of subject matter jurisdiction. **County of Johnston v. City of Wilson, 775.**

EMOTIONAL DISTRESS

Intentional—negligent—behavior did not exceed all bounds tolerated by decent society—The trial court did not err by directing verdict in favor of defendant on the issues of intentional or negligent infliction of emotional distress because the evidence, that an officer of defendant BB&T continued to discuss the bank loan with plaintiff Reynolds and implied that the loan would be forthcoming even after internal approval of the loan had been withdrawn, fails to establish that BB&T's behavior exceeded all bounds usually tolerated by decent society. **Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co., 695.**

Intentional—sufficiency of evidence—The trial court did not err in granting summary judgment in favor of defendants on the intentional infliction of emotional distress claim because plaintiff did not present any evidence supporting a finding that he suffered from mental distress of a nature generally recognized by trained professionals. **May v. City of Durham, 578.**

Negligent infliction—concern for own welfare—foreseeability—The trial court did not err in granting summary judgment in favor of defendant security company on plaintiff Shipley's negligent infliction of emotional distress claim, based on her concern for her own welfare when an enraged former co-worker came back to plaintiff's workplace and killed two people, because plaintiff's emotional distress was not a reasonably foreseeable consequence of any negligent conduct resulting from defendant's failure to retrieve the former co-worker's temporary access card to the workplace building. **Robblee v. Budd Services, Inc., 793.**

Negligent infliction—drowning—private home pool party—no negligence as a matter of law—The trial court did not err in granting defendants' motion for summary judgment on the negligent infliction of emotional distress claim based on the drowning death of an eight-year-old boy at a private home pool party, because the court already determined that defendants were not negligent as a matter of law. **Royal v. Armstrong, 465.**

EMPLOYER AND EMPLOYEE

Covenant not to compete—signature required—In a case where defendant-former employee's name is not found in any form on the signature line of an agreement not to compete, but defendant did print her name at the top of the agreement ahead of the substantive portions, the trial court erred in granting a preliminary injunction preventing plaintiff from working with other rental car agencies because N.C.G.S. § 75-4 requires this type of agreement to be signed. **New Hanover Rent-A-Car, Inc. v. Martinez, 642.**

Employment by defendant—genuine issue of material fact—Although defendant contends decedent was barred from bringing this wrongful death action because the exclusive remedy would be under the Workers' Compensation Act since decedent was a joint employee of defendant and Griffin Wrecking, the trial court erred by granting defendant's motion for summary judgment because there is a genuine issue of material fact under the "special employer" test concerning whether decedent was an employee of defendant. **Anderson v. Demolition Dynamics, Inc., 603.**

Negligent supervision—actual or constructive knowledge required—The trial court did not err in granting defendant Kimberly-Clark Corporation's motion for summary judgment on the claim of negligent supervision because plaintiff's forecast of evidence was insufficient to show that Kimberly-Clark had actual or constructive knowledge of any tortious acts of defendant-manager Schneider since there is no evidence that any employee, including plaintiff prior to her discharge, ever complained to the management about Schneider. **Barker v. Kimberly-Clark Corp., 455.**

Termination—bonus—The trial court did not err in an action arising from an employment termination by denying plaintiff's request for instructions regarding plaintiff's claim for an unpaid wage bonus. Although there was no notification to plaintiff that termination of his employment could result in forfeiture of his bonus, the decision to require forfeiture of the bonus did not constitute a change in the benefits plan and no notice was required. **McCullough v. Branch Banking & Trust Co., 340.**

Tortious interference with contractual rights—genuine issue of material fact—The trial court erred in granting defendants' motion for summary judgment on the tortious interference with contractual rights claim. **Barker v. Kimberly-Clark Corp., 455.**

Tortious interference with contractual rights—non-outsiders to contract—Although defendants, Schneider and Wager, contend they cannot be liable for a claim of tortious interference with contractual rights since they were managers and thus non-outsiders to plaintiff-employee's employment contract, the trial court erred in granting defendants' motion for summary judgment on this issue because plaintiff's forecast of evidence sufficiently raises the issue as to whether the motives of the two managers were reasonable, good faith attempts to protect their interests or the corporation's interests. **Barker v. Kimberly-Clark Corp., 455.**

Tortious interference with contractual rights—ratification—Although defendant Kimberly-Clark Corporation contends it did not ratify any alleged tortious conduct, the trial court erred in granting defendant's motion for summary judgment on the tortious interference with contractual rights claim because

EMPLOYER AND EMPLOYEE—Continued

plaintiff's forecast of evidence revealed Kimberly-Clark had an Open Door policy investigation and failed to use it. **Barker v. Kimberly-Clark Corp., 455.**

Unlawful discharge—Employment Security Commission—department head has authority to discharge—The trial court did not err in granting summary judgment in favor of defendant Mary Sue Brown in her official capacity as Chairman of the Employment Security Commission on plaintiff-employee's unlawful discharge claim because the Chairman, as the department head, has authority to terminate an employee in an exempt policymaking position pursuant to N.C.G.S. § 126-5(e). **Carrington v. Brown, 554.**

ESTOPPEL

Equitable—put on inquiry as to truth—Since plaintiff had a copy of the installment contract which required written consent by defendant-Johnsons before it could be assigned and plaintiff knew written consent was not given, defendants are not equitably estopped from denying the validity of Gwynn's assignment of rights under the installment contract to plaintiff because a party cannot rely on equitable estoppel if it was put on inquiry as to the truth and had available the means for ascertaining it. **Parkersmith Properties v. Johnson, 626.**

Quasi—no evidence of actual benefits—Defendant-Johnsons are not estopped from denying the validity of Gwynn's assignment of rights under the installment contract to plaintiff based on quasi-estoppel because the record does not contain any evidence defendants actually received any benefits as a result of the assignment. **Parkersmith Properties v. Johnson, 626.**

EVIDENCE

Codefendant's statement—no prejudicial error—The trial court did not commit prejudicial error by admitting inculpatory statements of an unavailable codefendant in a prosecution for first-degree murder under the felony murder rule, first-degree kidnapping, conspiracy to commit murder, and robbery with a dangerous weapon. **State v. Harris, 611.**

Crack pipe, wallet, and identification cards—motive—identity—chain of custody—The trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by admitting into evidence a crack pipe, a wallet, and identification cards that were all found in the white Cadillac defendant had been driving just prior to his arrest. **State v. Stevenson, 235.**

Direct examination—leading questions—The trial court did not abuse its discretion in a first-degree kidnapping and first-degree rape case by sustaining the State's objections to defendant's leading questions on direct examination. **State v. Wiggins, 735.**

Document—sufficient indicia of trustworthiness—The trial court did not err in an assault with a firearm on a law enforcement officer case by accepting into evidence a mutual aid agreement between Robeson County and the town of Red Springs to show that the assaulted officer was acting as a government officer at the time of the incident because the State laid a sufficient foundation under

EVIDENCE—Continued

N.C.G.S. § 8C-1, Rule 901(a) to establish the trustworthiness of the document. **State v. Locklear, 716.**

"Drug use" reputation of a place—relevant to show motive—Even though this case does not involve a drug charge, the trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by allowing the officer to testify that he had training in the investigation of drug offenses, had dealt with occupants of the house in question when investigating drug offenses, and had arrested folks that resided in the house for drug offenses, because this evidence was relevant to show defendant's motive to commit the robbery in order to get money to buy drugs. **State v. Stevenson, 235.**

Exclusion of testimony—no prejudicial error—The trial court did not commit prejudicial error in a first-degree murder and robbery with a dangerous weapon case by refusing to allow the testimony of a certified school psychologist and a child psychologist. **State v. Johnson, 683.**

Expert—area crime data—exclusion—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by excluding the analysis of 1988-91 data from a crime analysis expert. **Benton v. Hillcrest Foods, Inc., 42.**

Habit—others in defendant's position—relevance—The trial court did not err in the prosecution of a police officer for first-degree murder by not allowing evidence that it was the habit of several officers to "run tags" and stop attractive women following the State's evidence that defendant had this habit. **State v. Griffin, 531.**

Hearsay—corroboration—excited utterance—The trial court did not commit plain error in a first-degree sexual offense and taking indecent liberties with a child case by admitting the testimony of the minor victim's mother, relating what the minor victim said about the attack when the child was picked up from day care, because: (1) this testimony did tend to corroborate the victim's in-court testimony; and (2) this testimony could have qualified as substantive evidence under the excited utterance exception of N.C.G.S. § 8C-1, Rule 803(2). **State v. Ford, 634.**

Hearsay—personal knowledge—corroboration—There was no plain error in a cocaine trafficking prosecution in the admission of testimony from an officer about setting up the drug deal. Although defendant contended that the testimony must have been based on a conversation with another and went to matters not within the officer's personal knowledge, the State's questions called for the officer to testify as to what may have occurred after the alleged conversation and his testimony consisted of details of the drug transaction derived from the officer's subsequent participation in the deal. Assuming the testimony was hearsay, it corroborated the third party's direct testimony. **State v. Brome, 82.**

Identification—eyewitness—The trial court did not err at a hearing on a motion for appropriate relief by denying defendant's motion to suppress identification testimony from the victims of a robbery and shooting. **State v. Garner, 1.**

Impeachment—specific instance of conduct—direct examination—inadmissible—not probative of truthfulness—The trial court did not err in a first-

EVIDENCE—Continued

degree kidnapping and first-degree rape case by excluding evidence of the victim's theft of money and cocaine from defendant and defendant's reaction to the alleged theft, which defendant attempted to elicit on direct examination from a witness to impeach the credibility of the victim by inquiring into a specific instance of conduct of the victim. **State v. Wiggins, 735.**

Hearsay—not an out-of-court statement—The trial court did not err in an assault with a firearm on a law enforcement officer case by allowing the State to ask an officer whether he had any information that defendant had committed a crime, based on the information allegedly being hearsay since it was relayed to the officer by a third party, because the witness did not testify about an out-of-court statement but merely testified that he did have information that defendant committed a crime. N.C.G.S. § 8C-1, Rule 801(c). **State v. Locklear, 716.**

Lay opinion—intoxication—The trial court did not err in an assault with a firearm on a law enforcement officer case by allowing an officer to answer whether defendant appeared to be intoxicated because N.C.G.S. § 8C-1, Rule 701 allows a lay witness to give an opinion as to the intoxication or sobriety of another, and the evidence reveals the officer was close enough to observe defendant's actions. **State v. Locklear, 716.**

Lay opinion—personal perception—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by refusing to sustain defendant's objection to the State's questioning of the detectives as to their opinions of defendant's understanding of the juvenile rights form because the opinions were based on the detectives' personal perceptions of defendant at the time of the confession and helped the trial court determine the issue of the voluntariness of defendant's statement. N.C.G.S. § 8C-1, Rule 701. **State v. Johnson, 683.**

Negotiated agreement and consent order—action for resulting trust—There was no prejudicial error in an action to establish a resulting trust in the improper admission of a negotiated agreement and consent order from the estate administration of Mr. Anderson, from whose widow the property in question was purchased. **Tucker v. Westlake, 162.**

Offer to take polygraph excluded—subsequent testimony—Even if evidence that defendant had offered to take a polygraph test was erroneously excluded on cross-examination, any prejudice was cured by defendant's subsequent testimony that such an offer had been made, defendant did not make an offer of proof, and defendant waived plain error by not arguing it in his brief. **State v. Cabe, 510.**

Prior bad acts—State witness—cutting victim after alcohol and drug use—not sufficiently similar—The trial court did not abuse its discretion in a second-degree murder case by excluding evidence of a State witness's prior bad acts concerning an incident in which the witness and her brother had cut a third person with a broken bottle, even though defendant sought to use it under N.C.G.S. § 8C-1, Rule 404(b) to show a common plan or scheme in order to point to the witness as the perpetrator rather than defendant. **State v. Deese, 413.**

Prior bad acts—State witness—juvenile adjudication—fair determination of guilt or innocence—The trial court did not abuse its discretion in a second-degree murder case by excluding evidence of a State witness's prior bad

EVIDENCE—Continued

acts concerning her juvenile adjudication of guilt of involuntary manslaughter in South Carolina, even though defendant sought to use it to impeach the witness. **State v. Deese, 413.**

Recorded recollection—statement not written or recalled by witness—impeachment—The trial court erred in the retrial of a murder defendant five years after the original trial by admitting a written pretrial statement by a State's witness where the witness's recollection of the events was not clear but there was no showing that the statement was made or adopted when the matter was fresh in the witness's memory and that it reflected her knowledge correctly. There was no foundation for suggesting that the statement was independently admissible and it was not used properly to impeach her because she denied making some of the prior statements. N.C.G.S. § 8C-1, Rule 803. **State v. Spinks, 153.**

Relevance—unstated theory of case—The trial court did not abuse its discretion in an action involving the transfer of church property by excluding video evidence of the value of the property where defendant argued that the evidence was relevant to establishing a claim of equitable mortgage, but neither the pleadings, the pretrial conference, nor the trial itself show any attempt by defendant to advance that theory. While defendant's exception to the court's ruling preserves the relevance issue, it is not true that any legal theory that might have been supported by that evidence may be asserted on appeal. **Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, 493.**

Subsequent crime or act—impermissible character evidence—Defendant is granted a new trial under N.C.G.S. § 15A-1443(a) because the trial court erred in a common law robbery case by admitting, over defendant's objection, evidence that defendant had been convicted of common law robbery in Guilford County for an incident occurring eight days after the events in this case because the only relevance of the evidence was to impermissibly show the character of defendant to commit common law robbery. N.C.G.S. § 8C-1, Rule 404(b). **State v. Willis, 820.**

Subsequent remedial measures—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not abuse its discretion by excluding evidence of subsequent remedial measures in the form of written instructions to security guards to lock the door in the event of a disturbance in the restaurant parking lot. **Benton v. Hillcrest Foods, Inc., 42.**

Unprobated will—action for resulting trust—The trial court erred in an action to establish a resulting trust in the admission of an unprobated will on the issue of intent where the only issue before the jury was Mrs. Tucker's intent in 1972, when she purchased the property and titled it in defendant's name, and the will spoke only to her intent in 1961 and was testamentary in nature. However, there was no prejudice in light of other evidence. **Tucker v. Westlake, 162.**

Waiver of objection—cross-examination—Defendant in a murder prosecution did not waive his objection to a written statement by a State's witness when he cross-examined her for the purpose of showing that the statement was unreliable. Defendant did not refer to or rely upon portions of the statements as substantive evidence. **State v. Spinks, 153.**

EVIDENCE—Continued

Witness directed to answer yes or no—no prejudicial error—The trial court did not err in an assault with a firearm on a law enforcement officer case by directing an officer to answer yes or no to the question of whether he had any information that defendant had committed a crime, based on the theory that the jury was unfairly prevented from hearing that the witness had no personal knowledge of the assault, because the officer's testimony on cross-examination indicated he had no personal knowledge of the assault. **State v. Locklear, 716.**

FRAUD

Constructive—deed execution—no special relationship of trust and confidence—The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the issue of constructive fraud because plaintiff's forecast of evidence fails to establish a special relationship of trust and confidence with those present at the execution of the deed. **Stephenson v. Warren, 768.**

GRAND JURIES

Review of members and witnesses—validity of indictment—The trial court did not err in a first-degree murder prosecution by not conducting an in camera review of grand jury members and witnesses who appeared before the grand jury in order to determine the validity of the indictment. **State v. Griffin, 531.**

HOMICIDE

First-degree murder—defendant as perpetrator—sufficiency of evidence—The trial court did not err in a homicide case by failing to dismiss the charge of first-degree murder based on insufficient evidence to show that the victim's assault was committed by defendant. **State v. Brooks, 124.**

First-degree murder—failure to instruct on second-degree—The trial court did not err in a first-degree murder prosecution by not giving an instruction on second-degree murder where the State offered evidence on each element of first-degree murder and there was no conflicting evidence. **State v. Griffin, 531.**

First-degree murder—sufficiency of the evidence—The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss where the State offered substantial evidence of each element of first-degree murder based on premeditation and deliberation. **State v. Griffin, 531.**

Second-degree murder—lesser included offense—state of mind—The trial court did not err in a homicide case by submitting the lesser included offense of second-degree murder as a possible jury verdict because it is not unreasonable to conclude that a rational trier of fact could find that defendant lacked the requisite state of mind to be convicted of first-degree murder. **State v. Brooks, 124.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—amendment of prehearing statement—A Department of Health and Human Services' decision to reverse an administrative law judge's

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

denial of Liberty Services' motion to amend its prehearing statement in a certificate of need preceding was not arbitrary or capricious where Liberty Services had not been required to file a prehearing statement, the statement which it filed addressed only its own application, and summary judgment motions from the competing applicant had not been filed at that time. **Johnston Health Care Ctr., LLC v. N.C. Dep't of Human Res., 307.**

Certificate of need—commitment of funds—insufficient application—There was substantial evidence in the record to support a Department of Health and Human Services' finding that Johnson Health Care's certificate of need application failed to comply with the statutory criteria of evidence of a funding source's ability and commitment to provide funds where Johnson's line of credit expired before the commencement of the proposed project. **Johnston Health Care Ctr., LLC v. N.C. Dep't of Human Res., 307.**

Certificate of need—commitment of funds—sufficient application—Substantial evidence existed in the whole record to support the Department of Health and Human Services' findings that Liberty Services' application for a certificate of need for nursing facility beds provided evidence of funding source commitment which supported the conclusion that the application conformed with statutory criteria. **Johnston Health Care Ctr., LLC v. N.C. Dep't of Human Res., 307.**

Certificate of need—final agency decision—adoption of administrative law judge's prior decision—The Department of Health and Human Services' final agency decision that approved the application for a certificate of need was not defective under N.C.G.S. § 150B-51(a) for failure to state specific reasons why the Department did not adopt multiple portions of the administrative law judge's recommended decision because the rule does not require a point-by-point refutation of the judge's findings and conclusions. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res., 103.**

Certificate of need—final agency decision—requirements for application—Although the Department of Health and Human Services exceeded its authority and jurisdiction and committed errors of law by awarding a certificate of need to Dialysis Care on the basis of an application that was never shown to be conforming to all applicable criteria, this argument when applied to the facts and unusual procedural posture of this case reveals Bio-Medical Applications was not prejudiced by these alleged mistakes or omissions. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res., 103.**

Certificate of need—size of dialysis unit—issue not previously addressed—The Department of Health and Human Services' final agency decision concerning an application for a certificate of need was not erroneous based on a lack of findings regarding the size of the proposed dialysis facility because there are no specific size requirements for a dialysis facility, and the issue of size is not properly before the court because it was not addressed by the Department of Health and Human Services on Dialysis Care's appeal. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res., 103.**

Certificate of need—whole record test—not arbitrary and capricious—The Department of Health and Human Services' final agency decision that approved the application for a certificate of need was not arbitrary and capri-

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

cious because the whole record test reveals all the necessary criteria had been met. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res., 103.**

Certificate of need—whole record test—requirements for application— The Department of Health and Human Services' final agency decision concerning an application for a certificate of need was supported by the evidence because the whole record test reveals the Department relied on all of the evidence before it issued the final agency decision. **Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Hum. Res., 103.**

Nursing home—observation of patient's smoking—not medical malpractice—The trial court erred by granting a motion to dismiss under N.C.G.S. § 1A-1, Rule 9(j) in an action alleging negligence in the observation and supervision of the smoking area of a nursing home. The observation and supervision of plaintiff while she smoked did not constitute an occupation involving specialized knowledge or skill and did not involve matters of medical science; this was a claim for ordinary negligence, not medical malpractice subject to Rule 9. **Taylor v. Vencor, Inc., 528.**

INDICTMENT AND INFORMATION

Address—correction—unnecessary to set out offense—The trial court did not err by allowing the State's pre-evidentiary motion to amend a count of the indictment charging keeping and maintaining a dwelling for the use of a controlled substance to the correct address of 929 Dollard Town Road, instead of 919 Dollard Town Road. **State v. Grady, 394.**

INDIGENT DEFENDANTS

Funds for expert witness—ex parte hearing on motion—The trial court did not abuse its discretion by refusing defendant's request for an ex parte hearing on his motion for funds to employ an eyewitness identification expert. While it has been held that the trial court is constitutionally required to grant indigent defendants an ex parte hearing to establish the need for a psychiatric expert, a request for an eyewitness identification expert does not require the constitutional protections afforded the request for a psychiatric expert. **State v. Garner, 1.**

Funds for expert witness—eyewitness identification—The trial court did not abuse its discretion by denying defendant's motion for funds to employ an eyewitness identification expert where defendant failed to make the required threshold showing that he would be deprived of a fair trial without the expert assistance or that there was a reasonable likelihood that the expert assistance would materially assist him in the preparation of his case. **State v. Garner, 1.**

INSURANCE

Automobile—underinsured motorist coverage—definition of company officer—The general manager of an automobile dealership was not entitled to underinsured motorist coverage as an officer under a policy which provided coverage in one amount for most employees and in a greater amount for officers. **Hlasnick v. Federated Mut. Ins. Co., 320.**

INSURANCE—Continued

Automobile—underinsured motorist coverage—primary and excess—The trial court erred in a declaratory judgment action to determine underinsured motorist coverage by finding that defendant State Farm's policy provided primary coverage where there was no dispute that an automobile dealership owned the automobile, its policy (Federated) provided primary coverage for any automobile its insured owned, and the driver's policy (State Farm) stated that it would be only an excess provider with respect to a vehicle that its policyholder did not own. **Hlasnick v. Federated Mut. Ins. Co., 320.**

Automobile—underinsured motorist coverage—rejection form—The trial court did not err in a declaratory judgment action to determine insurance coverage arising from an automobile accident by finding that plaintiffs were entitled to $50,000 in underinsured motorist coverage from defendant Federated Mutual where plaintiff argued that the underinsured coverage equals the limits of liability coverage when a mandatory selection/rejection form is not completed. Federated was not required to use the Rate Bureau's selection/rejection form and the rejection was not required to be in writing because Federated's was a fleet policy which was not under the jurisdiction of the Rate Bureau. Although it would be preferable for the form to contain a written unambiguous rejection, Federated's form meets the bare requirements. **Hlasnick v. Federated Mut. Ins. Co., 320.**

Automobile—underinsured motorist coverage—two-tiered—A two-tiered underinsured motorist policy which provided $50,000 of coverage to most employees of an automobile dealership and $500,000 in coverage to directors, officers, partners, or owners did not contravene the purpose of the Motor Vehicle Safety and Responsibility Act. Nothing in the Act requires all those covered under the policy to be insured at identical levels of coverage and the coverage here met the statutory minimum requirements for all employees. **Hlasnick v. Federated Mut. Ins. Co., 320.**

Subrogation rights—landlord and tenant—lease governs liabilities—The trial court did not err in granting summary judgment in favor of defendant-tenant in a subrogation action to recover damages for a fire allegedly caused by defendant because: (1) the terms of the lease govern the liabilities of the parties where the insured is a landlord and the third party is a tenant; (2) the plain and unambiguous language of the lease evidences the intent of each of the parties to relieve the other from all liability for damages otherwise covered by insurance, including negligence; and (3) plaintiff-insurer could have no greater rights against defendant through subrogation than its insured. **Lexington Ins. Co. v. Tires Into Recycled Energy and Supplies, Inc., 223.**

INJUNCTION

Permanent—trial pending—error—The trial court erred in granting the county a permanent injunction instead of a preliminary injunction to restrain the city from exercising its power of eminent domain because the permanent injunction actually determined the final rights of the parties before a final trial of the action. **County of Johnston v. City of Wilson, 775.**

INTEREST

Accrual date—amended judgment—Although defendant did not specifically appeal from the underlying amended equitable distribution judgment for his

INTEREST—Continued

challenge of the trial court's ability to change the date at which interest on his equitable distribution award accrued, the Court of Appeals granted certiorari and determined that the trial court did not err because interest runs from the date of an amended judgment when a judgment is reversed or vacated on appeal. **Ice v. Ice, 787.**

JUDGES

Recusal—no evidence or personal bias, prejudice, or interest—The trial court did not err in denying defendant's motion for the presiding judge's recusal, based solely on the fact that the plaintiff is Johnston County and the judge is the Resident Superior Court Judge of that county, because the record reveals no evidence of personal bias, prejudice, or interest on the part of the presiding judge. **County of Johnston v. City of Wilson, 775.**

JUDGMENTS

Default—entry set aside—good cause shown—The trial court erred in a personal injury case by denying defendant-Watkins's motion to set aside entry of default for good cause shown under N.C.G.S. § 1A-1, Rule 55(d). **Brown v. Lifford, 379.**

JURISDICTION

Final judgment—condemnation—The trial court lacked jurisdiction to review two consent judgments previously entered in condemnation proceedings because a final judgment fully determines the action, and a court has no jurisdiction at a subsequent term to proceed further on issues already determined. **County of Johnston v. City of Wilson, 775.**

Matter exceeding magistrate's dollar amount—district court dismissal—The district court erred in dismissing plaintiff's claims based on lack of jurisdiction and venue because plaintiff's claims do not meet the requirements necessary to be heard in small claims court since: (1) plaintiff did not request that her claim be heard by a magistrate as required by N.C.G.S. § 7A-210(3); and (2) the amount in controversy is above the $3,000 monetary amount established in N.C.G.S. § 7A-210(1) for a small claim action, but less than the $10,000 requirement for an action in superior court under N.C.G.S. § 7A-243. **Wilson v. Jefferson-Green, Inc., 824.**

JUVENILES

Transfer of case—reasons for transfer not stated—abuse of discretion—The juvenile court abused its discretion in transferring felony charges to the superior court for trial as an adult because the juvenile court failed to adequately state reasons underlying the decision as required by N.C.G.S. § 7A-610, and therefore, these charges are remanded to juvenile court for disposition. **In re J.L.W., 596.**

KIDNAPPING

Sufficiency of evidence—The trial court did not err by not dismissing a first-degree kidnapping prosecution where there was ample evidence from which the

KIDNAPPING—Continued

jury could infer that defendant, a law enforcement officer, stopped the victim for the purpose of a sexual encounter; "something" occurred; and defendant drove the victim from the well-traveled area where he had stopped her to a quiet, dark place so that he could ensure her silence by killing her and concealing her body. **State v. Griffin, 531.**

LIBEL AND SLANDER

Employment—actual malice—genuine issue of material fact—The trial court erred in granting defendants' motion for summary judgment on the slander per se claim, based on defendant-manager Schneider's accusation in front of third persons at their work that plaintiff-employee used illegal drugs on the company's premises and accessed pornography on the internet on one of the company's computers, because viewing the evidence in the light most favorable to plaintiff reveals a genuine issue of material fact exists concerning actual malice. **Barker v. Kimberly-Clark Corp., 455.**

NEGLIGENCE

Breach of duty to supervise—delegation of duty—drowning—private home pool party—The trial court did not err in granting defendants' motion for summary judgment in a negligence action for the drowning death of an eight-year-old boy at a private home pool party based on the theory of the Burtons' breach of duty to supervise being attributable to defendant-Armstrongs. **Royal v. Armstrong, 465.**

Breach of duty to supervise—direct duty—delegation of duty—drowning—private home pool party—The trial court did not err in granting defendants' motion for summary judgment in a negligence action for the drowning death of an eight-year-old boy at a private home pool party based on the theory of defendant-Armstrongs' breach of duty to supervise. **Royal v. Armstrong, 465.**

Contributory—initiation of confrontation—In an action against a restaurant owner and franchisor for wrongful death and personal injuries based on a fight occurring at the restaurant, the trial court did not err in denying plaintiffs' motion for directed verdict and judgment notwithstanding the verdict on the issue of contributory negligence because plaintiffs failed to use ordinary care for their own safety, as evidenced by the fact that plaintiffs initiated confrontation with the Mexican men. **Benton v. Hillcrest Foods, Inc., 42.**

Contributory—instructions—intentional act—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by submitting the issue of contributory negligence to the jury or by denying plaintiffs' motion for a new trial on the issue of contributory negligence even though plaintiffs' acts of initiating the physical confrontation were intentional and deliberate rather than negligent. **Benton v. Hillcrest Foods, Inc., 42.**

Contributory—recovery barred—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by granting defendants Waffle House, Inc., and Waffle House Holding Company, Inc.'s motion for directed verdict as to all claims because even

NEGLIGENCE—Continued

if plaintiffs could show negligence by either of these defendants, plaintiffs would have been barred from recovery based on their contributory negligence. **Benton v. Hillcrest Foods, Inc., 42.**

Contributory—self-defense—instruction not required—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by failing to instruct the jury on the issue of self-defense in regard to its contributory negligence instruction because there is no support in North Carolina law for the proposition that a plaintiff is entitled to an instruction on self-defense in order to rebut the affirmative defense of contributory negligence. **Benton v. Hillcrest Foods, Inc., 42.**

OBSCENITY

Indecent exposure—public place—accessability and viewability—The trial court did not err in an indecent exposure case by its instruction to the jury concerning the definition of "public place" even though its final part of the instruction focuses on public view whereas our Supreme Court's definition focuses on accessibility. **State v. Fusco, 268.**

Indecent exposure—public place—creek embankment—use of property is key criterion—The trial court did not err in failing to dismiss both counts of indecent exposure on the basis that the creek embankment adjacent to one victim's backyard was not a "public place" under N.C.G.S. § 14-190.9(a) because use of the property, as opposed to its ownership, is the key criterion and the evidence establishes that the creek embankment was being used by the public. **State v. Fusco, 268.**

Indecent exposure—testimony of victim not required—Even though one of the victims never testified at trial, the trial court did not err in failing to dismiss that indecent exposure charge because the victim's testimony was not even needed to substantiate the charge since the State only needed to show that defendant was exposing himself and that the victim was present during the exposure and could have seen had she looked. **State v. Fusco, 268.**

OPEN MEETINGS

Government body—attorney-client exception—closed session minutes—in camera review by trial court required—Plaintiff's claim seeking injunctive relief to prevent recurring violations of the Open Meetings Law and also seeking a writ of mandamus ordering defendants to turn over minutes from a closed session of the Henderson County Board of Commissioners invoked pursuant to the attorney-client exception under N.C.G.S. § 143-318.11(a)(3) is remanded to the trial court for an in camera review of the minutes of the closed session. **Multimedia Publ'g of N.C., Inc. v. Henderson County, 456.**

PENSIONS AND RETIREMENT

Judicial benefits—return to state employment—The trial court did not err in concluding that N.C.G.S. §§ 135-3(8)c and 135-3(8)d apply to plaintiff, thus forfeiting plaintiff's contractual right to his judicial monthly service retirement benefit for the period of time when he served as Chairman of the Utilities Commission. **Wells v. Consolidated Jud'l Ret. Sys. of N.C., 671.**

PENSIONS AND RETIREMENT—Continued

Judicial benefits—return to state employment—constitutionality—The Retirement System's interpretation of N.C.G.S. § 135-3(8)(d), providing that plaintiff's benefits would cease if he returned to employment with the State of North Carolina following his retirement from the Court of Appeals, does not violate the taking clause and the equal protection clause. **Wells v. Consolidated Jud'l Ret. Sys. of N.C., 671.**

PLEADINGS

Additional theory—failure to plead or amend complaint—The trial court did not err by granting defendant-Johnsons' motion for summary judgment in a claim for interference with contractual relations based on the issue of whether the installment contract was an equitable mortgage because: (1) plaintiff's complaint does not allege equitable mortgage as a possible claim against defendants and does not allege any facts that would put defendants on notice; (2) plaintiff did not amend its complaint at any time to allege this additional theory of recovery to put defendants on notice; and (3) plaintiff cannot assert an additional theory of recovery for the first time on appeal. **Parkersmith Properties v. Johnson, 626.**

Rule 11 sanctions—California child support order—Plaintiff's counsel had grounds for seeking the registration of a California child support order and did not violate N.C.G.S. § 1A-1, Rule 11. **Twaddell v. Anderson, 56.**

Rule 11 sanctions—time for filing motion—By waiting over thirteen months after our Supreme Court denied defendants' petition for discretionary review, plaintiff failed to file his motion for N.C.G.S. § 1A-1, Rule 11 sanctions within a reasonable time of detecting the alleged impropriety. **Griffin v. Sweet, 762.**

Third-party complaint—dismissed and refiled—The trial court erred by dismissing a third-party complaint in a medical malpractice action where the complaint was filed, voluntarily dismissed under Rule 41, refiled without leave of the court within one year but more than 45 days after the answer was served, and dismissed under Rule 14. Rules 14 and 41 are in conflict and the restrictive Rule 14 approach would violate the traditional open courts policy of North Carolina. **Clark v. Visiting Health Prof'ls, Inc., 505.**

PREMISES LIABILITY

Contributory negligence—slip and fall—The trial court did not err in granting summary judgment in favor of defendant-store in a slip and fall case because: (1) plaintiff-customer's testimony demonstrates that the hazard was obvious, making the defense of contributory negligence relevant; and (2) plaintiff did not forecast evidence to indicate that defendant did anything which could or did divert plaintiff's attention from the hazard. **Hall v. Kmart Corp., 839.**

Drowning—private home pool party—The trial court did not err in granting defendants' motion for summary judgment in a negligence action for the drowning death of an eight-year-old boy at a private home pool party based on the theory of premises liability, even though plaintiffs allege there was no lifeguard on duty and that adequate safety devices were not available. **Royal v. Armstrong, 465.**

PROBATION AND PAROLE

No findings longer period necessary—intermediate punishment—The trial court erred in placing defendant on supervised probation for a period of sixty months without making findings that a period longer than thirty-six months was necessary because defendant received intermediate punishment, and therefore, N.C.G.S. § 15A-1343.2(d) provides that he should not receive probation for more than thirty-six months unless on remand the trial court makes findings that a longer period of probation is necessary. **State v. Hughes, 92.**

PROCESS AND SERVICE

Acceptance of service—back dated—The trial court properly set aside a judgment of divorce entered on 8 December where plaintiff filed the action on 3 November; the acceptance of service carried the date 4 November, creating a prima facie case that defendant accepted service on that date; and defendant presented unequivocal and convincing evidence that she did not sign the acceptance until 15 November and back dated it at the request of plaintiff. The court acted prior to the expiration of 30 days from service and was without jurisdiction to adjudicate the absolute divorce on 8 December. **Latimer v. Latimer, 227.**

Certified mail—foreign child support order—Even if the U.S. Marshal's signed statement indicating that the German child support court documents were mailed certified to defendant-father had deficiencies, plaintiff presented satisfactory proof of proper service of process under N.C.G.S. § 1A-1, Rule 4(j)(1)(c). **State ex rel. Desselberg v. Peele, 206.**

Personal jurisdiction—certificate of addressing and mailing—foreign child support order—Although there was no affidavit averring the circumstances of service as required by N.C.G.S. § 1-75-10(4) to prove service by mail in a foreign country, the trial court did not err in concluding a German court had personal jurisdiction over defendant-father in a child support matter because plaintiff is able to prove service by mail in a foreign country by a certificate of addressing and mailing by the clerk of court. **State ex rel. Desselberg v. Peele, 206.**

Service of process—in-hand delivery not required—The trial court erred in a negligence case by granting defendant city's motion to dismiss for insufficient service of process under N.C.G.S. § 1A-1, Rule 4(j)(5)(a) and lack of personal jurisdiction because the circumstances of this case reveal that there was no requirement of in-hand delivery to effect proper service. **Crabtree v. City of Durham, 816.**

Service on insurance company—strict compliance required—The trial court did not err in a case arising out of an automobile accident with an uninsured motorist by granting summary judgment for the unnamed defendant insurance company based on improper service of process prior to expiration of the three-year statute of limitations because: (1) plaintiff did not keep her action alive under N.C.G.S. § 1A-1, Rule 4(d) through the issuance of a chain of alias or pluries summonses, since both individual defendants were served personally with the original summons; (2) plaintiff did not attempt to serve a "copy" of the summons and complaint on the insurer, as required by the Financial Responsibility Act; and (3) in addition to the methods of service of process on a corporation set out in N.C.G.S. § 1A-1, Rule 4(j)(6), plaintiff could have served the insurance company under N.C.G.S. § 58-16.30, by delivering a copy of the

PROCESS AND SERVICE—Continued

process to the Office of the Commissioner of Insurance, or mailing it to the Commissioner by registered or certified mail, return receipt requested. **Thomas v. Washington, 750.**

PUBLIC RECORDS

Government body—closed session—minutes—Although plaintiff claims it is entitled to public disclosure of the minutes of a closed session of the Henderson County Board of Commissioners pursuant to the Public Records Law under N.C.G.S. § 132-9(a) even if the closed session was warranted under the attorney-client exception in N.C.G.S. § 143-318.11(a)(3), this determination must be made by the trial court after an in camera review of the minutes of the closed session. **Multimedia Publ'g of N.C., Inc. v. Henderson County, 456.**

ROBBERY

Armed—dangerous weapon—sufficiency of evidence—The trial court did not err in convicting defendant for robbery with a dangerous weapon and of being a violent habitual felon by refusing to dismiss the charges of armed robbery at the end of the State's evidence and at the end of all the evidence. **State v. Stevenson, 235.**

Firearm—not operational—The trial court did not err by denying defendant's motion to dismiss a charge of armed robbery where the firearm was not recovered and defendant contended that there was insufficient evidence of the use of a firearm. Defendant's testimony that he employed only the barrel of a gun which was not operational was sufficient to remove the presumption that his actions endangered or threatened the victim's life, but failed to show conclusively that the weapon was not operational and did not eliminate the permissive inference of danger to the victim. **State v. Duncan, 515.**

Instructions—use of firearm—There was no error in an armed robbery prosecution in which the trial court denied defendant's requested instruction defining a handgun as being capable of expelling a projectile at the time of the alleged offense. There was contradictory testimony as to the nature of the weapon here and the instruction given properly left resolution of the factual issue with the jury. Moreover, the instruction given was substantially the same as the one requested. **State v. Duncan, 515.**

SCHOOLS AND EDUCATION

Possession of weapon—sufficiency of evidence—The trial court did not err in denying defendant's motion to dismiss his charges for possessing a pellet gun on school property in violation of N.C.G.S. § 14-269.2(d) based on the State's failure to show defendant had exclusive possession of the book bag in which the pellet gun was found or its contents. **In re Murray, 648.**

SEARCH AND SEIZURE

Investigatory stop—anonymous informant—predictions about future behavior—verified by officers—sufficient indicia of reliability—The trial court erred in concluding the anonymous informant did not provide reliable

SEARCH AND SEIZURE—Continued

information sufficient to justify an investigatory stop, and subsequently by granting defendant's motion to suppress the evidence of drugs, because significant aspects of the anonymous informant's predictions about the future behavior of defendant were verified by the detectives, and thus, exhibited sufficient indicia of reliability. **State v. Hughes, 286.**

School official—weapon in student's book bag—reasonableness—The trial court did not err in denying defendant's motion to suppress evidence of a pellet gun found in defendant's book bag at school by a school official because: (1) the search was reasonable at its inception, and (2) the search was conducted in a reasonable manner. **In re Murray, 648.**

Warrant—tainted evidence—Even though the officers' prior warrantless entries into defendant's residence did not violate the Fourth Amendment since the security alarm was sounding at the time officers arrived, the back door of the residence was ajar, and a cursory inspection revealed a recently broken window, the officers' search violated the permissible scope, and the trial court erred in denying defendant's motion to suppress the additional evidence the officers obtained pursuant to a warrant because the illegally discovered marijuana and cash obtained during the warrantless search comprised more than a minor portion of the evidence establishing probable cause for the warrant. **State v. Woods, 386.**

Warrant for premises—search of individual—probable cause—Even though police officers had a warrant to search a mobile home and all outbuildings at the residence for crack cocaine and other controlled substances, the search of a defendant not named in the warrant but found on the premises named therein that he neither owned nor controlled and the seizure of a rock of crack cocaine and crack pipes from his jacket violated defendant's Fourth Amendment right to be free from unreasonable search and seizure because the right to search defendant under N.C.G.S. 21 15A-256, which allows the search of persons on the premises who were not named in the warrant when the items sought were not found, ended when officers found crack cocaine in an outbuilding. **State v. Cutshall, 756.**

Warrantless search—permissible scope of search exceeded—Even though the officers' warrantless entries into defendant's residence did not violate the Fourth Amendment since the security alarm was sounding at the time officers arrived, the back door of the residence was ajar, and a cursory inspection revealed a recently broken window, the trial court erred in denying defendant's motion to suppress evidence of marijuana and $44,890 cash based on the ensuing search and seizure violating the permissible scope of searches. **State v. Woods, 386.**

SENTENCING

Active prison sentence—restitution can only be recommended—The trial court erred in requiring defendant to make restitution in the amount of $550,283.75 for the charge of accessing computers in Count III of the indictment when an active prison sentence was imposed on this count, and on remand, the trial court is required to indicate whether it is recommending that defendant is to make restitution as a condition of work release or post-release supervision. **State v. Hughes, 92.**

SENTENCING—Continued

Aggravating factor—ethnic group of victim—The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the offenses were committed against the victims because of their race, color, religion, or country of origin where defendant's accomplice testified that they selected two Hispanic men as their victims because they thought that Hispanics carried large sums of cash and were less likely to report crimes committed against them. There is no language in N.C.G.S. § 15A-1340.16 (d)(17) to suggest a limiting requirement that the defendant harbor animosity toward a race or ethnic group. **State v. Hatcher, 524.**

Aggravating factor—great monetary loss—conspiracy—The trial court did not err in finding as an aggravating factor that the offense of conspiracy involved damage causing great monetary loss. **State v. Hughes, 92.**

Aggravating factor—great monetary loss—felony accessing computers—not element of offense—The trial court did not err in finding as an aggravating factor that the offense of felony accessing computers involved damage causing great monetary loss and consequently by sentencing defendant in the aggravating range. **State v. Hughes, 92.**

Double punishment—first-degree kidnapping—first-degree rape—improper—Although the trial court did not err in instructing on first-degree kidnapping based on sexual assault and on first-degree rape, defendant's sentence is vacated and remanded since he was improperly convicted of and sentenced to double punishment for first-degree kidnapping and first-degree rape because: (1) the verdict sheet is ambiguous as to whether the jury relied on the theory that the victim was not released in a safe place or the theory that the victim had been sexually assaulted to elevate the kidnapping charge to first-degree; and (2) construing the ambiguous verdict in favor of defendant reveals the first-degree kidnapping conviction arose from the same sexual assault which was the basis of the first-degree rape conviction. **State v. Wiggins, 735.**

Habitual felon—attempt—substantially equivalent offense—The trial court did not err in defendant's convictions for robbery with a dangerous weapon and of being a violent habitual felon by ruling as a matter of law that defendant's prior conviction for assault with intent to commit oral copulation from California is a substantially equivalent offense to that of a Class A through E felony, making it a violent felony under N.C.G.S. § 14-7.7(b). **State v. Stevenson, 235.**

Habitual felon—sufficiency of evidence—Although defendant claims the trial court erred in convicting him of robbery with a dangerous weapon and of being a violent habitual felon by ruling there is no additional requirement that the State prove his 1992 conviction for assault with intent to commit a felony was a violent felony and by ruling as a matter of law that said felony was a violent felony, the Court of Appeals did not need to reach this assignment of error in light of its holding that the trial court did not err in ruling as a matter of law that defendant's 1992 conviction in California was a violent felony. **State v. Stevenson, 235.**

Mitigating factors—not found—sentence within presumptive range—The trial court did not err in a homicide case by sentencing defendant for second-degree murder without finding mitigating factors because the trial court sentenced defendant within the presumptive guidelines for his offense, and there-

SENTENCING—Continued

fore, findings of mitigating or aggravating factors were not required. **State v. Brooks, 124.**

Mitigating factors—sufficiency of evidence—The trial court did not err in failing to find certain statutory mitigating factors because the evidence was not conclusive that: (1) defendant had made substantial restitution to the victim; (2) defendant had been a person of good character or has a good reputation in the community in which he lives; (3) defendant had a positive employment history and was gainfully employed; or (4) defendant had a support system. **State v. Hughes, 92.**

Structured—prior record level points—pjc—The trial court did not err in its assessment of prior record points when sentencing defendant for armed robbery by assessing prior record level points for an offense to which he pled no contest and for which prayer for judgment was continued. Defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered. **State v. Hatcher, 524.**

SEXUAL OFFENSES

First-degree sexual offense—indecent liberties—sufficiency of evidence—The trial court did not err in a first-degree sexual offense and taking indecent liberties with a child case by denying defendant's motion to dismiss. **State v. Ford, 634.**

STATUTE OF LIMITATIONS

Tolling—bankruptcy—In an action to recover for work completed by plaintiff on defendant's property on 16 August 1989, the trial court erred in denying defendant's motion to dismiss based upon expiration of the three-year statute of limitations under N.C.G.S. § 1-52(1) because: (1) even though the statute of limitations was suspended in March 1992 when defendant filed for Chapter 13 bankruptcy, defendant's bankruptcy petition was dismissed on 4 March 1994, at which point the statute of limitations began to run again, and plaintiff did not commence this action until 1 December 1994; and (2) even though an acknowledgment of the existence of a debt may renew a statute of limitations in some circumstances, the bankruptcy trustee's installment payments to plaintiff do not warrant a clear inference that defendant acknowledged the existence of the debt, nor do these payments indicate defendant's willingness to pay such debt, in light of the facts that defendant did not list plaintiff as a creditor and objected to plaintiff's claim. **Person Earth Movers, Inc. v. Buckland, 658.**

Uninsured motorist coverage—tort statute of limitations applies—In an action against an unnamed defendant insurance company for damages arising out of an automobile accident with an uninsured motorist, the three-year tort statute of limitations for automobile negligence actions applies to a claim against an uninsured motorist carrier instead of the three-year contract statute of limitations. **Thomas v. Washington, 750.**

TAXATION

Property—qualification as forestland—challenge of tax listing—A private citizen could contest the preferential tax assessment of Whiteside's property as

TAXATION—Continued

forestland after the listing period had expired because this case involves an appeal from a decision of the board of equalization and review instead of an exemption decision made by a county assessor, and Whiteside would not have benefitted from being notified to file a new exemption application. **In re Appeal of Whiteside Estates, Inc., 360.**

Property—qualification as forestland—due process—notice—The Property Tax Commission did not violate Whiteside's due process rights by failing to notify it of the initial proceeding before the Jackson County Board when a private citizen appeared in support of his challenge to the present-use classification of the Whiteside property as forestland, and by failing to make an "intelligible transcript" of the proceeding. **In re Appeal of Whiteside Estates, Inc., 360.**

Property—qualification as forestland—findings of fact—sufficiency—The Property Tax Commission did not err in finding as fact that Whiteside was not actively engaged in the commercial growing of trees under a sound management program pursuant to N.C.G.S. § 105-277.2(2), which would have qualified its property for taxation at present-use value. **In re Appeal of Whiteside Estates, Inc., 360.**

Property—qualification as forestland—standing—aggrieved taxpayer—The Property Tax Commission did not err in denying Whiteside's motion to dismiss the initial appeal to the County Board by a private citizen, who owned a small interest in a piece of property in Jackson County, based on lack of standing to contest the preferential assessment of Whiteside's property as forestland under N.C.G.S. § 105-277.6. **In re Appeal of Whiteside Estates, Inc., 360.**

TERMINATION OF PARENTAL RIGHTS

No right to file Anders brief—sufficiency of evidence—Although counsel for a parent appealing from a juvenile court's severance order has no right to file an Anders brief since a parent whose rights are terminated is not equivalent to a convicted criminal, the Court of Appeals exercised its discretion pursuant to N.C. R. App. P. 2 and upheld the trial court's termination of respondents' parental rights because the trial court's findings of fact are supported by clear and convincing evidence. **In re Harrison, 831.**

Past adjudication of neglect—probability of repetition—The trial court did not err in terminating respondent mother's parental rights under former N.C.G.S. § 7A-289.32(2) because even if there is no evidence of neglect at the time of the termination proceeding, parental rights may be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents. **In re Reyes, 812.**

Standard of proof—clear and convincing evidence—statement required in order—The order of the trial court terminating respondents' parental rights is vacated and remanded because N.C.G.S. § 7A-289.30(e) (now N.C.G.S. § 7B-1109(f)) requires the trial court to affirmatively state in its order the clear and convincing evidence standard of proof utilized in the termination proceeding, and the order failed to do so. **In re Church, 654.**

TERMINATION OF PARENTAL RIGHTS—Continued

Sufficiency of evidence—Although there was competent evidence before the trial court to support a finding that statutory grounds existed under N.C.G.S. § 7A-517 (now N.C.G.S. § 7B-100 et seq.) to terminate parental rights based on neglect, dependence, and the children being placed in foster care for a period of twelve months, this case must be remanded for the trial court to determine whether the evidence satisfies the required standard of proof of clear and convincing evidence under N.C.G.S. § 7A-289.30(e) (now N.C.G.S. § 7B-1109(f)). **In re Church, 654.**

TRIALS

Continuance—insufficient time to prepare for trial—The trial court did not abuse its discretion by denying a motion for a continuance where plaintiffs alleged an insufficient time to prepare for trial in that the court calendar was sent to them two weeks before the trial was to begin, but the litigation had been going for four years and a previous appeal had held that a directed verdict motion was improperly granted, so that plaintiffs would surely have known that a second trial was imminent, and plaintiffs failed to show how an out-of state deposition taken three weeks before the trial changed the underlying issue. **Tucker v. Westlake, 162.**

Motion for continuance—no showing of diligence or good faith effort—The trial court did not abuse its discretion in denying plaintiff Martin's motion for an additional continuance of a summary judgment hearing because plaintiff did not demonstrate diligence or a good faith effort to meet the schedule set by the trial court. N.C.G.S. § 1A-1, Rule 40(b). **May v. City of Durham, 578.**

Order of jury arguments—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not err by denying plaintiffs' motion for the last jury argument because the order of the jury arguments is in the discretion of the trial court and the trial court's decision is final. **Benton v. Hillcrest Foods, Inc., 42.**

UNFAIR TRADE PRACTICES

Deed execution—private sale of residence—not an act "in or affecting commerce"—The trial court did not err in a case concerning the execution of a deed for real estate by granting summary judgment in favor of defendants on the unfair and deceptive trade practices claim, and on plaintiff's request for treble damages, because plaintiff's claim is beyond the purview of N.C.G.S. § 75-1.1. **Stephenson v. Warren, 768.**

Sufficiency of evidence—The trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to allege a claim for unfair and deceptive acts arising out of the sale of remnant parcels of land where plaintiffs own residential lots in the pertinent subdivision. **Harry v. Crescent Resources, Inc., 71.**

Third-party claimants—insurance company of adverse party—The trial court did not err in granting defendants St. Paul's and Lee's motion to dismiss under Rule 12(b)(6) because North Carolina does not recognize any cause of action for unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party. **Lee v. Mut. Community Sav. Bank, 808.**

VENUE

Change—convenience of witnesses—motion after answer—The trial court did not err by considering a motion for change of venue filed after the answer where the motion was based on the convenience of the witnesses. **McCullough v. Branch Banking & Trust Co., 340.**

Performance bond—county where construction performed—Although N.C.G.S. § 44A-28(a) states that actions on payment bonds shall be brought in the county where the contract or any part thereof has been performed, the statutory definitions, the plain language, the context, and the federal case law all support the interpretation that the "contract" is the prime contract and that "any part thereof" refers to contracts which physically span more than one county. The prime contract here was performed in Warren County. **McClure Estimating Co. v. H.G. Reynolds Co., 176.**

State's motion to change—limitation of facilities—The trial court did not abuse its discretion in a first-degree murder prosecution by granting the State's motion to change the venue based upon the physical limitations of the facilities. **State v. Griffin, 531.**

WILLS

General power of appointment—residuary clause—trust assets—Even though the general rule is that specific reference must be made to a power of appointment before the power may be exercised, the trial court erred in concluding decedent's will had no effect on the disposition of decedent's trust because the residuary clause of decedent's will exercised the general power of appointment reserved by him in the pertinent trust. **First Union Nat'l Bank v. Ingold, 262.**

Stock—charge upon shares—continuing payment for life—intent of testatrix—In order to give effect to testatrix's intent, the trial court did not err in granting summary judgment in favor of defendant Sykes and declaring that the language of article three of testatrix's will imposes a charge upon any shares of stock of plaintiff Branch Funeral Homes taken by plaintiff Howell thereunder for continuing payment to defendant Sykes for the remainder of his natural life of the amount of the annual salary he was receiving from plaintiff Branch Funeral Homes and of the amount of life insurance premiums upon his life. **Howell v. Sykes, 407.**

WITNESSES

Child—competency—The trial court did not abuse its discretion in a first-degree sexual offense and taking indecent liberties with a child case by finding the four-year-old female victim competent to testify, even though she did not know what it meant to put her hand on the Bible and swear to tell the truth, because voir dire examination revealed that she knew what it meant to tell the truth. N.C.G.S. § 8C-1, Rule 601. **State v. Ford, 634.**

Cross-examination—credibility—The trial court did not abuse its discretion in a prosecution for armed robbery by not allowing defendant to cross-examine the victims regarding their immigration status and an accomplice regarding his history of firearm use and his plea agreement. **State v. Hatcher, 524.**

WITNESSES—Continued

Expert—failure to qualify—no pre-trial identification—similar testimony—In an action filed for wrongful death and personal injuries based on a fight occurring at a Waffle House restaurant, the trial court did not abuse its discretion by failing to qualify a witness as an expert in the field of security for restaurants and in excluding his opinions because: (1) plaintiffs violated a pre-trial discovery order by failing to identify the witness as an expert; and (2) plaintiffs retained another expert witness to testify as to the same security issues at the restaurant. **Benton v. Hillcrest Foods, Inc., 42.**

Statements—not disclosed—The trial court did not abuse its discretion in a first-degree murder prosecution by not ordering the disclosure of witness statements after the witnesses testified or by failing to order the disclosure of notes used to refresh the recollection of witnesses. **State v. Griffin, 531.**

WORKERS' COMPENSATION

Additional medical treatment—relation to original compensable injury—rebuttable presumption—In a case where plaintiff-employee requested additional medical treatment under N.C.G.S. § 97-25 for a back injury, the Industrial Commission's opinion must be remanded for a new determination of causation because it is unclear whether plaintiff was given the benefit of the rebuttable presumption that the treatment is directly related to the original compensable injury. **Reinninger v. Prestige Fabricators, Inc., 255.**

Attorney fees—amount—discretion of Commission—The Industrial Commission did not abuse its discretion by modifying the deputy commissioner's original award of attorney fees based on only part of plaintiff's total workers' compensation award, while the Full Commission granted plaintiff's request that attorney fees be calculated on the total award, because the award was within the Full Commission's authority to approve fee payments pursuant to N.C.G.S. § 97-90(c). **Cole v. Triangle Brick, 401.**

Causation—carpal tunnel syndrome—The Industrial Commission did not err in a workers' compensation action by not finding that plaintiff's employment with defendant caused her carpal tunnel syndrome; while plaintiff's treating doctors stated that typing is a known cause for carpal tunnel, competent evidence shows that her job was not a significant contributing factor. **Hardin v. Motor Panels, Inc., 351.**

Causation—standard—The Industrial Commission applied the correct standard in determining causation in a carpal tunnel workers' compensation action by requiring that the employment have significantly contributed to or have been a significant causal factor in the disease's development. **Hardin v. Motor Panels, Inc., 351.**

Close of case—unilateral Form 28B—The unilateral filing of a Form 28B did not foreclose an employee's right to further compensation where the compensation had only been temporarily suspended. The filing of a Form 28B with the Industrial Commission, combined with forwarding that form to the employee, will preclude further recovery by the employee after two years only if the original claim was closed to begin with. **Scurlock v. Durham County Gen. Hosp., 144.**

WORKERS' COMPENSATION—Continued

Company treating physician—knowledge not imputed to employer—Even though the general rule is that the principal is charged with the knowledge of his agent, ex parte communications between the company physician and the company or the company's attorney in a workers' compensation case are not inferred or imputed when the agent has a reason or motive to withhold facts from his principal. **Reinninger v. Prestige Fabricators, Inc., 255.**

Company treating physician—private communications—exclusion of testimony not required—Although plaintiff-employee argues the testimony of Dr. Simpson, defendant-employer company's treating physician, should be excluded and not considered by the Industrial Commission based on alleged ex parte communications with the employer, the Commission did not err in admitting the doctor's testimony because plaintiff has presented no evidence that the doctor engaged in any ex parte communications with defendants regarding his treatment of plaintiff. **Reinninger v. Prestige Fabricators, Inc., 255.**

Conclusions of law—attendant health care services—family member—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff-employee is entitled to compensation for attendant health care services provided by his wife because this conclusion is supported by the findings of fact, and family members are entitled to payment for attendant care provided to an injured family member. **London v. Snak Time Catering, Inc., 473.**

Credibility—deference to hearing commissioner—The Industrial Commission did not fail to perform its fact-finding function when it deferred to the credibility determination of the deputy commissioner concerning plaintiff-employee's alleged back injury. **Reinninger v. Prestige Fabricators, Inc., 255.**

Credibility—determination by full Industrial Commission—Even though N.C.G.S. § 97-85 places the ultimate fact-finding function with the full Industrial Commission and not the hearing officer, the Commission did not err in a workers' compensation case by accepting the credibility determination of a deputy commissioner because the Commission is not precluded from accepting the deputy commissioner's credibility determinations if it elects to do so. **Fuller v. Motel 6, 727.**

Disability—burden on employee—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff-employee failed to prove she was unable to earn the same wages she earned before her neck injury and that she is not entitled to a presumption of disability upon proof she sustained an injury as a consequence of an accident arising out of and in the course of her employment. **Fuller v. Motel 6, 727.**

Employer credit—private disability insurance policy—reduction for attorney fees—The Industrial Commission did not abuse its discretion in a workers' compensation case by reducing defendant-employer's credit by twenty-five percent for payments made under a private disability insurance policy fully funded by defendant Triangle Brick in order to provide plaintiff an award of attorney fees. **Cole v. Triangle Brick, 401.**

Findings of fact—attendant health care services—evidence sufficient—The Industrial Commission's findings of fact in a workers' compensation case

WORKERS' COMPENSATION—Continued

regarding plaintiff-employee's need for attendant care services are binding because they are supported by competent evidence. **London v. Snak Time Catering, Inc., 473.**

Last injurious exposure—carpal tunnel—The evidence in a workers' compensation action supported the Industrial Commission's finding that plaintiff was last injuriously exposed to carpal tunnel syndrome while working with subsequent employers. **Hardin v. Motor Panels, Inc., 351.**

Occupational disease—carpal tunnel syndrome—ganglion cyst—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff-employee did not meet her burden of proving she sustained a compensable occupational disease since there was competent evidence to show that plaintiff's carpal tunnel syndrome and ganglion cyst were not due to causes and conditions which were characteristic and peculiar to her employment as a housekeeper, and which excluded all ordinary diseases of life to which the general public was equally exposed. **Fuller v. Motel 6, 727.**

Occupational disease—diagnosis prior to leaving employment—The Industrial Commission did not err in a workers' compensation action by not considering evidence which showed that plaintiff was diagnosed with an occupational disease prior to leaving defendant's employment where plaintiff failed to demonstrate a causal connection between her disability and employment. The doctor's records relied upon by plaintiff show only a notation that he suspected that the overuse/repetition injury was connected to her employment; the suspicion of a doctor is insufficient proof of causation. **Hardin v. Motor Panels, Inc., 351.**

Timeliness—claim for further compensation—An Industrial Commission order that workers' compensation be resumed retroactively was remanded for further findings where defendants contended that plaintiff's application for further compensation was barred by the two-year-statute of limitations for change-of-condition cases under N.C.G.S. § 97-47, but plaintiff also alleged that she was in compliance with all rehabilitative services and this was a case still pending under N.C.G.S. § 97-25 rather than a change-of-condition case. An employee's refusal to cooperate only bars her from receiving compensation until her refusal ceases. **Scurlock v. Durham County Gen. Hosp., 144.**

Treatment—refusal to cooperate—reinstatement of compensation—findings—A workers' compensation case was remanded to the Industrial Commission for further findings where plaintiff was attempting to have her compensation reinstated and should have been required to show that she was now willing to cooperate with medical treatment and rehabilitative services, but the Commission instead concluded that defendants' own noncompliance estopped them from claiming that the refusal continued, in effect placing the burden on defendants. **Scurlock v. Durham County Gen. Hosp., 144.**

Treatment—selection of physician—findings—A workers' compensation action was remanded for further findings on the issue of whether a particular doctor was now the treating physician where the Industrial Commission made no findings as to whether plaintiff sought authorization for her own physician within a reasonable time. The mere fact that plaintiff was seeing this doctor at the time of the prior opinion does not mean that she was authorized to do so. **Scurlock v. Durham County Gen. Hosp., 144.**

WRONGFUL DEATH

Death of child—parental entitlement to settlement proceeds—abandonment of child—no exceptions met—In a case determining entitlement to the proceeds of a wrongful death settlement in the estate of the parties' daughter, if on remand for trial the court determines that respondent-mother abandoned her child, she will not be entitled to share in her child's wrongful death benefits because: (1) she was not deprived of the custody of her child under an order of a court of competent jurisdiction; and: (2) she does not meet the requirements for an exception under N.C.G.S. § 31A-2(2). **Hixson v. Krebs, 183.**

Death of child—parental entitlement to settlement proceeds—determination of abandonment of child—In a case determining entitlement to the proceeds of a wrongful death settlement in the estate of the parties' daughter, the trial court erred in granting summary judgment in favor of respondent-mother on the issue of whether she abandoned her daughter before her daughter's fatal accident. **Hixson v. Krebs, 183.**

ZONING

Board of Adjustment—burden of persuasion—established standards—The trial court did not err in a zoning case regarding a special use permit application by concluding that the Board of Adjustment did not improperly combine established standards or alter petitioners' burden of persuasion. **Richardson v. Union County Bd. of Adjust., 134.**

Board of Adjustment—discretion in limiting testimony—The trial court did not err in a zoning case regarding a special use permit application by determining that interested persons were permitted to testify before the Board of Adjustment because the record reveals that both sides were given adequate time to present evidence, and case law, as well as § 101(b) and (c) of the Union County Land Use Ordinance, gives the Board discretion in equitably limiting testimony. **Richardson v. Union County Bd. of Adjust., 134.**

Conditional use permits—interference with contractual relations—aldermen—legislative immunity—The trial court did not err in dismissing plaintiff's claims of interference with contractual relations against the Garner aldermen based on their denial of a conditional use permit because the aldermen may claim legislative immunity. **Stephenson v. Town of Garner, 444.**

Conditional use permits—interference with contractual relations—town—Although plaintiff could not allege a claim for interference with contractual relations against the Town of Garner based on the right to income under an option contract in existence at the time the Garner-Sprint Lease was executed since plaintiff had no contract rights at the time the Garner-Sprint Lease was executed, the trial court erred in dismissing plaintiff's claim of interference with contractual relations against the Town based on plaintiff's right to future income under the Stephenson-Sprint Lease, had the Town eventually approved Sprint's conditional use permit. **Stephenson v. Town of Garner, 444.**

Conditional use permits—unfair trade practices claims—aldermen—The trial court did not err by dismissing plaintiff's Chapter 75 unfair trade practices claims against the Garner aldermen, based on their alleged inducement of Sprint to enter into the Garner-Sprint Lease by denying Sprint's conditional use permit (CUP) petition seeking to place a cellular tower on plaintiff's property, and the

ZONING—Continued

town's subsequent execution of the Garner-Sprint Lease. **Stephenson v. Town of Garner, 444.**

Conditional use permits—unfair trade practices claims—town—The trial court did not err by dismissing plaintiff's Chapter 75 unfair trade practices claims against the Town of Garner, based on its alleged inducement of Sprint to enter into the Garner-Sprint Lease by denying Sprint's conditional use permit (CUP) petitions seeking to place a cellular tower on plaintiff's property, and the town's subsequent execution of the Garner-Sprint Lease, because a city or town may not be sued under Chapter 75. **Stephenson v. Town of Garner, 444.**

Manufactured homes overlay district—change in ownership of property—standing—not moot—In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court erred in dismissing plaintiff's arbitrary/capricious and N.C.G.S. § 160A-383.1 claims based on mootness and lack of standing, even though plaintiff no longer owns one of the pertinent parcels of land. **Northfield Dev. Co. v. City of Burlington, 272.**

Manufactured homes overlay district—council not obligated to approve petitions—council retains discretion—In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, even though the City's zoning code provides that manufactured home overlay district petitions are "permitted by right" in R-9 districts, the trial court did not err in dismissing plaintiff's N.C.G.S. § 160A-383.1 claims because the Council is not obligated to approve the petitions and retains the discretion to make the designation. **Northfield Dev. Co. v. City of Burlington, 272.**

Manufactured homes overlay district—deposition of mayor—legislative immunity—In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court's protective order with respect to plaintiff's request to take a deposition of the mayor of City is modified and affirmed in that: (1) the mayor cannot be compelled to testify about his actions, intentions, and motives with respect to the manufactured home overlay district petitions based on legislative immunity; (2) he did not abandon that privilege when he spoke with the newspapers; and (3) the part of the order prohibiting any questioning of the mayor is reversed because the relevancy of those questions must be judged by the trial court. **Northfield Dev. Co. v. City of Burlington, 272.**

Manufactured homes overlay district—preclusion of use not shown—In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two parcels of land, the trial court did not err in dismissing plaintiff's N.C.G.S. § 160A-383.1 claims, based on allegations that the City has adopted or enforced zoning regulations precluding the use of manufactured homes in the City's entire zoning jurisdiction, because the City has approved two manufactured home overlay district petitions. **Northfield Dev. Co. v. City of Burlington, 272.**

Manufactured homes overlay district—substantial presence—city not required to adopt—In a case concerning the City's denial of two separate requests by plaintiff for manufactured home overlay district zoning for two

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parcels of land, the trial court did not err by dismissing plaintiff's N.C.G.S. § 160A-383.1 claims, based on allegations that the statute reveals a legislative intent that there be a substantial presence of manufactured homes within each municipality, because this statute does not require a city to adopt any manufactured home overlay district zoning. **Northfield Dev. Co. v. City of Burlington, 272.**

Principal structures—piers—The Mecklenburg County Board of Adjustment and the trial court erred by deciding and affirming that pier permits should be issued for certain lots on Lake Norman. The only logical construction of the ordinance is that a single family dwelling house is the principal use or structure on a residential building lot in this district, that a pier would constitute an accessory use and structure, and that no accessory use or structure shall be approved, established, or constructed before the principal use is approved. **Harry v. Mecklenburg County, 200.**

Special use permit—application requirements—The trial court did not err in a zoning case regarding a special use permit application by concluding that the Board of Adjustment's action of granting the permit was based on conclusions fully supported by the findings of fact, even though the Board did not make written findings of fact a part of its motion to issue the permit, because nowhere in the Union County Land Use Ordinance is there a requirement that the Board's vote to approve the permit must be simultaneous with its written approval. **Richardson v. Union County Bd. of Adjust., 134.**

Special use permit—completion of application—The trial court did not err in a zoning case regarding a special use permit application by concluding that the Administrator of the Union County Inspection Department complied with § 56(a) of the Union County Land Use Ordinance when he reported to the Board of Adjustment that the application was complete. **Richardson v. Union County Bd. of Adjust., 134.**

Special use permit—mobile home parks—conditions—There was ample evidence in the record of a special use permit proceeding that petitioners had satisfied the specific requirements set forth in the ordinance for the development of mobile home parks. **Clark v. City of Asheboro, 114.**

Special use permit—mobile home parks—conditions—conformity with area—Petitioners seeking a special use permit for a mobile home park met their burden of demonstrating compliance with a requirement that the use be in harmony with the area in which it was to be located and in general conformity with the plan of development of Asheboro. **Clark v. City of Asheboro, 114.**

Special use permit—mobile home parks—conditions—no material danger to public health or safety—Petitioners who were seeking a special use permit for a mobile home park met their burden of introducing substantial evidence that the proposed use would not materially endanger the public health or safety. **Clark v. City of Asheboro, 114.**

Special use permit—mobile home parks—findings—The trial court did not err by concluding that respondents (the Town Council) failed to make adequate findings of fact when denying an application for a special use permit for a mobile home park where the Council appears to have based its contention regarding

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impact on the neighborhood on a statement by a Council member which was at best conclusory and did not amount to a finding, and which was not based on competent, material, and substantial evidence. **Clark v. City of Asheboro, 114.**

Special use permit—mobile home parks—injury to adjoining property— Petitioners seeking a special use permit for the development of a mobile home park complied with a condition in the special use ordinance that the use not substantially injure the value of the adjoining property. **Clark v. City of Asheboro, 114.**

Special use permit—notice—The trial court did not err in a zoning case regarding a special use permit application by concluding that petitioners received adequate notice of a public hearing. **Richardson v. Union County Bd. of Adjust., 134.**

Special use permit—review by superior court—The trial court did not err when reviewing the denial of a special use permit for a mobile home park by issuing a decree directing the city to issue the permit where the court properly determined that the denial was not supported by appropriate findings and that there was no competent evidence rebutting the prima facie case made by petitioners. **Clark v. City of Asheboro, 114.**

Variance—similar situations—A trial court decision affirming the Board of Adjustment's denial of variances was reversed and remanded where, despite the similarities between defendant's lot and requested variance and a neighboring lot which received a similar variance, the Board denied petitioner's request without setting forth sufficient findings and conclusions for the appellate court to adequately determine whether the decision was supported by competent, material, and substantial evidence or whether it was arbitrary and capricious. **Through the Looking Glass, Inc. v. Zoning Bd. of Adjust., 212.**

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