NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Deceased 29 November 2000.
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RULES OF CIVIL PROCEDURE CITED

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LAMBE REALTY INVESTMENT, INC., PLAINTIFF v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. COA99-503

(Filed 21 March 2000)

1. **Appeal and Error— appealability—partial summary judgment—insurer's refusal to defend**

Certification under Rule 54(b) makes appellate review mandatory, but a trial court may not render a decree immediately appealable by certification if it is not a final judgment. Here, a partial summary judgment on the issue of an insurer's duty to defend was properly before the Court of Appeals because it affected a substantial right which might be lost absent an immediate appeal.

2. **Insurance— commercial liability policy—coverage—insurer's duty to defend**

The trial court correctly entered summary judgment for plaintiff on the issue of whether defendant-insurer had a duty to defend an action arising from an mobile home being left in an uninhabitable position after it was moved. Under the language of the policy, coverage was not provided under a provision dealing with damaged property, but the allegations of the underlying complaint triggered "Liabilities Covered" provisions. Exclusions for "completed work" and for individuals involved in real estate sales or management do not apply because the work never

reached a state of completion which would trigger the clause and because a reasonable person in plaintiff's position would have understood that normal business operations were covered under the policy. Defendant's construction of the policy would render the policy worthless for all practical purposes.

Judge HORTON concurring in the result.

Appeal by defendant from judgment entered 19 January 1999 by Judge Roland H. Hayes in District Court, Forsyth County. Heard in the Court of Appeals 26 January 2000.

Morgan & Yankanich, P.A., by Eric C. Morgan, for plaintiff-appellee.

Burton & Sue, L.L.P., by Gary K. Sue and James D. Secor, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

This appeal arises out of an action brought by Lambe Realty Investment, Inc. ("LRI") seeking a declaratory judgment determining its rights under a commercial liability policy issued to it by Allstate Insurance Company ("Allstate"). The relevant facts follow.

On 19 May 1997, John C. and Tammy L. Kippe ("the Kippes") filed a lawsuit ("the underlying action" or "the underlying complaint") against LRI asserting claims for breach of contract, negligence, breach of warranty, breach of implied covenant of quiet enjoyment, constructive eviction, and unfair and deceptive trade practices. The underlying complaint alleges that the Kippes owned a 1991 Redmon Flamingo mobile home and that they had leased a lot at the East Forsyth Trailer Park on which to park the home. The trailer park was owned and operated by LRI. In 1995, the Kippes entered into a contract with LRI wherein LRI agreed to move the Kippes' mobile home to a new site in the town of East Bend, North Carolina. Under the terms of the agreement, the Kippes were to pay $300, and LRI was to pay the balance of the costs of moving and setting up the home, which included preparing a proper foundation, placing the home on that foundation, and securing the home in place. According to the underlying complaint, LRI moved the home to the new site but left it in an uninhabitable position. When LRI refused to do any further work, the Kippes undertook to reposition the home themselves and suffered severe damage, which rendered the home a total loss.

At the time the Kippes filed the underlying action, LRI had a commercial liability insurance policy with Allstate. Clarence Lambe, the president of LRI, became aware of the suit and notified his Allstate agent, Bob Hicks, of the litigation on or about 22 July 1997. Hicks reported the lawsuit to the Allstate Claims Office, and Monty Hall, a claims representative, informed Hicks that he would process the claim. Upon further investigation, however, Hall determined that LRI's policy excluded coverage for the underlying action instituted by the Kippes. Therefore, on 21 August 1997, Hall sent a letter to LRI denying any duty to defend it in the underlying action or to indemnify it against any recovery by the Kippes.

On 4 November 1997, LRI initiated the present action for declaratory relief against Allstate. The complaint seeks a judicial determination that Allstate owes LRI a duty both to defend it in the underlying action and to indemnify it for any resulting judgment or settlement. Following some discovery, LRI filed a motion for partial summary judgment on the issue of whether Allstate had a duty to defend LRI in the underlying action. The trial court conducted a hearing on the motion and, on 19 January 1999, entered judgment in favor of LRI. The court certified the order as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Allstate filed timely notice of appeal.

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[1] Before addressing the merits of Allstate's appeal, we must examine whether the order directing partial summary judgment for LRI is immediately appealable. An interlocutory order, such as the one here, is immediately appealable in only two instances. The first is when the trial court enters a final judgment with respect to one or more, but less than all of the parties or claims and certifies the judgment for immediate review under Rule 54(b) of the Rules of Civil Procedure. *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). The second instance is when the order "affects a substantial right and will work injury to the appellant[] if not corrected before final judgment." *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984).

In the present case, the trial court certified that partial summary judgment order as immediately appealable pursuant to Rule 54(b). Although certification of an order under Rule 54(b) makes appellate review mandatory, "the trial court may not, by certification, render its decree immediately appealable if '[it] is not a final judgment.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999)

(quoting *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983)). With respect to the order in this case, the trial court apparently recognized that it was not a final judgment and certified it for immediate review based on the court's determination that the order "effects [sic] a substantial right of the parties." We agree with the court's conclusion that the order affects a substantial right.

As noted by the Supreme Court of Ohio,

> The duty to defend is of great importance to both the insured and the insurer. If an insurer mistakenly refuses to defend its insured, the adverse consequences can be great. "When an indemnitor wrongfully refuses to defend an action against an indemnitee, the indemnitor is liable for the costs, including attorney fees and expenses, incurred by the indemnitee in defending the initial action and in vindicating its right to indemnity in a third-party action brought against the indemnitor." (Citation omitted.) On the other hand, if the insurer is required to defend an insured, "* * * [the insurer] may try an expensive negligence case which a court may later hold is not within the terms of the policy. * * * (Citation omitted.)
>
> The duty to defend is equally important to the insured. If the insurance company refuses to defend, then the insured often must choose to settle the suit as quickly as possible in order to avoid costly litigation, bring a declaratory judgment action against the insurer seeking a declaration that there is a duty to defend, or defend the suit without help from the insurer.
>
> Thus, the duty to defend involves a substantial right to both the insured and the insurer.

General Accident Ins. Co. v. Insurance Co. of North America, 44 Ohio St. 3d 17, 21-22, 540 N.E.2d 266, 271 (1989). Accordingly, we conclude that the order of partial summary judgment on the issue of whether Allstate has a duty to defend LRI in the underlying action affects a substantial right that might be lost absent immediate appeal. Having determined that the appeal is properly before us, we proceed to our analysis of the contentions raised by the parties.

[2] At the outset, Allstate argues that the trial court improvidently granted LRI's motion for summary judgment on the question of whether, under the terms of the policy issued to LRI, Allstate had a duty to defend LRI in the underlying action brought by the Kippes. Allstate contends that the Kippes' complaint alleges facts which con-

clusively establish that their damages were not covered by LRI's policy and, therefore, Allstate had no duty to defend LRI in the underlying action. For the reasons hereinafter given, we conclude that the trial court committed no error and affirm the order of summary judgment.

In reviewing the propriety of summary judgment, this Court's task is to determine whether the pleadings and other evidentiary materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Yamaha Corp. v. Parks*, 72 N.C. App. 625, 325 S.E.2d 55 (1985); N.C.R. Civ. P. 56(c). The instant case concerns the construction of language used in the policy of insurance issued by Allstate to LRI. If the policy language as applied to the facts conclusively shows that Allstate has a duty to defend LRI in the underlying action, then the trial court was correct in entering summary judgment for LRI.

"There is no statutory requirement that an insurance company provide its insured with a defense." *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 391, 390 S.E.2d 150, 152 (1990). Nevertheless, an insurance provider may commit itself to such a responsibility under the terms of an insurance policy. *Id.* Thus, an insurer's duty to defend an action brought against its insured is determined by the language in the policy, *id.* at 392, 390 S.E.2d at 153, and this duty "is absolute when the allegations of the complaint bring the claim within the coverage of the policy," *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 376, 343 S.E.2d 15, 19 (1986). This is true, even if the facts alleged are only arguably covered by the policy. *See Wilkins v. American Motorists Ins. Co.*, 97 N.C. App. 266, 269, 388 S.E.2d 191, 193 (1990) ("[I]f the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, then the insurer has a duty to defend.") Furthermore, "where a complaint contains multiple theories of recovery, some covered by the policy and others excluded by it, the insurer still has a duty to defend." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 85, 323 S.E.2d 726, 730 (1984), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986).

It is axiomatic that an insurance policy is a contract, the provisions of which govern the rights and responsibilities of the contracting parties. *Deason v. J. King Harrison Co.*, 127 N.C. App. 514, 517, 491 S.E.2d 666, 668 (1997), *aff'd in part and disc. review improvidently allowed in part*, 349 N.C. 220, 504 S.E.2d 784 (1998). " 'As with

all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued.' " *Brown*, 326 N.C. at 392, 390 S.E.2d at 153 (quoting *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)). In reviewing an insurance policy, exclusions from coverage are strictly construed, *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 114, 314 S.E.2d 775, 779 (1984), and any ambiguities in the policy are resolved against the insurer and in favor of the insured, *Brown*, 326 N.C. at 392, 390 S.E.2d at 153. With these principles in mind, we now examine the relevant provisions of the commercial liability policy issued by Allstate to LRI.

The policy in question contains two primary types of coverage: Coverage A applies to "Business Property" and Coverage B applies to "Business Liability." LRI takes the position that the underlying action brought by the Kippes falls squarely within the "Additional Protection" section of Coverage A and the "Comprehensive Liability" section of Coverage B and, thus, Allstate has an absolute duty to defend the underlying action. We will address each of these sections separately.

The relevant provisions of Coverage A read as follows:

Part Two—Business Contents

Property Covered

This policy covers the *replacement cost* . . . of business contents owned by you, usual to your business, on the premises described in the Declarations, or within 100 feet of such premises for which a limit of liability is shown in the Declarations, including:

1. Property of others, but not that of an employee, in your care, custody or control for business purposes.

. . . .

Additional Protection

In addition to the coverage under Parts One and Two, this policy also gives you the following protection for losses covered under Coverage A:

. . . .

2. Property in Transit

   When coverage is provided under Part Two, we will also cover your business contents while in transit on vehicles owned by, rented to or controlled by you. . . . (Emphasis added.)

LRI contends that pursuant to these provisions, Allstate has a duty to defend it in the underlying action, because the Kippes' mobile home was in LRI's "care, custody, and control" and was "in transit" when it was damaged. Allstate, on the other hand, persuasively argues that no duty to defend arises under Coverage A, because that section refers only to the "replacement cost" of damaged property and makes no mention of defending the insured against a lawsuit. Although LRI argues that the "duty to defend" is not limited to any particular type of coverage, this construction is contrary to the express language of the policy. The "Defense" provision of the policy appears in Part One of Coverage B and states that "[the insurer] will defend any suit brought against persons insured seeking damages to which *this Part* applies." (Emphasis added.) Thus, we conclude that Coverage A does not grant LRI any right to a defense in the underlying action. We proceed then to the question of whether a duty to defend LRI exists pursuant to Coverage B of the policy.

Under Coverage B, the policy pertinently provides the following:

> **Part One—Comprehensive Liability**
>
> **Liabilities Covered**
>
> We will pay on behalf of persons insured all sums which they become legally obligated to pay as damages arising out of an accidental event . . . that occurs while this policy is in effect. We will cover accidental events arising out of your completed work or products only when the accidental event occurs away from premises you own or rent and:
>
> 1. After the work has been completed or abandoned.
>
> 2. The product is in the hands of the consumer.
>
> . . . .
>
> **Defense**
>
> We will defend any suit brought against persons insured seeking damages to which this Part applies, even if the allegations in the suit are groundless, false or fraudulent.

The policy defines an "accidental event" as "an accident, including continuous or repeated exposure to the same conditions, resulting in bodily injury or property damage."

Allstate does not dispute that the allegations set forth in the underlying complaint are sufficient to trigger the "Liabilities

Covered" provisions of Coverage B. It is Allstate's position, however, that coverage is denied under Exclusions 12(a) and 13(f), which provide as follows:

> **Exclusions—Liabilities We Do Not Cover**
>
> We do not cover:
>
> . . . .
>
> 12. Any accidental events arising out of completed work resulting from:
>
> a Operations related to transporting property, unless the accidental event results from a condition in or on the vehicle used to transport the property and the condition was created while loading or unloading the vehicle.
>
> Loading or unloading extends from the place where property is accepted for movement onto a vehicle to the place where property is finally delivered.
>
> . . . .
>
> 13. Any damage:
>
> . . . .
>
> f. With respect to the completed work performed by you arising out of such work or any portion, or out of such materials, parts or equipment furnished in connection with the work.

LRI contends that these exclusions have no bearing on the present set of facts, because the gravamen of the Kippes' complaint is that the work to be done in setting up the mobile home was never completed. LRI's contention has merit.

Under the policy, "completed work" is defined as follows:

> 1. Your operations or operations performed on your behalf that are completed, or
>
> 2. Someone's reliance on a warranty or representation made relating to those operations.

> Operations includes materials, parts and equipment used in connection with your operations.
>
> We will consider work to be completed at the earliest of the following times:
>
> 1. When all operations to be performed by you or on your behalf under the contract are finished, or
> 2. When all operations to be performed by you or on your behalf at the site of those operations are finished, or
> 3. When the portion of the work has been put to use by any person or organization, except for any contractor or subcontractor working on the same project.
>
> Operations which may need further maintenance or service, or which may require repairs or replacement because of a defect, will be considered to have been completed.

The Kippes' complaint alleges that LRI agreed to assume the responsibility of moving and setting up their mobile home, which "include[d] preparing proper foundations, placing the mobile home on those foundations, and tying the mobile home down." According to the Kippes, after moving the home, LRI "left it on the site in an uninhabitable position" and that LRI "simply abandoned" the home, refusing to complete the set up process. The complaint further states that after being contacted by the Kippes' attorney, LRI again "agreed to arrange to have the home properly set up and tied down on the lot." "The person selected by [LRI] . . . made no effort to set the home up so that it was level[,] . . . left the home sitting at a sharp angle so that the home was unlivable and . . . improperly used 'X' bracing under the mobile home to tie it down." When LRI "refused to . . . make any further efforts to have the work done properly," Mr. Kippe "attempt[ed] to level the home himself," during which "the home fell off its supports . . . and was destroyed."

The facts of this case are analogous to those of *Daniel v. Casualty*, 221 N.C. 75, 18 S.E.2d 819 (1942), wherein our Supreme Court was called upon to interpret the term "complete" within the meaning of a "completed operations hazard" exclusion. The insured, a plumbing company, had contracted with a customer to remove a hot water heater from their home and to convert it into a stove or room heater. The plaintiff introduced evidence tending to show that the plumbing company had agreed to fix the hot water heater so that it

would heat satisfactorily and would be safe. "In performing the job the plumbers sealed up the water jacket of the heater, but left some water inside." *Id.* at 76, 18 S.E.2d at 820. When the customer subsequently lit a fire in the converted heater, the water in the sealed water jacket turned to steam, expanded and created an explosion resulting in injury to the customer. The plumbing company's insurance provider raised as a defense the completed operations hazard exclusion.

In construing the term "complete," the Court stated the following:

> We do not consider that the work is complete within the meaning of the insurance contract so long as the workman has omitted or altogether failed to perform some substantial requirement essential to its functioning, the performance of which the owner still has a contractual right to demand.
>
> There is evidence here from which the jury might infer that by reason of the omission on the part of Alphin Plumbing and Heating Co. to do work essential to the functioning of the heater in the manner intended and called for in the contract, the work at the time plaintiff sustained her injury had never reached that condition of completeness that would render the restrictive clause in the policy operable.

Id. at 77, 18 S.E.2d at 820.

Applying the Court's reasoning in *Daniel*, we are convinced that the Kippes' claims do not fall under Exclusions 12(a) and 13(f), because LRI's actions with regard to setting up the mobile home do not come within the definition of "completed work." Under the terms of the agreement between the Kippes and LRI, "setting up" the mobile home "include[d] preparing proper foundations, placing the mobile home on those foundations, and tying the mobile home down." According to the complaint, LRI never satisfied this obligation; therefore, LRI's work "never reached that condition of completeness that would render [Exclusions 12(a) and 13(f)] operable." *Id.*

Allstate also contends that the facts of this case trigger Exclusion 22, which purports to withhold coverage for the following individuals:

> Anyone engaged in the business of real estate sales and/or real estate management with the exception of:
>
> a. That part of any premises used by persons insured for general office purposes, and

b. Premises listed with persons insured for sale or rental, provided that such premises are not owned, operated, managed by, rented or in the care, custody or control of persons insured, or as to which persons insured act as an agent for the collection of rents or in any supervisory capacity, unless such premises are specifically insured under Coverage A, Part One of this policy. (Emphasis added.)

Allstate argues that Exclusion 22 "applies here because at the time of the incident involving the Kippes, [LRI] was engaged in the business of real estate sales and/or real estate management." LRI argues that the construction offered by Allstate is erroneous, as it would effectively deny coverage for LRI's ordinary business operations. Based on the reasoning that follows, we find that the language of the exclusion creates an ambiguity as to the true intention of the parties.

" 'An ambiguity exists when the language used in the policy is susceptible to different, and perhaps conflicting, interpretations.' " *City of Greenville v. Haywood*, 130 N.C. App. 271, 275, 502 S.E.2d 430, 433 (quoting *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 290, 444 S.E.2d 487, 492, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994)), *disc. review denied*, 349 N.C. 354, — S.E.2d — (1998). In other words, a provision of the policy is ambiguous if "the writing leaves it uncertain as to what the agreement was." *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). As a general rule, "[a]mbiguities in insurance policies are to be strictly construed against the drafter, the insurance company, and in favor of the insured and coverage since the insurance company prepared the policy and chose the language." *West American Insurance Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 320, 409 S.E.2d 692, 697 (1991), *overruled on other grounds by Gaston County Dyeing Co. v. Northfield Ins. Co.*, No. 10PA99, 2000 WL 126622 (N.C. Supreme Court Feb. 4, 2000). Moreover, exclusions from coverage in insurance policies are disfavored and, as such, must be narrowly construed. *Stanback*, 68 N.C. App. at 114, 314 S.E.2d at 779.

As previously mentioned, Exclusion 22 appears in a section of the policy entitled, "*Liabilities* We Do Not Cover." Notably, however, Exclusion 22 is the only exclusion within this section which purports to deny coverage to an individual or entity. Every other exclusion in this section addresses a particular liability. Indeed, the provision at issue makes no reference to losses whatsoever; thus, it is unclear from the language of the exclusion precisely what liabilities the par-

ties intended to exclude under the provision. Therefore, we conclude that Exclusion 22 is ambiguous.

"[W]hen an ambiguity exists, an insurance policy should be construed as a reasonable person in the position of the insured would have understood it to mean." *Tufco*, 104 N.C. App. at 321, 409 S.E.2d at 697. In our judgment, a reasonable person in Lambe's position would have understood that his normal business operations were covered under the policy. As the name suggests, Lambe Realty, Inc. (LRI) is in the business of selling, renting, and managing real estate, and Lambe purchased the commercial liability policy at issue to insure LRI against liabilities arising out of its ordinary business operations. Indeed, Lambe testified that when he purchased the policy in 1984, he asked Bob Hicks, Allstate's agent, for "umbrella" or "blanket" coverage "to make sure [LRI was] covered for any type of lawsuit that occurred." Allstate was aware of the nature of LRI's business, and according to Hicks' testimony, he advised Lambe that he was covered under the commercial policy "if [he got] sued for owning [his] business in a general or comprehensive manner." Thus, we reject Allstate's construction of Exclusion 22, as it would, for all practical purposes, render the policy worthless to LRI. *See id.* at 321, 409 S.E.2d at 697-98 (construing policy in favor of insured where insurance provider attempted to deny coverage for insured's normal business operations). Furthermore, given that the duty to defend is broader than the insured's duty to pay damages, *Waste Management*, 315 N.C. at 691, 340 S.E.2d at 377, we hold that Allstate has a duty to defend LRI in the underlying lawsuit.

Having concluded that the claims in the underlying complaint fall within the protection of the commercial liability policy and that none of the asserted exclusions apply, we hold that the trial court was correct in entering summary judgment for LRI on the issue of whether Allstate had a duty to defend it in the underlying action. We have examined Allstate's remaining argument and find it to be without merit.

The order of the trial court is, therefore,

Affirmed.

Judge MARTIN concurs.

Judge HORTON concurs in the result with a separate opinion.

Judge HORTON concurring in the result.

Because our Supreme Court has held that the duty to defend an insured is broader than its duty to indemnify the insured for damages incurred by events allegedly covered by the policy of insurance, I concur in the result reached by the majority. *See Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986).

I also agree that the issue before us involves a substantial right of the appellant, but write separately to stress that the trial court cannot certify an appeal of an interlocutory order pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 54(b), on the grounds that it involves a substantial right. By its express language, Rule 54(b) limits the situations in which the trial court may certify a decision for immediate appeal. The rule provides, in pertinent part, that where an action includes more than one claim for relief, the trial court may

> enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.*

Id. (emphasis added). Thus, although a party may appeal an interlocutory order and argue *on appeal* that the issue appealed affects a substantial right of the appellant, that argument must be directed to the appellate court and not to the trial court.

IN THE MATTER OF: JONATHON MATTHEW CLAPP

No. COA99-290

(Filed 21 March 2000)

1. Appeal and Error— appealability—delinquency adjudication—sufficiency of evidence—no motion for dismissal at trial

A juvenile adjudicated delinquent for a sexual offense was precluded from raising the issue of whether there was sufficient evidence of force where he failed to move for a dismissal at the close of the evidence.

2. Witnesses— child—competency—other evidence

The trial court did not abuse its discretion by admitting the testimony of a four-year-old sexual assault victim where, even if she had been declared incompetent to testify, her statements to her mother and doctor could have been admitted under established exceptions to the hearsay rule and there was testimony from another witness sufficient to show that the juvenile used force to commit a sexual act. A careful review of the record reveals overwhelming evidence supporting the finding that the juvenile was delinquent.

3. Juveniles— disposition order—sufficiency of information

The juvenile court did not err in making a dispositional order where the juvenile contended that the court had insufficient social, medical, psychiatric, psychological, and educational information regarding the juvenile under N.C.G.S. § 7A-639 and the State contended that there is no statutorily required information which the court must receive before disposition. The juvenile court is required to select the least restrictive alternative, taking into account certain factors. In this case, the court reviewed the juvenile's file and the information presented by the parties, the prosecutor, the court counselor, and the juvenile's attorney and determined that placing the juvenile on probation for one year and requiring him to complete a sex offender evaluation and any recommended treatment would be in the juvenile's best interest and meet the needs of the State.

4. Constitutional Law— effective assistance of counsel—juvenile delinquency—failure to move to dismiss

A juvenile adjudicated delinquent did not receive ineffective assistance of counsel where his attorney did not move for dismissal at the close of the State's evidence based upon insufficient evidence of force accompanying the alleged sexual offense. The attorney was experienced in juvenile court, argued vigorously that the juvenile had consistently denied committing the offense, asked for judgment in the juvenile's favor, and, even assuming that she should have moved to dismiss the petition, there was no prejudice because sufficient evidence of force was presented.

5. Constitutional Law— effective assistance of counsel—juvenile delinquency—failure to move to disqualify witnesses

A juvenile adjudicated delinquent did not receive ineffective assistance of counsel where the attorney did not move to disqualify two juvenile witnesses. The attorney had interviewed the witnesses and could have determined that the court would find them competent, with the overruling of an objection enhancing their credibility; moreover, their statements to their mothers and a doctor could have been admitted under exceptions to the hearsay rule even if they had been declared incompetent.

6. Constitutional Law— effective assistance of counsel—juvenile delinquency—failure to move for continuance

A juvenile adjudicated delinquent did not have ineffective assistance of counsel where his dispositional counsel did not move for a continuance on the grounds that the court had not received sufficient social, medical, psychiatric, psychological and educational information. The record reveals that the dispositional attorney had previously requested and received two continuances in order to secure the presence of the juvenile, the dispositional attorney filed a notice of appeal and a motion for appropriate relief seeking a new adjudicatory hearing on the basis that the juvenile was denied effective assistance of counsel during the adjudication, and the court held a hearing on the motion at which the dispositional attorney argued vigorously that the juvenile was denied effective assistance of counsel during the adjudication.

Judge GREENE concurring in the result.

Appeal by respondent juvenile from judgments entered 25 November 1997 by Judge Lawrence C. McSwain and 6 April 1998 by

Judge Charles L. White in Guilford County District Court. Heard in the Court of Appeals 7 December 1999.

Smith Helms Mulliss & Moore, L.L.P., by Amie Flowers Carmack, for respondent-appellant Jonathon Matthew Clapp.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth J. Weese, for the State.

WALKER, Judge.

On 25 November 1997, Jonathon Matthew Clapp (the juvenile) was adjudicated to be delinquent for committing a second degree sexual offense. After a dispositional hearing, the juvenile was placed on probation for 12 months with certain terms and conditions.

The State's evidence at the adjudicatory hearing tended to establish the following: On 28 July 1997, the juvenile, age 11, was playing at the home of M.H., age 3. The juvenile had been playing in the bedroom with M.H. and her brother, J.H., age 7, when the juvenile's mother called at approximately 5:00 p.m. and requested that he come home. Angel Delzo, M.H.'s mother, testified that as she went towards the bedroom to tell the juvenile to go home, he "came out of the bedroom really quick" with "wild" hair and "ran out the door really quick." Then, according to Ms. Delzo, M.H. "came out of the bedroom pulling at her crouch" or "pulling at her panties." M.H. stated that the juvenile "made her take her clothes off" and "was licking her privates." Ms. Delzo further testified that M.H. was referring to her vagina as her "privates."

Ms. Delzo called the juvenile's mother and asked her to bring the juvenile back to her house. Ms. Delzo testified that after the juvenile arrived with his mother, she asked him why he did it and he responded that he did not know. When the juvenile's mother asked him the same question, he stated that he had spent the night with a friend, who had him watch Playboy, and he learned this from the Playboy channel. Ms. Delzo called the police, and Detective Delores Jackson responded to the call that day and interviewed Ms. Delzo, J.H., and M.H. at the hospital. The following day, Detective Jackson interviewed the juvenile in the presence of his parents.

At the adjudicatory hearing, after being sworn individually, M.H., who was then age 4, testified that she had been playing in her bedroom with J.H. and the juvenile, when the juvenile told her to take off all of her clothes. She further testified that after she took off her

clothes, the juvenile started "licking my privates" with "his tongue." M.H. then explained that her "private parts" are between her legs. After pointing to her "belly button," M.H. testified that her belly button is not her "private parts."

J.H. testified that he, M.H., and the juvenile were in the bedroom when the juvenile "told [M.H.] to get in the closet and take off her clothes" and then "asked her to get on the bed." The juvenile then, according to J.H., started "licking her privates," the area "between your legs." J.H. testified that, during this time, the juvenile "was holding her down" with his "hands on [her] arms" and "his feet on her legs." J.H. further testified that the juvenile threatened to hit him if he did not participate, after which J.H. pretended to lick M.H.

John Robert White, a neighbor, testified that he had a conversation with the juvenile on 28 July 1997, while waiting for the police to arrive and that the juvenile admitted that he had kissed M.H. and that "he had her take her clothes off." Mr. White further testified that the juvenile admitted that he knew it was wrong to do this.

Detective Jackson testified that she interviewed M.H. at the hospital. M.H. informed her that the juvenile had licked her private parts while they were playing in the bedroom that day. M.H. further explained to Detective Jackson that they had been playing a game where she was pretending to be the wife of J.H. and of the juvenile and that at one point during the incident, she had taken off her dress and her panties. Additionally, Detective Jackson was permitted to testify for corroborative purposes that M.H. informed her examining doctor that the juvenile had licked her private parts.

Detective Jackson further testified that the juvenile gave her a statement, admitting that he "started talking to [J.H.] about sex" and was "telling [him] about how a man and a woman get naked and kiss and have sex." The juvenile also admitted that he had kissed M.H. on the belly button while she was laying on the bed and that at this time, M.H. had her dress on but not her panties. The juvenile informed Detective Jackson that he then went in the closet with M.H. and kissed her on the cheek. He and M.H. then came out of the closet, at which time M.H. took off her dress so she could put on another dress and she was naked because she could not find her panties.

The juvenile testified that on this occasion he had kissed M.H. on the belly button and on the cheek. He denied asking M.H. to take her clothes off and denied touching her private parts.

After hearing the evidence and the arguments of counsel, the juvenile court found facts which were proven beyond a reasonable doubt, including the following:

> 6. That on that occasion the children were playing in a bedroom; that [M.H.] ended up with her panties being removed; that she stated that the juvenile respondent licked her private parts, indicating that her private parts [were] between her legs.
>
> 7. That the juvenile respondent indicated that he did kiss the victim in this case on the cheek and on the belly button; that she had on no panties at one time; that he found her panties and gave them back to her and that the kissing and the contact between the victim and the juvenile respondent was initiated and brought about as a result of the 7 year old brother [J.H.] suggesting that they should kiss the victim.
>
> 8. That the victim in this case told her mother that the juvenile respondent licked her private parts and told the same story consistently to include here in the courtroom this day.
>
> 9. That the juvenile respondent indicated that after he left the home where the victim was, and he heard the phone ring in his house, that he thought it might be the victim's mother calling and when asked why he thought it might be the victim's mother calling, he said he did not know.

Based on these findings, the juvenile court concluded that the juvenile is delinquent, as defined by N.C. Gen. Stat. § 7A-517(12) (repealed effective 1 July 1999), for having committed a second degree sexual offense in violation of N.C. Gen. Stat. § 14-27.5, and is in need of the protective supervision of the court.

The dispositional hearing was held on 6 April 1998, and the juvenile was represented by a different attorney. The juvenile court, after reviewing the juvenile's file and information presented by the parties, the prosecutor, the court counselor, and the juvenile's attorney, placed the juvenile on probation for 12 months with certain terms and conditions, including the requirement that he obtain a sex offender assessment and complete any course of treatment that is recommended based on that evaluation.

The juvenile sets forth the following assignments of error: (1) the juvenile court erred in adjudicating him delinquent since there was insufficient evidence of the element of force; (2) the juvenile court

erred in admitting the testimony of four-year-old M.H. since she was incompetent to testify; (3) the juvenile court did not have sufficient social, medical, psychiatric, psychological, and educational information regarding the juvenile to make its dispositional order; and (4) the juvenile's attorneys provided ineffective assistance of counsel at both the adjudicatory and dispositional hearings.

[1] The juvenile first contends that the juvenile court erred in adjudicating him delinquent since there was insufficient evidence of force. The State counters that the juvenile is precluded from raising this issue on appeal since he did not move to dismiss the petition at the close of the evidence during the adjudicatory hearing. This Court, in *In re Davis*, 126 N.C. App. 64, 483 S.E.2d 440 (1997), found that the respondent juveniles were precluded from challenging the sufficiency of the evidence presented during a juvenile delinquency proceeding since they failed to move for a dismissal of the petitions at trial pursuant to N.C.R. App. 10(b)(3). *See also State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988). Here, since the juvenile failed to move for a dismissal at the close of the evidence, he is precluded from raising this issue on appeal.

[2] The juvenile next assigns that the juvenile court committed plain error in admitting M.H.'s testimony since she was only four-years-old and was incompetent to testify. Specifically, the juvenile argues that M.H. did not clearly communicate her understanding of the obligation to tell the truth or illustrate that she had the capacity to understand and relate facts since she provided inaudible responses to questions.

The general rule is that every person is competent to be a witness unless the trial court determines that he or she is disqualified under the Rules of Evidence. *Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988). Rule 601(b) provides: "A person is disqualified to testify as a witness when the court determines that he is . . . (1) incapable of expressing himself concerning the matter as to be understood . . ., or (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601(b) (Cum. Supp. 1998). The issue of competency of a witness rests in the sound discretion of the trial court based upon its observation of the witness. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987). A decision will not be disturbed on appeal unless there is a showing that the trial court's ruling as to competency could not have been the result of a reasoned decision. *Id.* This Court, in *In re Arthur*, 27 N.C. App. 227, 218 S.E.2d 869 (1975), *reversed on other grounds*, 291 N.C. 640, 231 S.E.2d 614 (1977),

emphasized that "[j]uvenile proceedings are designed to foster individualized disposition of juvenile offenders under the protection of the courts and are something less than a full blown determination of criminality."

Here, before M.H. was sworn individually, the juvenile court asked the following of her:

> THE COURT: And so I want you to stand up beside the table. I know that's going to keep you about the same height. Now I'm going to need you to put your hand on the [B]ible, and you're going to have to promise to do some things for us. . . . Now listen to this lady, and I want you to give me an answer based on what you hear her say. Okay?

The Clerk then asked M.H. the following:

> Do you promise that you will tell the truth, the whole truth and nothing but the truth, so help you God?

M.H. answered "yes" and then testified that she had been playing in her bedroom with J.H. and the juvenile, when the juvenile told her to take off all of her clothes. She further testified that after she took off her clothes, the juvenile licked her private parts. M.H.'s testimony was corroborated by the testimony of her mother, her brother J.H., and Detective Jackson. Furthermore, the trial court found that M.H. had "told her mother that the juvenile respondent licked her private parts and told the same story consistently to include here in the courtroom this day." Thus, we cannot find that the trial court abused its discretion in finding M.H. competent to testify based upon its observation of her testimony.

The juvenile judge, as the trier of fact in these proceedings, has the duty to ensure that a finding of delinquency is based on competent evidence. However, even if M.H. had been declared incompetent to testify, and thus unavailable, her statements to her mother and her doctor could have been admitted as substantive evidence under the established exceptions to the hearsay rule which are set forth in N.C. Gen. Stat. § 8C-1, Rule 803(2) for excited utterances and Rule 803(4), the medical diagnosis and treatment exception (Cum. Supp. 1998). *See State v. Ward*, 118 N.C. App. 389, 455 S.E.2d 666 (1995). If M.H. were unavailable, the hearsay testimony of M.H.'s mother and doctor would have been both necessary and inherently trustworthy under these "firmly rooted" hearsay exceptions, such that the constitutional requirements of the confrontation clause would have been satisfied.

See State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, *Rogers v. N.C.*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994).

In *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), our Supreme Court found that the child's statements to her grandmother regarding the alleged sexual abuse was admissible substantively under Rule 803(2) as an excited utterance since the child voluntarily made the statements between two and three days after the abuse occurred. Here, M.H.'s statements to her mother were made immediately after the juvenile left the house. There was also evidence that later the same day, M.H. and her mother informed M.H.'s examining doctor that the juvenile had licked her private parts. Therefore, if M.H. were unavailable to testify, her statements to her mother and her doctor could have been admitted as substantive evidence under the excited utterance exception.

In the recent case of *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), our Supreme Court held that two inquiries must be satisfied for hearsay evidence to be admissible under Rule 803(4), the medical diagnosis and treatment exception:

> First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

The Court, in *Hinnant*, found that there was insufficient evidence regarding the child's motive in making the statements to a psychologist or that the child understood that the psychologist was conducting the interview in order to provide medical diagnosis or treatment since the interview occurred approximately two weeks after the child's initial medical examination and was not conducted in a "medical environment." *Id.* We find that the present case is distinguishable from *Hinnant*. Here, according to Ms. Delzo, M.H. "came out of the bedroom pulling at her crouch" or "pulling at her panties" and stated that the juvenile had made her take off her clothes and licked her private parts. Later that same day, Ms. Delzo took M.H. to the hospital emergency room, where M.H. and her mother informed the examining doctor that the juvenile had licked M.H.'s private parts. Therefore, if M.H. had been unavailable to testify, the trial court could have found

that M.H.'s statements to her mother and her doctor would have been admissible through the doctor's testimony under the medical diagnosis and treatment exception.

Furthermore, even assuming the juvenile court erred in failing to find M.H. incompetent, and thus unavailable, we conclude that J.H.'s testimony was sufficient to show that the juvenile used force on M.H. to commit a sexual act, and thus to sustain the finding of delinquency. Therefore, a careful review of the record reveals that there was overwhelming evidence to support the juvenile court's finding that the juvenile was delinquent for having committed a second degree sexual offense.

[3] The juvenile also argues that the juvenile court erred in making its dispositional order since it had insufficient social, medical, psychiatric, psychological, and educational information regarding the juvenile. N.C. Gen. Stat. § 7A-639 (1995) provides that the "judge shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. . . ." (Repealed effective 1 July 1999). The State contends, however, that the juvenile's reliance on the statute is misplaced and that there is no "statutorily required information" which a court must receive before proceeding to disposition. Further, the State argues that the juvenile court did not have this information because the juvenile and his parents refused to participate in any assessments with the court counselor either before or after the adjudicatory hearing.

The purpose of the juvenile code is to avoid commitment of the juvenile to training school if he could be helped through community-level resources. *In re Hughes*, 50 N.C. App. 258, 273 S.E.2d 324 (1981). Thus, in selecting among dispositional alternatives, the juvenile court is required to select the least restrictive disposition, taking into account the seriousness of the offense, degree of culpability, age, prior record, and circumstances of the particular case. *In re Bullabough*, 89 N.C. App. 171, 365 S.E.2d 642 (1988). The juvenile judge must also weigh the State's best interest and select a disposition consistent with public safety. *Id.*

Here, although the court counselor had "not had the opportunity to do an investigation, nor to meet with the family nor [the juvenile]," he recommended that the juvenile be required to complete a specific sex offender evaluation as the "first step of the process" because of the "nature of the offense." The juvenile court, after reviewing the juvenile's file and information presented by the parties, the prosecu-

tor, the court counselor, and the juvenile's attorney, determined that placing the juvenile on probation for one year and requiring him to complete a sex offender evaluation and any subsequent treatment recommended based upon that evaluation, would be in the juvenile's best interest and meet the objectives of the State. Thus, the juvenile court did not err in making its dispositional order.

[4] The juvenile next contends that his attorneys at the adjudicatory and dispositional hearings provided ineffective assistance of counsel. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-562, 324 S.E.2d 241, 248 (1985), *citing Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Defendant must satisfy a two-part test by showing (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* "The fact that counsel made an error, even an unreasonable error, does not warrant 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." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (1985), *citing Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). "Trial counsel [are] necessarily given wide latitude in these matters." *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). "Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *Id.* In *State v. Sneed*, 284 N.C. 606, 613, 201 S.E.2d 867, 871-872 (1974), our Supreme Court stated that courts rarely grant relief on these grounds and have "consistently required a stringent standard of proof" to show ineffective assistance of counsel. The Supreme Court then explained that:

> . . . such a standard is necessary, since every practicing attorney knows that a 'hindsight' combing of a criminal record will in nearly every case reveal some possible error in judgment or disclose at least one trial tactic more attractive than those employed at trial.

Id. To impose a less stringent rule would encourage frivolous claims. *Id.*

Here, the juvenile first contends that his attorney at the adjudicatory hearing was ineffective since she failed to move for a dismissal at the close of the State's evidence when there was insufficient evidence of force. Although the juvenile's attorney did not move for a

dismissal, the record reveals that she argued vigorously during her closing argument that the juvenile had consistently denied committing the second degree sexual offense and asked the juvenile court to render judgment in his favor. Furthermore, the juvenile's attorney is obviously experienced in juvenile delinquency proceedings since she stated to the juvenile court during her closing argument that "this has been the toughest case I've had so far, and I'm in here almost every other day." Additionally, after the dispositional hearing, the juvenile court held a hearing on the juvenile's motion for appropriate relief, which alleged that the juvenile was denied effective assistance of counsel during the adjudication. After hearing the testimony of the juvenile, his mother, and the adjudicatory attorney, the juvenile court made extensive findings and concluded that the juvenile had failed to meet his burden of showing ineffective assistance of counsel and thus denied his motion for appropriate relief.

Thus, even assuming *arguendo* that the juvenile's attorney should have moved to dismiss the petition for insufficient evidence of force, we conclude that this omission did not prejudice the juvenile's defense since sufficient evidence of force was presented during the hearing. Pursuant to N.C. Gen. Stat. § 14-27.5, a person who engages in a sexual act with another person "by force and against the will of the other person," is guilty of a second degree sexual offense. *State v. Britt*, 80 N.C. App. 147, 341 S.E.2d 51, *disc. review denied*, 317 N.C. 337, 346 S.E.2d 141 (1986). The statutory requirement that the act be committed by force and against the will of the victim "may be established by either actual, physical force or by constructive force in the form of fear, fright, or coercion." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987). "Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent, takes the place of force and negates consent." *Britt*, 80 N.C. App. at 148, 341 S.E.2d at 51. "Physical force" means force applied to the body. *State v. Scott*, 323 N.C. 350, 354, 372 S.E.2d 572, 575 (1988).

Here, M.H. testified that the juvenile told her to take off all of her clothes. J.H. testified that the juvenile told M.H. to get in the closet, to take off her clothes, and then to get on the bed where he started licking her private parts. J.H. further testified that the juvenile was holding M.H. down on the bed with his hands on her arms and his feet on her legs. In addition, the juvenile court was in a position to observe the size, strength, maturity, demeanor, and conceptual awareness of the juvenile as compared to M.H. in determining

whether there was sufficient evidence of force, either actual or constructive. Furthermore, even if M.H. and J.H. had been found incompetent to testify and thus, unavailable, Ms. Delzo testified that M.H. came out of the bedroom and told her that the juvenile made her take off her clothes and licked her private parts. *See State v. Easterling*, 119 N.C. App. 22, 42-43, 457 S.E.2d 913, 925, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 762 (1995). This evidence of force, when viewed in the light most favorable to the State, was sufficient to withstand a motion to dismiss. Therefore, we conclude that the juvenile has failed to meet the "stringent" standard of proof required to show a reasonable probability that, but for counsel's omission, there would have been a different result.

[5] The juvenile also argues that his adjudicatory attorney rendered ineffective assistance when she failed to move to disqualify M.H. and J.H. on the ground that they were incompetent to testify. However, the juvenile's attorney interviewed both M.H. and J.H. approximately one week prior to the adjudicatory hearing and could have determined that the juvenile court would find M.H. and J.H. competent to testify. Thus, an objection to their competency, if overruled by the juvenile court, could only enhance their credibility. Additionally, as previously noted, even if M.H. had been declared incompetent to testify, her statements to her mother and her doctor could have been admitted as substantive evidence under the exceptions to the hearsay rule as set forth in Rule 803(2) for excited utterances and Rule 803(4), the medical diagnosis and treatment exception. J.H.'s statements to his mother could have also been admitted under the excited utterance exception if he had been found incompetent to testify. Therefore, we conclude that any failure to qualify M.H. or J.H. was harmless given the likelihood that their statements would have been admitted as substantive evidence.

[6] The juvenile next contends that his attorney at the dispositional hearing rendered ineffective assistance since he failed to move for a continuance on the grounds that the court had not received sufficient social, medical, psychiatric, psychological and educational information pursuant to N.C. Gen. Stat. § 7A-639. The State argues that the juvenile court did not have this information because the juvenile and his parents refused, either before or after the adjudication, to participate in any assessments with the court counselor.

The record reveals that the dispositional attorney had previously requested and received two continuances in order to secure the pres-

ence of the juvenile since the juvenile was attending school out of state. Additionally, after the dispositional hearing, the dispositional attorney filed a notice of appeal and a motion for appropriate relief seeking a new adjudicatory hearing on the basis that the juvenile was denied effective assistance of counsel during the adjudication. The juvenile court held a hearing on the juvenile's motion during which the dispositional attorney presented evidence and argued vigorously that the juvenile was denied effective assistance of counsel during the adjudication. Thus, after a careful review, we find that the juvenile has failed to meet his burden of proving that his dispositional attorney's performance fell below an objective standard of reasonableness and that the defense was prejudiced by his attorney's alleged deficient performance.

We have reviewed the juvenile's remaining assignments of error and find them to be without merit.

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, had M.H. been found incompetent to testify, "M.H.'s statements to her mother and her doctor would have been admissible through the doctor's testimony under the medical diagnosis and treatment exception." The record shows that M.H.'s doctor did not testify in this case. This Court cannot, when reviewing a case, make assumptions regarding evidence one of the parties *would have* offered during the trial below when that party did not, in fact, offer the evidence. We must therefore assume, when considering the juvenile's claim for ineffective assistance of counsel, that M.H. would have been found incompetent to testify, and the only evidence regarding M.H.'s statements came from Ms. Delzo's testimony.

Defendant argues he received ineffective assistance of counsel because his attorney failed to make a motion to dismiss for insufficient evidence of force, which is an element of second-degree sexual offense. N.C.G.S. § 14-27.5 (1999).

"To defeat a motion to dismiss on insufficiency of the evidence, there must be substantial evidence to establish each essential ele-

ment of the crime charged." *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988). "Substantial evidence 'must be existing and real,' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981)).

In this case, Ms. Delzo testified M.H. told her the juvenile "made her take her clothes off" and "was licking her privates." At the time of the incident, M.H. was three years old and the juvenile was twelve years old. A reasonable person could find, based on M.H.'s statement's to her mother as well as M.H.'s age in relation to the age of the juvenile, that the juvenile used force against M.H. The evidence of force, therefore, was sufficient to withstand a motion to dismiss for insufficiency of evidence. Accordingly, I agree with the majority that failure of the juvenile's attorney to make a motion to dismiss did not prejudice the juvenile's defense, and the juvenile consequently did not receive ineffective assistance of counsel.

THE KNIGHT PUBLISHING CO., INC., PLAINTIFF v. THE CHASE MANHATTAN BANK, N.A. AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, DEFENDANTS

No. COA98-12

(Filed 21 March 2000)

Compromise and Settlement; Damages and Remedies— settlement by one of several parties—credit against judgment

The trial court did not abuse its discretion by denying a motion for credit and for discovery of how a settlement was reached where Knight Publishing was awarded a judgment for losses arising from checks written in a fraudulent invoicing scheme, defendants Chase Manhattan and First Union learned that plaintiff had settled claims with the companies for whom the fraudulent invoices were submitted, and Chase Manhattan and First Union filed this motion for credits on the judgment and for discovery to determine how the settlement was reached. Knight Publishing is not receiving payments in excess of those to which it is equitably entitled and, because the credit was properly denied, how the settlement agreement was negotiated is immaterial, irrelevant, and not subject to discovery.

Judge WYNN dissenting.

On remand from the Supreme Court of North Carolina in accordance with their opinion, 351 N.C. 98, --- S.E.2d --- (1999) (September 27, 1999). Previously heard by this Court on 22 September 1998, 131 N.C. App. 257, 506 S.E.2d 728 (1998), on appeal by defendants from an order and also from a modified final order and judgment both filed 19 September 1997 by Judge Chase B. Saunders in Mecklenburg County Superior Court. The issues addressed on remand are the same as those previously heard by this Court.

Smith Helms Mulliss & Moore, L.L.P., by Jonathan E. Buchan and T. Jonathan Adams, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by William L. Rikard, Jr., Craig T. Lynch, Kiah T. Ford, IV, and R. Bruce Thompson, II, for defendant-appellants.

GREENE, Judge.

Plaintiff, The Knight Publishing Co., Inc. (Knight Publishing), and defendants, The Chase Manhattan Bank, N.A. (Chase Manhattan) and First Union National Bank of North Carolina (First Union), have been involved in this protracted litigation for over six years. Indeed, Knight Publishing initially filed a complaint against Chase Manhattan and First Union in July of 1992 seeking to recover for the improper handling of checks drawn on Knight Publishing's account as part of a fraudulent invoice scheme. The facts recited below are drawn in part from our earlier opinion regarding this matter. *See Knight Publishing Co. v. Chase Manhattan Bank*, 125 N.C. App. 1, 479 S.E.2d 478, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 548, *motion dismissed*, 347 N.C. 137, 492 S.E.2d 22 (1997).

From 1980 until 1992, Oren Johnson (Johnson) headed Knight Publishing's camera/platemaking department. Beginning in 1985, Johnson conspired with John Rawlins (Rawlins) and Lloyd Douglas Moore (Moore), the owners of Graphic Image, Inc. (Graphic Image), to defraud Knight Publishing. Specifically, Graphic Image would deliver bogus invoices to Johnson and charge Knight Publishing for supplies it never received. Johnson would forward the invoices to Knight Publishing's accounts payable department, which would issue checks payable to "Graphic Image." Graphic Image would receive these checks, cash them, and Johnson, Rawlins, and Moore would divide the monies.

Knight Publishing maintained a checking account at both Chase Manhattan and First Union. All but two checks were drawn on Knight

Publishing's Chase Manhattan account. All of the checks, however, were deposited at First Union's banks.

From 1985 until 1987, Marilyn Mabe (Mabe), a bookkeeper for Graphic Image, deposited the improperly obtained checks into Graphic Image's First Union account. In July of 1987, this procedure changed after Conbraco, Inc. (Conbraco) purchased 50% of Graphic Image's stock, leaving Rawlins and Moore each with a 25% share. Rawlins and Moore were concerned their embezzlement scheme would be discovered by Conbraco employees, and therefore instructed Mabe to deposit Knight Publishing's checks into Graphic Color Prep.'s (Graphic Prep.'s) account—Graphic Prep. being a wholly owned partnership of Rawlins and Moore. As instructed, Mabe began depositing the checks into Graphic Prep.'s account by endorsing them as follows:

"FOR DEPOSIT ONLY
GRAPHIC COLOR PREP.
ACCT. #7048286557"

From January 1988 to May 1992, Mabe deposited approximately fifty-five checks into the Graphic Prep. account with a total face amount of $1,479,003.96.

In June of 1992, Knight Publishing discovered the embezzlement scheme and demanded reimbursement from Chase Manhattan and First Union. On 26 October 1994, Judge Chase B. Saunders entered an Order and Judgment finding: (1) Chase Manhattan liable for charging improperly endorsed checks against Knight Publishing's account; (2) Chase Manhattan's liability is limited to those checks charged after 19 June 1989 because Knight Publishing's claim against any checks prior to that time was time barred under U.C.C. § 4-406; and (3) First Union's summary judgment motion should be granted. Thereafter, on 9 January 1995, the trial court entered a Final Order and Judgment whereby Knight Publishing was awarded $1,202,344.84 in damages, representing the principal amount of Knight Publishing's non-time barred losses. Knight Publishing and Chase Manhattan appealed both of those orders.

On 7 January 1997, this Court ruled on the aforementioned appeals. Specifically, we affirmed the trial court's granting of summary judgment against Chase Manhattan, reversed the trial court's decision to grant First Union's summary judgment motion, and reversed the trial court's decision concerning the applicable rate of interest. *Id.* at 21, 479 S.E.2d at 490.

In accordance with our ruling, Judge Saunders held three hearings in September of 1997 to consider Knight Publishing's proposed Modified Final Order and Judgment. It was during one of these hearings that Chase Manhattan and First Union first discovered Knight Publishing had settled claims (Settlement Agreement) with Graphic Images' successor corporation, Performance Printing Inc. (Performance Printing), and Conbraco. According to the terms of the Settlement Agreement, Performance Printing and Conbraco would pay Knight Publishing $625,000.00 for the checks drawn on Knight Publishing's account prior to 19 June 1989. Moreover, Rawlins and Moore agreed to transfer all of their Graphic Image and Performance Printing Stock to Performance Printing, and Knight Publishing agreed to dismiss all claims against Graphic Image, Graphic Prep., Rawlins, and Moore. Lastly, Knight Publishing agreed not to enforce federally imposed restitution orders against Rawlins and Moore.

Upon learning of the Settlement Agreement, Chase Manhattan and First Union argued, *inter alia*, that they were entitled to credits on the judgment corresponding to the monies received by Knight Publishing under the Settlement Agreement. Judge Saunders scheduled a third hearing on 10 September 1997, at which time Chase Manhattan and First Union filed a motion for credit and for discovery to determine how Knight Publishing reached the Settlement Agreement and to what claims the monies received were applied. On 19 September 1997, after hearing arguments and accepting briefs, Judge Saunders entered an order denying the motion for credit and for discovery, and then set forth the Modified Final Order and Judgment awarding Knight Publishing damages without crediting Chase Manhattan and First Union for any of the monies Knight Publishing had already received with regard to this matter. Chase Manhattan and First Union appeal.

The single issue presented is whether Chase Manhattan and First Union are entitled, in equity, to a credit on the Modified Final Order and Judgment.

A general principle of equity is that a party is entitled to a full recovery for its damages and that any recovery in excess of that amount should be denied. *See Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357, *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997). Our review of the record in this case accords with that of the trial court and reveals no abuse of discretion, the standard for the review of relief sought on the basis

of equity. *See* 27A Am. Jur. 2d *Equity*, § 97 (1996). The record simply does not support that Knight Publishing, even when the credit requested is denied, is receiving payments in excess of those to which it is equitably entitled. Accordingly, the order of the trial court denying the credit request is affirmed.

Furthermore, because the credit request was properly denied, it follows that "how the Settlement Agreement was negotiated" is immaterial and irrelevant and, thus, not subject to discovery. The trial court, therefore, correctly denied the request for discovery.

Affirmed.

Judge WALKER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

This appeal presents two issues for consideration. The majority opinion found that because it affirmed the second issue upholding the denial of a credit to Chase Manhattan and First Union, the first issue of " 'how the Settlement Agreement was negotiated' is immaterial and irrelevant." Because I disagree with the majority's holding that affirms the denial of credit, I also address the issue of whether the Settlement Agreement was a valid and binding compromise and settlement, or was it an "arrangement" designed to alleviate the malefactors of any liability and provide Knight Publishing with a double recovery.

At the outset, it should be noted that in their appeal, Chase Manhattan and First Union do not attempting to re-litigate issues which have already been decided by this Court. Rather, Chase Manhattan and First Union request this Court to act in equity, utilizing principles of fairness and justice. Specifically, Chase Manhattan and First Union ask this Court to grant them a credit equal to the monies Knight Publishing received through its Settlement Agreement with Graphic Images, Graphic Preparation, Conbraco, the malefactors and other sources. Chase Manhattan and First Union argue this offset is a fair compromise because the Settlement Agreement was "an attempt to recover [an] amount which [Knight Publishing] is not legally entitled to recover, while eliminating the Banks' ability to recover their own statutorily imposed losses from the actual perpe-

trators of the fraud." I believe, however, that the power of equity not need be considered in the case *sub judice* because the proper outcome is more aptly guided by concrete principles of law.

First, Chase Manhattan and First Union argue that the Settlement Agreement is inequitable because it allows Knight Publishing to recover monies for which it is not legally entitled to recover, while, at the same time, eliminating the ability of Chase Manhattan and First Union to recover their own losses from the actual perpetrators of the fraud. Chase Manhattan and First Union support this argument by noting that the Settlement Agreement was structured in such a manner as to grant Knight Publishing recovery for only the time-barred checks—that is, the checks prior to 19 June 1989. Chase Manhattan and First Union note that if the Settlement Agreement included the checks at issue in their case (the post 19 June 1989 checks), they would be entitled to a credit as a matter of law. Therefore, according to Chase Manhattan and First Union, Knight Publishing "conveniently" left these checks out of the Settlement Agreement to achieve a double recovery.

It is important to note that at the heart of Chase Manhattan and First Union's argument is the fact that the Settlement Agreement corresponded to claims that Chase Manhattan and First Union conclude were barred by the statute of limitations. Chase Manhattan and First Union support their conclusion by noting that a fraud claim's three year statute of limitations begins to run from the date when the fraud should have been discovered in the exercise of ordinary care. *See Shepherd v. Shepherd*, 57 N.C. App. 680, 682, 292 S.E.2d 169, 170 (1982). According to Chase Manhattan and First Union, since Knight Publishing's own internal investigation "conclude[d]" that Knight Publishing "should have known" about the embezzlement scheme early in its inception, Knight Publishing's fraud claim against the malefactors was time barred.

Chase Manhattan and First Union also argue that the Settlement Agreement was more form than substance. They support this argument with numerous conclusory and speculative theories. For example, they state the Settlement Agreement may in reality be an arrangement whereby: (1) Conbraco can purchase 100% ownership of Performance Printing for only $625,000, while, at the same time, ridding itself of two criminal directors; (2) Rawlings and Moore can absolve themselves of any financial liability by settling the claim and using the proceeds from the sale of their stock to pay off Knight Publishing; and (3) Knight Publishing receives the $625,000 "bird in

the hand," rather than a significantly larger sum that they may be awarded in the future.

Although the "conclusions" drawn by Chase Manhattan and First Union may in fact be true, they have little import in the case *sub judice*. It is well settled that "an agreement to compromise and settle disputed matters is valid and binding." *York v. Westall*, 143 N.C. 276, 277, 55 S.E. 724, 725 (1906). Indeed, the law favors the avoidance of litigation, and a compromise made in good faith "will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well . . . ." *Id.* Moreover, the agreement will be upheld without any serious regard to the merits of the controversy or the character or validity of the claims. *See id.*; *Bohannon v. Trotman*, 214 N.C. 706, 721, 200 S.E. 852, 860 (1939). The real consideration is not found in the parties' sacrifice of rights, but in the bare fact that they have settled the dispute. *See York*, 143 N.C. at 277, 55 S.E. at 725. Thus:

> . . . no investigation into the character or relative value of the different claims involved will be entered into, . . . it being enough if the parties to the agreement thought at the time that there was a question between them—an actual controversy—without regard to what may afterwards turn out to have been an inequality of consideration.

Id.

Although the aforementioned rules apply directly to matters whereby one party contends that a compromise and settlement did not constitute adequate consideration, I would find that the underlying policy issues are nonetheless useful here. Therefore, unless there is evidence of bad faith, deception, fraud or mistake, the argument of Chase Manhattan and First Union that the Settlement Agreement was an unbargained for sham "arrangement" need not be addressed. *See Bohannon*, 214 N.C. at 721, 200 S.E. at 860 (holding that compromise settlements are binding absent evidence of deception, fraud or mistake).

In conducting this analysis, I accept that given the evidence available, it appears that Knight Publishing's fraud claims may in fact be time barred. Nonetheless, this first impression guesstimate is far from a legal certainty. Indeed, this guesstimate is based in part upon Knight Publishing's independent auditor's conclusions. These conclusions, however, are based upon only one person's opinions, and moreover are factual conclusions, not legal ones. Given this uncertainty, along

with the monetary and time costs involved with pursuing the fraud litigation, in my opinion, Knight Publishing and the malefactors entered into the Settlement Agreement in good faith and to avoid subsequent uncertainty and costs. Therefore, I believe the Settlement Agreement was a valid and binding compromise and settlement, not an "arrangement" designed to alleviate the malefactors of any liability and provide Knight Publishing with a double recovery.

The second issue presented forms the crux of my disagreement with the majority opinion. Chase Manhattan and First Union request this Court to apply equitable principles and thereby credit them for the monies received by Knight Publishing. They note that regardless of whether the Settlement Agreement was intended to provide Knight Publishing with a double recovery, it nonetheless does so provide. Chase Manhattan and First Union therefore argue that regardless of Knight Publishing's intent, they are entitled to be credited for the monies Knight Publishing received.

With respect to this aspect of the credit issue, it is uncontroverted that while Knight Publishing is entitled to fully recover its damages, Knight Publishing is not entitled to a "double recovery" for the same loss or injury. *See Markham v. Nationwide Mutual Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357, *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997). As stated by our Supreme Court, "there can be but one recovery for the *same injury* or damage, . . . and further that, when merely a covenant not to sue, as distinguished from a release, is executed by the injured party to one joint tort-feasor for a consideration, the amount paid for such covenant will be held as a credit on the total recovery in actions against the other joint tort-feasors." *Holland v. Southern Public Utilities Co., Inc.*, 208 N.C. 289, 290, 180 S.E. 592, 593 (1935) (emphasis added). According to the Court, "the weight of both authority and reason is to the effect that *any* amount paid by *anybody* . . . for and on account of any injury or damage should be held for a credit on the total recovery in any action for the *same injury* or damage." *Id.* at 292, 180 S.E. at 593-94 (emphasis added). Although *Holland* involved joint tortfeasors, it has been quoted as controlling law in numerous types of damage cases. *See e.g.*, 25 C.J.S. Damages Sec. 99(2) at 1016 (footnotes omitted); *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 681, 384 S.E.2d 36, 47 (1989). Therefore, it is necessary to conduct a further examination into whether the monies Knight Publishing received as a result of the Settlement Agreement emanate from the "same injury" claimed in the case *sub judice*.

Knight Publishing contends that any monies received from the Settlement Agreement do not stem from the "same injury" at issue in the case *sub judice*. Indeed, Knight Publishing notes the explicit language of the Settlement Agreement which states that "[the] recovery was for a loss *separate and distinct* from the losses related to the checks improperly charged against [Knight Publishing's] bank accounts and deposited into the accounts of Graphic Image Color Prep"—that is, the Settlement Agreement compensated Knight Publishing for losses distinct from the losses related to the checks at issue here. This statement, however, is simply a conclusory assertion without legal tenability.

Knight Publishing has but one injury in this case—the money lost when Knight Publishing's improperly endorsed checks were unlawfully charged against its accounts. Although Chase Manhattan, First Union and the malefactors were independently liable, their actions were nonetheless concurrent and were it not for Chase Manhattan and First Union's unlawful acts, the malefactors' scheme would never have succeeded. Moreover, the injury created by the malefactors' scheme—Knight Publishing's monetary loss—is the same injury caused by the failure of Chase Manhattan and First Union to notice the malefactors' unlawful acts. Indeed, the amount of loss depended on the malefactors, not the bank; for if the malefactors embezzled $1 million, $5 million, or $10 million, Knight Publishing's loss would correspond to the injury created by the malefactors, not by any actions or non-actions taken by Chase Manhattan and First Union. Thus, Chase Manhattan and First Union's acts, or lack thereof, created no additional loss.

The Michigan Supreme Court, in *Riverview Co-op, Inc. v. First Nat. Bank & Trust Co. of Michigan*, 337 N.W.2d 225 (Mich. 1983), was asked to determine whether a defendant's recovery from both check converters and the bank from which the check cleared constituted a double recovery for the same injury. The court ruled that "[w]hile the converters and the bank are each, on the facts alleged, guilty of separate and distinct wrongdoing, [defendant] *suffered but a single injury*. Consequently, [defendant] may have but one satisfaction for that injury and may not have double redress." *Id.* at 231 (emphasis added). In making this ruling, the Michigan court used an election of remedies analysis, noting the election of remedies doctrine is a procedural rule designed not to prevent recourse of alternate remedies, but to prevent double redress for a single injury. *Id.* at 226-27. The court proceeded to state the elements essential for the doctrine to

apply: (1) the existence of two or more remedies; (2) the inconsistency between such remedies; and (3) a choice of one of them. *Id.* at 227. Under the facts of the case, the court stated that the first and third requirements were clearly met because defendant could have sued either the converter or the bank, and a choice was available as demonstrated by the fact that defendant sued the converter first and the bank second. *Id.* Lastly, the court noted that the remedies were not inconsistent because the defendant did not "ratify" or "affirm" the bank's payment to the converter by suing the converter first. *Id.* at 229.

The *Riverview* analysis is sound and accordingly should guide the outcome of the case *sub judice.* While the malefactors Chase Manhattan and First Union are each guilty of separate wrongdoing, Knight Publishing suffered but a single injury. "The remedies sought do not proceed from opposite and irreconcilable claims of right and are not inconsistent in the sense that a party may not logically pursue one remedy without renouncing the other." *Id.* at 231. Because there is but a "single injury," *Holland* requires this Court to hold that any monies Knight Publishing received through the Settlement Agreement or other arrangements relating to this matter must be credited against Knight Publishing's total recovery.

Having decided that Chase Manhattan and First Union are entitled to a credit, it should further be determined how much credit Chase Manhattan and First Union are entitled to from Knight Publishing's Settlement Agreement. Knight Publishing argues that its total damages amount to $2,023,890.48. Knight Publishing argues that even under the most optimistic theory supporting Chase Manhattan and First Union, it still will be unable to recover that amount. Therefore, according to Knight Publishing, there is no risk that it will be able to receive a double recovery. Knight Publishing, however, has failed to adequately substantiate the damages in excess of the Modified Final Order and Judgment described below.

Chase Manhattan and First Union, on the other hand, contend that Knight Publishing is legally entitled to recover only $1,244,011.18—the principal amount of non-time barred losses resulting from the embezzlement scheme. Chase Manhattan and First Union do concede that Knight Publishing is entitled to interest upon this amount.

In its Modified Final Order and Judgment, the trial court awarded Knight Publishing damages as follows: (1) $1,202,344.84 from Chase

Manhattan for lost principal; (2) $277,199.45 from Chase Manhattan as prejudgment interest; (3) $289,058.25 from Chase Manhattan as additional interest; and thereafter $296.47/day until the judgment is paid; (4) $41,666.34 from First Union for lost principal; (5) $8,901.75 from First Union for prejudgment interest; and (6) $9.13/day of interest until the judgment is paid.

Knight Publishing has already received $779,879.30 in damages. Specifically, Knight Publishing received $625,000 in damages from the Settlement Agreement, $68,223 from the malefactors personally, and $86,656.30 from Knight Publishing's insurance company. Again, these monies partly reimburse Knight Publishing for the "same injury" at issue in the case *sub judice*. Chase Manhattan and First Union are, therefore, entitled to have this money credited in its entirety, and therefore offset their liability under the Modified Final Order and Judgment.

For these reasons, I dissent with the majority opinion. In my opinion, this case should be remanded to the trial court with instructions to amend its Modified Final Order and Judgment to reflect the $779,879.30 credit due Chase Manhattan and First Union.

STATE OF NORTH CAROLINA v. JEFFREY DOUGLAS LANCASTER

No. COA99-190

(Filed 21 March 2000)

1. Venue— change—publicity

The trial court did not err in a prosecution for robbery and other crimes by denying defendant's motion for a change of venue due to pretrial publicity. Of the three newspaper articles defendant submitted in support of his motion, two were published at the time of the robbery, nearly 16 months before the hearing on the motion to change venue, and the third related to defendant being attacked in jail and only briefly mentioned the circumstances surrounding his impending trial.

2. Rape— continuous act—multiple penetrations

The trial court did not err by denying a motion to dismiss one of two rape charges on the theory that there was only one continuous act. Each act of intercourse constitutes a distinct and

separate offense and the victim testified that she was penetrated from behind by defendant, that he forced her onto a closet shelf so that she was facing him, and that he again forcibly penetrated her.

3. Kidnapping— instructions—false imprisonment as lesser included offense

The trial court did not err in a second-degree kidnapping prosecution by not instructing the jury on the lesser-included offense of false imprisonment where the evidence shows that defendant confined, restrained, or removed the victim in order to commit a robbery and there was no evidence that defendant acted for any other purpose.

4. Criminal Law— diminished capacity—sufficiency of the evidence

The trial court did not err in a prosecution for rape and kidnaping by denying defendant's request for an instruction on diminished capacity and voluntary intoxication where there was insufficient evidence that defendant was unable to form the requisite intent.

5. Kidnapping— indictment and instruction—use of conjunctive and disjunctive

The trial court did not err in its instructions on kidnapping where the indictment charged defendant with kidnapping by confining, restraining, and removing, and the instruction allowed a conviction upon a showing of either confining, restraining, or removing. There was substantial evidence to support any of the three methods set out in the indictment and an indictment alleging all three theories is sufficient and puts defendant on notice that the State intends to show that defendant committed kidnapping in any one of the three theories.

6. Kidnapping— instructions—restraint and removal separate from armed robbery

The trial court's instructions in a kidnapping and armed robbery prosecution were not erroneous where defendant contended that the instruction was ambiguous as to whether the kidnapping was an inherent and inevitable feature of armed robbery, but the court gave the pattern jury instruction that a finding of kidnapping was warranted if defendant's act of confinement, restraint, or removal was a separate complete act independent of and apart

from armed robbery or common law robbery, and the evidence established that defendant's binding of the victim's hands and feet, dragging her 15 feet into a storage closet, and moving her several times while in the closet were acts independent of and apart from the robbery.

7. Constitutional Law— effective assistance of counsel— items not introduced

A kidnapping, rape, and robbery defendant did not have ineffective assistance of counsel where defendant's counsel did not introduce an SBI lab report of defendant's DNA and did not submit medical records regarding defendant's drug use and addiction. Both decisions were strategic and neither approach the levels required by *State v. Boswell*, 312 N.C. 553.

Appeal by defendant from judgments entered 2 October 1998 by Judge Charles H. Henry in Craven County Superior Court. Heard in the Court of Appeals 10 January 2000.

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

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first degree rape, second degree kidnapping, attempted first degree rape, and robbery with a dangerous weapon and was sentenced to a minimum of 439 months and a maximum of 560 months in prison. The defendant moved for a change of venue and to dismiss one of the rape charges, both of which the trial court denied.

The State's evidence tended to show the following: At approximately 1:00 a.m. on 29 May 1997, R.R. ("the victim") was working as the desk clerk at the Comfort Inn in Havelock, North Carolina. The victim testified that the defendant entered the building and inquired about room rates. The defendant said he would check the rates across the street at another hotel and left. The victim testified that defendant did not appear intoxicated or in any way impaired. When he returned, the defendant jumped over the counter and pulled out a box cutter. He then grabbed the victim and said: "Don't scream or I'll kill you." He dragged her approximately 15 feet into a small

storage closet. Defendant used wire ties to bind the victim's hands behind her back. He left the victim in the storage closet and returned to the front office, where he took approximately $300.00 from the cash register.

Defendant returned to the closet and bound the victim's ankles with wire ties. Defendant pulled down the victim's pants and underpants and ordered her to spread her legs. Defendant then penetrated the victim from behind. The victim testified she felt defendant's penis inside her vagina and that he then became frustrated and agitated. Defendant then picked up the victim and threw her onto a shelf so that she was facing him. He then ripped the victim's shirt and bra off. Defendant ordered the victim to spread her legs and he forcibly penetrated her vagina with his penis a second time. Defendant withdrew his penis and masturbated, ejaculating on the victim's clothing. Defendant then pulled up the victim's pants and taped her mouth with masking tape before leaving.

After the victim called the police, she was transported to the emergency room at the Craven Regional Medical Center and examined by Dr. Mark Anthony Willi. Dr. Willi testified that his examination of the victim's vagina yielded the presence of a discharge he thought was semen.

On 30 May 1997, defendant's brother, Jimmy Lancaster, assisted Trooper Gregory Steffens of the Highway Patrol in searching for the defendant. After locating the defendant inside his vehicle, Trooper Steffens blocked the defendant's vehicle in a parking lot and the defendant subsequently fled on foot. Trooper Steffens apprehended the defendant and subdued him with pepper spray.

The defendant testified that he is a crack cocaine addict and that prior to the attack, he purchased and smoked crack cocaine in Maysville, North Carolina, until he ran out of money. Defendant then drove to Havelock to rob someone for money to purchase more crack cocaine. Defendant testified that he entered the Comfort Inn, asked the victim for the money and took her to the closet but that he did not drag or force her there. He admitted taking the money out of the cash register and returning to the closet where the victim was located. Further, he undressed the victim but he could not obtain an erection and there was no intercourse between him and the victim.

Defendant also testified that after he left the Comfort Inn, the defendant returned to Maysville but did not find anyone at the origi-

nal crack house. He drove towards New Bern, North Carolina, and found another crack house where he purchased and smoked more crack cocaine. Defendant then returned to Havelock and drove past the Comfort Inn two times to observe any developments. Defendant then drove to "Slope," North Carolina, purchased and smoked more crack cocaine, and finally returned home sometime after 5:00 a.m. Upon returning home, defendant told his mother, "Mama, I did something I shouldn't have done last night. I robbed somebody."

Other witnesses testified to the defendant's drug addiction and mental treatment problems. Bob Mashburn, defendant's sponsor in the high risk cocaine group at the Neuse Mental Health Center in Morehead City, North Carolina, testified about defendant's cocaine addiction. Susan Eatmon, defendant's employer, also testified to his drug problems. Ron Bancroft, defendant's counselor at the Neuse Mental Health Center, testified about defendant's drug problems and depression. Bancroft further stated that defendant's "high" would have been over at the time of the robbery and rape; however, his cocaine addiction could have a negative impact on his ability to think through the consequences of his action.

I.

[1] Defendant first assigns as error the trial court's denial of his motion to change venue, arguing that pre-trial publicity in Craven County prejudiced him so that he could not obtain a fair and impartial trial. Specifically, defendant cites three newspaper articles published in the *Sun Journal*, the only daily newspaper published in Craven County, along with similar stories appearing on local radio and television stations.

After a hearing on defendant's motion, the trial court's order denying the motion stated in part:

> 4. From May 29, 1997, the date of the offense, to the date of the hearing of this motion, September 21, 1998, there have been three newspaper articles published in *The Sun Journal*. Two of those articles were printed back in May, 1997, the time of the commission of these offenses, and the third was published in August, 1998.
>
> 5. The news accounts of these offenses and the subsequent arrest of the defendant were not excessive in number or in length.

6. That all three articles were factual and non-inflammatory news accounts of the rape, robbery, and kidnapping and the subsequent arrest of the defendant.

7. That the defense in jury voir dire will be able to determine whether jurors have knowledge of the case and, if so, whether they can set aside what they have previously heard or read about this case, and decide this case based on the evidence and testimony offered during the trial.

8. That the defendant has not shown that it is reasonably likely that prospective jurors would base their decisions in this case upon pretrial information from either the print or television media or from word of mouth.

9. That the defendant can receive in Craven County a fair and impartial trial.

A motion for a change of venue is addressed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Pendergrass*, 111 N.C. App. 310, 316, 432 S.E.2d 403, 407 (1993). In order to obtain a change of venue, a defendant must establish that it is reasonably likely that prospective jurors would base their decision upon pre-trial information rather than evidence presented at trial and would be unable to remove any preconceived impressions they might have formed. *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983). Factual news accounts regarding the commission of a crime and the pre-trial proceedings do not of themselves warrant a change of venue. *State v. Madric*, 328 N.C. 223, 400 S.E.2d 31 (1991). If factual news articles are non-inflammatory and contain information that for the most part could be offered at defendant's trial, a motion for change of venue is properly denied. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984).

Of the three newspaper articles defendant submitted in support of his motion, two were published at the time of the robbery, which was nearly 16 months prior to the hearing on defendant's motion to change venue. The third article, published a month before the venue hearing, relates to the defendant being attacked while awaiting trial in jail and only briefly mentions the circumstances surrounding the defendant's impending trial. Defendant has failed to meet his burden to show that he could not receive a fair trial in Craven County and the trial court did not err in denying his motion to change venue.

II.

[2] The defendant next argues that the trial court erred in denying his motion to dismiss one of the two rape charges submitted to the jury. Specifically, if an act of rape occurred, there was only one single continuous act and not two separate acts.

"Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987) (*quoting* 75 C.J.S. Rape § 4); *State v. Small*, 31 N.C. App. 556, 559, 230 S.E.2d 425, 427 (1976), *disc. review denied*, 291 N.C. 715, 232 S.E.2d 207 (1977). Each act of forcible vaginal penetration constitutes a separate rape. *State v. Midyette*, 87 N.C. App. 199, 202, 360 S.E.2d 507, 509 (1987), *aff'd*, 322 N.C. 108, 366 S.E.2d 440 (1988). "Evidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown to prove the offense of rape." *State v. Williams*, 314 N.C. 337, 351, 333 S.E.2d 708, 718 (1985); *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984); *State v. Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968); *State v. Monds*, 130 N.C. 697, 41 S.E. 789 (1902).

The victim testified that she was penetrated from behind by the defendant. Then, he forced her onto a shelf in the closet so that she was facing him, and he again forcibly penetrated her a second time. Thus, there was sufficient evidence of two separate acts of rape and the trial court did not err in denying defendant's motion to dismiss one of the rape charges.

III.

[3] Next, defendant argues that the trial court erred in refusing to instruct the jury on the lesser-included offense of false imprisonment with regard to the kidnapping charge.

Pursuant to N.C. Gen. Stat. § 14-39(a) (1999), kidnapping is an unlawful, nonconsensual confinement, restraint or removal from one place to another for the purpose of committing specified acts. The State need only prove that defendant intended to commit one of the specified acts in order to sustain its burden of proof as to that element of the crime. *State v. Surrett*, 109 N.C. App. 344, 348-49, 427 S.E.2d 124, 126 (1993). Here, the defendant was charged with kidnapping the victim for the purpose of facilitating the commission of a felony. *See* N.C. Gen. Stat. § 14-39(a)(2).

Where there is no evidence from which the jury could find that the crime of lesser degree was committed, the trial court need not instruct on a lesser-included offense. *Surrett*, 109 N.C. App. at 351, 427 S.E.2d at 128. The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. *State v. Claypoole*, 118 N.C. App. 714, 717-18, 457 S.E.2d 322, 324 (1995). If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. *Id.* However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment. *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 562 (1992). Since the evidence shows that defendant confined, restrained, or removed the victim in order to commit a robbery and there was no evidence indicating that defendant acted for any other purpose, the trial court did not err in failing to instruct on the lesser-included offense. *See Surrett*, 109 N.C. App. at 352, 427 S.E.2d at 128.

IV.

[4] Defendant's next two assignments of error concern the trial court's denial of his requests for jury instructions on diminished capacity and voluntary intoxication. We discuss each in turn.

Defendant argues that the evidence of defendant's history of drug addiction, as testified to by his drug counselors and employer, along with evidence of defendant's mental condition on the night of the robbery, constituted sufficient evidence such that a jury instruction on diminished capacity was warranted.

An instruction on diminished capacity is warranted where the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier-of-fact as to whether the defendant had the ability to form the necessary specific intent to commit the crimes for which he is charged. *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989).

Mr. Bancroft was certified as an expert in the fields of substance abuse addictions and cognizant behaviors. He testified that defendant could have been impaired at the time of the robbery, but that "the euphoric high would have probably been over." Additionally, Bancroft testified that such an impairment "could have had a negative impact" upon the defendant's ability to form a plan or course of conduct. In a *voir dire* examination of Bancroft, he stated that he could not testify about the defendant's ability to think, make judgments, and distin-

guish right from wrong at the time these acts occurred. Bancroft's testimony only referred to the effect cocaine *could* have had on the defendant, based on his experience of how cocaine affects people in general.

Defendant testified that he smoked crack and drank three or four beers over the course of the night. After looking around the Comfort Inn, defendant returned with a box cutter and wire ties to bind the victim. Defendant asked the victim for the keys to lock the front door. After raping the victim twice, defendant taped her mouth shut and left her in a closet before leaving the scene. Defendant drove through parts of eastern North Carolina in search of crack cocaine before committing the robbery and twice drove past the Comfort Inn after the robbery to see what developments had occurred. Furthermore, the victim testified that defendant did not appear intoxicated or in any way impaired during the ordeal.

Viewed in the light most favorable to the defendant, there was insufficient evidence of defendant's mental condition to create a reasonable doubt in the jurors' minds that defendant was unable to form the specific intent necessary to commit these crimes; therefore, the trial court did not err in denying a request for jury instructions on diminished capacity.

To be entitled to an instruction on voluntary intoxication, a defendant must produce substantial evidence which would support a conclusion by the judge that he was "so completely intoxicated and overthrown to render him utterly incapable of forming [the intent required to commit the offense.]" *Clark*, 324 N.C. at 161, 377 S.E.2d at 63; *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). "In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to [commit the offenses], the court is not required to charge the jury thereon." *State v. Washington*, 71 N.C. App. 767, 770, 323 S.E.2d 420, 423 (1984), *cert. denied*, 315 N.C. 396, 339 S.E.2d 412 (1986); *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 319 (1981). Evidence of mere intoxication is not enough to meet defendant's burden of production. *State v. McQueen*, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989).

Again, viewed in the light most favorable to the defendant, there was no substantial evidence that the defendant was utterly incapable of forming the requisite intent to commit these crimes and therefore defendant was not entitled to a voluntary intoxication jury instruction.

V.

[5] Defendant next argues that the jury instruction on kidnapping was erroneous in that it was "disjunctively nonspecific and constituted plain error." The indictment charged defendant with kidnapping by "unlawfully confining, restraining and removing her from one place to another without her consent." Defendant argues that since the indictment used the conjunctive "and" to describe the State's allegations, the trial court's use of the disjunctive "or" in the jury instruction on kidnapping was error because it did not accurately express the State's allegations.

The indictment for kidnapping stated in part:

> The jurors for the State upon their oath present that . . . the defendant . . . unlawfully, willfully and feloniously did kidnap [the victim], who had attained the age of 16 years, by unlawfully confining, restraining, *and* removing her from one place to another . . . for the purpose of facilitating the commission of a felony.

(Emphasis added). The trial court instructed the jury in part that:

> [I]f you find from the evidence beyond a reasonable doubt that . . ., the defendant unlawfully confined a person, restrained a person, *or* removed a person from one place to another, and that the person did not consent to this confinement, restraint *or* removal and that this was done for the purpose of facilitating the defendant's commission of armed robbery or common law robbery, and that this confinement, restraint *or* removal was a separate complete act independent of and apart from the armed robbery or common law robbery, it would be your duty to return a verdict of guilty of second-degree kidnapping.

(Emphasis added).

If the defendant fails to object to a jury instruction, that instruction is reviewable on a plain error standard on appeal. *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998). The plain error standard requires a defendant to make a showing that absent the erroneous instruction, a jury would not have found him guilty of the offense charged. *Id.* To rise to the level of plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

Our Supreme Court has held that a jury instruction on a theory of kidnapping different than the theory charged in the indictment was reversible error. *See State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). In *Tucker*, the defendant did not object to the jury instruction and argued plain error on appeal. The indictment charged the defendant with kidnapping by "unlawfully removing [the victim] from one place to another." *Id.* at 537, 346 S.E.2d at 420. The jury instruction allowed a conviction for kidnapping if the jury found that defendant unlawfully "restrained" the victim. *Id.* The *Tucker* court stated that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *Tucker*, 317 N.C. at 537-38, 346 S.E.2d at 420 (*quoting State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)). The *Tucker* court went on to find the error reversible under a plain error standard, holding that "[i]n light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have . . . " 'tilted the scales" and caused the jury to reach its verdict convicting the defendant.' " *Id.* at 540, 346 S.E.2d at 422 (citations omitted).

Recently, in *State v. Dominie*, 134 N.C. App. 445, 448, 518 S.E.2d 32, 35 (1999), this Court, following the mandate of *Tucker*, held that an indictment limiting the kidnapping charge to "removing" the victim, followed by a "confining, restraining, or removing" jury instruction, constituted reversible error under a plain error standard.

We find *Tucker* and *Dominie* distinguishable. In both cases, the indictment limited the alleged kidnapping to one theory: "removing" the victim from one place to another. However, the jury instructions in each case allowed for a conviction of kidnapping based on a different theory than the one set out in the indictment. Additionally, the *Tucker* court found the error reversible based on the conflicting evidence on the removal and restraint issues.

Here, the indictment charged defendant with kidnapping by "confining, restraining, and removing" the victim. The jury instruction allowed a conviction upon a showing of either confining, restraining, or removing, which is not an "abstract theory not supported by the bill of indictment." *See Tucker*, 317 N.C. at 537-38, 346 S.E.2d at 420.

The evidence showed that the defendant bound the victim's hands behind her back with wire ties. Then, he dragged her approximately 15 feet and forced her into a storage closet. He left the victim in the

closet and returned to the front office to empty the cash register. Upon returning to the closet, the defendant bound the victim's ankles with wire ties. The defendant then moved the victim to the corner of the closet and raped her twice. There was substantial evidence to support any of the three methods set out in the indictment.

Defendant argues that by asserting three theories in the indictment, the State has confined itself to proving that all three theories were used in order to convict the defendant. We disagree.

A bill of indictment is sufficient if it charges the offense in a plain, intelligible manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972). The purpose of the indictment is to put the defendant on notice of the offense with which he is charged and to allow him to prepare a defense to that charge. *State v. Sumner*, 232 N.C. 386, 61 S.E.2d 84 (1950). The State need only prove that defendant intended to confine, restrain, or remove the victim in order to sustain its burden of proof as to that element of the crime. N.C. Gen. Stat. § 14-39 (1999); *Surrett*, 109 N.C. App. at 348-49, 427 S.E.2d at 126.

Since an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the State intends to show that the defendant committed kidnapping in any one of the three theories. The jury instruction correctly allowed any one of the three theories to serve as the basis for a finding of kidnapping; therefore, the jury instruction accurately reflected the three permissible theories alleged in the indictment. Accordingly, the trial court did not err in its jury instruction on kidnapping.

[6] Additionally, defendant argues that the kidnapping jury instruction erroneously stated the law in that it was "ambiguous as to whether the kidnapping was an inherent and an inevitable feature of armed robbery," and that this error also constitutes plain error.

Defendant did not make an assignment of error in the record on this basis. Instead, defendant includes this argument under Assignment of Error Number 6, which states: "The jury instruction on kidnapping was erroneous in that it was disjunctively nonspecific, and it constituted plain error."

The scope of appellate review is limited to those issues presented by assignment of error set out in the record on appeal. N.C.R. App. P.

10(a) (1999); *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). No assignment of error corresponds to the issue presented and thus the argument is not properly before this Court. However, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, at our discretion, we elect to address the merits of defendant's argument.

Defendant correctly cites *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978) and its progeny for the principle that any restraint or removal which is also "an inherent and inevitable feature of" armed robbery cannot also be the basis for a conviction of second degree kidnapping, based on the constitutional prohibition against double jeopardy. *See e.g. State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981); *State v. Weaver*, 123 N.C. App. 276, 473 S.E.2d 362, *disc. review denied*, 344 N.C. 636, 477 S.E.2d 53 (1996); *State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998). Defendant argues that the trial court's charge is an incorrect statement of the law and was plain error.

The jury instructions on kidnapping given by the trial court, pursuant to N.C.P.I.-Crim. 210.35, stated that if the defendant's act of "confinement, restraint or removal was a separate complete act independent of and apart from the armed robbery or common law robbery," then a finding of kidnapping was warranted. *Fulcher* and its progeny establish that if the act committed by defendant is "an inherent, inevitable feature" of the other felony (*e.g.* armed robbery), then a finding of kidnapping is constitutionally impermissible. Thus, N.C.P.I.—Crim. 210.35 is not in conflict with *Fulcher* and is a correct statement of the law.

Here, the evidence established that defendant's binding of the victim's hands and feet, his dragging her 15 feet into a storage closet, and his moving her several times while in the closet, all were acts independent of and apart from the act of armed robbery. Accordingly, defendant's argument is without merit.

VI.

[7] Defendant's two remaining assignments of error are based upon allegations of ineffective assistance of counsel. Defendant first contends that trial counsel's failure to submit into evidence the SBI lab report of defendant's DNA was error and prejudicial to his defense. Secondly, defendant argues that trial counsel erred by not submitting into evidence additional medical records regarding defendant's drug use and addiction.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984). In order to meet this burden, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "Ineffective assistance of counsel claims are 'not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.' " *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986) (citations omitted).

Our review of the record reveals that both decisions made by trial counsel were strategic decisions and that neither approach the levels required by *Braswell*. Defendant is unable to establish that either decision deprived defendant of a fair trial and thus defendant's contentions are without merit.

In sum, the defendant received a fair trial free of prejudicial error.

No error.

Chief Judge EAGLES and Judge WYNN concur.

JUDY CAROLYN YOUNG, EMPLOYEE, PLAINTIFF v. HICKORY BUSINESS FURNITURE, EMPLOYER, SELF-INSURED (ALEXSIS, INC. SERVICING AGENT), DEFENDANTS

No. COA99-524

(Filed 21 March 2000)

1. Workers' Compensation— consideration of testimony—authority to reject

There was no error in a workers' compensation proceeding where defendant contended that the Industrial Commission had not given weight to evidence or had failed to give proper weight to testimony. It was apparent from the Commission's findings of fact that it had considered the opinion testimony and the evidence and it was well within the Commission's authority to reject what it deemed to be unreliable evidence.

2. Workers' Compensation— fibromyalgia—related to workplace injury

The Industrial Commission did not err by finding and concluding that plaintiff's fibromyalgia was causally related to an earlier injury at work where defendant contended that the etiology of fibromyalgia cannot be scientifically or objectively determined, but plaintiff's doctor, who was an expert in the field of rheumatology and the treatment of fibromyalgia and was in a better position to draw a conclusion from the relevant circumstances, testified that plaintiff's injury could have or would have aggravated or caused the fibromyalgia and that her history did not reveal any other causative factor. His testimony was more than mere speculation and was sufficient to support the finding that plaintiff's fibromyalgia was caused by or was substantially aggravated by her accident.

3. Workers' Compensation— change of condition—disability rating unchanged

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff experienced a substantial change of condition where her disability rating did not change. The record contains ample evidence that her physical condition changed so as to impact her wage-earning capacity.

Judge HORTON dissenting.

Appeal by defendants from opinion and award entered 28 January 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2000.

Randy D. Duncan for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Hickory Business Furniture ("defendant-employer") and its insurance servicing agent, Alexsis, Inc., (collectively, "defendants") appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission") finding and concluding that Judy Carolyn Young ("plaintiff") experienced a substantial change of condition within the meaning of section 97-47 of the North Carolina General Statutes. Having carefully examined defendants' assignments of error, we affirm the Commission's opinion and award.

Plaintiff strained her back on 3 March 1992 while picking up a piece of furniture. At the time of the admittedly compensable injury, plaintiff was forty-eight years old and had been employed with defendant-employer for six years. Dr. Robert Hart, a family practitioner who served as defendant-employer's physician, initially treated plaintiff's injury and recommended physical therapy for her complaints of mid-back pain. Plaintiff's symptoms persisted, however, so Dr. Hart referred her to Dr. H. Grey Winfield, III, an orthopedist. Dr. Winfield's examination found plaintiff to have full range of motion in the lower extremity, to be a bit histrionic in her heel-toe walk, and to exhibit some symptom magnification. Dr. Winfield continued to treat plaintiff through 21 May 1992, after which plaintiff did not return for a follow-up assessment.

On her own, plaintiff sought treatment from Bruce Hilton, D.C., a chiropractor, on 9 November 1992, and on 20 July 1993, he rated her as retaining a 5% permanent partial impairment to her back. At the time of the rating, plaintiff continued to experience pain in her back and right hip and tingling in her right leg. The pain never ceased following plaintiff's initial treatment by the various doctors and, instead, increased gradually over time. Plaintiff, therefore, returned to Dr. Hilton for chiropractic treatment of a "popping" right hip on 20 August 1994. Dr. Hilton testified that plaintiff's condition appeared to be the same as when she originally sought his treatment, but the con-

dition had substantially worsened. On 19 October 1994, when plaintiff could no longer physically perform her job, Karen Hightower, plaintiff's supervisor, terminated plaintiff's employment.

On 19 June 1995, plaintiff began treatment with Dr. Dennis Payne, a rheumatologist with expertise concerning fibromyalgia, a chronic muscular pain syndrome that is associated with a non-restorative sleep pattern. Dr. Payne diagnosed plaintiff as having reactive fibromyalgia resulting from her 3 March 1992 compensable injury.

Plaintiff returned to Dr. Winfield on 2 August 1995 complaining of neck and bilateral arm pain. She also complained of swelling in the hands and back pain that radiated from the neck through the lumbar area and into both legs. Dr. Winfield examined plaintiff and found her to be neurologically intact with a full range of motion for the hips, knees and ankles. Dr. Winfield conducted a series of diagnostic tests, the results of which were normal, and determined that plaintiff's condition was much worse than when he last saw her on 21 May 1992. He concluded, however, that the present symptoms were not causally related to the prior compensable injury.

Plaintiff filed a Form 33, Request for Hearing, on 10 January 1995, alleging a substantial change of condition. The case came on for hearing before Deputy Commissioner Lorrie L. Dollar, who entered an opinion and award on 18 October 1996 finding and concluding that plaintiff had sustained a substantial change of condition within the meaning of section 97-47 of the General Statutes. Defendants appealed to the Full Commission, and on 7 April 1997, the matter was heard by a panel of the Full Commission consisting of Commissioners Thomas J. Bolch, Coy M. Vance, and Dianne C. Sellers. On 2 June 1997, Commissioner Bolch, with Commissioner Vance concurring, filed an opinion and award affirming the deputy commissioner's decision. Commissioner Sellers dissented, however, finding that plaintiff had failed to meet her burden of proving a substantial change of condition.

Defendants appealed to this Court, and in an opinion filed 21 April 1998, we vacated the opinion and award of the Full Commission and remanded the case for more definite factual findings. On remand, the case was considered by a panel comprised of Commissioners Bolch, Sellers, and Christopher Scott (Commissioner Vance had retired). Commissioner Bolch, with Commissioner Scott concurring, entered an opinion and award on 28 January 1998 finding and con-

cluding that plaintiff had undergone a substantial change of condition. Commissioner Sellers again dissented on the same grounds. Defendants now appeal.

On appeal from an opinion and award of the Industrial Commission, the reviewing court's task is to determine (1) whether there is any competent evidence of record to support the Commission's factual findings and (2) whether those findings, in turn, provide support for the Commission's conclusions of law. *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 25, 514 S.E.2d 517, 520 (1999). To that end, the findings by the Commission are binding on the reviewing court if the record contains any competent evidence in their support. *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). This is true, even when the record offers evidence that would support findings to the contrary. *Id.* The Commission's legal conclusions, however, are subject to this Court's *de novo* review. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996).

[1] With these principles in mind, we proceed to our discussion of defendants' arguments. Defendants first contend that the Commission disregarded competent evidence and thereby committed reversible error. In essence, defendants assert that the Commission was required to give some weight to the evidence elicited by the cross-examination of Dr. Payne regarding the etiology of fibromyalgia. Defendants also contend that the Commission failed to give proper weight to the opinion testimony of Dr. Winfield. We must disagree.

As defendants point out, "the Commission may not 'wholly disregard or ignore competent evidence' and must consider and evaluate all the evidence" presented by the parties. *Jarvis v. Food Lion, Inc.*, 134 N.C. App. 363, 366-67, 517 S.E.2d 388, 391 (1999) (quoting *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596 (1999)). This notwithstanding, the Commission is the sole judge of the credibility of the witnesses and the weight be accorded their testimony. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998). Furthermore, the Commission "may reject a witness' testimony entirely if warranted by disbelief of that witness." *Pittman*, 132 N.C. App. at 156, 510 S.E.2d at 709.

It is apparent from the Commission's findings of fact that it, indeed, considered the opinion testimony of Dr. Winfield as well as the evidence brought out during the cross-examination of Dr. Payne. In Finding of Fact #5, the Commission notes that Dr. Winfield was of the opinion that plaintiff's current complaints were "not causally related to the prior compensable injury." The Commission states, however, that it "[gave] no weight to this opinion inasmuch as Dr. Winfield has no expertise concerning fibromyalgia." Regarding Dr. Payne's testimony on cross-examination, the Commission states the following in Finding of Fact #18:

> Defendants' counsel's cross-examination of Dr. Payne did not result in a change of his opinion that plaintiff had disabling fibromyalgia caused or aggravated by her March 3, 1992, injury by accident. Nothing elicited by such cross examination causes the Full Commission to modify its finding of facts.

Since the Commission was well within its authority to reject what it deemed to be unreliable evidence, defendants' argument is without merit.

[2] Defendants next argue that the Commission erred in finding and concluding that plaintiff's fibromyalgia was causally related to her 3 March 1992 injury. Defendants' chief contention is that because the etiology of fibromyalgia cannot be scientifically or objectively determined, Dr. Payne's opinion as to the cause of plaintiff's condition is no more than speculation and conjecture. Again, we disagree.

The Industrial Commission is vested with full authority to find the essential facts in a workers' compensation case, *Bailey*, 131 N.C. App. at 653, 508 S.E.2d at 834, and it is the responsibility of the Commission, not the reviewing court, to weigh the evidence of causation and to assess its credibility, *id.* at 653, 508 S.E.2d at 835. Therefore, this Court can do no more than examine the record to determine whether any competent evidence exists to support the Commission's findings as to causation, and we are not at liberty "to weigh the evidence and then decide the issue on the basis of its weight." *Porter*, 133 N.C. App. at 26, 514 S.E.2d at 520. "[W]hen conflicting evidence is presented, 'the Commission's finding of causal connection between the accident and the disability is conclusive.' " *Bailey*, 131 N.C. App. at 655, 508 S.E.2d at 835 (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 275 (1965)).

Defendants maintain that Dr. Payne's testimony regarding the cause of plaintiff's condition should have been excluded as unreliable. Defendants take the position that the lack of definitive scientific methodology verifying the cause and effect relationship between plaintiff's compensable injury and her subsequent fibromyalgia rendered Dr. Payne's opinion incompetent and inadmissible. However, Dr. Payne, as an expert in the field of rheumatology and the treatment of fibromyalgia, was in a better position than the fact-finding body to draw a conclusion from the relevant circumstances as to what brought on plaintiff's current condition. The Commission was then free to receive this testimony and adopt Dr. Payne's conclusion as fact. Thus, contrary to defendants' assertion, we conclude that plaintiff has met her burden of establishing a causal connection between the fibromyalgia and her 3 March 1992 injury in terms of "reasonable medical probability."

Dr. Payne testified that "[f]ibromyalgia is a clinical diagnosis," which means that it is diagnosed "based on history and examination rather than doing any type of testing or x-ray studies." He stated that fibromyalgia "produces soft tissue pain and tenderness . . . in very characteristic locations in a person's body." Dr. Payne further stated that "[plaintiff] had the tender points and they were in the characteristic locations that we see in this problem." He indicated that "[plaintiff] fulfill[ed] the American College of Rheumatology criteria for fibromyalgia." According to Dr. Payne, "reactive fibromyalgia" is related, in time, to a particular event and could be caused or aggravated by trauma. While Dr. Payne conceded that fibromyalgia is controversial "because there's difficulty in objectively studying [the condition]," it was his opinion, to a reasonable degree of medical certainty, that plaintiff's compensable "injury could have or would have aggravated or caused the fibromyalgia." Dr. Payne noted further that plaintiff's history did not reveal any causative factor, other than the work-related injury, for the onset of fibromyalgia.

In light of this testimony, we hold that Dr. Payne's opinion regarding the etiology of plaintiff's current condition is more than mere speculation and, thus, was sufficient to support the Commission's finding that "[plaintiff's] reactive fibromyalgia was caused or substantially aggravated by her original injury by accident." *See Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997) (holding that although cause of dystonia unknown, expert's opinion regarding causation, based on temporal relationship between plaintiff's work-related

injury and onset of condition, was sufficient to support Commission's finding that dystonia was caused by compensable injury); *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992) (stating that causal connection may be established by circumstantial evidence and that absolute medical certainty not required). Defendants' argument, then, fails.

[3] Lastly, defendants assert that the evidence does not support the Commission's conclusion that plaintiff experienced a substantial change of condition, because Dr. Hilton testified that he would have given her the same disability rating in 1995 that he gave her in 1993, i.e., 5% permanent partial impairment to the back. We are not persuaded.

Under section 97-47 of our General Statutes, a "change of condition" refers to " 'a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.' " *East v. Baby Diaper Services, Inc.*, 119 N.C. App. 147, 151, 457 S.E.2d 737, 740 (1995) (quoting *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 34 (1960)). Whether a change of condition has occurred is a factual question, and whether the facts as found constitute a change of condition is a legal question. *Id.*

Defendants cite no authority for the proposition that an injured employee's disability rating must change in order to conclude that she has suffered a substantial change of condition under section 97-47. Moreover, we note that "[i]n determining if a change of condition has occurred entitling an employee to additional compensation under G.S. 97-47 the primary factor is a change in condition affecting the employee's physical capacity to earn wages[.]" *Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988). The record contains ample evidence tending to show that plaintiff's physical condition changed so as to impact her wage-earning capacity. Dr. Winfield testified that when he examined plaintiff on 2 August 1995, her condition was much worse than when he last saw her on 21 May 1992. Dr. Hilton similarly testified that plaintiff's condition had substantially worsened when she returned to him for treatment on 20 August 1994. Furthermore, plaintiff presented evidence that she was terminated from her position with defendant-employer on 19 October 1994, because she was no longer physically able to perform her job. We, therefore, hold that the Commission did not err in concluding that plaintiff underwent a substantial change of condition within the meaning of section 97-47. Accordingly, defendants' argument is overruled.

In light of the foregoing analysis, we affirm the opinion and award of the Industrial Commission.

AFFIRMED.

Judge MARTIN concurs.

Judge HORTON dissents with a separate opinion.

Judge HORTON dissenting.

On 3 March 1992, Judy Carolyn Young (plaintiff) injured her back in a compensable accident while employed by Hickory Business Furniture. After a period of temporary total disability, plaintiff retained a five percent permanent partial disability of her back, for which she was compensated. Plaintiff now contends that she has sustained a substantial change of condition since 15 October 1993, when she last received compensation. In a divided decision, the Full Commission found that plaintiff's condition substantially worsened, that she became unable to work on 19 October 1994 because of fibromyalgia, and that her condition is likely to be permanent. The Full Commission concluded as a matter of law that the medical testimony offered by plaintiff to support a substantial change in her condition "[did] not have to arise to a medical certainty." The Commission concluded that plaintiff met her burden of proof "when her physicians testify that the cause 'could or might' have likely produced the effect."

Where an employee seeks to establish a substantial change in condition pursuant to N.C. Gen. Stat. § 97-47 (1999), the burden is on the employee to prove the causal relationship between the new condition and the injury that is the basis of the award the employee seeks to modify. *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (citations omitted). Here, even assuming that the employee's condition has worsened and that she suffers from fibromyalgia, the Commission erred in finding that there was a causal connection between the original injury by accident to her lower back and the fibromyalgia. The Commission's error resulted from applying the wrong standard to the medical evidence.

Rather than requiring the employee to produce evidence " 'indicat[ing] a reasonable scientific probability that the stated cause pro-

duced the stated result,' " *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996) (citation omitted), the Commission concluded that plaintiff's "medical testimony does not have to arise to a medical certainty." Thus the Commission would apparently find that the *Phillips* requirement of "reasonable scientific probability" is met when plaintiff's doctor testified that the compensable accident "could or might" have produced the result (fibromyalgia). Our cases have, however, consistently mandated a higher degree of proof than that required by a majority of the Commission in this case. *See, for example, id.* at 542, 463 S.E.2d at 262; and *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990).

In *Phillips*, the employee contended that he contracted salmonella from drinking contaminated water at work, and thereafter developed chronic fatigue syndrome. The Commission rejected his claim, finding first that "[t]here is no sufficient convincing medical evidence to any reasonable degree of medical certainty that plaintiff developed his salmonella infection from drinking contaminated water at work . . . ." *Phillips,* 120 N.C. App. at 540-41, 463 S.E.2d at 262-63. The Commission further pointed out that "[t]he exact cause of . . . [chronic fatigue syndrome] remains unknown as does its manner of transmission." *Id.* at 541, 463 S.E.2d at 263. Further, even assuming that Phillips contracted salmonella from contaminated water at work, the Commission found "there is no convincing medical evidence to any reasonable degree of medical certainty that his salmonella infection triggered or otherwise caused him to develop disabling chronic fatigue syndrome. . . ." *Id.*

Phillips is strikingly similar to the case before us. Here, plaintiff injured her back at work lifting a chair. Three years later, she was diagnosed with fibromyalgia by Dr. Payne, who is board-certified in Rheumatology. Dr. Payne acknowledged that fibromyalgia is a "very controversial subject in medicine primarily because there's difficulty in objectively studying it [and it is] diagnose[d] . . . based on criteria rather than any type of testing." He also testified that plaintiff met the criteria set out by the American College of Rheumatology for the condition. Dr. Payne then opined that the injury to plaintiff's low back at work "could have or would have aggravated or caused the fibromyalgia." Dr. Payne's reasoning was that he did not know of anything other than her injury at work which might have caused fibromyalgia, but admitted that "a lot of times I have no idea why someone has fibromyalgia. Far and away, fibromyalgia occurs more commonly for

unknown reasons. But she had no other reason that I could discover for having it."

The findings and conclusions of the Commission are based entirely on Dr. Payne's unsupported opinion as to causation. Yet on cross-examination, Dr. Payne acknowledged that plaintiff had gall-bladder surgery in 1994 and that he had "seen cases of fibromyalgia that occur following operations." Second, Dr. Payne acknowledged that he had done no tests to "rule out other forms of rheumatoid disease or illness," although "those studies need to have been done." Third, although Dr. Payne opined that "fibromyalgia can be either caused or aggravated by trauma," he acknowledged that no epidemiological studies have been done in the field of fibromyalgia to support that opinion. Indeed, a 1996 study published in The Journal of Rheumatology indicates that evidence that trauma causes fibromyalgia is "insufficient to establish causal relationships." Frederick Wolfe, The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability, 23:3 The Journal of Rheumatology 534 (1996). Thus, "whether an injury . . . caused the patient's [fibromyalgia], a retrodictive (or It Did) causal proposition[,] can rarely be determined to be certainly true or certainly false." *Id. See also Black v. Food Lion, Inc.*, 171 F.3d 308, 313 (5th Cir. 1999) ("Experts in the field conclude that the ultimate cause of fibromyalgia cannot be known, and only an educated guess can be made based on the patient's history.")

Dr. Payne summarized the basis for his causation opinion in the following answer:

> I think she does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's the only piece of information that relates the two.

It is well-settled that evidence which " 'raises a mere conjecture, surmise, and speculation,' " is insufficient to support a finding of causation. *Hinson*, 99 N.C. App. at 202, 392 S.E.2d at 659 (citation omitted). Even Dr. Payne agreed that his opinion had only a *post hoc, ergo propter hoc* (after this, therefore because of this) basis. Black's Law Dictionary defines this *post hoc* type of analysis as "[o]f or relating to the fallacy of assuming causality from temporal sequence; confusing sequence with consequence." (Black's Law Dictionary 1186 (7th ed. 1999). Reduced to its bare essentials, Dr. Payne's reasoning is that because plaintiff's fibromyalgia appeared three years after her on-the-

job low back injury, nothing else appearing, it must have resulted from that prior traumatic injury.

It simply cannot be said, on the facts of this case, that plaintiff offered evidence which indicates a "reasonable scientific probability" that plaintiff's present condition is causally related to her at-work injury. Nothing in this record indicates that Dr. Payne's theory of a causal relationship between trauma and fibromyalgia is widely accepted in the medical profession, nor have the necessary studies been done to demonstrate such a connection. I believe the Commission erred in basing its award on unsupported "could or might" causation testimony, and I would vote to reverse its opinion and award. Therefore, I respectfully dissent from the opinion of the majority which affirms that award.

DONNA LEWIS, EMPLOYEE, PLAINTIFF v. SONOCO PRODUCTS COMPANY, EMPLOYER; HOME INSURANCE COMPANY, CARRIER; GAB ROBINS, SERVICING AGENT, DEFENDANTS

No. COA99-367

(Filed 21 March 2000)

1. Workers' Compensation— total disability—return to work

The Industrial Commission did not err by concluding that plaintiff was entitled to continue receiving temporary total disability benefits despite a video of plaintiff mowing a lawn and an appearance before a Board of Adjustment. Competent evidence supports the finding that plaintiff may have engaged in intermittent mowing activities and appeared once before a Board of Adjustment but had not returned to either full or part-time employment. Defendants did not file the appropriate form for terminating plaintiff's benefits for reasons other than a return to work and plaintiff's earning capacity is not addressed.

2. Workers' Compensation— consideration of evidence—findings

The Industrial Commission's findings in a workers' compensation action do not indicate that it did not consider and evaluate all of the evidence where its direction that benefits were to be reinstated effective 16 July 1996 did not indicate that the Commission failed to recognize that benefits had been unilater-

ally reinstated in 1997, only that benefits should never had been terminated in 1996 and were to be reactivated as of that date.

3. Workers' Compensation— attorney fees—appeal by insurer

The Industrial Commission did not err by awarding plaintiff attorney fees where the defendant insurer appealed, the Commission ordered defendant to reinstate benefits, the sum awarded was for defending the appeal, and the amount was not disputed. N.C.G.S. § 97-88.

4. Workers' Compensation— attorney fees—costs—no reasonable grounds for appeal

The Industrial Commission did not err in a workers' compensation action by awarding attorney fees to plaintiff under N.C.G.S. § 97-88.1 where defendants erroneously used Form 28T to terminate plaintiff's benefits and did not have reasonable grounds to appeal the opinion and award of the deputy commissioner to the full Commission.

Appeal by defendants from an opinion and award entered 13 November 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 January 2000.

Eagen, Eagen & Adkins, by Charles E. Flowers III and Philip S. Adkins, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Joy H. Brewer, for defendant-appellants.

HUNTER, Judge.

Sonoco Products Company, Home Insurance Company, and GAB Robins (collectively "defendants") terminated the temporary total disability workers' compensation benefits of Donna Lewis ("plaintiff") with the filing of North Carolina Industrial Commission ("Industrial Commission") Form 28T on the basis that plaintiff had returned to work. Plaintiff disputed that she had returned to work and requested a hearing on the matter. Both a deputy commissioner and the Full Industrial Commission ("Full Commission") found in her favor. Defendants appeal. We affirm on the basis that defendants never established that plaintiff had returned to work.

The evidence indicates that plaintiff was employed by Sonoco Products Company as a trimmer operator in August 1994. On 5 May

1995, plaintiff suffered an injury to her back when she picked up a can of strap rings while at work for employer. Plaintiff's treating physician indicated in his 12 October 1995 medical notes that plaintiff's back injury required fusion surgery. Defendants requested an independent medical examination by Dr. William Lestini, who, in his 1 January 1996 evaluation, agreed that plaintiff was a reasonable candidate for an instrumented two-level fusion and decompression surgery. Defendants requested a second independent medical evaulation. Dr. Robert W. Elkins examined plaintiff on 2 June 1996, and agreed that surgery was a serious option for plaintiff.

Plaintiff's injury was accepted as compensable per an Industrial Commission Form 21, entitled "Agreement for Compensation for Disability Pursuant to N.C. Gen. Stat. § 97-82" which was approved by the Industrial Commission on 10 January 1996. On 16 July 1996, defendants filed an Industrial Commission Form 28T, entitled "Notice of Termination of Compensation by Reason of Trial Return to Work Pursuant to N.C. Gen. Stat. § 97-18.1(b) and N.C. Gen. Stat. § 97-32.1." On the Form 28T, defendants explained: "Employee has returned to work for other employer and in self-employed capacity without employer's knowledge." With the filing of the Form 28T, plaintiff's benefits were terminated. In response, plaintiff requested a hearing on the matter.

The case was heard before Deputy Commissioner Edward Garner, Jr. on 23 January 1997. After the hearing, Garner recused himself and this case was reassigned to Deputy Commissioner George T. Glenn, II. Deputy Commissioner Glenn reviewed the transcript of the evidence and on 22 September 1997 filed an opinion and award concluding that defendants had failed to show that plaintiff had returned to gainful employment and therefore she was entitled to continue receiving temporary total disability compensation. Defendants appealed and the Full Commission affirmed the opinion and award of Deputy Commissioner Glenn on 13 November 1998. Defendants appeal.

[1] Defendants first argue that "the Full Commission acted under a misapprehension of legal principles when it concluded that plaintiff-appellee was entitled to continue receiving temporary total disability benefits." On appeal, defendants contend that plaintiff's presumption of total disability was successfully rebutted by the demonstration that plaintiff had wage earning capacity, although they made no motion on this basis before the Industrial Commission.

Once a Form 21 agreement is entered into, the employer is deemed to have admitted liability and a presumption of disability attaches in favor of the plaintiff. *Kisiah v. W. R. Kisiah Plumbing*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). While demonstration of wage earning capacity generally rebuts the presumption of total disability, defendants' filing of Industrial Commission Form 28T indicates that it sought to suspend plaintiff's benefits *only* on the basis of her return to work. Form 28T indicates that benefits are to be terminated because a plaintiff has returned to work, pursuant to N.C. Gen. Stat. § 97-18.1(b) and N.C. Gen. Stat. § 97-32.1, which provide in pertinent part, respectively:

> (b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1, or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder. The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability.

N.C. Gen. Stat. § 97-18.1(b) (1999).

> Notwithstanding the provisions of G.S. 97-32, an employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article.

N.C. Gen. Stat. § 97-32.1 (1999). In the present case, defendants did not assert any other reason for termination of plaintiff's benefits besides "return to work" on the Form 28T, which is to be used only when a claimant has returned to work.

The Industrial Commission's workers' compensation rule entitled "Trial Return to Work" states, in pertinent part:

> (1) . . . [W]hen compensation for total disability being paid pursuant to N.C. Gen. Stat. § 97-29 is terminated because the

employee has returned to work for the same or a different employer, such termination is subject to the trial return to work provisions of N.C. Gen. Stat. § 97-32.1. When compensation is terminated under these circumstances, the employer or carrier/administrator shall file a Form 28T and provide a copy of it to the employee and the employee's attorney of record, if any.

(2) If during the trial return to work period, the employee must stop working due to the injury for which compensation had been paid, the employee shall complete and file a Form 28U and provide a copy of the completed form to the employer and carrier/administrator. A Form 28U shall contain a section which must be completed by the employee's authorized treating physician certifying that the employee's injury for which compensation had been paid prevents the employee from continuing the trial return to work. If the employee returned to work with an employer other than the employer at the time of injury, the employee must complete the "Employee's Release and Request For Employment Information" section of a Form 28U.

(3) Upon receipt of a properly completed Form 28U, the employer or carrier/administrator shall forthwith resume payment of compensation for total disability. If the employee fails to provide the required certification of the authorized treating physician or if the employee fails to execute the "Employee's Release and Request" section of a Form 28U, if required pursuant to paragraph (2) above, the employer or carrier/administrator shall not be required to resume payment of compensation. Instead, in such circumstances, the employer or carrier/administrator shall forthwith return a Form 28U to the employee and the employee's attorney of record, if any, along with a statement explaining the reason the Form 28U is being returned and the reason compensation is not being reinstated.

. . .

(5) When the employer or carrier/administrator has received a properly completed Form 28U and contests the employee's right to reinstatement of total disability compensation, it may suspend or terminate compensation only as provided in N.C. Gen. Stat. § 97-18.1 and/or pursuant to the provisions of N.C. Gen. Stat. § 97-83 and N.C. Gen. Stat. § 97-84.

Workers' Comp. R. of N.C. Indus. Comm'n 404A(1)-(3), (5), 2000 Ann. R. 718, 718-19 (Lexis). While defendants assert that plaintiff did not abide by section (2) above by completing and filing a Form 28U, the record reveals the plaintiff denied that she ever attempted a "trial return to work" and thus she was not required to file a Form 28U.

The Industrial Commission's workers' compensation rules also provide that if an employer seeks to terminate or suspend compensation for a reason other than payment without prejudice or trial return to work, the employer shall notify the employee on an Industrial Commission Form 24, which is entitled "Application to Stop Payment of Compensation." Workers' Comp. R. of N.C. Indus. Comm'n 404(2), 2000 Ann. R. 717, 717 (Lexis). It is undisputed that defendants in the present case did not file a Form 24 seeking to terminate plaintiff's compensation on grounds other than plaintiff's "return to work." Therefore, the only issue before the Full Commission pursuant to defendants' filing of the Form 28T was whether or not plaintiff had returned to work, warranting termination of benefits pursuant to N.C. Gen. Stat. § 97-18.1(b). Accordingly, the Full Commission did not consider the issue of whether or not plaintiff had wage earning capacity and neither does this Court.

As to the issue of plaintiff's return to work, the Full Commission found, in pertinent part:

> 10. Plaintiff assisted her husband who has a small lawn cutting business. She has mowed lawns on perhaps five different occasions since the injury on 5 May 1995 until she was videotaped in June of 1996. She received no compensation for her services, but rather did so because she was tired of sitting at home. Plaintiff is not an employee for any of her parents' businesses, but appeared before the Board of Adjustment on her mother's behalf. She received no compensation for her efforts but did so out of love and affection for her mother.
>
> . . .
>
> 12. Defendant-Employer filed a Form 28T on 16 July 1996, alleging that Plaintiff "has returned to work for another employer and/or was working in a self-employed capacity without employer's knowledge." The employer relied on a videotape provided by a detective agency showing the Plaintiff on a riding lawn mower with an automatic transmission slowly mowing a relatively flat area. The detective agency surveiled the Plaintiff for a

period of four months off and on, and videotaped the Plaintiff on only one occasion performing what can only be described as light duty effort which had previously been approved by the treating physician. The employer also relied, among other things, upon plaintiff's appearance before the City of Burlington's Board of Adjustment and a newspaper article concerning that appearance.

13. The Defendant-Employer had already indicated light duty was not available to the Plaintiff. Plaintiff did not receive any compensation for mowing or for appearing before the Board of Adjustment. Without any further inquiry of the Plaintiff, or Plaintiff's husband, Defendant summarily terminated Plaintiff's compensation, purportedly pursuant to N.C. Gen. Stat. § 97-18.1(b).

14. There is insufficient evidence in the record to prove that Plaintiff has returned to gainful employment as Defendants alleged.

The Full Commission concluded that "there is insufficient evidence in the record to show that Plaintiff has returned to gainful employment," and that a Form 28T is to be used by the employer only when such employer is certain that the employee has returned to work and has conclusive evidence to establish the employment. It pointed out that when the employer is uncertain whether the employee has returned to work, the employer should file a Form 24, a culmination of N.C. Gen. Stat. § 97-18.1(c), which provides in pertinent part:

(c) An employer seeking to terminate or suspend compensation . . . for a reason other than those specified in subsection (b) of this section [payment without prejudice and trial return to work] shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission. . . .

N.C. Gen. Stat. § 97-18.1(c) (1999). This conclusion is in accord with the Industrial Commission's Workers' Compensation Rule 404(2), which provides that a Form 24 is to be filed when an employer seeks to terminate benefits for reasons other than payment without prejudice or trial return to work.

The standard of appellate review of an opinion and award of the Industrial Commission is limited to a determination of (1) whether its findings of fact are supported by any competent evidence in the record; and (2) whether the Industrial Commission's findings of fact

justify its legal conclusions. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 493 S.E.2d 305 (1997). The Industrial Commission's conclusions of law are reviewable *de novo* by this Court. *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). Our review of the record indicates that competent evidence supports the finding that plaintiff may have engaged in intermittent mowing activities and appeared once before a Board of Adjustment. However, she had not returned to either full or part-time employment which, in turn, supports the conclusion that plaintiff's benefits should not be terminated pursuant to defendants' Form 28T request. As we have noted, defendants did not file a Form 24 for the purpose of terminating plaintiff's benefits for reasons other than a return to work; as a result, the issue of plaintiff's wage earning capacity was not considered by the Full Commission and we do not address defendants' argument on this issue. Accordingly, we overrule defendants' first assignment of error.

[2] Defendants next contend that the Full Commission committed an abuse of discretion by failing to make a finding that plaintiff's compensation benefits were unilaterally reinstated by defendants on 21 August 1997 pursuant to an Industrial Commission Form 62. Defendants argue the Full Commission made no finding as to this fact and stated that "[d]efendants shall reinstate temporary total disability benefits to the Plaintiff effective July 16, 1996." Therefore, they contend, it is obvious that the Full Commission did not consider all of the evidence because if it had, it would have reinstated benefits only from their termination in 1996 to their reinstatement in 1997. We disagree.

"Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis in original). The record reveals that plaintiff's benefits were reinstated on 21 August 1997, retroactive to 18 July 1997, pursuant to an Industrial Commission Form 62 "Notice of Reinstatement . . . ." The "reasons for reinstatement" blank on the form is completed with the statement "Ms. Lewis has undergone a change in condition." No other information regarding the change of condition is shown on the form. The direction of the Full Commission that benefits were to be reinstated effective 16 July 1996 does not indicate that the Full Commission did not recognize that they were reinstated in 1997 due to a change in condition. Our review reveals that it merely indicates

that plaintiff's benefits should have never been terminated on 16 July 1996 and they were to be reactivated as of that date because defendants failed to show plaintiff had returned to work. The Full Commission's findings do not indicate that it did not consider and evaluate all of the evidence as required by *Weaver v. American National*. Accordingly, this assignment of error is overruled.

[3] Finally, defendants' last assignment of error states: "The Full Commission committed a manifest abuse of discretion by awarding attorney's fees to plaintiff-appellee pursuant to N.C. Gen. Stat. §§ 97-88 and 97-88.1." To the contrary, our review reveals that the Full Commission awarded attorney's fees pursuant to N.C. Gen. Stat. § 97-88 and costs pursuant to N.C. Gen. Stat. § 97-88.1; however, we shall address the propriety of both awards.

Under N.C. Gen. Stat. § 97-88, "[e]xpenses of appeals brought by insurers":

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

N.C. Gen. Stat. § 97-88 (1999). Interpreting this statute, this Court has held that the Industrial Commission may award attorney's fees when: "(1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee." *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994). Thus, pursuant to N.C. Gen. Stat. § 97-88, an employee may be awarded attorney's fees and there is no requirement that the insurer had no reasonable grounds to pursue the appeal. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481, 485 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). In other words, an award of attorney's fees under N.C. Gen. Stat. § 97-88 is permitted even if the insurer who institutes the proceeding has reasonable grounds and is ordered as a result of the pro-

ceeding to make or continue making benefit payments to the injured worker. However, the Industrial Commission may only award attorney's fees under N.C. Gen. Stat. § 97-88 to the injured worker for the portion of the case attributed to the insurer's appeal(s). *Id.* The order of the Full Commission in the present case states that "Defendants shall pay Plaintiff's attorney the sum of $1,000.00 as reasonable attorney's fees for defending this appeal, pursuant to N.C. Gen. Stat. § 97-88." Defendants do not dispute the amount awarded. They only dispute that the award was made to plaintiff. Since the defendant insurer appealed in the present case and the Commission ordered it to reinstate benefits to plaintiff, the award of attorney's fees in the present case was proper under N.C. Gen. Stat. § 97-88, and this assignment of error is overruled.

[4] Similarly, the Industrial Commission may assess the whole cost of the proceedings, including reasonable attorney's fees, against the party who brought or defended the proceeding without reasonable grounds. N.C. Gen. Stat. § 97-88.1 (1999). The purpose of N.C. Gen. Stat. § 97-88.1 is to prevent " 'stubborn, unfounded litigiousness' which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (*quoting Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982)). In the present case, the Full Commission found that:

> 15. At the time of filing the Form 28T, Defendants had no evidence that plaintiff was attempting a trial return to work. Filing the Form 28T without knowledge from the same employer or a different employer that the employee and employer had agreed to a trial return to work was *improper use of the Form 28T. The resulting litigation in support of the improper use of the Form 28T was unfounded. Thus this hearing has been brought and prosecuted by the Defendants without reasonable ground.*

(Emphasis added). Subsequently, the Full Commission ordered that "Defendants shall pay $3,500.00 to plaintiff's counsel pursuant to N.C. Gen. Stat. § 97-88.1 as part of the bill of costs." As with attorney's fees, defendants do not dispute the amount of the award, just the propriety of the award being made to plaintiff.

The Industrial Commission is

> authorized under N.C.G.S. § 97-88.1 to assess attorney's fees, and other costs, for the entire case, against a party prosecuting or

> defending a hearing without reasonable grounds. The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion.

Troutman, 121 N.C. App. at 54-55, 464 S.E.2d at 486 (citations omitted). In order to determine whether or not the Full Commission abused its discretion, we must examine whether or not the reasonable grounds requirement was met by defendants under N.C. Gen. Stat. § 97-88.1. In *Tharp v. Southern Gables*, 125 N.C. App. 364, 481 S.E.2d 339, *disc. review denied*, 346 N.C. 184, 48 S.E.2d 219 (1997), we held that where no evidence existed that claimant was having alcohol withdrawal seizure at the time of injury and the employer was unable to cite any authority to support the intoxification defense, the employer did not have reasonable grounds to request a hearing before the Industrial Commission based on an intoxication defense. In another case, this Court held that the carrier's motion to stop payment of compensation was brought without reasonable grounds based upon the finding that the carrier acted in violation of Industrial Commission rules by terminating benefits without the Commission's approval, and refusing to resume immediate payments following a deputy commissioner's order. *Hieb v. Howell's Child Care Center*, 123 N.C. App. 61, 472 S.E.2d 208, *disc. review denied*, 345 N.C. 179, 479 S.E.2d 204 (1996).

In the present case, no evidence indicated that defendants were informed by an employer that plaintiff had returned to work. Our review of the record indicates that substantial evidence was consistent with plaintiff's claim that she had not returned to work. *See Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575. Therefore, we agree with the Full Commission that defendants erroneously used Form 28T to terminate plaintiff's benefits. Accordingly, we hold that defendants did not have reasonable grounds to appeal the opinion and award of the deputy commissioner and the Full Commission did not abuse its discretion in awarding costs to plaintiff under N.C. Gen. Stat. § 97-88.1. Accordingly, this assignment of error is overruled.

Affirmed.

Judges JOHN and McGEE concur.

GLENDA L. SHUMAKER, PLAINTIFF v. GEORGE R. SHUMAKER, DEFENDANT

No. COA99-197

(Filed 21 March 2000)

1. **Divorce— alimony pendente lite—willful failure to comply—contempt**

The trial court did not err in a contempt action arising from failure to pay alimony pendente lite by determining that defendant was able to comply with the temporary alimony order but did not do so willfully, deliberately, and without justification. Although the defendant argued that courts must make particular findings of ability to pay in order to find failure to pay willful, the court concluded that defendant's assertions that his income and earning capacity had decreased were not credible and thus implicitly found that he possessed the means to comply and willfully refused to do so. Moreover, defendant did not provide information as to his personal checking account although those documents were subpoenaed and failed to furnish an affidavit of financial standing, thus failing to meet his burden proof.

2. **Divorce— alimony pendente lite—contempt—attorney's fees**

The trial court did not abuse its discretion in awarding attorney's fees to plaintiff in a contempt action arising from defendant's failure to pay alimony pendente lite. The court found that plaintiff had an interest in enforcing the temporary alimony order, acted in good faith in pursuing her motion for contempt and defending defendant's modification request, and had inadequate funds to defray the expense of the suit; that the amount of time plaintiff's attorney devoted to the matter was reasonable; and made a finding as to the reasonable value of the attorney's services. Although the record does not contain explicit findings as to the value of defendant's estate, the court's findings indicate that it considered defendant's financial situation and the reasonableness of the fees.

Judge GREENE dissenting in part.

Appeal by defendant from judgment entered 4 November 1998 by Judge James M. Honeycutt in Davidson County District Court. Heard in the Court of Appeals 16 November 1999.

Wilson, Biesecker, Tripp & Sink, by Max R. Rodden, for plaintiff-appellee.

Metcalf & Beal, L.L.P., by Christopher L. Beal, for defendant-appellant.

WALKER, Judge.

On 4 January 1994, the trial court granted plaintiff's motion for alimony *pendente lite*. Seeking to enforce this order, plaintiff filed a motion for contempt on 25 March 1998. On 31 March 1998, the trial court entered an order for defendant to show cause, if any, as to why he should not be adjudged in willful contempt. Defendant filed a motion on 1 April 1998 to terminate or modify his obligation to pay alimony *pendente lite* to plaintiff. On 4 November 1998, the trial court entered an order which denied defendant's motion to terminate or modify temporary alimony, found defendant in contempt for failing to comply with the temporary alimony order, and awarded plaintiff legal fees and costs to defray her expenses in the action.

The trial court's findings in its 4 November 1998 order included the following:

> 3. Through September 3, 1998 the defendant was in arrears $4,760.00 in alimony. The defendant paid an amount of ad valorem taxes in 1996 to offset his obligation to pay the 1997 and 1998 ad valorem taxes on the real estate where the plaintiff's residence is located . . . and to offset his alimony arrearage by $204.00. The total amount necessary to bring the mortgage loan to a current status as of September 1998 is $12,038.67.
>
> . . .
>
> 5. . . . The defendant's accountant furnished financial statements he prepared for the defendant's business, Shumaker Body Repair, Inc. The only information the accountant had available to him to use in preparing the financial statements was information furnished by the defendant, and the only verification of this information was bank statements. The defendant changed accountants some time in 1997. Detailed information is available from only August 1997 onward from which the accountant testified to the gross income, expenses, net income, and cash on hand of the corporation for 1998 but he did not do an audit of the defendant or his corporation. The accountant admitted that some of the defendant's financial statements presented in evidence through

his accountant were in error, and the errors had to be corrected during the course of the accountant's testimony.

6. The accountant testified that the defendant took no salary during 1998.

7. The defendant is in arrearage on federal income taxes. The defendant is making monthly payments to the Internal Revenue Service (hereinafter "IRS") for income tax arrearage for taxes that go back to 1987, 1990, 1992, 1993, and 1994. The tax arrearage may be in excess of $20,000.00 but the arrearage arose from the defendant's failure to pay taxes when due in those years.

8. . . . The defendant states that he has gotten as much as $21,000.00 in "loans" from "a friend" who was identified under cross-examination as his girlfriend who is "retired." The defendant does not know the exact amounts of such loans or when they were made. They were made without any promissory notes or terms of repayment. The defendant testified that he "couldn't keep up with" the large sums of money he paid to the Internal Revenue Service such as his $11,000.00 payment to the Internal Revenue Service in February 1998. He was not sure if he got the money in cash or otherwise. The defendant was unclear as to whether he deposited as much as $10,000.00 in cash to bank accounts at any one time.

9. The defendant drives a vehicle which is registered in his son's name to avoid seizure by the IRS.

10. The defendant did not provide information as to his personal checking account although such documents were subpoenaed. He only furnished documents regarding the corporate account.

11. The defendant did not furnish an affidavit of financial standing as did plaintiff.

12. The defendant is in the business of painting trucks and trailers. Since the entry of the previous temporary alimony order, the defendant incorporated his business with the defendant as a sole stockholder. The business conducted by the corporation is the same as the defendant's sole proprietorship before the prior order. The defendant has been in business many years in the same business regardless of whether acting through a corporation or as a sole proprietor.

13. The defendant was vague on his efforts to supplement his income with business from other than his regular customers. The defendant is also a certified mechanic. He made no efforts to supplement his income with mechanic work. Although the defendant is not found to have intentionally depressed his income, he is indifferent to fluctuations in the income of his truck painting business, if in fact, such fluctuations [exist].

14. Based on the financial information for years from 1993 to 1998, the defendant has essentially the same earning capacity as when the previous order was entered. Considering the testimony and exhibits of the defendant and observing his demeanor, especially considering his ability to obtain large sums of cash, supposedly from his girlfriend, and his inability to accurately recall the details of these "loans" or provide any documentation of them, the court simply does not believe the defendant's assertions that his income and earning capacity have decreased. The defendant has the burden of proof on his motion to modify alimony.

. . .

20. Mr. Rodden devoted 46.25 hours to representing the plaintiff on the contempt and modification proceeding. This amount of time is reasonable and the activities of Mr. Rodden were reasonably required for representation of the plaintiff in this matter.

21. The reasonable value of legal services rendered by plaintiff's counsel to plaintiff in this matter is $4,625.00. Associated costs total $59.06.

Based on these findings, the trial court concluded that the "defendant failed to show by the greater weight of the evidence that there has been a change in circumstances related to the factors that the court must consider in setting or modifying alimony." The trial court further concluded that defendant is "sufficiently able to comply with the temporary alimony order, but he has wilfully, deliberately, and without justification failed to comply with the order, and is [in] contempt of this court."

Based on its findings and conclusions, the trial court ordered that defendant be held in contempt until he paid certain sums of money, including plaintiff's attorney fees.

Defendant sets forth two assignments of error: (1) that the trial court erred in determining that defendant was sufficiently able to comply with the temporary alimony order but willfully, deliberately, and without justification failed to comply with the order; and (2) that the trial court erred in awarding plaintiff attorney fees.

[1] "Civil contempt proceedings are initiated by a party interested in enforcing the order by filing a motion in the cause." *Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985). "The motion must be based on a sworn statement or affidavit from which the court determines there is probable cause to believe there is civil contempt." *Id.*; *see* N.C. Gen. Stat. § 5A-23(a) (Cum. Supp. 1998). The burden then moves to the opposing party to show cause why he should not be found in contempt of court. *Id.* The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful. *Plott*, 74 N.C. App. at 85-86, 327 S.E.2d at 275; *see Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1990), *affirmed*, 328 N.C. 729, 403 S.E.2d 307 (1991) (holding that "[i]n civil contempt the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril") and *Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000) (holding that the defendant was properly held in contempt since he failed to carry his burden of proving that he was unable to pay or that he did not act willfully in failing to pay the child support arrearages); *see also McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (holding that "absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages" since indigent defendants are often unaware they "could avoid imprisonment if they showed that they were unable to pay" and "many such defendants would not know how to prove their inability to pay").

Defendant cites this Court's decision in *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), for the proposition that courts are required to make "particular findings" of ability to pay in order to find the failure to pay was willful. This Court, however, in *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985), held that although explicit findings are preferable, they are not absolutely essential where the findings otherwise indicate that a contempt order is warranted. An order is sufficient if it is implicit in the court's findings that the delinquent obligor both possessed the means to comply and willfully refused to do so. *Id.*

When reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings and whether the findings support the conclusions. *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986). Here, defendant is the sole stockholder of Shumaker Body Repair, Inc., which is the same business defendant owned as a sole proprietor prior to the entry of the temporary alimony order. Based on defendant's financial information for years 1993-1998, the trial court found that defendant has the same income or earning capacity as when the alimony *pendente lite* order was entered. The trial court also noted that during the hearing, defendant was vague as to his efforts to supplement his income with business from other than his regular customers and determined that although defendant may not have intentionally depressed his income, "he is indifferent to fluctuations in the income of his truck painting business, if in fact, such fluctuations [exist]."

In *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980), this Court held that a person may be guilty of civil contempt, even if he does not have the money to make court ordered payments, if he could take a job which would enable him to make those payments and he fails to do so. In the case at bar, the trial court found that although defendant is a certified mechanic, he has made no effort to supplement his income with mechanic work. The trial court emphasized that defendant had the "ability to obtain large sums of cash, supposedly from his girlfriend" but was unable to "accurately recall the details of these 'loans' or provide any documentation of them." Defendant also testified that he "couldn't keep up with" the large sums of money he had paid to the IRS, which included a $11,000.00 payment in February 1998. Based on these findings, the trial court concluded that defendant's assertions that his income and earning capacity have decreased were not credible. Thus, it is implicit in the court's findings that defendant both possessed the means to comply and willfully refused to do so.

The trial court further noted in its findings that defendant did not provide any information as to his personal checking account although the documents were subpoenaed and that he failed to furnish an affidavit of financial standing. While defendant's accountant furnished financial statements he had prepared for defendant's business, defendant failed to provide any detailed information for the time period prior to August 1997, and the accountant admitted that some of defendant's financial statements were erroneous.

Therefore, defendant failed to meet his burden of proof of establishing that he lacked the means to pay or that his failure to pay was not willful.

The case of *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948), cited by the dissent, did not address the issue of who has the burden of proof in a civil contempt proceeding. In *Lamm*, the plaintiff offered evidence that the defendant had failed to comply with the court's order. *Id.* at 249, 49 S.E.2d at 404. The defendant then came forward with evidence that he was out of the county and the State when the original order was entered on 7 February 1948 and did not have notice of the order until he was served with a show cause order on 30 April 1948. *Id.* Defendant also presented evidence that he was working for the State Highway Commission at the present time but that he had only worked for them for two weeks, having received only $25.00 from said employment. *Id.* Additionally, defendant testified that he does not own any property nor have any money with which to comply with the order. *Id.* Based on the evidence presented by the defendant, our Supreme Court found that the trial court erred in finding that the defendant willfully disobeyed the court order. *Id.* at 250, 49 S.E.2d at 404.

[2] Defendant next contends that the trial court erred in awarding plaintiff attorney fees, since it was required to consider defendant's estate and ability to defray legal costs under *Perkins v. Perkins*, 85 N.C. App. 660, 355 S.E.2d 848, *cert. denied*, 320 N.C. 633, 360 S.E.2d 92 (1987), and failed to do so. In *Perkins*, this Court stated:

> A trial court is authorized to award attorney's fees to a party who has shown that she is entitled to the relief demanded, is a dependent spouse, and lacks sufficient means upon which to live during the prosecution of the suit and to defray her necessary legal expenses. Once fees are authorized, a trial court must consider several factors in determining the amount of the award, including but not limited to: each party's estate and ability to defray legal costs; the nature and scope of the legal services rendered the dependent spouse; and the skill, time, and labor expended during such representation.

Id. at 668, 355 S.E.2d at 853. However, the amount of an award of attorney's fees rests within the sound discretion of the trial court and is reviewable on appeal only for abuse of discretion. *Stickel v. Stickel*, 58 N.C. App. 645, 294 S.E.2d 321 (1982).

Here, the trial court found that plaintiff had an interest in enforcing the temporary alimony order, acted in good faith in pursuing her motion for contempt and defending the defendant's modification request, and had inadequate funds to defray the expense of the suit. The trial court also found that plaintiff's attorney devoted 46.25 hours to representing plaintiff in this matter and that this amount of time was reasonable. Further, the reasonable value of plaintiff's attorney's legal services in this matter was $4,625.00, and the associated costs totaled $59.06. Although the record before this Court does not contain explicit findings as to the value of defendant's estate, in *Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985), this Court found that such findings were not required in an order awarding attorney's fees where there was no conflicting evidence and the facts were obvious. Since the trial court's findings here indicate that it considered defendant's financial situation and the reasonableness of the attorney's fees, we cannot find that the trial court abused its discretion in awarding attorney's fees to plaintiff.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in part with separate opinion.

Judge GREENE dissenting in part.

I disagree with the majority that the party alleged to be delinquent in an action for civil contempt has the *burden of proving* his failure to make payments in compliance with a court order was not willful. I, therefore, respectfully dissent on this issue.

Civil or Criminal Contempt

Because of differences in " 'procedure, punishment, and right of review' " in actions for civil and criminal contempt, this Court must first determine when reviewing a contempt order whether the order evidences an adjudication of civil or criminal contempt. *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988) (quoting *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985)). In this case, plaintiff's motion for contempt and the trial court's contempt order do not state whether plaintiff's contempt action is criminal or civil. I, however, agree with the majority that the order is for civil contempt. This is because the order allows the defendant to

purge himself of contempt and be released from custody by paying funds into the court, and any funds paid into the court will be disbursed to plaintiff's attorney rather than to the court.[1] *See Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109 (order for contempt is civil if the contemnor may "avoid or terminate his imprisonment by performing some act required by the court" and any funds paid by contemnor are disbursed to the movant rather than the court).

Burden of Proof in Civil Contempt

In *McBride v. McBride*, the North Carolina Supreme Court stated civil contempt proceedings are criminal in nature because a civil contempt hearing may "result in the incarceration of a[] . . . [contemnor] who is without the means to procure his release and who, absent those means, may be incarcerated for an indeterminate period of time." *McBride v. McBride*, 334 N.C. 124, 130, 431 S.E.2d 14, 19 (1993). The *McBride* court stated that when contemnor "is jailed pursuant to a civil contempt order which calls upon him to do that which he cannot do[,] . . . the deprivation of his physical liberty is no less than that of a criminal defendant who is incarcerated upon conviction of a criminal offense." *Id.* at 131, 431 S.E.2d at 19. It follows a contemnor who is incarcerated based on a civil contempt order is entitled to protections afforded alleged contemnors in actions for criminal contempt. When a show cause order has been issued in an action for criminal contempt, the *burden of proof* is on the party initiating the contempt action to prove the alleged contemnor is in contempt. *See* N.C.G.S. § 5A-15(e), (f) (1999). I, therefore, would hold the party initiating an action for civil contempt has the *burden of proving* the elements of civil contempt, including that the alleged contemnor's noncompliance with the court order was willful.

Even if a civil contempt proceeding is not to be treated like a criminal contempt proceeding, I do not read the case law in this

1. Although this Court is able to review proceedings in the trial court to determine whether an action was for civil or criminal contempt, it is the better practice for the trial court to require the movant to provide an alleged contemnor with notice of whether an action is for civil or criminal contempt. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 395, 393 S.E.2d 570, 579 (Greene, J., dissenting) ("Allowing movant or the trial court to choose between civil contempt or criminal contempt based on evidence adduced during the course of trial does not provide the alleged contemnor reasonable notice and does not give him adequate opportunity to prepare and defend the action."), *appeal dismissed and disc. review denied*, 327 N.C. 482, 397 S.E.2d 218 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). An alleged contemnor, therefore, should object if the notice of hearing does not specify the type of contempt order sought by the movant.

State to place the *burden of proof* on the alleged contemnor in a civil contempt proceeding. The trial court is required, prior to the entry of an order of civil contempt, to "find as a fact that the [alleged contemnor] presently possesses the means to comply [with the underlying order]." *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983); *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E.2d 403, 404 (1948) (contempt order set aside because "no testimony was presented . . . to establish as an affirmative fact that [the alleged contemnor] possessed the means . . . to comply with the order"). That finding must be supported by evidence in the record. *Henderson*, 307 N.C. at 409, 298 S.E.2d at 351. If the finding is not made or if made and there is no evidence to support the finding, the order of contempt "must be set aside." *Id.* It, thus, follows there exists an affirmative duty on some party to present evidence the alleged contemnor has the present ability to comply with the underlying order and that duty necessarily rests with the movant.[2]

I acknowledge there are several cases, relied on by the majority, stating the alleged contemnor has the *burden of proof* in a civil contempt proceeding. Those cases, however, are inconsistent with the unequivocal teachings of *Henderson* and thus are not controlling.[3] *See State v. Adams*, 132 N.C. App. 819, 821, 513 S.E.2d 588, 589 (court of appeals must follow decisions of supreme court), *disc. review denied*, 350 N.C. 836, — S.E.2d —, *cert. denied*, — U.S. —, 145 L. Ed. 2d 414 (1999). In any event, I believe those cases simply place the *burden of production* on the alleged contemnor in a civil contempt proceeding, not the *burden of proof*. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 ("In civil contempt the

2. If the duty to present evidence was placed on the alleged contemnor and he failed to present any evidence, there would be no evidence in the record to support the entry of an order of contempt.

If the issuance of a show cause order in a civil contempt proceeding gave rise to a presumption, the alleged contemnor would have the burden of producing evidence "sufficient to permit reasonable minds to conclude that the presumed fact [did] not exist." N.C.G.S. § 8C-1, Rule 301 (1999). If he failed to meet his burden of producing evidence, "the presumed fact [would] be deemed proved." *Id.* Although there is no case law addressing the existence of a presumption in the context of civil contempt, the *Henderson* case implicitly rejects its existence. That court specifically held evidence was necessary to support the order of contempt and, had the movant been entitled to the benefit of the presumption, no evidence would have been required to support the order.

3. In addition to opinions from the Court of Appeals, the majority also cites *McBride* in support of its holding that the alleged contemnor has the *burden of proof* in a civil contempt proceeding. *McBride* does not reach the issue of who has the *burden of proof* in a civil contempt proceeding.

[alleged contemnor] has the burden of presenting evidence to show that he was not in contempt and [he] refuses to present such evidence at his own peril."), *appeal dismissed and disc. review denied*, 327 N.C. 482, 397 S.E.2d 218 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

In this case, the trial court consolidated for hearing defendant's motion to modify temporary alimony and plaintiff's motion for contempt. The trial court's order combines its findings of fact and conclusions of law for both motions, and it is impossible to determine from the trial court's order on which party it placed the burden of proof for plaintiff's motion for contempt. I, therefore, would remand this case to the trial court for a new hearing on plaintiff's motion for contempt, with the burden of proof on the movant plaintiff.

LASSIE M. SHARPE, PLAINTIFF v. DAVID ERIC WORLAND, GREENSBORO ANESTHESIA ASSOCIATES, P.A., WESLEY LONG COMMUNITY HOSPITAL, INC., JOHN DOES I THROUGH XXV, AND JANE DOES I THROUGH XXV, DEFENDANTS

No. COA98-557-2

(Filed 21 March 2000)

Medical Malpractice— privileged documents—physician impairment treatment

The trial court erred in a medical malpractice action by denying defendant hospital's motion for a protective order and in requiring the hospital to produce all documents relating to defendant doctor's participation in the Physician's Health Program (PHP), a physician impairment treatment program operated by the North Carolina Medical Society, because: (1) N.C.G.S. § 90-21.22(e) provides that the pertinent documents have an unqualified privileged since they are "acquired, created, or used on good faith by" the PHP; (2) unlike N.C.G.S. § 131E-95, which allows discovery of documents produced by medical review committees that are "otherwise available" because it does not discourage the candor and objectivity of medical review committees, the discovery of the pertinent documents would discourage the legislature's intent of enacting N.C.G.S. § 90-21.22 for the purpose of encouraging health care providers to seek treatment for

their impairments; and (3) neither defendant hospital's possession of documents prepared by PHP nor the doctor's participation in Alcoholics Anonymous can reasonably transform the documents into public information.

Appeal by defendants Worland, Greensboro Anesthesia Associates, P.A., and Wesley Long Community Hospital, Inc., from order entered 24 February 1998 by Judge William H. Freeman in Guilford County Superior Court. Originally heard in the Court of Appeals 4 January 1999.

Faison & Gillespie, by O. William Faison and John W. Jensen, for plaintiff-appellee.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendant-appellants Worland and Greensboro Anesthesia Associates, P.A.

Elrod Lawing & Sharpless, P.A., by Joseph M. Stavola, for defendant-appellant Wesley Long Community Hospital, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael E. Weddington, for North Carolina Physicians Health Program, Inc., amicus curiae.

MARTIN, Judge.

This case is before us on remand from the North Carolina Supreme Court. *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999).

Plaintiff filed this action alleging that she had been injured as a result of negligence on the part of David Eric Worland, M.D. ("Dr. Worland"); his employer, Greensboro Anesthesia Associates, P.A.; and Wesley Long Community Hospital, Inc. ("Hospital"). The action arises out of a surgical procedure which plaintiff underwent at defendant Hospital on 15 November 1993, during which Dr. Worland served as the anesthesiologist. Following the procedure, Dr. Worland administered an epidural for post-surgery pain management. Plaintiff alleges that Dr. Worland negligently administered the epidural, resulting in plaintiff's permanent loss of the use of her legs. She also alleges that defendant Hospital was negligent in allowing Dr. Worland to maintain staff membership privileges after it knew or should have known that

Dr. Worland was not practicing medicine in accordance with the applicable standard of care.

During an October 1997 deposition, Dr. Worland acknowledged his past participation in the Physician's Health Program, a treatment program operated by the North Carolina Medical Society designed specifically to deal with, and provide treatment for, physician impairment, which, according to the PHP's *amicus curiae* brief, includes conditions such as substance abuse, alcoholism, mental illness, sexual misconduct, aging and similar difficulties. In December 1997, plaintiff noticed the deposition of defendant Hospital and requested production of various documents for inspection, including documents containing information about Dr. Worland's participation in the PHP. Defendant Hospital moved for a protective order on the ground that the documents sought by plaintiff regarding Dr. Worland's participation in the PHP are protected by the privilege set out in G.S. § 90-21.22 (1997). In an order entered 24 February 1998 Judge Freeman denied Hospital's motion for a protective order, required Hospital to produce all documents in its possession concerning Dr. Worland's participation in the PHP, and instructed plaintiff's attorney that all such documents be kept sealed from the public.

Defendants' appeal from the trial court's order was dismissed by this Court as interlocutory and not affecting a substantial right under G.S. §§ 1-277(a) and 7A-27(d)(1), *Sharpe v. Worland*, 132 N.C. App. 223, 511 S.E.2d 35 (1999). The Supreme Court reversed, holding that "when . . . a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. The case was remanded to this Court for a determination on the merits of whether the documents sought for discovery are protected by statutory privilege.

The sole issue presented in this appeal is whether and to what extent the documents in the possession of defendant Hospital, pertaining to Dr. Worland's participation in the PHP, are privileged. The discoverability of information regarding an individual's participation in a program for impaired physicians is governed by G.S. § 90-21.22 (1997). Of particular importance in the present case is G.S. § 90-21.22(e), which provides:

> Any confidential patient information and other nonpublic information acquired, created, or used in good faith by [the North

> Carolina Medical Society and its local medical society components and the North Carolina Academy of Physician Assistants] pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

G.S. § 90-21.22 has not previously been interpreted by the appellate courts of this State. We preface our analysis by noting that statutory interpretation begins with the plain meaning of the words of the statute. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 484 S.E.2d 566 (1997); *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 480 S.E.2d 681 (1997). Where the plain meaning of the statute is clear, no further analysis is required. *Three Guys*, 345 N.C. at 472-73, 480 S.E.2d at 683-84. Where the plain meaning is unclear, legislative intent controls. *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975).

I.

Defendant argues in part that the information sought is privileged because it was "acquired, created, or used in good faith by" the PHP, a component of the North Carolina Medical Society, pursuant to G.S. § 90-21.22(e). Plaintiff responds, relying on *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 347 S.E.2d 824 (1986), that the documents fall outside the protections of the privilege set forth in subsection (e) because they are available from a source other than the PHP. In *Shelton*, the North Carolina Supreme Court held that the scope of the privilege provided by G.S. § 131E-95, which regulates discovery of information produced by medical review committees, is limited to information that is not "otherwise available," that is, available from a source other than the medical review committee itself. *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. The *Shelton* court observed:

> The statute [§ 131E-95] protects only a medical review committee's (1) proceedings; (2) records and materials it produces; and (3) materials it considers. But the statute also provides:
>
> "[I]nformation, documents, or records otherwise available are not immune from discovery or use in a civil action merely because

> they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings."

[N.C. Gen. Stat. § 131E-95.]

> These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee. [citation omitted.]
>
> The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. This part of the statute creates an exception to materials which would otherwise be immune under the third category of items as set out above.

Shelton, 318 N.C. at 83-84, 347 S.E.2d at 829.

The statute at issue in *Shelton* is distinguishable from the statute involved in the present case. In contrast to G.S. § 131E-95, G.S. § 90-21.22 does not contain an "otherwise available" proviso, providing instead an unqualified privilege to information "acquired, created, or used in good faith by the Academy or a society pursuant to [G.S. § 90-21.22]." G.S. § 90-21.22 was enacted at the urging of the North Carolina Medical Malpractice Study Commission's Report and Recommendations to the 1987 General Assembly. In the Report, the Commission observed that physicians and other health care providers are more prone to addiction than other similar groups due to high stress levels and easy access to drugs. The Commission emphasized that "no evidence has been presented . . . that there is a proven correlation between professional impairment and medical malpractice. Yet it is obvious that the efforts of the profession to help itself should be supported." Report and Recommendations to the 1987 General

Assembly, p. 16. The Commission therefore recommended that the licensing boards of each of the health care professions be empowered to enter agreements with voluntary professional societies to conduct peer review of impaired physicians; this recommendation led directly to the enactment of G.S. § 90-21.22 and was followed by the creation of the PHP.

It is clear, then, that the Legislature enacted G.S. § 90-21.22 with the intent to encourage health care providers to seek treatment for their impairments. By contrast, the legislative intent underlying G.S. § 131E-95, as quoted in *Shelton*, *supra*, is "to encourage candor and objectivity in the internal workings of medical review committees." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829. Moreover, the stated purposes of the Hospital Licensure Act, of which G.S. § 131E-95 is a part, are " 'to establish hospital licensing requirements which promote public health, safety and welfare and to provide for the development, establishment and enforcement of basic standards for the care and treatment of patients in hospitals.' " *Id.* at 80, 347 S.E.2d at 827 (quoting N.C. Gen. Stat. § 131E-75). Thus, whereas G.S. § 90-21.22 emphasizes providing treatment to impaired health care providers, the emphasis of G.S. § 131E-95 is on encouraging the candor and objectivity required to enable medical review committees to improve the medical treatment of the public at large. Allowing discovery of documents that are "otherwise available" does not discourage the candor and objectivity of medical review committees. By contrast, allowing discovery of documents considered by the PHP, and which are otherwise available, would undoubtedly discourage physicians from seeking treatment for their impairments for fear that hospitals would deny them privileges to protect against liability.

In order to encourage health care providers to take full advantage of the newly-formed PHP, the Legislature created a broad privilege against discovery of information "acquired, created, or used in good faith by . . . a society" by omitting an "otherwise available" proviso like the one considered in *Shelton*, a case decided the year before the Commission submitted its recommendations to the Legislature. That it was the intent of the Legislature to create a broader privilege in G.S. § 90-21.22 than in peer review statutes such as the one at issue in *Shelton* is further supported by the Legislature's liberal inclusion of "otherwise available" provisos in numerous statutes governing the discoverability of information produced by various medical review committees. *See, e.g.*, N.C. Gen. Stat. § 90-48.10 (dental review committee); § 90-21.22A (medical review committee); § 122C-30 (peer

review committee of mental health facility); § 130A-45.7 (medical review committee). It is telling that there are only two statutes other than G.S. § 90-21.22 that deal with peer review organizations for impaired members of medical occupations, and neither of these statutes contains an "otherwise available" proviso. *See* N.C. Gen. Stat. § 90-48.2 (1999) (peer review for impaired dentists); N.C. Gen. Stat. § 90-85.41 (1999) (peer review for impaired pharmacists). When combined with the Legislature's frequent use of "otherwise available" provisos in medical peer review statutes, the absence of such a proviso in *all three* of the statutes dealing with peer review organizations for impaired health care providers presents clear evidence that the Legislature intended to grant a broader privilege to information produced pursuant to these statutes than to information produced pursuant to peer review statutes like the one considered in *Shelton*.

Plaintiff argues, however, that the information she seeks is not "confidential patient information and other nonpublic information," as required by subsection (e), due to Dr. Worland's participation in Alcoholics Anonymous and defendant Hospital's knowledge of his participation in the PHP. Chapter 90, Article 1D of the General Statutes fails to provide a definition of "nonpublic information." Where the General Statutes fail to provide a definition of a term, it is appropriate to turn for guidance to dictionaries. *Beechridge Dev. Co. v. Dahners*, 350 N.C. 583, 516 S.E.2d 592 (1999); *Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260, (1981). Webster's Third New International Dictionary defines "nonpublic" as "not public" and its definitions of "public" include "accessible to or shared by all members of the community" and "exposed to general view." Webster's Third New International Dictionary 1538, 1836 (1968). Black's Law Dictionary defines the term "public" as meaning "[o]pen to all; notorious. Common to all or many; general; open to common use." Black's Law Dictionary 1104 (5th ed. 1979). It follows that information that does not satisfy this definition constitutes "nonpublic" information. Neither defendant Hospital's possession of documents prepared by PHP nor Dr. Worland's participation in Alcoholics Anonymous can reasonably be said to render the information contained in the documents open or common to all or many. In both instances, access to information pertaining to Dr. Worland's impairment is limited to only a handful of individuals, and neither defendant Hospital nor Alcoholics Anonymous discloses its knowledge of an individual's impairment to the public. Therefore, the documents plaintiff seeks to discover contain nonpublic information.

Nor does defendant Hospital's possession of the documents relating to Dr. Worland's participation in the PHP serve to waive the documents' confidentiality. As an initial matter, we note that the record before this Court is unclear as to whether defendant Hospital obtained these documents as part of its staff credentialing process or through third party participation in the PHP's treatment efforts. In either case, however, we do not believe the confidentiality of the documents in question is waived by the Hospital's possession of them. If the Hospital obtained the documents pursuant to its staff credentialing procedures, we believe that to allow discovery of these documents would seriously undermine the clear legislative intent behind G.S. § 90-21.22. A doctor who believes that a hospital, in order to protect itself against liability, will deny him full privileges due to his participation in the PHP, may decide not to participate at all, contrary to the clear legislative intent of promoting such participation.

Documents that may have come into defendant Hospital's possession through third party participation in the PHP's treatment of Dr. Worland are expressly privileged by subsection (e), which protects any "person participating in good faith in the . . . impaired physician . . . programs of this section." We note that Chapter 90, Article 1D of the General Statutes does not provide a definition of who constitutes a "person" for the purposes of the privilege set out in G.S. § 90-21.22. Absent such a definition, however, the general rule of statutory construction holds that, absent a clear legislative intent to the contrary, "person" should be defined pursuant to G.S. § 12-3(6) (1999), which provides that the term "person" applies to "bodies politic and corporate, as well as to individuals." *Jackson v. Housing Authority of City of High Point*, 316 N.C. 259, 341 S.E.2d 523 (1986). Thus, defendant Hospital, a corporate body, qualifies as a "person" under G.S. § 90-21.22(e). To the extent the PHP sought defendant Hospital's participation in Dr. Worland's care and rehabilitation, the Hospital is a "person participating in good faith in the . . . impaired physician . . . programs of this section." Any documents in defendant Hospital's possession obtained as a third party participant in Dr. Worland's treatment program are, therefore, privileged.

Plaintiff argues, however, that defendant Hospital is not protected by the privilege set forth in G.S. § 90-21.22 because the information in its possession was not, as required by subsection (e), "acquired or developed solely in the course of participating in any agreements pursuant to [G.S. § 90-21.22]." The "agreements" referred to throughout G.S. § 90-21.22 refer to agreements entered into

between either the North Carolina Medical Board and the North Carolina Medical Society and its local medical society components or the North Carolina Academy of Physician Assistants for the purpose of conducting peer review activities. N.C. Gen. Stat. § 90-21.22(a). Since defendant Hospital is none of these organizations, it cannot enter agreements pursuant to G.S. § 90-21.22. This does not mean, however, that defendant Hospital cannot be a third party participant in any agreements reached pursuant to G.S. § 90-21.22. Thus, if defendant Hospital obtained information about Dr. Worland's participation in the PHP through third party participation, that information is privileged.

For the foregoing reasons, we conclude the documents sought by plaintiff are privileged and protected from discovery pursuant to G.S. § 90-21.22(e). Accordingly, we hold the trial court erred in denying Hospital's motion for protective order and in ordering Hospital to turn over all documents in its possession relating to Dr. Worland's participation in the PHP.

Reversed.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. WAYNE ANTONE CLARK

No. COA99-156

(Filed 21 March 2000)

1. Drugs— trafficking in marijuana—controlled delivery—doctrine of constructive possession does not apply

In a case where the police intercepted a package, opened it pursuant to a warrant, and removed most of the twelve and one-half pounds of marijuana so that it would not be lost when the police undertook a controlled delivery of .13 kilograms of marijuana, the trial court erred in denying defendant's motion to dismiss the charge of trafficking in marijuana by possession at the conclusion of the State's case in chief, based on the defense that defendant never possessed ten pounds of marijuana as required by N.C.G.S. § 90-95(h), because the doctrine of constructive possession does not apply since: (1) there is no evidence as to the actual source of the drugs; and (2) there is no evidence defendant

ever had the capability to exercise dominion and control over the original package.

2. Drugs— conspiracy—trafficking in marijuana—sufficiency of evidence

In a case where the police intercepted a package, opened it pursuant to a warrant, and removed most of the twelve and one-half pounds of marijuana so that it would not be lost when the police undertook a controlled delivery of .13 kilograms of marijuana, the trial court did not err in failing to dismiss the charge of conspiracy to traffic in excess of ten pounds of marijuana because: (1) defendant and his accomplice waited together in the area of the false address to take possession of a package bearing no return address; (2) defendant and his accomplice exhibited approach-avoidance behavior consistent with a desire to obtain the package coupled with knowledge that taking possession would be dangerous; and (3) even if the package contained no drugs, its delivery would still constitute evidence to support the charges of conspiracy.

3. Drugs— trafficking in marijuana—attempt—lesser included offense

Although defendant's conviction of trafficking in marijuana by possession is reversed, attempt to traffic in marijuana by possession in a lesser-included offense of trafficking in marijuana by possession, and therefore, upon remand the trial court shall enter judgment upon a conviction of attempt to traffic in marijuana by possession.

Appeal by defendant from judgments entered 13 August 1998 by Judge Julius A. Rousseau, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 4 January 2000.

Michael F. Easley, Attorney General, by Anna K. Baird, Assistant Attorney General, for the State.

Nils E. Gerber for defendant-appellant.

EDMUNDS, Judge.

Defendant Wayne Antone Clark appeals his convictions of trafficking in marijuana and conspiracy to traffic in marijuana. We reverse the trafficking conviction and find no error in the conspiracy conviction.

The investigation began when representatives of United Parcel Service (UPS) contacted Officer Sanders of the Greensboro Police Department, Narcotics Division, to investigate a package. A number of factors aroused Officer Sanders' suspicions that the package might contain controlled substances. The parcel had been sent from southern California, an area known to be a source of drugs; the label was handwritten and lacked a return address; and the package had been shipped to a "Tisha Wilson" at an address that consisted of uninhabited apartments still under construction. After obtaining a search warrant, Officer Sanders opened the package and found twelve and one-half pounds of marijuana hidden inside a television set. He removed all but .13 kilograms of marijuana from its hiding place then resealed the package to conduct a controlled delivery.

Officer Sanders donned a UPS driver's uniform and drove a UPS truck to the vicinity of the address written on the package. As he pulled into the area, he noticed two men in a burgundy car watching him. Officer Sanders approached several residents of an apartment complex located near the delivery address. Defendant stared at Officer Sanders from the breezeway of the building but did not approach. The officer returned to the UPS truck and drove out of the complex. The burgundy automobile was five or six car lengths ahead of Officer Sanders, heading in the same direction. Defendant was driving the burgundy car and the second man, later identified as Mr. Junne, was in the passenger seat. When Officer Sanders pulled into the parking lot of a NAPA dealership, defendant turned his car around and parked in an adjacent lot. Officer Sanders entered the store to feign delivery of a package. When he emerged, an individual asked for directions. During the ensuing conversation, Mr. Junne approached and paced in the vicinity of Officer Sanders and the stranger. However, Officer Sanders' directions became rather lengthy, and Mr. Junne returned to the burgundy automobile.

When Officer Sanders drove out of the NAPA dealership lot, defendant's car again preceded him, and when the officer turned into the parking lot of an Ace Hardware dealership, defendant made a U-turn and parked in a nearby restaurant parking lot. Mr. Junne approached Officer Sanders, asked for the package addressed to "Tisha Wilson," and showed him the tracking number for the package. Mr. Junne signed for the package, took possession of it, and returned to the burgundy car. Before he could put the package in the trunk, the police arrested both defendant and Mr. Junne.

At trial, a jury found defendant guilty of felonious trafficking in marijuana and conspiracy to traffic in marijuana. He was sentenced to concurrent terms of not less than twenty-five months and not more than thirty months.

I.

[1] Defendant first contends the trial court erred in denying his motion to dismiss the charge of trafficking in marijuana at the conclusion of the State's case in chief. The indictment charged trafficking in marijuana by possession, in that "the defendant, Wayne Antone Clarke [sic] unlawfully, willfully and feloniously did possess more than ten (10) pounds of marijuana, a substance included in Schedule VI of the North Carolina Controlled Substances Act," in violation of N.C. Gen. Stat. § 90-95(h) (1999). Defendant argues that he never possessed ten pounds of marijuana; therefore, he cannot be guilty of the offense charged.

The uncontested evidence is that the police intercepted the package, opened it pursuant to a warrant, prudently removed most of the marijuana lest it be lost if the operation did not unfold as planned, then undertook a controlled delivery of .13 kilograms of marijuana, an amount substantially less than ten pounds. Therefore, no matter how nefarious defendant's intent, the actions of the police made it impossible for him actually to possess the quantity of marijuana required for a trafficking conviction.

The State contends that defendant is guilty of constructive possession of over ten pounds of marijuana.

> It is well established in North Carolina that possession of a controlled substance may be either actual or constructive. A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it.

State v. Jackson, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991) (internal citations omitted), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992).

> Numerous cases have considered this doctrine. No single factor controls. Constructive possession has been found when the narcotics were (1) on property in which the defendant had some exclusive possessory interest and there is evidence of his or her presence on the property; (2) on property of which defendant,

although not an owner, had sole or joint physical custody; or (3) in an area which the defendant frequented, usually near his or her property.

State v. Baize, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984) (internal citations omitted).

Because the cases reviewed in *Baize* dealt with controlled substances that were already "on the street" when first detected, they provide only general guidance. We have found few North Carolina cases with facts closely analogous to the facts in the case at bar and no cases that directly address the specific issue raised by defendant. In *State v. Rosario*, 93 N.C. App. 627, 379 S.E.2d 434 (1989), the defendant and others discussed obtaining a kilogram of cocaine. One of the co-conspirators traveled to Florida, purchased the cocaine, and was apprehended returning to North Carolina. He agreed to cooperate. Police investigators substituted 900 grams of powder, of which two percent was cocaine, for the original kilogram, and the co-conspirator delivered the package to the defendant. During a subsequent search of the defendant's premises, officers recovered the package from a garbage can where the defendant had placed it when he heard police were in the area. Police also found other cocaine and drug-related paraphernalia during the search.

The defendant was charged with trafficking in cocaine by possession of at least 400 grams, based upon the package delivered by the cooperating co-defendant, and with trafficking in cocaine by possession of at least twenty-eight but less than 200 grams, based upon the other cocaine found at the scene. The defendant claimed that the trafficking charge for the larger amount should have been dismissed because the cocaine was provided to him by law enforcement officers. We held that, unlike stolen merchandise, which loses its "stolen" character upon being recovered by police, a controlled substance retains its identity as a controlled substance even when lawfully possessed. Therefore, although the officers lawfully possessed the cocaine pursuant to N.C. Gen. Stat. § 90-101(c)(5) (1999), the defendant's subsequent possession was unlawful. *See Rosario*, 93 N.C. App. at 634, 379 S.E.2d at 438. The defendant then argued that there was insufficient evidence of constructive possession of the delivered package of cocaine and of the smaller bags of cocaine on which the lesser trafficking charge was based. We noted that the defendant received the delivered package from a co-conspirator, placed it in a freezer, then moved it to a garbage can when warned that police were in the vicinity. The smaller bags were found between the mattresses

of a bed used by an inhabitant of the house, and a witness testified that she had seen the defendant sell cocaine in the house on numerous occasions and use the drug paraphernalia found there. All the evidence established that the defendant had control of the premises. We held this evidence sufficient to show that the defendant had both the power and the intent to control the disposition and use of the cocaine, thus warranting an inference of constructive possession. *See id.* at 638, 379 S.E.2d at 440.

However, the defendant in *Rosario* never raised the defense of impossibility, which is now squarely before us. Our review of the record convinces us that the doctrine of constructive possession does not apply to the case at bar. There is no evidence as to the actual source of the drugs. Although defendant may well have had the requisite intent, there is no evidence he ever had the capability to exercise dominion and control over the original package. Therefore, he never had constructive possession of the trafficking amount of marijuana. An appropriate charge under such circumstances would be an attempt, pursuant to N.C. Gen. Stat. § 90-98 (1999). *See, e.g., U.S. v. Jackson*, 55 F.3d 1219 (6th Cir. 1995); *People v. Echols*, 668 N.E.2d 35 (Ill. App. Ct. 1996).

II.

[2] Defendant next contends the trial court erred in failing to dismiss the charge of conspiracy to traffic in marijuana at the close of the State's evidence and at the close of all the evidence. "A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998) (citation omitted). "Direct proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence." *State v. Aleem*, 49 N.C. App. 359, 363, 271 S.E.2d 575, 578 (1980) (citation omitted). A conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (citation omitted).

The evidence established that defendant and Mr. Junne waited together in the area of the false address to take possession of a package bearing no return address. Defendant left his car and watched Officer Sanders' first attempt to make a delivery, although he did not ask for the package. At each of the next two stops, defendant main-

tained proximity to the UPS truck, turning his car around so he could park nearby. At both of these stops, Mr. Junne emerged from the car to approach Officer Sanders. Defendant and Mr. Junne exhibited approach-avoidance behavior consistent with a desire to obtain the package coupled with knowledge that taking possession could be dangerous. This evidence is sufficient to establish that defendant and Mr. Junne conspired to traffic in excess of ten pounds of marijuana. As we said in *Rosario*, "We note that, even if the package contained no drugs, its delivery would still constitute evidence to support the charges of conspiracy . . . ." *Rosario*, 93 N.C. App. at 633, 379 S.E.2d at 437-48; *see also State v. Kelly*, 120 N.C. App. 821, 463 S.E.2d 812 (1995) (holding that where police intercepted Federal Express package containing cocaine, substituted dummy package, and delivered package to the two defendants, indictment for conspiracy to traffic cocaine by possession appropriate; new trial granted because of improper jury instruction).

Defendant argues there is no proof that a conspiracy existed to possess ten pounds of marijuana. Although there is no direct evidence of an agreement between defendant and Mr. Junne, reasonable inferences from the circumstantial evidence support the conviction. Someone shipped defendant and Mr. Junne a television in which twelve and one-half pounds of marijuana had been carefully concealed. Defendant's actions showed an understanding of the nature of the contents of the package. Viewed in the light most favorable to the State, there was sufficient evidence to convict defendant of conspiracy to traffic marijuana. *See State v. Worthington*, 84 N.C. App. 150, 352 S.E.2d 695 (1987). This assignment of error is overruled.

[3] Defendant's conviction of trafficking in marijuana by possession is reversed. "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. Gen. Stat. § 15-170 (1999). Although the wording of this statute indicates that an attempt is not automatically a lesser-included offense of the crime charged, our courts frequently have recognized through holding or dicta that an attempt may be a lesser-included offense. *See, e.g., State v. Kirkpatrick*, 343 N.C. 285, 470 S.E.2d 54 (1996) (interpreting *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (1955) and stating that attempted robbery is a lesser-included offense of robbery); *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993) (holding that trial court erred in

failing to instruct on attempted murder, a lesser-included offense of first-degree murder); *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982) (stating that attempted arson is a lesser-included offense of arson); *State v. Watts*, 76 N.C. App. 656, 334 S.E.2d 68 (1985) (affirming trial court's failure to submit the lesser-included offense of attempted burglary in a burglary trial). As a general rule, a conviction of attempt carries a lesser penalty than a conviction of the underlying crime. *See* N.C. Gen. Stat. § 14-2.5 (1999). This general rule does not necessarily hold true for controlled substance offenses. While a conviction of conspiring to traffic in marijuana by possession is subject to mandatory minimum sentencing provisions, *see* N.C. Gen. Stat. § 90-95(i), an attempt to traffic in marijuana by possession, though the same class offense as a completed trafficking crime, *see* N.C. Gen. Stat. § 90-98 (1999), is subject only to the sentencing guidelines. *See* Robert L. Farb, *Supplement to North Carolina Crimes: A Guiudebook on the Elements of Crime* 59 (4th ed. 1998). The penalty for conviction of attempting to traffic in marijuana by possession under certain circumstances may be the same as the penalty for trafficking. *See* N.C. Gen. Stat. § 15A-1340.17(c) (1999); N.C. Gen. Stat. § 90-95(h)(1)(a). Our Supreme Court has held that a lesser-included offense need not have a lesser penalty than the greater offense. *See State v. Young*, 305 N.C. 391, 289 S.E.2d 374 (1982). Accordingly, we hold that attempt to traffic in marijuana by possession is a lesser-included offense of trafficking in marijuana by possession.

By finding defendant guilty of trafficking in marijuana by possession, the jury necessarily found defendant guilty of attempted trafficking. *See* N.C. Gen. Stat. § 15-170; *State v. Suggs*, 117 N.C. App. 654, 453 S.E.2d 211 (1995). It is not required that defendant be indicted for attempt or that the attempt charge be submitted to the jury. *See State v. Jolly*, 297 N.C. 121, 254 S.E.2d 1 (1979). Therefore, upon remand the trial court shall enter judgment upon a conviction of attempt to traffic in marijuana by possession. *See State v. Barnes*, 121 N.C. App. 503, 466 S.E.2d 294, *aff'd*, 345 N.C. 146, 478 S.E.2d 188 (1996).

98 CrS 54752—Reversed and remanded with instructions.

98 CrS 54743—No error.

Judges GREENE and LEWIS concur.

BLEVINS v. WELCH

[137 N.C. App. 98 (2000)]

DAVID JAMES BLEVINS, PLAINTIFF v. KENNETH D. WELCH AND WIFE, W. LUCY WELCH, AND MICHAEL WELCH AND WIFE, GEORGIA WELCH, DEFENDANTS

No. COA99-501

(Filed 21 March 2000)

1. Contempt— interpretation of prior order—willfulness

The trial court did not impermissibly transform the contempt action concerning obstruction of plaintiff's enjoyment of an easement into a declaratory judgment action by considering whether the easement awarded in the 1983 judgment included both the Mountain and Center Roads because a contempt proceeding requires willful violation of a prior court order or judgment, and therefore, an interpretation of the prior court order was required.

2. Contempt— ambiguous order—deference to trial court

Even though the record in a contempt action reveals the 1983 judgment concerning an easement was ambiguous as a matter of law and susceptible to three different interpretations, the Court of Appeals deferred to the trial court's interpretation applying the judgment to both the Mountain and Center roads, especially in light of the fact that the trial judge is the same one who presided over the original judgment now being interpreted.

3. Contempt— ambiguous order—no evidence of willfulness

The trial court erred in holding defendants in contempt for violating the pertinent 1983 judgment concerning an easement because there was no evidence of willfulness on the part of defendants due to the ambiguous nature of the judgment.

4. Contempt— attorney fees—easements—no specific statutory authority

The trial court erred in awarding plaintiff $2,000 in attorney fees for a contempt action involving easements because there is no specific statutory authorization for the award of attorney fees in this type of action.

Appeal by defendants from order entered 15 October 1998 by Judge Alexander Lyerly in Mitchell County District Court. Heard in the Court of Appeals 25 January 2000.

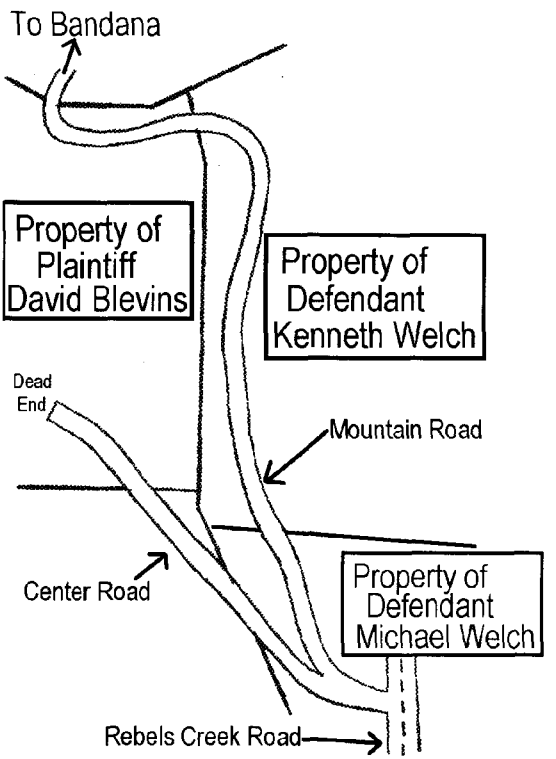
Harrison & Poore, P.A., by Hal G. Harrison, for plaintiff-appellee.

Randy A. Carpenter for defendant-appellants.

LEWIS, Judge.

This appeal arises from an order holding defendants in contempt for violating a court order. The basis is defendants' obstruction of plaintiff's enjoyment of an easement he purportedly has that runs across defendants' lands. Although the immediate issue on appeal is the contempt order, a resolution of this issue actually requires us to delve nearly two decades into the past and consider the judgment that awarded plaintiff's predecessors-in-title the easement in the first place.

As the map below illustrates, plaintiff and defendants are neighboring landowners in Mitchell County. N.C. State Road 1174 (also known as Rebels Creek Road) runs through defendants' properties. This case involves an unimproved dirt road that turns off of Rebels Creek Road and also runs through defendants' properties. A few hundred feet from Rebels Creek Road, this unimproved road forks off into two directions. The left fork, which we will refer to as the Center Road, runs for a short distance along the southwestern boundary of defendant Michael Welch's land and then enters plaintiff's property at his southern boundary. It



dead ends within a few hundred feet. The right fork, herein referred to as the Mountain Road, continues for several hundred feet along the western boundary of both defendants' properties before entering plaintiff's property at his northern boundary. The Mountain Road then exits plaintiff's land, apparently improves in quality, and continues on towards the town of Bandana.

As part of a judgment entered in 1983 ("the 1983 judgment"), plaintiff's predecessors-in-title were awarded a prescriptive easement. That easement allowed plaintiff's predecessors-in-title to use "a road" that traversed defendants' properties as a means of perpetual ingress and egress. The 1983 judgment described this road as follows:

> 3. [It] extends from the Rebels Creek Public Road along the western boundary of and through the lands of the Defendants Welch to the lands of the plaintiffs . . . .
>
> 4. [It] has provided the sole means of ingress and egress to plaintiffs' lands and has been used in connection with mining and timbering operations conducted on plaintiffs' lands . . . .

In 1995, plaintiff purchased his property, along with the easement, from those who were plaintiffs in the 1983 judgment. Shortly thereafter, he and his family began using the Mountain Road. Defendants responded by constructing a roadblock to prevent plaintiff's use; they left the Center road unobstructed. Plaintiff then instituted this action, asserting defendants' contempt of the 1983 judgment. At a contempt hearing before the same judge who decided the 1983 case, defendants argued that the "road" described in the 1983 judgment was the Center Road only. Plaintiff, on the other hand, maintained that the judgment included both the Center and Mountain roads. The trial court concluded that the 1983 judgment included both the Mountain and Center roads. The trial court then concluded that, by obstructing plaintiff's use of the Mountain Road, defendants were in contempt. The trial court also awarded plaintiff $2000 in attorney's fees. From this order, defendants appeal.

[1] In their first argument, defendants contend the trial court impermissibly transformed the contempt action that was before it into a declaratory judgment action by considering whether the easement awarded in the 1983 judgment included both the Mountain and Center roads. We find this argument to be without merit. A contempt proceeding requires willful violation of a prior court order or judgment.

Hancock v. Hancock, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996). As such, an interpretation of the prior court order in this case was required. The trial court did not err by considering what road or roads the easement in the 1983 judgment included.

[2] Next, defendants argue that the trial court incorrectly interpreted the 1983 judgment to apply to both the Mountain and Center roads. Generally, the interpretation of judgments presents a question of law that is fully reviewable on appeal. *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986). In interpreting judgments, we are to consider the pleadings, issues, and other circumstances leading to the judgment. *White v. Graham*, 72 N.C. App. 436, 441, 325 S.E.2d 497, 501 (1985). Aside from the 1983 judgment itself, the record on appeal here, however, contains no information relative to the prior judgment. We are thus left to piece together the issues and circumstances leading up to that judgment.

Based upon our review of the record before us, we conclude that the 1983 judgment was ambiguous as a matter of law. Specifically, we conclude that the judgment was reasonably susceptible to three differing interpretations. First, the judgment can reasonably be construed to include both the Mountain and Center roads. After all, both roads do in fact "extend[] from the Rebels Creek Public Road along the western boundary of and through the lands of the Defendants Welch to the lands of the plaintiffs." Second, the judgment can be interpreted to only include the Mountain Road, since the Mountain Road extends along much more of the western boundary than does the Center Road. Furthermore, the judgment throughout only refers to "a road," refuting the notion that more than one road was intended to be included. Third, the judgment is reasonably susceptible to the interpretation that only the Center Road was included. The Center Road provides the "sole means of ingress and egress" to the majority of plaintiff's property. The Mountain Road, on the other hand, is not a sole means of ingress and egress; plaintiff can access the northeastern tip of his property by traveling south from Bandana, in which case he would never have to cross into defendants' properties. Adding to all of this uncertainty is the fact that plaintiff's and defendants' lands had not even been surveyed at the time of the 1983 action. Thus, any description of the easement was inherently imprecise. Accordingly, we conclude that the 1983 judgment was ambiguous. Our next step, then, is to resolve this ambiguity.

Unfortunately, the law with respect to ambiguous judgments is not very well-developed in our State. What little law there is can be

summarized as follows: Where a judgment is ambiguous, and thus susceptible to two or more interpretations, our courts should adopt the interpretation that is in harmony with the law applicable to the case. *See Alexander v. Brown*, 236 N.C. 212, 215, 72 S.E.2d 522, 524 (1952). This principle is not helpful here because more than one of the above interpretations is in harmony with the law concerning prescriptive easements.

Prescriptive easements require the showing of four elements: (1) an adverse or hostile use; (2) the use has been open and notorious; (3) the use has been continuous and uninterrupted for at least twenty years; and (4) substantial identity of the way claimed to be an easement. *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981). At the contempt hearing, plaintiff's evidence tended to show that the pre-1983 use of both roads satisfied all four of these elements. Defendants' evidence, on the other hand, tended to show that only the pre-1983 use of the Center Road satisfied the requisite elements. Accordingly, we are left with an ambiguous judgment, reasonably susceptible to more than one interpretation, all of which are in relative harmony with the applicable law. We have found no guidance in our state with respect to this rare situation, and so we turn to the common law and to other states for assistance.

Although no unanimity seems to exist, several courts, in the context of ambiguous judgments, have given deference to the trial court's interpretation of the prior judgment. Exactly how much deference varies. *See, e.g., County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (stating a trial court's interpretation is subject to an abuse of discretion standard); *Holmberg v. Holmberg*, 578 N.W.2d 817, 825 (Minn. Ct. App. 1998) (stating the trial judge's interpretation is given "great weight"), *aff'd*, 588 N.W.2d 720 (Minn. 1999); *Schultz v. Schultz*, 535 N.W.2d 116, 120 (Wis. Ct. App. 1995) (stating that some deference is given to the trial court's interpretation). *But see Kerndt v. Ronan*, 458 N.W.2d 466, 470-71 (Neb. 1990) (stating that a trial judge's interpretation is irrelevant). Deference to a trial judge's interpretation is even more appropriate where, as here, that trial judge is the same one who presided over the original judgment now being interpreted. This is so because "the [trial judge's] resolution of the ambiguity is made based upon the judge's experience of trial or prior experience with the record." *Schultz*, 535 N.W.2d at 120. Here, the trial judge interpreted the 1983 judgment to include both roads. We will defer to his experience with this case and the parties and therefore affirm his interpretation.

[3] Having resolved the ambiguity in the 1983 judgment, we must next determine whether, by blockading plaintiff's access to the Mountain Road, defendants were in contempt of this judgment. As previously stated, in order to be held in contempt, a party must have willfully violated a court order. *Hancock*, 122 N.C. App. at 523, 471 S.E.2d at 418. The trial court here found that defendants did willfully violate the 1983 judgment. This finding is conclusive on appeal if supported by competent evidence. *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978). Here, however, there was simply no evidence of willfulness on the part of defendants.

With respect to contempt, willfulness connotes knowledge of, and stubborn resistance to, a court order. *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966). If the prior order is ambiguous such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have "knowledge" of that order for purposes of contempt proceedings. *Cf. In re Board of Commissioners*, 4 N.C. App. 626, 629-30, 167 S.E.2d 488, 491 (1969) ("The generality of the Order leaves much to be desired, and it is questionable whether the Order is capable of full understanding. . . . In view of the apparent vagueness of the order . . . and the lack of notice to show cause before entry of the Order appealed from, we reverse the adjudication of contempt . . . ."). Due to the ambiguity of the 1983 judgment here, we reverse the trial court's adjudication of contempt.

[4] Finally, we address the trial court's award of attorney's fees. Generally speaking, "[a] North Carolina court has no authority to award damages to a private party in a contempt proceeding. Contempt is a wrong against the state, and moneys collected for contempt go to the state alone." *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985) (citations omitted). But our courts can award attorney's fees in contempt matters when specifically authorized by statute. *Records v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973). Thus, in *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996), we allowed attorney's fees in a contempt action to enforce a child support order because our child support statutes specifically authorized such an award. *Id.* at 339-40, 465 S.E.2d at 55-56. With respect to contempt actions involving easements, however, there is no specific statutory authorization for the award of attorney's fees. We therefore reverse that part of the trial court's order awarding plaintiff $2000 in attorney's fees.

In conclusion, we feel obligated to comment on the scope of the easement here. "In the case of easements arising by prescription, the character and pattern of the user during the whole period during which the easement came into being determines its extent." 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 15-22 (5th ed. 1999). This is so because a prescriptive easement is a form of estoppel; "[it] is an invasion of the rights of the owner of the servient tenement, and he is only estopped from claiming damages as to such injuries as he has quietly submitted to for twenty years." *Powell v. Lash*, 64 N.C. 456, 459 (1870). Accordingly, "[i]f any *new injury* is occasioned by the easement, the owner of the servient tenement, may, at any time within twenty years, sustain an action for this *additional invasion* of his rights. *Id.* (emphasis added). Here, the prescriptive easement was based upon two uses by plaintiff's predecessors-in-title: (1) mining and timbering operations; and (2) ingress and egress to their property. These uses thus define the scope of the easement that plaintiff now owns. At the contempt proceeding, plaintiff testified that he is currently using the roads for two uses: (1) ingress and egress; and (2) recreational four-wheeling. Pure recreational use was never contemplated in the 1983 judgment and thus would appear to exceed the scope of the easement awarded therein. Any use consistent with ingress and egress to plaintiff's property, however, would be within the scope of that easement. The able trial judge has resolved the use of the easement granted in 1983. The parties now understand what easements exist and the limitations on them.

Affirmed in part, reversed in part.

Judges GREENE and EDMUNDS concur.

IN THE MATTER OF JONATHAN THOMAS WRIGHT, JUVENILE

No. COA99-77

(Filed 21 March 2000)

1. Juveniles— transfer of case—reasons for transfer

The juvenile court did not abuse its discretion in transferring the defendant-juvenile's first-degree sexual offense case to superior court under N.C.G.S. §§ 7A-608 and 7A-610(a) (both statutes

now replaced by N.C.G.S. § 7B-100 et seq.), based on the findings that the juvenile's history indicates prior aggressive tendencies and the public needs to be protected from this type of crime and the sex offenders that commit them, because: (1) N.C.G.S. § 7A-610(c) does not require the trial court to make findings of fact, but only to set forth its reasons for transfer; and (2) the trial court's reasons are supported by the evidence.

2. Juveniles— transfer of case—factors considered—new statute inapplicable

The juvenile court did not abuse its discretion in transferring the defendant-juvenile's first-degree sexual offense case to superior court under N.C.G.S. §§ 7A-608 and 7A-610(a) (both statutes now replaced by N.C.G.S. § 7B-100 et seq.), based on failing to consider "the age or the maturity of the juvenile" or his "condition and needs for treatment" under N.C.G.S. § 7B-2203(b), because: (1) N.C.G.S. § 7B-2203(b) is not applicable to this case since it applies to hearings related to acts committed on or after 1 July 1999; (2) defendant cites no statute or case which required the judge to consider these factors at the time of his hearing; and (3) even if consideration of these factors was required, the record reflects that evidence on each factor was presented to the trial court.

3. Juveniles— transfer of case—chronological age

The ordinary meaning of the words in N.C.G.S. § 7A-608 reveals that the legislature intended for juveniles who have achieved the chronological age of thirteen years to be subject to the transfer of their case to superior court, and the determination is not based on the juvenile's developmental age.

4. Constitutional Law— cruel and unusual punishment—possible conviction—purely speculative

Although the juvenile court transferred defendant-juvenile's case to superior court and defendant argues that his possible conviction of first-degree sexual offense in superior court would constitute cruel and unusual punishment, the courts have no jurisdiction to determine purely speculative matters since the issue of punishment will arise, if at all, only if defendant receives an adverse verdict at trial and is then sentenced for the crime.

Appeal by juvenile from order filed 4 August 1998 by Judge Rodney R. Goodman in Wayne County District Court. Heard in the Court of Appeals 20 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth L. Oxley, for the State.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for juvenile-appellant.

JOHN, Judge.

Jonathan T. Wright (Wright), juvenile, appeals the trial court's "Order Transferring Juvenile Case to Superior Court." We affirm.

Pertinent facts and procedural history include the following: A Juvenile Petition was filed 6 May 1998 in Wayne County District Court alleging that

> between the dates of March 1, 1998 and April 12, 1998 [Wright] unlawfully, willfully and feloniously did engage in a Sex Offense with [M.], a [male] child under the age of 13 years, in violation of [N.C.G.S. § 14-27.4 (1999)].

At the time alleged, Wright was thirteen years old and M. was eight. Wright was taken into secure custody 12 May 1998, and a probable cause hearing was conducted 4 August 1998.

At the hearing, M. testified he "suck[ed] on" Wright's penis for "[a]bout a minute" because Wright "said he was going to beat me up." M. stated he believed this had happened four times previously, but "[t]he only time I remember was the last time," immediately prior to Easter 1998. H. and J., two juvenile males who resided in the neighborhood and who knew both Wright and M., indicated they had witnessed the Easter incident and corroborated M.'s testimony. In addition, J. testified Wright had stated he was also "going [to] try to get [J.'s] sister to do it." M.'s mother and a Wayne County Sheriff's Department detective were additional witnesses for the State. Wright presented no evidence.

The trial court found probable cause on the charge of first degree sex offense and, upon motion by the State, conducted a second hearing on the issue of whether to transfer Wright's case to superior court for trial pursuant to N.C.G.S. §§ 7A-608 and 7A-610 (1995) (repealed 1 July 1999).[1] The statutes provided in pertinent part:

1. These provisions were repealed effective 1 July 1999, *see* 1998 N.C. Sess. Laws ch. 202, §§ 5, 37, and replaced with a new juvenile code, N.C.G.S. § 7B-100 *et seq.* (1999).

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult.

G.S. § 7A-608.

> If probable cause is found . . . , 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.

G.S. § 7A-610(a).

At this latter phase of the proceedings, several witnesses testified on Wright's behalf. These included members of his church, a neighbor, his school guidance counselor, an employee of the detention center, and Dr. Kurt Luedtke (Dr. Luedtke), a court-appointed expert witness in forensic psychology.

According to Dr. Luedtke, he performed an "independent forensic examination" of Wright on 21 May 1998. Dr. Luedtke concluded "there [wa]s evidence of psychiatric disturbance and evidence that a prodomal psychotic state could be developing," but he did not believe Wright fit the North Carolina Department of Correction profile indicative of a "child rapist or non-violent sexual molester" or of one who commits "aggravated sex crimes [or] sex perversion [crimes]."

Dr. Luedtke's written report noted that Wright, prior to being placed in custody, was

> along with other individuals that he had recruited, . . . planning to take over his school . . . . He had a weapon under his bed that his parents had discovered, namely a shotgun, and he had developed an elaborate plan for not only taking over the school by force, but also to possibly bomb it.
>
> . . . .
>
> . . . In his elaborate plan for wanting to "take over the school," he indicates that he did not necessarily want to hurt anybody, but just to scare them all. He also indicates that he did not care if he did kill anyone if they did not "go along" and indicated that he

would begin to kill hostages if the police did not go along with his plan.

Dr. Luedtke testified he viewed Wright's plan as "more fantasy than reality" and as a "delusion." In Dr. Luedtke's opinion, Wright would not pose a risk to the community if accorded proper treatment, and Dr. Luedtke recommended Wright be "placed in a residential treatment environment" rather than incarcerated.

At the close of the hearing, the trial court ordered transfer of the first degree sex offense charge to superior court for trial, finding that:

> the needs of the juvenile or the best interest of the State, or both, will be served by transfer of the case to superior court. The reasons for transfer are: . . .
>
> 1. the seriousness of the offense, and the fact the [j]uvenile used intimidation and force.
>
> 2. under current juvenile law, a juvenile court would have no jurisdiction past 4 years. If the juvenile is found guilty in an adult court, that court can order treatment and have jurisdiction over him for many more years.
>
> 3. the juvenile's history indicates prior violent aggressive tendencies. He had a plan for wanting to take over a school and indicated to Dr. Luedtke that he would kill anyone that did not go along with him.
>
> 4. the public needs to be protected from this type of crime and the sex offenders that commit them.
>
> 5. the State presented 3 eye-witnesses to the crime (the victim and 2 more).

Wright timely appealed.

[1] Among numerous assignments of error directed at the transfer order, Wright first contends the trial court's third and fourth "reasons for transfer" were not supported by the evidence adduced at the hearing.

"Any order of transfer [must] specify the reasons for transfer." G.S. § 7A-610(c). However,

> [t]he judge is not required to make findings of fact to support his conclusion that the needs of the juvenile or that the best interest of the State would be served by transferring the case to the

> [s]uperior [c]ourt division. It is only required that if he elects to order the transfer, he must state his reasons therefor.

In re Bunn, 34 N.C. App. 614, 616, 239 S.E.2d 483, 484 (1977). So long as the trial court has complied with G.S. § 7A-610(c), "the decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the hearing judge," *State v. Green*, 348 N.C. 588, 601, 502 S.E.2d 819, 827 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999), and "that discretion is not subject to review in the absence of a showing of gross abuse," *Bunn*, 34 N.C. App. at 616, 239 S.E.2d at 484.

As noted above, the trial court *sub judice* set forth its "reasons for transfer" in ordering transfer to the superior court. Further, the court's reasons "are supported by evidence on the record from the transfer hearing[; accordingly, there is] sufficient support for the juvenile court judge's discretionary transfer decision . . . ." *Green*, 348 N.C. at 602, 502 S.E.2d at 827. In short, Wright's first assignment of error is unfounded.

[2] Wright next asserts the trial court abused its discretion by failing to consider "the age or the maturity of the juvenile" or his "condition and needs for treatment." In advancing this argument, Wright cites the following provision of the new juvenile code:

> In the transfer hearing, the court shall determine whether the protection of the public and the needs of the juvenile will be served by the transfer of the case to superior court and shall consider the following factors:
>
> (1) The age of the juvenile;
>
> (2) The maturity of the juvenile;
>
> (3) The intellectual functioning of the juvenile; [and]
>
> . . . .
>
> (6) Facilities or programs available to the court . . . and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts . . . .

N.C.G.S. § 7B-2203(b) (1999).

However, the foregoing code section is applicable only to hearings related to acts committed on or after 1 July 1999, *see* 1998 N.C. Sess. Laws ch. 202, § 37, and thus is not implicated herein. Moreover,

Wright "cites no statute or case which require[d, at the time of his hearing,] a district court judge to consider" a juvenile's age, maturity, condition, or needs for treatment "before making a transfer decision." *State v. Green*, 124 N.C. App. 269, 276, 477 S.E.2d 182, 185 (1996), *aff'd*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999); *see also* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned").

In any event, assuming *arguendo* consideration of such factors was required, the record reflects that evidence on each was presented to the trial court. *See Green*, 348 N.C. at 600, 502 S.E.2d at 826 (juvenile court deciding transfer "does so with full knowledge of the dispositional alternatives in the juvenile and adult systems. . . . [The court'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.")

For example, Wright acknowledges the trial court without doubt was aware of Wright's age. Further, all Wright's witnesses during the transfer hearing addressed his level of maturity, and Dr. Luedtke testified as to Wright's "condition and needs for treatment." The court also specifically commented that if Wright were "found guilty in an adult court, that court can order treatment," indicating the court's consideration of any need for treatment.

To conclude, we reiterate that transfer of a juvenile case to superior court is solely within the discretion of the trial court, *Bunn*, 34 N.C. App. at 616, 239 S.E.2d at 484, so long as the court has complied with G.S. § 7A-610(c). Such ruling "will not be reversed unless the decision was arbitrary," *Albrecht v. Dorsett*, 131 N.C. App. 502, 508, 508 S.E.2d 319, 323 (1998), or "lacked any basis in reason." *Judkins v. Judkins*, 113 N.C.App. 734, 740, 441 S.E.2d 139, 142, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994). We cannot say the trial court's transfer decision in the instant case was either arbitrary, *Albrecht*, 131 N.C. App. at 508, 508 S.E.2d at 323, or without any basis in reason, *Judkins*, 113 N.C.App. at 740, 441 S.E.2d at 142, and we therefore reject Wright's second assignment of error.

[3] Next, Wright insists the transfer statutes

> should be construed to prohibit transfer of this juvenile to [s]uperior [c]ourt, because his real age for the purposes of the statute is below the statutory threshold

of thirteen, *see* G.S. § 7A-608. Wright does not claim a chronological age of less than thirteen at the time of the alleged offense, but rather maintains the evidence presented at the hearing

> showed without contradiction that [he] was developmentally, socially, psychologically, and emotionally a child far younger than thirteen . . . .

However, Wright cites no "authorities upon which the appellant relies," N.C.R. App. P. 28(b)(5), for the novel proposition that the transfer statute should be interpreted to require determination of a juvenile's developmental, as opposed to chronological, age. Wright's final assignment of error is therefore deemed abandoned. *Id.* ("[a]ssignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned").

Notwithstanding, we note that it is well established that

> [i]n interpreting a statute, it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech. When the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute.

Nelson v. Battle Forest Friends Meeting, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993) (citation omitted).

Therefore, it must be presumed that, in allowing transfer to superior court of cases of juveniles who are "13 years of age or older," G.S. § 7A-608, the General Assembly intended the "ordinary" meaning of the words employed, *i.e.*, that the cases of juveniles who have achieved the chronological age of thirteen years are subject to transfer. The statute contains no ambiguity nor any indication the General Assembly intended "13 years of age or older" to be construed as developmental or emotional age rather than chronological. Accordingly, we "go no further in interpreting the statute." *Nelson*, 335 N.C. at 136, 436 S.E.2d at 124.

[4] Finally, Wright argues that, if convicted of first degree sex offense in superior court, even the minimum punishment to which he might be subjected, *see* G.S. § 14-27.4(b) and N.C.G.S. § 15A-1340.17 (1999), would constitute cruel and unusual punishment. We do not address this assertion in that

> [t]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoreti-

cal problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions.

Little v. Trust Co., 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960).

Wright has been neither tried nor convicted of any crime, much less sentenced. The issue of punishment thus is not "ripe for review because it will arise, if at all, only if [Wright] receives [an adverse] verdict" at trial and is then sentenced for the crime of first degree sex offense. *Simmons v. C.W. Myers Trading Post*, 307 N.C. 122, 123, 296 S.E.2d 294, 295 (1982).

Affirmed.

Judges LEWIS and McGEE concur.

SANDRA LEITH LEWIS AND EBONY C. LEWIS, BY AND THROUGH HER GUARDIAN AD LITEM, SANDRA LEITH LEWIS, PLAINTIFFS V. ESTATE OF CHARLES ERIC LEWIS AND LAURA LEWIS, DEFENDANTS

No. COA99-551

(Filed 21 March 2000)

Insurance— serviceman's death benefits—federal preemption

Although plaintiff-first wife attempted to get a constructive trust placed on decedent's Servicemember's Group Life Insurance death benefits since decedent signed a Hawaiian divorce decree stating he would keep at least $50,000 in life insurance benefits for his child but subsequently named his second wife as the sole beneficiary of his $200,0000 death benefits, the trial court did not err in granting summary judgment in favor of defendant-second wife because: (1) decedent could freely choose his beneficiary under the federal Servicemember's Group Life Insurance Act (SGLIA) of 38 U.S.C.A. § 1917(a); (2) a servicemember's designation of beneficiary under SGLIA prevails over a state child support order requiring the servicemember to maintain life insurance for his child; and (3) the anti-attachment provision of SGLIA provides the death benefits shall not be liable to attachment, levy, or seizure by or under any legal or equitable process.

Appeal by plaintiffs from an order entered 26 January 1999 by Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 27 January 2000.

Law Offices of Mark E. Sullivan, P.A., by Mark E. Sullivan and Nancy L. Grace, for plaintiff-appellants.

Monroe, Wyne & Wallace, by Robert E. Monroe, Administrator for the Estate of defendant-appellee Charles Eric Lewis.

The Law Office of John T. Benjamin, Jr., by John T. Benjamin, Jr. and William E. Hubbard, for defendant-appellee Laura Lewis.

HUNTER, Judge.

Sandra Leith Lewis ("Leith") and Ebony C. Lewis ("Ebony") (collectively "plaintiffs") brought suit against the estate of Charles E. Lewis ("decedent") and his wife Laura Lewis ("Lewis"), seeking a constructive trust on decedent's Servicemember's Group Life Insurance ("SGLI") death benefits, of which Lewis is beneficiary. Defendant Lewis made a motion for summary judgment on the basis that under the federal Servicemember's Group Life Insurance Act ("SGLIA"), a serviceman may freely designate his beneficiary and federal law prevails over conflicting state law according to the Supremacy Clause of the United States Constitution. We agree with defendant, and affirm that portion of the trial court's order which granted her motion.

Evidence presented to the trial court indicated that Leith married decedent on 15 April 1985 and Ebony was the only child born to the couple. Leith and decedent were divorced in Hawaii by a decree which was effective 21 February 1990, and contained the following provision:

> For so long as there is a child support obligation, [decedent] shall maintain life insurance coverage (or aggregate life insurance policies) on his life which makes [Ebony] the primary irrevocable beneficiaries [sic] in the face amount of $50,000. If [decedent] dies without the required life insurance, his estate shall be liable to [Ebony] in the amount of insurance that should have been maintained. This provision is subject to further orders of the Court.

Decedent subsequently married defendant Lewis on 16 December 1995. On 16 January 1996, decedent named Lewis as the sole benefi-

ciary of his SGLI death benefits. Decedent died on 17 November 1996, and Ebony then applied for payment of fifty thousand dollars of decedent's SGLI benefits pursuant to the Hawaiian divorce decree. The claim was denied and $200,000.00, the full amount of the SGLI benefits, was paid to Lewis. Plaintiffs thereafter brought the present suit, alleging that:

> d. [Decedent] induced [Leith] to sign the consent decree by promising to her that he would keep at least $50,000 in life insurance benefits for [Ebony].
>
> e. This statement was false, and [Leith] relied on it to her detriment. Such reliance was reasonable.
>
> f. After entry of the decree he changed his life insurance so that Defendant Lewis was his sole beneficiary.
>
> g. He did not comply with the court's order to provide at [sic] the above death benefit to [Ebony] due to fraud, breach of duty or other wrongdoing.

Plaintiffs also alleged unjust enrichment of Lewis and sought a constructive trust for $50,000.00 for the benefit of Ebony, and made claims for specific performance and enforcement of the Hawaiian decree under the federal Full Faith and Credit for Child Support Orders Act. Both plaintiffs and defendant Lewis made a motion for summary judgment. The trial court granted the motion of Lewis for summary judgment against plaintiffs, but also granted plaintiffs' motion for summary judgment as to the estate of decedent. Plaintiffs appeal the granting of summary judgment for Lewis.

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. In the present case, plaintiffs assert the trial court erred in granting summary judgment for defendant Lewis because decedent committed fraud and breached a fiduciary duty to plaintiffs and therefore Lewis holds a constructive trust for Ebony. Lewis denies plaintiffs' allegations of decedent's wrongdoing, and contends that despite the order of any state, or violation of any state's laws by decedent, decedent could freely designate his beneficiary and the proceeds are not attachable under SGLIA. We agree with defendant, based on a review of the provisions of SGLIA and the holding by

the United States Supreme Court in *Ridgway v. Ridgway*, 454 U.S. 46, 70 L. Ed. 2d 39 (1981).

First, we note that under SGLIA, decedent could freely choose his beneficiary:

> The insured shall have the right to designate the beneficiary or beneficiaries of insurance . . . and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.

38 U.S.C.A. § 1917(a) (1991). Therefore, decedent could change his beneficiary from Ebony to Lewis without informing plaintiffs or gaining their consent.

The United States Supreme Court has held that a servicemember's designation of beneficiary under SGLIA prevails over a state child support order requiring the servicemember to maintain life insurance for his children. In *Ridgway*, the facts indicated Army Sergeant Richard H. Ridgway ("Ridgway") was ordered by the courts of Maine, at the time of his divorce from wife April, to keep current insurance policies in force for the benefit of his three children. At the time of the divorce, Ridgway's life was insured under a policy for $20,000.00 issued by Prudential Insurance Company pursuant to the SGLIA, with April as beneficiary. Subsequently, Ridgway married his second wife, Donna Ridgway, and changed the policy's beneficiary designation, directing that it be paid as specified "by law." Under SGLIA, the serviceman can name a beneficiary, and if none is named, the proceeds go to his spouse at the time of his death. *Id.; see* 38 U.S.C.A. § 1970(a) (1991). After Ridgway's death, April Ridgway instituted suit in Superior Court for Androscoggin County, Maine for a declaratory judgment that her children were entitled to the SGLI proceeds. Donna Ridgway also asserted a claim for the proceeds, whereupon April Ridgway cross-claimed, asking for a constructive trust on any proceeds paid to Donna Ridgway for the benefit of the Ridgway children. The Superior Court for Androscoggin County, Maine ruled in favor of Donna Ridgway, stating that a constructive trust on the SGLI proceeds would interfere with the operation of the SGLIA, running afoul of the Supremacy Clause of the United States Constitution. The Supreme Judicial Court of Maine reversed. The United States Supreme Court granted certiorari and reversed the Supreme Judicial Court of Maine, stating:

> [T]he insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office. . . . "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other."

Ridgway, 454 U.S. at 56, 70 L. Ed. 2d at 48 (*quoting Wissner v. Wissner*, 338 U.S. 655, 94 L. Ed. 424 (1950)).

> Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary.
>
> That right is personal to the member alone. . . .
>
> We conclude, therefore, that the controlling provisions of the SGLIA prevail over and displace inconsistent state law.
>
> The imposition of a constructive trust upon the insurance proceeds is also inconsistent with the anti-attachment provision . . . of the SGLIA. . . .
>
> . . .
>
> We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision.

Ridgway, 454 U.S. at 59-61, 70 L. Ed. 2d at 51-52 (footnotes omitted). The strong anti-attachment provision of SGLIA mentioned in *Ridgway* provides that SGLI benefits

> shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . .

38 U.S.C.A. § 1970(g) (Supp. 1999). This provision

> ". . . ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process '[n]otwithstanding any other law . . . of any State.' . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy."

Ridgway, 454 U.S. at 61, 70 L. Ed. 2d at 52 *(quoting Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584, 59 L. Ed. 2d 1, 12 (1979)). The Court in

Ridgway noted that the possession of government insurance payable to the beneficiary of the servicemember's choice was designed to directly enhance morale, a purpose within congressional power pertaining to national defense. *Id.* at 56-57, 70 L. Ed. 2d at 49 *(citing Wissner v. Wissner*, 338 U.S. 655, 94 L. Ed. 424).

The Court in *Ridgway* did indicate, but did not hold, that if Ridgway's conduct had amounted to conversion of another's property, another result may have ensued. The Court cited *Yiatchos v. Yiatchos*, 376 U.S. 306, 11 L. Ed. 2d 724 (1964), where a husband had used community property to buy federal bonds designating his brother as beneficiary. Community property usually includes all property acquired by either spouse during a marriage other than by gift, devise, or descent. 15A Am. Jur. 2d *Community Property* § 3 (1976). The Court in *Yiatchos* held that the husband could not deprive his wife of her interest in community property by using it to buy federal bonds and designating his brother as beneficiary:

> Under the federal regulations petitioner is entitled to the bonds unless his deceased brother committed fraud or breach of trust tantamount to fraud. Since the construction and application of a federal regulation having the force of law, are involved, whether or not there is fraud which will bar the named beneficiary in a particular case must be determined as a matter of federal law[.] But in applying the federal standard we shall be guided by state law insofar as the property interests of the widow created by state law are concerned. It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds.

Yiatchos, 376 U.S. at 309, 11 L. Ed. 2d at 728 (citations omitted). Unlike *Yiatchos*, the present case does not concern federal bonds or community property. Contrary to plaintiffs' assertion, the *Ridgway* court never stated that fraud or breach of fiduciary duty by a servicemember would defeat the provisions of SGLIA. In dicta, the Court merely pointed out that the beneficiary and anti-attachment provisions of SGLIA may possibly be overcome in circumstances where a claimant had property rights in the proceeds. This situation occurred in *In re Marriage of Gonzales*, 168 Cal. App. 3d 1021 (1985), where a life insurance policy covering the husband was originally a military policy but had been converted to an individual policy under SGLIA with community funds when the husband retired and the parties were

still married. Thus, the appellate court held, the policy was properly designated as community property by the trial court. *Id.* Plaintiffs make no allegation that they have property rights in decedent's SGLI death benefits in the present case.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407 (1992), the United States Supreme Court explained that state law is not preempted by federal law unless it is the "clear and manifest purpose of Congress" to effect preemption, a purpose that can be demonstrated by the express language of the federal enactment or its structure and purpose, or by a direct conflict between the terms of the federal and state enactments, or by a showing that federal law occupies the field so completely as to justify the inference that state legislation addressing that subject is precluded. 505 U.S. at 516, 120 L. Ed. 2d at 422 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 91 L. Ed. 1447 (1947)). As we have previously noted, the United States Supreme Court has held that there is a clear and manifest purpose by Congress that the controlling provisions of the SGLIA prevail over and displace inconsistent state law. *Ridgway*, 454 U.S. at 60, 70 L. Ed. 2d at 51. Thus, we do not analyze plaintiffs' claims any further in our determination since they are preempted by the beneficiary and anti-attachment provisions of SGLIA.

As the United States Supreme Court stated in *Ridgway*, "[w]e recognize that this unpalatable case suggests certain 'equities' in favor of the . . . child[] and the[] mother." *Ridgway*, 454 U.S. at 62, 70 L. Ed. 2d at 53. However, based on the foregoing, we hold that any alleged violation of state law by decedent or order of a state court does not defeat the provisions of SGLIA. There are no genuine issues of material fact and as a matter of law, Lewis is entitled to decedent's SGLI benefits under SGLIA. The trial court properly granted summary judgment for Lewis, and that portion of its order is affirmed.

Affirmed.

Judges JOHN and McGEE concur.

LARRY HARVEY, PLAINTIFF-APPELLANT v. LEROY STOKES, DEFENDANT-APPELLEE

No. COA99-560

(Filed 21 March 2000)

1. **Negligence— contributory—inference from plaintiff's evidence**

Even though defendant did not offer any evidence at trial in a personal injury action arising out of an automobile accident, the trial court did not err in submitting the issue of contributory negligence to the jury because a jury could reasonably infer from plaintiff's own evidence that he was negligent in the operation of his motor vehicle.

2. **Appeal and Error— transcript not certified by reporter— time for serving proposed record on appeal not expired**

Although the better practice is for an appellant to request an extension of time when a court reporter fails to deliver a transcript within the sixty-day period under N.C. R. App. P. 7(b) and the trial court should set out facts which support its determinations that "good cause" exists for appellant's failure to request extensions of time and for appellant's failure to file a proposed record on appeal within the allotted time, the trial court did not abuse its discretion in denying defendant's motion to dismiss plaintiff's appeal because the thirty-five-day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript.

Appeal by plaintiff from judgment entered 20 August 1998 by Judge Henry Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2000.

On 7 May 1997, Larry Harvey (plaintiff) filed this civil action against Leroy Stokes (defendant), seeking to recover monetary damages for personal injuries arising out of an automobile accident on 14 June 1994. Defendant denied that he was negligent as alleged in the complaint, and pleaded the contributory negligence of plaintiff in bar. On 22 July 1998, a jury found that plaintiff was injured by the negligence of the defendant, but that plaintiff, by his own negligence, contributed to his injuries. The trial court entered a judgment denying plaintiff any recovery, from which plaintiff appealed in apt time.

Gray, Newell & Johnson, L.L.P., by Angela Newell Gray, for plaintiff appellant.

Burton & Sue, L.L.P., by Walter K. Burton and James D. Secor, III, for defendant appellee.

HORTON, Judge.

On 22 July 1998, following the unfavorable jury verdict, plaintiff requested in writing that the court reporter furnish him a copy of the trial transcript. The court reporter prepared a trial transcript and mailed it to plaintiff on 20 January 1999. Defendant moved to dismiss plaintiff's appeal because of plaintiff's failure to move for an extension of time to deliver the transcript, and the failure of the court reporter to deliver the transcript within 60 days of receiving an order from plaintiff to do so. The trial court denied defendant's motion, finding good cause to excuse plaintiff's failure to move for an extension of time and good cause for the court reporter's failure to deliver the transcript in a timely fashion. Defendant appealed. Defendant's appeal is pending before this Court in case number COA99-952; for clarity, we have elected to consider the appeals of both plaintiff and defendant in this opinion.

I. Plaintiff's Appeal

[1] Plaintiff contends that the trial court erred in submitting the issue of contributory negligence to the jury, arguing that defendant offered no evidence at trial. Instead, defendant relied on reasonable inferences from plaintiff's evidence. We disagree with plaintiff, and hold that the issue of contributory negligence was properly submitted to the jury based on reasonable inferences drawn from plaintiff's own evidence.

Contributory negligence is "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). Defendant bears the "burden of proving contributory negligence . . . [but] is entitled to have the issue submitted to the jury if all the evidence and reasonable inferences drawn therefrom and viewed in the light most favorable to defendant tend to establish or suggest contributory negligence." *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 38, 365 S.E.2d 198, 201, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988).

Here, the collision between vehicles driven by plaintiff and defendant occurred on Bennett Street in the City of Greensboro. At the point of collision, Bennett Street has four lanes, two for travel in a southerly direction, and two lanes for travel in a northerly direction. Immediately prior to the collision, plaintiff testified that he was traveling south along Bennett Street in the "inside" travel lane, the lane nearest the median of Bennett Street, approaching the intersection of Bennett Street and Broad Street. Plaintiff testified that he saw defendant's vehicle stop at the stop sign regulating traffic entering Bennett Street, and saw defendant begin to enter the intersection of Bennett and Broad Streets. Plaintiff testified that he blew his horn and moved over to the outside lane to "give him space." Plaintiff did not realize that defendant was moving into his lane until the contact occurred. Asked by defense counsel whether he stopped watching defendant's vehicle, plaintiff testified as follows:

> A I wouldn't say that I stopped watching. I probably began to pay a little more attention to what I was doing at that time.
>
> . . . .
>
> A At that point, once I had moved over, I really considered myself to be safe and considered that I've done all the proper things and I had no idea that this gentlemen [*sic*] was going to just bear off and cut off in front of me.

Plaintiff called the investigating officer as a witness. The accident report prepared by the officer was introduced into evidence without objection. The investigating officer testified without objection that the speed limit on Bennett Street at the scene of the collision was 35 miles per hour (mph); that plaintiff was traveling 35 to 40 mph along Bennett Street, and there was no evidence that plaintiff ever reduced his speed prior to the collision. The officer also testified that there were no skid marks or tire impressions left by plaintiff's vehicle, and no indication that plaintiff made any effort to avoid the collision. According to the investigating officer, the left front of plaintiff's vehicle struck the "right rear quarter" of defendant's vehicle.

Viewing the evidence in the light most favorable to the defendant, as we are required to do, we hold that a jury could reasonably infer from the evidence summarized above that the plaintiff was negligent in the operation of his motor vehicle. As our Supreme Court stated in *Parker v. Bruce*, 258 N.C. 341, 128 S.E.2d 561 (1962), "[o]rdinarily, the mere fact of a collision with a vehicle ahead furnishes some evidence

that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout." *Id.* at 343, 128 S.E.2d at 562.

The trial court properly submitted the issue of contributory negligence to the jury, and properly instructed the jury on that issue. Its judgment is affirmed.

II. Defendant's Appeal

[2] Although we have resolved plaintiff's appeal in favor of the defendant, we have elected to discuss defendant's appeal because it presents a recurring question of concern to the appellate bar of this state: what action, if any, must an appellant take to preserve the right of appeal when the court reporter does not transmit a copy of the trial transcript within the time mandated by the appellate rules?

Here, the facts with regard to the timeliness of the appeal are not contested. On 22 July 1998, the jury returned a verdict adverse to plaintiff. On that same day, plaintiff stated, "we'll file appropriate notice of appeal." Plaintiff also requested in writing on 22 July 1998, a copy of the trial transcript from the court reporter. The written judgment was signed by the trial court on 20 August 1998, "as of July 22, 1998." Plaintiff filed written notice of appeal on 20 August 1998. The court reporter did not deliver a copy of the completed transcript until 20 January 1999, long after the expiration of the 60-day period allowed the court reporter by Rule 7(b)(1) of the Rules of Appellate Procedure. There is no explanation of the reporter's delay in the record. Plaintiff did not seek an extension of time from either the trial court or from this Court, and the record does not contain reasons for his failure to do so. However, once the plaintiff received the trial transcript, he acted promptly, within the time set out in the appellate rules, to serve a proposed record on appeal. Defendant argues, however, that plaintiff had an affirmative duty to secure extensions of time, and to take whatever action might result in a more expeditious delivery of the trial transcript.

The parties have ably set forth the arguments for and against a strict construction and application of the appellate rules in the context of this familiar factual situation. We do not, however, write on a clean slate. In *Lockert v. Lockert*, 116 N.C. App. 73, 446 S.E.2d 606, *disc. review allowed*, 338 N.C. 311, 450 S.E.2d 487, *cert. allowed*, 338 N.C. 311, 450 S.E.2d 490 (1994), this Court answered the question raised by this appeal:

> [I]f the court reporter fails to certify that the transcript has been delivered within the sixty-day period permitted by Appellate Rule 7(b), the thirty-five day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript. To hold otherwise would allow a delay by a court reporter, whether with or without good excuse, to determine the rights of litigants to appellate review. In this case, we hold that since Ms. Rorie [the court reporter] had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the appeal, the defendant's thirty five day period to serve the record on appeal never began to run, and the trial court erred when it concluded that the defendant's time for serving his proposed record on appeal, and time for filing and docketing the record on appeal with this Court, had expired.

Id. at 81, 446 S.E.2d at 610. We followed the holding in *Lockert* in *Chamberlain v. Thames*, 131 N.C. App. 705, 509 S.E.2d 443 (1998), in which the majority of a divided panel considered itself bound by *Lockert* under the holding of *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (one panel of the Court of Appeals may not overrule another panel).

Both this Court and our Supreme Court have stated that the Rules of Appellate Procedure are "mandatory," and that failure to take timely action as required by the Rules may subject an appeal to dismissal. *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979). In *Craver*, the trial court settled the record on appeal as required by the appellate rules. Defendant appellant, however, did not obtain the clerk's certification of the record within 10 days of the settlement, nor did defendant file the settled record on appeal in this Court within the time set out in the Rules. Thus, our Supreme Court held in *Craver* that the trial court properly dismissed defendant's appeal and this Court erred in considering the merits of defendant's appeal. *Id.* at 236, 258 S.E.2d at 361. In *Craver*, dismissal was proper because the appellant failed to take action required by the appellate rules and was not otherwise prevented from complying with the rules by the action or inaction of some third party.

Defendant relies on four of our decisions in which the Rules of Appellate Procedure were strictly construed and applied. However, none of the cases (all of which predate *Lockert*) involved the dismissal of an appeal because of the failure of the court reporter to deliver a transcript. *See Woods v. Shelton*, 93 N.C. App. 649, 379

S.E.2d 45 (1989) (appellant tendered proposed record on appeal 139 days after notice of appeal in violation of Rule 11(b)); *McGinnis v. McGinnis*, 44 N.C. App. 381, 261 S.E.2d 491 (1980) (appellant failed to tender a proposed record on appeal in apt time or secure an extension of time to do so); *Byrd v. Alexander*, 32 N.C. App. 782, 233 S.E.2d 654 (1977) (appellant did not file the record on appeal within 10 days of certification of the record on appeal by the clerk); and *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E.2d 836 (1976) (failure of appellant to obtain clerk's certification within 10 days of settlement of record on appeal justified dismissal of appeal).

Here, the trial court found good cause to deny defendant's motion to dismiss plaintiff's appeal. Based on our holding in *Lockert*, we cannot say that the trial court abused its discretion in doing so. However, we stress that, when a court reporter fails to deliver a transcript within the time allowed by the appellate rules, the better practice is that appellant request an extension of time from the appropriate court. In appellant's application for additional time, he should set forth the reasons for the reporter's delay in delivering the transcript and the probable date of delivery. The initial application for an extension of time to produce the transcript is made to the trial court, which "in its discretion, and for good cause shown" may extend the time for production of the transcript an additional 30 days. N.C.R. App. P. 7(b)(1). Subsequent motions for extension of time to produce the transcript "may *only* be made to the appellate court to which appeal has been taken." *Id.* (emphasis added). We are aware, as are the trial courts, that our court reporters face increasing, and sometimes conflicting, demands on their time. Documentation by the court reporter, through an affidavit or verified motion, of the reasons for non-production of an ordered transcript will help inform the decision of a trial court or this Court when considering an appellee's motion to dismiss based on a violation of the appellate rules. Further, when motions for extension of time are supported by documentation regarding the court reporter's failure to timely deliver an ordered transcript, it is easier for a court which is deciding a motion to dismiss an appeal, to determine whether appellant has contributed to the delay in preparation of a proposed record on appeal.

Finally, it would be better practice for the trial court to set out facts which support its determinations that "good cause" exists both for appellant's failure to request extensions of time, and for appellant's failure to file a proposed record on appeal within the allotted time. However, in this case, even assuming that the trial court's order

was incomplete or unsupported by the evidence of record, we find no error prejudicial to the defendant appellee. Therefore, the decision of the trial court which denied defendant's motion to dismiss plaintiff's appeal is affirmed.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. ANTHONY BRIGGS

No. COA99-365

(Filed 21 March 2000)

1. **Confessions and Incriminating Statements— Miranda warnings—not in custody**

Even though the State concedes defendant made his incriminating statements during an interrogation, the trial court did not err in an extortion case by denying defendant's motion to suppress his incriminating statements to a correction unit manager and an assistant superintendent for operations at a correction institute because: (1) an inmate is not automatically in custody for the purposes of Miranda because of his incarceration; and (2) defendant was free to not talk and to return to his cell at any time.

2. **Sentencing— habitual felon—indictment—underlying felony—notice**

An habitual felony indictment which alleged that defendant had been convicted of three felonies, including "the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54," provided defendant with adequate notice of the underlying felonies even though a defendant may be charged with either felony or misdemeanor breaking or entering under § 14-54, and the indictment failed to allege the particular felony defendant intended to commit pursuant to the breaking and entering, since the indictment clearly stated defendant had been convicted of the felony of breaking and entering, and the indictment contained the date the felony was committed, the court in which defendant was convicted, the number assigned to the case, and the date of the conviction.

Appeal by defendant from judgment dated 7 May 1998 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 15 February 2000.

Attorney General Michael F. Easley, by Associate Attorney General Christopher W. Brooks, for the State.

The Kelly Law Firm, by George E. Kelly, III, for defendant-appellant.

GREENE, Judge.

Anthony Briggs (Defendant) appeals jury verdicts finding him guilty of extortion and of being an habitual felon.

Prior to trial, Defendant filed a motion to suppress allegedly incriminating statements he made to Renoice Stancil (Stancil), a correction unit manager at Eastern Correction Institute (Eastern), and Milton Nowell, Jr. (Nowell), the assistant superintendent for operations at Eastern. The motion was based on the ground the statements "were made in response to officer interrogation, while in custody, without waiver of Miranda rights." The State conceded before the trial court that the statements were made during an "interrogation"; however, the State argued the officers were not required to provide Defendant with his Miranda rights because the interrogation was not custodial.

At the suppression hearing, Stancil testified that in June of 1996 he was working at Eastern and was in charge of the "segregation lockup" unit. Stancil testified an inmate would be placed in segregation lockup pending any investigation of a rule violation. An inmate in segregation lockup would remain in his cell and, if that inmate left his cell for any reason, he would be placed in restraints consisting of waist chains and handcuffs and would be escorted by a prison officer.

Stancil testified that in June of 1996, he received information Defendant, an inmate at Eastern, had written a threatening letter to Hazel Scarboro (Scarboro), a woman residing in Wake County. Defendant was placed in segregation lockup pending investigation of the incident and, on 21 June 1996, Nowell and Stancil met in Stancil's office and "had [Defendant] brought to [Stancil's] office and questioned him in regards to that letter." Defendant was escorted from his cell to Stancil's office by an officer, and he wore waist chains and handcuffs. Stancil testified Defendant was "required" to come to his office.

Once inside Stancil's office, Defendant was questioned regarding the letter and he told Stancil and Nowell he did not write it. He then "got up to . . . exit the office." Stancil stated that when Defendant reached the door, Defendant "stopped and he closed the door [and] [a]fter he closed the door . . . he sit [sic] back down and that's when he began to state that he did write the letter to . . . Scarboro." Defendant explained why he wrote the letter, and then "he just got up and left." Stancil advised an officer, who was standing outside of Stancil's office, that Defendant was leaving his office. When Defendant stepped outside of the office, the officer escorted him back to his cell. Stancil and Nowell did not, at any time, read Defendant his Miranda rights.

Nowell testified at the suppression hearing that in June of 1996, Defendant had been placed in "administrative segregation" pending the investigation of the letter. When Defendant was brought into Stancil's office on 21 June 1996, he was "free not to talk" and to return back to his cell; however, he would have to be escorted back to his cell by an officer. Nowell stated that when Defendant denied writing the letter, Nowell told him "we are going to process this investigation anyway and it is my opinion that you wrote the letter[] and we are going to proceed with our administrative remedies anyway." Defendant then stood up and said, "I don't have anything else to say," and Nowell responded, "[o]kay, we are going to go ahead anyway." Defendant then began to leave the office; however, when he reached the doorway he asked if he could close the door. After Nowell responded that the door could be closed, Defendant "closed the door and sat back down and continued to explain about the letter[]." After he had finished explaining, he exited and "Stancil called for an officer to escort him back [to his cell]."

At the close of the hearing, the trial court orally denied Defendant's motion to suppress his confession. In the written order, dated 17 December 1998, the trial court made findings of fact consistent with the above stated facts. The trial court then denied Defendant's motion to suppress his confession, concluding as a matter of law Defendant's statements "were not obtained as a result of any custodial interrogation."

At trial, Stancil and Nowell testified, over Defendant's objection, regarding the statements made by Defendant on 21 June 1996.

At the close of trial, the jury found Defendant guilty of extortion, and the trial court proceeded to conduct a hearing on the habitual

felon indictment. Defendant moved to dismiss the habitual felon indictment on the ground it "does not charge habitual felon." The indictment for habitual felon stated Defendant had previously been convicted of three felonies, and contained, in pertinent part, the following language:

> 1. On February 14, 1975 in Guilford County . . . [D]efendant committed against the State of North Carolina the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54 and was thereafter charged and pled guilty and judgment was entered in Guilford [C]ounty Superior Court on April 15, 1975 [75 CR 27351][.]

Defendant argued the indictment, based on this language, contained a previous misdemeanor rather than felony conviction. The trial court denied Defendant's motion to dismiss the indictment, and the jury found Defendant guilty of being an habitual felon.

The issues are whether: (I) Defendant was in custody, for the purposes of *Miranda*, when he confessed to writing the letter; and (II) a conviction for "the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54" is a felony conviction for the purpose of an habitual felon indictment.

I

[1] Defendant argues his statements to Nowell and Stancil were made during a custodial interrogation and, because Defendant was not read his Miranda rights, those statements were unconstitutionally obtained. We disagree.

"The trial court's findings of fact after a *voir dire* hearing concerning the admissibility of [a] confession are conclusive and binding on the appellate courts when supported by competent evidence." *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982). The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law and is fully reviewable by this Court. *State v. Hall*, 131 N.C. App. 427, 431, 508 S.E.2d 8, 12 (1998).

In this case, Defendant does not contend the trial court's findings of fact are unsupported by competent evidence; therefore, the sole issue before this Court is whether the findings of fact support the trial court's conclusion of law that Defendant's confession to writing the threatening letter was "not obtained as a result of any custodial inter-

rogation." *See Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962). Additionally, because the state conceded to the trial court that the 21 June 1996 meeting was an "interrogation," we need only address whether the interrogation was "custodial" for purposes of *Miranda*.

"A person is in custody, for purposes of *Miranda*, when he is 'taken into custody or otherwise deprived of his freedom of action in any significant way,' " *Hall*, 131 N.C. App. at 431, 508 S.E.2d at 12 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966)), and an inmate who is subject to a custodial interrogation is entitled to Miranda warnings, *Mathis v. United States*, 391 U.S. 1, 4-5, 20 L. Ed. 2d 381, 385 (1968). An inmate, however, is not, because of his incarceration, automatically in custody for the purposes of *Miranda*; rather, whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation. *See United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985), *cert. denied*, 479 U.S. 830, 93 L. Ed. 2d 61 (1986). We recognize, however, that an inmate inherently has some restriction on his freedom of movement, and factors to consider when determining whether an inmate is free to depart from the place of his interrogation include whether: the inmate was free to refuse to go to the place of the interrogation, the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time, the inmate was physically restrained from leaving the place of interrogation, and the inmate was free to refuse to answer questions.

In this case, Defendant, who had been placed in segregation lockup pending investigation of the letter, was escorted to Stancil's office in waist restraints and handcuffs. Stancil testified Defendant was "required" to come to his office, and the restraints and handcuffs remained on Defendant while he was in Stancil's office. Defendant, nevertheless, remained "free not to talk" and to return to his cell. Indeed, Defendant did terminate the questioning at one point by stating he "[did not] have anything else to say." Defendant then proceeded to walk to the doorway, and he was not restrained from attempting to leave the room. Because Defendant was free to leave Stancil's office and return to his cell at any time, Defendant was not in custody for the purposes of *Miranda*. The trial court, therefore, properly denied Defendant's motion to suppress his confession.[1]

1. A confession must also be given voluntarily in order to be admissible. *State v. Wiggins*, 334 N.C. 18, 28, 431 S.E.2d 755, 761 (1993). In this case, Defendant did not contend before the trial court and does not argue in his brief to this Court that his

II

[2] An habitual felon is "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States." N.C.G.S. § 14-7.1 (1999).

> An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C.G.S. § 14-7.3 (1999).

In this case, the habitual felon indictment stated Defendant had previously been convicted of three felonies, including, in pertinent part, "the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54." Section 14-54(a) provides "[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon," and section 14-54(b) provides "[a]ny person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor." N.C.G.S. § 14-54(a), (b) (1999).

Defendant contends the indictment for habitual felon did not set forth the statutorily required information regarding three felonies because "[t]o allege a felonious [b]reaking and [e]ntering [rather than a misdemeanor breaking and entering], the indictment would have to allege commission of breaking and entering with intent to commit some felony" pursuant to *State v. Vick*, 70 N.C. App. 338, 319 S.E.2d 327 (1984) (holding "an indictment charging the offense of felonious breaking or entering is sufficient only if it alleges the particular felony which is intended to be committed").

The purpose of an habitual felon indictment is to provide a defendant "with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge," and not to provide the defendant with an opportunity to defend himself against the underlying felonies. *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995). In this case, the habitual felon indictment provided Defendant with notice he was being tried as a recidivist, and

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statements were involuntarily given, and we, therefore, do not address this issue. *See* N.C.R. App. P. 10(a).

one of the underlying felonies was "the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54." Although a defendant may be charged with either felony or misdemeanor breaking and entering under section 14-54, the indictment in this case clearly stated Defendant had been convicted of *felony* breaking and entering. Moreover, the indictment contained the date the felony was committed, the court in which Defendant was convicted, the number assigned to the case, and the date of the conviction. The indictment, therefore, provided Defendant with adequate notice of the underlying felony. *Vick* is distinguishable from this case because in *Vick* the indictment charged the defendant with the crime of felonious breaking and entering, and the indictment failed to state the underlying felony. *Vick*, 70 N.C. App. at 339, 319 S.E.2d at 328. In this case, however, Defendant has been charged with being an habitual felon, and an indictment for habitual felon is sufficient if it provides a defendant with notice of his prior felony convictions. Accordingly, the trial court did not err by denying Defendant's motion to dismiss the habitual felon charge.

No error.

Judges WALKER and TIMMONS-GOODSON concur.

MARY L. BRICE, EMPLOYEE, PLAINTIFF-APPELLANT v. SHERATON INN, EMPLOYER, SELF-INSURED (COMPSOURCE), SERVICING AGENT, DEFENDANT-APPELLEES

No. COA99-418

(Filed 21 March 2000)

1. Workers' Compensation— credibility—determination by full Industrial Commission

Although this workers' compensation case was previously remanded to the Industrial Commission because the Commission failed to accord deference to the deputy commissioner's determinations of credibility, the North Carolina Supreme Court has since determined that the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony under N.C.G.S. § 97-85, and this rule is to be applied retroactively to cases remanded by the Court of Appeals to the Industrial Commission.

2. Workers' Compensation— burden of proof—temporary total disability—permanent total disability

Even though the Industrial Commission found plaintiff-employee to be temporarily totally disabled in a workers' compensation case, it did not err by placing on plaintiff the burden of proving permanent total disability because it is plaintiff's burden to establish both temporary total disability and permanent disability.

Appeal by plaintiff from Opinion and Award entered 25 January 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2000.

Robert J. Willis for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Timothy S. Riordan and Brian D. Lake, for defendant-appellees.

EDMUNDS, Judge.

Plaintiff appeals the finding of the Industrial Commission that, although plaintiff was temporarily totally disabled, she was not permanently totally disabled. We affirm.

In 1990, plaintiff Mary L. Brice (Brice), then fifty years old, began working for defendant-employer Sheraton Inn (Sheraton). Her duties required her to perform repetitive tasks with her hands, including retrieving and sorting soiled towels and linens; loading commercial-size washers and dryers; ironing, folding, and stacking hotel laundry; transporting the pressed and folded laundry to another room; cleaning and straightening the work area; and dispensing clean towels, linens, and soap to room attendants. Although she was promoted to laundry supervisor, she continued to perform her regular duties while overseeing the work of other employees assigned to the laundry area.

On 11 January 1995, plaintiff felt a "pop" in her right wrist as she was removing wet linen from a washing machine at work. She reported the incident to her supervisor, but continued to work despite growing pain and swelling in her right hand. Because of the recurrent pain, plaintiff relied increasingly on her left hand. As a result, plaintiff began experiencing pain in her left wrist and thumb. On 3 March 1995, plaintiff sought medical treatment for her injury. Physical therapy was recommended. Plaintiff resigned from her job

with Sheraton on 24 April 1995 for reasons unrelated to the condition of her hands.

Plaintiff continued to experience pain and swelling in her hands despite physical therapy. Thereafter, she was diagnosed with chronic bilateral de Quervain tenosynovitis and left trigger thumb, conditions resulting from the repetitive nature of her work while employed with Sheraton. She filed a Form 18 "Notice of Accident to Employer" on 3 May 1995, but her claim was denied. An orthopedist, Dr. Wallace Andrew, examined plaintiff and later performed surgery on her left hand. Dr. Andrew released plaintiff to return to work without restriction as of 28 August 1995.

Plaintiff's case initially was heard before a deputy commissioner on 5 December 1995. In an opinion and award filed 4 February 1997, the deputy commissioner found that plaintiff had suffered a compensable injury and was entitled to receive temporary total disability at the weekly rate of $177.43 from 9 May 1995 until further order from the full Commission. Both parties appealed the decision of the deputy commissioner.

On 29 July 1997, the case was reviewed by the full Commission, which filed an opinion and award on 25 August 1997. The Commission concluded that plaintiff had suffered a compensable injury and was entitled to receive temporary total disability at the weekly rate of $182.21 from 9 May 1995 until 28 August 1995, the date on which Dr. Andrew released plaintiff to work without restriction. Additionally, the Commission found plaintiff to be ten percent permanently partially disabled in her left hand and seven percent in her right. The Commission concluded that plaintiff failed to show that she was permanently and totally disabled.

Plaintiff appealed the full Commission's opinion and award to this Court. In her appeal, she contended the Commission erred by rejecting the deputy commissioner's determination of plaintiff's credibility, by arbitrarily according greater weight to the testimony of one expert over that of other experts, and by incorrectly shifting the burden of proof to plaintiff. This Court, relying on *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), vacated the opinion and award of the Commission and remanded "for entry of a new opinion and award wherein the Commission demonstrates it has applied the rule according deference to the deputy commissioner's determinations of credibility." *Brice v. Sheraton, Inc.*, 131 N.C. App. 335, 511 S.E.2d 47 (1998) (unpublished table decision).

Additionally, we held that the Commission's "solitary finding based upon the deposition testimony of Dr. Andrew [did not] justif[y] its conclusion of law that 'plaintiff has failed to show by the greater weight of the credible evidence . . . that she is totally and permanently disabled . . . .' " *Id.* (omissions in original).

On remand, the Commission again found plaintiff totally disabled from 9 May through 28 August 1995, but not thereafter. The Commission additionally found that greater weight should be given to the testimony of Dr. Andrew regarding plaintiff's ability to return to work. Plaintiff again appeals.

I.

[1] Plaintiff first contends the Commission erred in finding that she was not totally and permanently disabled after 28 August 1995. Because the Commission's finding is based upon the testimony of Dr. Andrew, plaintiff's contention is that the Commission failed to follow our directive, pursuant to *Sanders*, 124 N.C. App. 637, 478 S.E.2d 223, to give deference to the credibility findings of the deputy commissioner, who found plaintiff credible. Although plaintiff concedes that *Sanders* was overruled by our Supreme Court's decision in *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999), she argues that she and others similarly situated have "prejudicially relied upon the validity of *Sanders*" and thus *Adams* should not be applied retroactively to the case at bar.

Although this precise issue has not yet been presented to our courts, we consistently have applied *Adams* to cases decided by the Commission prior to the *Adams* ruling. *See, e.g., Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 514 S.E.2d 545 (1999) (applying *Adams* to 1998 opinion and award); *Foster v. Carolina Marble and Tile Co.*, 132 N.C. App. 505, 513 S.E.2d 75 (1999) (finding plaintiff's reliance on *Sanders* misplaced due to Supreme Court's decision in *Adams*), *disc. review denied*, 350 N.C. 830, — S.E.2d — (1999); *Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705 (same), *aff'd per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999). More important, implicit in the Supreme Court's orders to this Court to reconsider cases in light of *Adams* is the directive that *Adams* apply retroactively. *See Deese v. Champion Int'l Corp.*, 133 N.C. App. 278, 515 S.E.2d 239 (on remand from Supreme Court for reconsideration in light of *Adams*), *disc. review allowed*, 350 N.C. 828, — S.E.2d — (1999); *Timmons v. N.C. Dep't of Transp.*, 132 N.C. App. 377, 511

S.E.2d 659 (same), *rev'd on other grounds*, 351 N.C. 177, 522 S.E.2d 62 (1999); *see also Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 416 S.E.2d 193 (1992). Finally, retroactive application of *Adams* is consistent with the long-settled principle that "a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation." *Mason v. Cotton Co.*, 148 N.C. 492, 510, 62 S.E. 625, 632 (1908). Therefore, we hold that *Adams* is to be applied retroactively to cases remanded by this Court to the Industrial Commission.

Retroactive application of *Adams* resolves the issue presented by plaintiff. *Adams* stated the function of the Industrial Commission and of this Court in considering and reviewing workers' compensation claims:

> Under our Workers' Compensation Act, "the Commission is the fact finding body." "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony."
>
> Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders* states, "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one." . . .
>
> . . . .
>
> "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." Thus, on appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."

Adams, 349 N.C. at 680-81, 509 S.E.2d at 413-14 (internal citations omitted).

On remand, the Commission reviewed the evidence and concluded that Dr. Andrew's testimony was the most credible. Paragraph 12 of the Commission's fact findings states:

> The Full Commission reviewed and considered the testimony of Dr. Leonard Nelson, Dr. Andrew Jones, and Dr. Wallace Andrew. The Full Commission gives greater weight to the testimony of Dr. Andrew and finds that plaintiff was released and able to return to work with no restrictions on 28 August 1995. Plaintiff was unable to earn wages in the same employment or in any other employment from 9 May 1995 through 28 August 1995. To the extent that this finding contradicts plaintiff's testimony, that testimony is found to be not credible.

The record is replete with competent evidence to support the Commission's finding. This assignment of error is overruled.

II.

[2] Plaintiff next contends the Commission erred in placing on plaintiff the burden of proving ongoing disability.

> In worker's compensation cases, plaintiff has the initial burden of proving that he suffers from a disability as a result of a work-related injury. "Disability" is a technical term, meaning that because of a workplace injury the employee suffers from an "incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment."

Coppley v. PPG Industries, Inc., 133 N.C. App. 631, 634, 516 S.E.2d 184, 186 (1999) (internal citations omitted) (omission in original). A plaintiff may meet his or her burden of establishing disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). Once a plaintiff

establishes his or her disability, a presumption arises that the disability continues until the employee returns to work at wages equal to those he or she was receiving at the time of injury. *See Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 499 S.E.2d 470, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). At that point, "the burden [] shifts to the employer to produce evidence that suitable jobs are available for the employee and that the employee is capable of obtaining a job at pre-injury wages." *Coppley*, 133 N.C. App. at 635, 516 S.E.2d at 187 (citation omitted).

In the case at bar, the Commission reviewed the evidence presented and found that plaintiff was temporarily and totally disabled from 5 May to 28 August 1995. The Commission further held that plaintiff had failed to establish that she suffered *permanent* total disability after 28 August 1995, the date she was released to work without restriction by her orthopedist. Plaintiff argues that because the Commission found her to be temporarily totally disabled, the Commission erred by requiring that she bear the additional burden of establishing her permanent total disability. However, we previously have held that it is the plaintiff's burden to establish both temporary total disability and permanent disability. *See Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382 (1996). In the case at bar, plaintiff met her burden of proving temporary total disability. However, the Commission also properly placed the initial burden of proof on plaintiff to prove that she was permanently and totally disabled after the date she was released to work without restriction. When plaintiff failed to meet that burden, the inquiry ended; no burden passed to defendant to refute a claim of permanent and total disability. There was competent evidence to support the Commission's conclusion. This assignment of error is overruled.

Affirmed.

Judges GREENE and LEWIS concur.

STEVIE L. TURNER, ADMINISTRATOR OF THE ESTATE OF EDNA BRANCH TURNER, STEVIE L. TURNER, ADMINISTRATOR OF THE ESTATE OF STEVIE LARUE TURNER, JR., STEVIE L. TURNER, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SHERROD A. TURNER, STEVIE L. TURNER, ADMINISTRATOR OF THE ESTATE OF REDELL NELSON TURNER, PLAINTIFF v. NORFOLK SOUTHERN CORPORATION NORFOLK SOUTHERN RAILWAY CO., R.C. CHURCHILL, III, J. WILBERT FORBES, MARK BAUMAN, GLENN MAURER, TOMMY D. QUEEN, B.L. SYKES, L.E. WETSEL, JR., AND SERRMI SERVICES, INC., DEFENDANTS

No. COA99-399

(Filed 21 March 2000)

Appeal and Error— appealability—interlocutory order

Plaintiff's appeal from an interlocutory order in a negligence action arising out of a collision between an automobile driven by plaintiff's wife and an Amtrak train at a railroad crossing in Durham County is dismissed and remanded to the trial court for further proceedings because: (1) although the trial court granted defendants' motion to dismiss the contract claim, the pending tort claim remains; (2) defendant Serrmi Services, Inc., was not named in the trial court's grant of partial summary judgment and remains a party to the suit; (3) the trial court did not certify plaintiff's appeal pursuant to Rule 54(b), nor did plaintiff assign error to the trial court's failure to do so; and (4) a substantial right is not affected.

Appeal by plaintiff from orders entered 4 December 1998 and 18 December 1998 and filed 21 December 1998 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 10 January 2000.

Randall, Jervis & Hill, by John C. Randall, William L. Thorp, and E.C. Harris, for plaintiff-appellant.

Millberg & Gordon, P.L.L.C., by John C. Millberg and Frank J. Gordon; Michaux & Michaux, P.A., by Eric Michaux; and *Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr. and Matthew W. Sawchak, for defendants-appellees Norfolk Southern.*

WALKER, Judge.

Plaintiff filed this action on 3 May 1994 alleging defendants' negligence arising out of a collision between an automobile driven by the plaintiff's wife, Edna Turner, and an Amtrak train at the Hopson Road

railroad crossing in Durham County. Mrs. Turner and two of their children were killed, and a third child was seriously injured. Plaintiff is the administrator of the estates of his wife and two children and guardian ad litem of the injured child. The railroad in question is operated by defendant Norfolk Southern (Norfolk). Defendant Serrmi Services, Inc. was retained by the other defendants to perform the engineering and design work and carry out the construction plans for the automatic warning devices to be installed at the Hopson Road crossing.

Plaintiff claims defendants are negligent under two theories: (1) the defendants breached a common law duty to provide adequate warning devices at the Hopson Road crossing ("tort claim") and (2) the defendants negligently performed a contract between Norfolk and the North Carolina Department of Transportation (DOT) to design and erect automatic warning devices within a reasonable time at the Hopson Road crossing after receiving authorization from DOT to do so ("contract claim").

On 2 November 1998, all defendants, except Serrmi Services, Inc., moved for dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and for summary judgment and partial summary judgment pursuant to Rule 56. Defendants claimed, in part, that Title 23 U.S.C.A. § 409 (West 1999) ("Section 409") barred the introduction into evidence of the contract between DOT and Norfolk as well as certain documents which had been produced by defendants in discovery regarding defendants' performance of the contract, thus requiring dismissal of plaintiff's claims.

Title 23 U.S.C.A. § 409 states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C.A. § 409 (West 1999).

On 4 December 1998, the trial court granted defendants' motion for summary judgment as to plaintiff's contract claim based on a failure to comply with the contract between DOT and Norfolk and denied defendant's motion as to plaintiff's tort claim. The trial court's order stated in pertinent part:

> When federal funds participate in installation, federal preemption is triggered. If federally funded safety devices are planned but not installed prior to the accident in question, then the railroad's liability will be determined solely on the basis of a breach, if any, of that common law duty, as if no planning had ever occurred. 23 U.S.C. § 409 prohibits any evidence to be offered in trial of that common law cause of action regarding any recommendation, plan, agreement or scheduling of such safety devices under the federal program.

(Emphasis in original).

The trial court's order concluded that:

> [T]he motions for partial summary judgment filed by defendants are denied in part and granted in part; that summary judgment is granted against plaintiffs on their claims based on an alleged breach of duty created by contract; that plaintiff's common law tort claim survives summary judgment to the extent it is not based on and does not involve evidence of any recommendation, plan, agreement, or scheduling of the federally funded signal project for the Hopson Road crossing; that any such evidence is not competent or admissible on the issue of the alleged breach of a common law duty; and that such issue shall be tried as if there had never been any planned or recommended upgrades.

On 14 December 1998, plaintiff moved, pursuant to Rules 52(b) and 59 (4), (7), and (8) of the North Carolina Rules of Civil Procedure, to amend the order and for a new hearing, both of which were denied on 18 December 1998. The trial court's order denying plaintiff's motions stated:

> The Court, having considered the Plaintiff's motion to amend its prior judgment, hereby denies that motion in its entirety. The prior order of this Court remains in full force and effect. *However, nothing in that prior order shall deny to the trial judge the right to rule on matters of evidence which that judge*

considers competent, relevant and admissible on the remaining issues to be resolved by a jury in this case.

(Emphasis added).

We first consider whether plaintiff's appeal is properly before this Court. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980). There is generally no right to appeal an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). The rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 395 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997) (citations omitted); *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 518 S.E.2d 786 (1999); N.C. Gen. Stat. § 1-277 (1999); N.C. Gen. Stat. § 7A-27 (1999). Thus, we must determine whether the orders granting summary judgment to defendants and denying the amendment of the order were final or, in the alternative, whether a substantial right of the plaintiff will be affected absent immediate appellate review.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

When the trial court granted defendants' motion to dismiss the contract claim, the pending tort claim was not disposed of and the appeal is therefore interlocutory. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) ("A grant of partial sum-

mary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal"). Furthermore, defendant Serrmi Services, Inc. was not named in the trial court's grant of partial summary judgment and remains a party to the suit. *See Jarrell v. Coastal Emergency Services of the Carolinas*, 121 N.C. App. 198, 199, 464 S.E.2d 720, 722 (1995) ("Orders which do not dispose of the action as to all parties are interlocutory"). Additionally, a review of the record reveals the trial court did not certify plaintiff's appeal pursuant to Rule 54(b) nor did the plaintiff assign as error the trial court's failure to do so.

Next, we determine whether a substantial right would be affected. A substantial right is "one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983). The right to immediate appeal is "reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed." *Id.*, 299 S.E.2d at 780-81. Our courts have generally taken a restrictive view of the substantial right exception. *Id.* at 334, 299 S.E.2d at 780. The burden is on the appealing party to establish that a substantial right will be affected. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254.

The avoidance of one trial is not ordinarily a substantial right. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). However, the right to avoid the possibility of two trials on the same issues can be a substantial right. *Id.* "Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.*

Plaintiff contends that separate trials on the tort claim and on the contract claim would involve the same issues and require him to produce the same evidence for each trial. Further, the two theories involve negligence which are "logical manifestations of the overall umbrella of negligence and denial of any responsibility for grade crossing safety by Norfolk Southern's executives and management." Additionally, plaintiff contends that separate trials on these two theories could result in inconsistent verdicts on factual issues and other issues such that substantial rights will be affected should we dismiss his appeal.

Plaintiff's tort claim is predicated on the railroad's "duty to give reasonable and timely warning of the approach of a train to the crossing." *Caldwell v. R.R.*, 218 N.C. 63, 69, 10 S.E.2d 680, 683 (1940). To establish such a claim, the plaintiff must show that the crossing in question is "peculiarly and unusually hazardous to those who have a right to traverse it." *Id.*; *see also Robinson v. Seaboard System Railroad, Inc.*, 87 N.C. App. 512, 520, 361 S.E.2d 909, 915 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

In contrast, plaintiff's contract claim centers on the performances due on a contract between Norfolk and DOT. Plaintiff's claim focuses on the defendants' failure to act, and thus the defendants' breach of a contractual duty. The issues to be addressed in this claim would include plaintiff's status as a third party beneficiary to the contract, the duties imposed on defendants by the contract, and whether Norfolk was negligent in its performance of the contract between itself and the DOT. *See Matternes v. City of Winston-Salem*, 286 N.C. 1, 11-12, 209 S.E.2d 481, 486-87 (1974). Such issues are separate and distinct from those to be addressed in plaintiff's tort claim.

Plaintiff also argues that the trial court's 4 December 1998 order granting partial summary judgment effectively precludes plaintiff from proceeding with his tort claim. Specifically, the Section 409 documents produced by the defendants and excluded from evidence by the trial court's 4 December 1998 order were vital to establishing defendants' liability. We disagree.

The trial court's 18 December 1998 order denying plaintiff's motion to amend the 4 December 1998 order specifically states that "nothing in [the 4 December 1998] order shall deny to the trial judge the right to rule on matters of evidence which that judge considers competent, relevant, and admissible on the remaining issues to be resolved by a jury in this case." Thus, the applicability of Section 409 to plaintiff's tort claim and the admissibility of the documents in question remain to be decided by the trial court. Accordingly, no substantial right of the plaintiff has been affected.

In summary, plaintiff fails to establish, and we do not discern, a substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy. For these reasons, the appeal is dismissed and remanded to the trial court for further proceedings.

Dismissed.

Chief Judge EAGLES and Judge WYNN concur.

STATE OF NORTH CAROLINA v. LOUIS RIDGEWAY, JR., DEFENDANT

No. COA99-358

(Filed 21 March 2000)

1. Evidence— hearsay—no plain error

The trial court did not commit plain error in an assault with a deadly weapon with intent to kill case by failing to exclude an officer's alleged hearsay testimony ex mero motu because the testimony, that during his investigation the victim told him defendant was the person who shot her, added very little to the State's evidence in light of the victim's testimony that defendant had possession of the gun when he forced her out of the car and he never relinquished control of the weapon.

2. Assault— motion to dismiss—sufficiency of the evidence

Viewing the evidence in the light most favorable to the State reveals the trial court did not err in denying defendant's motion to dismiss the assault with a deadly weapon with intent to kill charge because the evidence was sufficient to show that defendant perpetrated the shooting in light of the victim's testimony that defendant had possession of the gun when he forced her out of the car and he never relinquished control of the weapon.

3. Robbery— motion to dismiss—sufficiency of the evidence

Viewing the evidence in the light most favorable to the State reveals the trial court did not err in denying defendant's motion to dismiss the robbery with a firearm charge, based on the theory that there was no evidence defendant and his friend agreed to rob the victim, because even though the evidence reveals defendant's friend ultimately demanded that the victim empty her pockets, defendant stood nearby holding a gun on the victim and repeatedly threatened to shoot her.

Appeal by defendant from judgment entered 26 February 1998 by Judge Robert F. Floyd, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 15 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Joan Herre Erwin, for the State.

Margaret Creasy Ciardella for defendant-appellant.

TIMMONS-GOODSON, Judge.

Louis Ridgeway, Jr. (defendant) appeals from a judgment imposed upon his convictions of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a firearm. The pertinent factual and procedural background follows.

The State's evidence presented at trial tended to show that in the early morning hours of 3 February 1996, Felicia White was shot twice and left lying in a deserted university parking lot after accepting a ride from defendant and his friend, Rondell Johnson. Defendant, who was driving a red two-door Nissan Sentra with an Alabama license plate number 15 AFM 56, had agreed to drive White home from Club International in Fayetteville, North Carolina, for a fee of ten dollars. After climbing into the backseat of the vehicle, White handed defendant two five-dollar bills. Defendant, upon receiving the payment, stated that he ought to take White's money and put her out of the car. Not certain whether to take defendant's threat seriously, White grabbed one of the bills she had just given him and told him to return her money and let her walk. Defendant refused and proceeded to drive.

Angered that White had retrieved part of the money, defendant told Johnson to give him his gun. Johnson complied, and as defendant drove, he held the gun to White's head, calling her various disparaging names and repeatedly threatening to kill her. When he reached a nearby college campus, defendant stopped the car and forced White out of the vehicle at gunpoint. While she was exiting the car, White grabbed the barrel of defendant's gun, but she was unable to wrestle it away from him. Still, she managed to aim the barrel at defendant and fire a shot into his abdomen. Defendant, nevertheless, maintained his grip on the weapon and continued struggling with White for its possession.

Unable to break White's hold on the gun, defendant called out to Johnson for help. Johnson, who had remained inside the vehicle, exited the car wielding a switchblade knife and threatened to slit White's throat if she did not let go of the gun. White acquiesced, and Johnson backhanded her, knocking her to the ground. When she got

up, Johnson ordered her to empty her pockets, so White handed over the five-dollar bill she had retrieved from defendant. He then knocked White down again and "stomped" on her head.

Meanwhile, defendant was leaning against the car door holding the gun. He taunted White by repeatedly cocking the pistol and threatening to take her life. Then, defendant fired three shots at White; one shot struck White in the left knee and another struck her in the left abdominal area. Thereafter, defendant and Johnson drove away, leaving White alone in the empty parking lot. White crawled to a house for help and was ultimately taken to Cape Fear Valley Hospital for emergency medical treatment.

At approximately 3:00 a.m. on the same morning, Officer Jessie Devane of the Fayetteville Police Department came upon a two-car accident involving a red two-door Nissan Sentra with Alabama license plates. Johnson, the driver of the Sentra, told Officer Devane that his passenger, defendant, had been shot while sitting in the vehicle. Officer Devane approached the vehicle and discovered defendant lying in the back seat with a gunshot wound to his abdomen. The officer noted that there were no bullet holes in the interior or exterior of the car and that the windows of the vehicle were still intact. Officer Devane further noted that although defendant was conscious and alert, he refused to answer the officer's questions regarding the shooting. Defendant was thereafter transported to Cape Fear Valley Hospital for emergency care.

White was brought into the emergency room shortly after defendant's arrival. Officer Michael Murphy, the officer investigating the accident involving defendant's vehicle, was also called upon to investigate the White shooting. When Officer Murphy questioned White about the matter, she stated that she was shot by a man driving a red Nissan Sentra. From this information, the officer deduced that White and defendant had been shot in the same incident. Later, White identified defendant and Johnson as the individuals who had shot her, held her at knife-point, and robbed her.

At the close of the State's evidence, defendant moved to dismiss the charges against him. The court denied the motion, and defendant presented evidence of good character. The jury deliberated and returned a verdict finding defendant guilty of the offenses charged. Defendant appeals.

[1] By his first assignment of error, defendant contends that the trial court improperly admitted hearsay testimony given by Officer Murphy. Defendant did not object to the testimony but argues, nonetheless, that he is entitled to a new trial, because the testimony was highly prejudicial to him and the court committed plain error in failing to exclude it *ex mero motu*. We cannot agree.

Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis, rather than the *ex mero motu* or grossly improper analysis, is the applicable standard of review. *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998). Our Supreme Court stated in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983):

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Therefore, if after thoroughly examining the record, we are not persuaded that the jury probably would have reached a different result had the alleged error not occurred, we will not award defendant a new trial. *See State v. Bronson*, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992) (stating that new trial will be granted only where defendant shows that jury probably would have acquitted him absent the error).

Defendant challenges the testimony offered by Officer Murphy wherein he stated that during his investigation, the victim, White, told him that defendant was the person who shot her. Defendant argues that this testimony was hearsay, not within any exception, and that the court's failure to exclude it was a fundamental error, because White herself testified that she did not see which of the perpetrators shot her. Assuming, for the purpose of this argument, that the challenged testimony was hearsay, we find no plain error in its admission,

because the testimony added very little to the State's evidence. White testified that defendant had possession of the gun when he forced her out of the car. She further stated that although she shot defendant in her effort to obtain possession of the gun, defendant never relinquished his hold on the weapon. Indeed, according to White, defendant was leaning against the car pointing the gun at her when Johnson began to assault her. The reasonable inference to be drawn from White's testimony is that defendant was the individual who shot her. Thus, we reject defendant's contention that the court committed plain error in failing to exclude Officer Murphy's testimony *ex mero motu*.

[2] With his next assignment of error, defendant argues that the trial court erred in denying his motions to dismiss the assault and robbery charges against him. Again, we find no error.

Upon a motion to dismiss, the question for the trial court is whether the State presented substantial evidence of each element of the crime charged and the defendant's role as the perpetrator of such crime. *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994). " 'Substantial evidence' is relevant evidence that reasonable jurors might accept as adequate to support a conclusion." *Id.* In determining whether substantial evidence exists, the trial court must examine the evidence in the light most favorable to the State and must give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Any discrepancies or contradictions arising from the evidence are for the jury to decide and do not, by themselves, warrant dismissal of the charge. *Id.*

The defendant is guilty of an assault with a deadly weapon with intent to kill inflicting serious injury if he (1) assaults the victim, (2) with a deadly weapon, (3) intending to kill her, and (4) inflicts serious bodily injury that does not result in her death. *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). Defendant does not contend that these elements have not been satisfied, but rather, argues that the evidence was insufficient as a matter of law to show that he perpetrated the shooting. However, given our discussion of the preceding issue, we hold that there was ample evidence to go to the jury on the issue of whether defendant shot the victim. Therefore, we summarily overrule this argument and proceed to defendant's contention that the evidence was insufficient to establish his guilt on the charge of armed robbery, because there was no evidence that he and Johnson agreed to rob the victim.

[3] The essential elements of robbery with a dangerous weapon are: "(1) the unlawful taking or attempted taking of personal property from another, (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means, and (3) danger or threat to the life of the victim." *State v. Donnell*, 117 N.C. App. 184, 188, 450 S.E.2d 533, 536 (1994). In this State, it is well settled that a defendant may be convicted of a crime under the theory that he acted in concert with another "if [he] is present at the scene of the crime and . . . [he acts] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Hart*, 105 N.C. App. 542, 547, 414 S.E.2d 364, 367, *dismissal allowed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992).

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, the evidence tended to show that when White got into the backseat of defendant's car, he threatened to take all of her money and make her walk. From that point, a series of events occurred which resulted in White handing over the contents of her pockets after being threatened at knifepoint and at gunpoint by Johnson and defendant, respectively. While the evidence suggests that it was Johnson who ultimately demanded that White empty her pockets, the evidence tends to show that defendant stood nearby holding a gun on the victim and repeatedly threatened to shoot her. Accordingly, we hold that the trial court was correct in denying defendant's motion to dismiss the armed robbery charge, as there was sufficient evidence of defendant's guilt to submit the charge to the jury.

For the foregoing reasons, we conclude that defendant received a fair trial, free of prejudicial error.

No error.

Judges GREENE and WALKER concur.

THE HONORABLE LACY THORNBURG, UNITED STATES DISTRICT COURT JUDGE, PLAINTIFF v. CONSOLIDATED JUDICIAL RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA99-511

(Filed 21 March 2000)

Costs— attorney fees—mathematical error

Although the trial court did not abuse its discretion by awarding plaintiff attorney fees under N.C.G.S. § 6-19.1, based on its determination that the attorney's contingency fee arrangement was a reasonable fee, the case must be remanded to the trial court for entry of an amended order because the trial court's findings reveal that there is a mathematical error.

Appeal by defendants from order awarding attorney fees entered 16 February 1999 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 26 January 2000.

Morgan, Reeves & Gilchrist, by Robert B. Morgan and Mary Morgan Reeves, for plaintiff appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for defendant appellants.

HORTON, Judge.

The Honorable Lacy Thornburg (Judge Thornburg) served as a Judge of the Superior Court from July 1967 through April 1983. During that service, Judge Thornburg was a member of, and contributed to, the Consolidated [formerly, Uniform] Judicial Retirement System (CJRS). His retirement benefits vested after five years of his service as a Superior Court Judge. Judge Thornburg began to receive monthly retirement benefits from CJRS after his retirement in 1983, but those benefits were suspended during his service as Attorney General of North Carolina from 1985 through 1992.

In January 1993, Judge Thornburg again began to receive retirement benefits from CJRS, and those benefits continued until March 1995, when he was appointed as a United States District Court Judge for the Western District of North Carolina. Upon his confirmation to the federal bench, his retirement benefits from CJRS were reduced to

an annuity funded only by his own contributions to the CJRS. Judge Thornburg's benefits were reduced pursuant to the provisions of N.C. Gen. Stat. § 135-72, which provided that members of the CJRS appointed to serve as judicial officers in the United States courts were not entitled to full benefits from the CJRS while serving in the United States courts. N.C. Gen. Stat. § 135-72 was enacted by the General Assembly in 1981, and became effective on 9 October 1981, *after* Judge Thornburg became vested in the CJRS. 1981 N.C. Sess. Laws ch. 978, § 7.

In response to an inquiry from counsel for Judge Thornburg, the Attorney General opined that Judge Thornburg was entitled to receive his benefits without reduction. CJRS officials considered themselves bound by the plain language of the statute, and expressed their inability to reinstate Judge Thornburg's benefits. This action was then filed on 9 January 1998 in Wake County Superior Court. On 7 July 1998, the parties entered a consent judgment requiring that the defendants pay Judge Thornburg retroactive benefits in the amount of $98,592.67 plus interest. The consent judgment made no provision for the payment of attorney fees.

On 26 August 1998, counsel for Judge Thornburg petitioned for attorney fees. After a hearing on the motion, the trial court entered an order on 16 February 1999 requiring defendants to pay to counsel for Judge Thornburg the sum of $42,239.92 as attorney fees, and to pay the costs. Defendants appealed, assigning error.

Defendants do not deny that counsel for plaintiff is entitled to a "reasonable" attorney fee pursuant to the provisions of N.C. Gen. Stat. § 6-19.1 (1999). Both assignments of error brought forward by defendants center around the question of whether the attorney fee awarded counsel for plaintiff was "reasonable" under the circumstances of this case. For the reasons set out below, we must remand this case to the trial court for further findings of fact and entry of a new fee award.

In order to support the conclusion of a trial court that a fee is reasonable as to amount, we have held that the trial court should make findings as to

> the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney.

Morris v. Bailey, 86 N.C. App. 378, 387, 358 S.E.2d 120, 126 (1987). *See also Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981) (court is to make findings about the skill of the lawyer, the hourly rate charged by the lawyer, the reasonableness of the hourly rate in comparison with that charged by other attorneys, and the time and effort expended by the lawyer).

Here, the trial court found that the skill, experience and ability of the attorney for Judge Thornburg was well above average; that the constitutional questions presented by this litigation were complex, difficult and time-consuming; and that $250.00 per hour would be a reasonable hourly rate for this type of litigation, considering the skill of the plaintiff's attorney. Although the defendants question the reasonableness of the amount of time claimed by plaintiff's attorney for research, defendants do not seem to question seriously the hourly rate found by the trial court to be reasonable. The trial court found that 97.5 hours was a reasonable amount of time to expend on a case of this complexity, and there is evidence in the record to support that finding. Based on the amount of time involved, the attorney for the plaintiff would be entitled to an award of $250.00 times 97.5 hours, or a total of $24,375.00.

The heart of the controversy seems to be that the trial court did not award an attorney fee based on the calculation of an hourly rate times the hours expended, but found that a contingency fee ranging between 25% and 33-1/3% would be a "reasonable and customary fee" in Wake County for this type of case, and awarded plaintiff's counsel a fee of 25% of the amounts recovered, including the present value of future payments. The trial court found that plaintiff recovered $98,592.67 in past-due benefits; that the present value of future benefits to the plaintiff was $51,167.00; that applying a 25% contingency fee, the plaintiff's counsel would be entitled to a fee of $42,239.92.

The State argues, and we agree, that Judge Thornburg and his counsel did not have a *traditional* contingency fee arrangement. Attorney Robert B. Morgan avers in his affidavit in support of his motion for attorney fees that

> 6. As has been my practice, I did not keep accurate records of time since I have always charged based *on the worth of the case.*
>
> . . . .

7. It is submitted that a percentage of the value of the judgment obtained is generally the preferred approach.

(Emphasis added.) Attorney Morgan then requested that he recover from the State a "reasonable attorney[] fee for services rendered."

As set out above, one of the factors to be considered by the trial court in setting a "reasonable" fee is "the customary fee for like work." *Morris*, 86 N.C. App. at 387, 358 S.E.2d at 126. In this case, the trial court properly considered affidavits from three prominent members of the trial bar of this state in an effort to determine the customary and usual fees in this type of complex litigation. Eugene Boyce, Esquire, of Wake County, opined that a fee of $30,000.00 would be reasonable under the circumstances of this case, considering the facts of the case, the risks taken by counsel, results obtained, time and effort expended, and other relevant factors. Phillip O. Redwine, Esquire, also of Wake County, opined that a contingency fee of at least 25% of the present-day value of the recovery would be a reasonable fee in Wake County for this type of litigation, and that he was familiar with fees for similar litigation being as much as 33⅓%. Professor Robinson O. Everett stated in his affidavit that a contingency fee of one-third of the recovery would be reasonable, or in the alternative, a fee based on an hourly rate of $250.00.

The trial court then made the following findings of fact:

24. That this Court is aware that in Wake County contingency fee arrangements are a customary fee arrangement[] in many civil cases, including civil matters such as the one before this court.

25. That the risk of receiving no fee unless a successful result is achieved and that such achievements are always unpredictable, are a part of the basis of a contingency fee.

26. That the complexity of this action, the complex constitutional issues involved, the formidable opposition this Defendant presented, the difficulty of filing winnable actions against governmental agencies, and the obligation of the said attorney to represent the Plaintiff until the conclusion of the case, further supports the Court's opinion that a contingency fee of 25 to 33⅓ percent of the recovery is not unreasonable.

. . . .

29. That a 25% contingency fee applied to the amount of "back benefits due" of $98,592.67 and a 25% contingency fee being

applied to the present day value of the future payments, totals $42,239.92.

The trial court then concluded that a contingency fee arrangement is not unreasonable under the facts of this case, and an award of a contingency fee would be reasonable. The trial court then ordered a fee of $42,239.92.

Our review is limited to a determination of whether the trial court has abused its discretion. *Tay v. Flaherty*, 100 N.C. App. 51, 57, 394 S.E.2d 217, 220, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). We cannot say, under the facts of this case, that the approach taken by the trial court was a clear abuse of its discretion. Contrary to the argument advanced by the State, the trial court was not making the State a party to the fee arrangement between plaintiff and his counsel, but was merely considering that a contingency fee is a customary fee in this type of litigation.

There is, however, a mathematical error which requires that we remand the case to the trial court for entry of an amended order. The trial court intended, according to its own findings, to award a fee of 25% of the past-due benefits and the present value of future benefits. The parties do not contest the trial court's findings that the past due benefits are $98,592.67 and the present value of the future benefits is $51,167.00, for a total recovery of $149,759.67. One-fourth of that amount is $37,439.92, rather than $42,239.92 as found and awarded by the trial court.

We vacate finding of fact number 29 and remand to the trial court for entry of an amended order correcting the amount of the fee awarded in accordance with the opinion. In all other respects, the order of the trial court is affirmed.

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

Judges MARTIN and TIMMONS-GOODSON concur.

LINDA WALDEN CULLER v. THOMAS RAY HARDY A/K/A KHALIL ABDUL-RAHMAN

No. COA99-285

(Filed 21 March 2000)

Costs— attorney fees—failure to consider factors

The trial court's award to plaintiff of attorney fees under N.C.G.S. § 6-21.1 in a personal injury case arising out of an automobile accident is vacated and remanded because the trial court abused its discretion since it failed to consider the timing and amount of settlement offers, the bargaining position of the parties, and the amount of the settlement offers as compared to the jury verdict.

Appeal by defendant from judgment entered 20 July 1998 by Judge Jerry Cash Martin in Superior Court, Guilford County. Heard in the Court of Appeals 7 December 1999.

Marquis D. Street for plaintiff-appellee.

Burton & Sue, L.L.P., by Gary K. Sue and James D. Secor, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 27 October 1995, Linda Walden Culler ("plaintiff") was stopped in her car at a red light when a vehicle driven by Thomas Ray Hardy ("defendant") struck the rear of plaintiff's car. Plaintiff submitted a settlement demand and brochure to defendant's liability carrier, the Allstate Insurance Company ("Allstate") demanding payment in the amount of $62,545.43 for medical costs, lost wages, past and present pain, suffering, and mileage for visits to a physical therapist. Allstate declined plaintiff's claim on the basis that there was insufficient impact to cause injury.

Prior to trial, plaintiff indicated in a Response to the Request for Amount of Monetary Relief that she sought $62,545.43 in damages. Defendant asserts and plaintiff denies that defendant offered plaintiff $1,000.00 in pretrial settlement discussions before the trial court, which plaintiff refused. Through the course of the trial, the lowest demand made by plaintiff was in the amount of $17,500.00.

Following a five day trial, the jury returned a verdict for plaintiff in the amount of $1,500.00. Counsel for plaintiff filed a Motion for

Attorney's Fees and submitted an Affidavit of Services chronicling 90.5 hours of time dedicated to the case. A hearing on the Motion was conducted and the trial court entered an order awarding counsel for plaintiff $9,050.00 in attorney's fees. The trial court signed a written judgment which included the following findings with regard to attorney fees:

> 4. The court finds that Marquis D. Street devotes in excess of ninety per cent of his practice in representing injured persons.
>
> 5. The court finds that Marquis D. Street expended 90.5 hours on behalf of the Plaintiff in the legal representation of this matter[.]
>
> 6. The court finds the 90.5 hours of legal representation to Plaintiff by Marquis D. Street are reasonable and the court finds that an attorney's fee of $100.00 per hour is reasonable considering the fees charged by other attorneys in this area with similar experience and background in representing clients in matters of this nature.

Defendant filed a Motion to Amend the order awarding fees, seeking to include as findings of fact:

> 4. During the hearing of the [Motion for Attorney's Fees], counsel for the defendant presented evidence on the issue of the appropriateness of the attorney's fee award. The matters presented by defense counsel on this issue included, but were not limited to, the following:
>
> (a) That counsel for the plaintiff's only pre-suit settlement demand was in the amount of $50,000.00;
>
> (b) That after suit was initiated, counsel for the plaintiff filed a Rule 8 Statement of Monetary Relief reflecting that the plaintiff was seeking damages in the amount of $50,000.00;
>
> (c) That at no time thereafter did counsel for the plaintiff's settlement demand ever fall below $17,500.00;
>
> (d) That defense counsel had offered $1,000.00 in settlement of this matter prior to trial;
>
> (e) That the jury award was in the amount of $1,500.00.

The trial court denied the Motion to Amend the order. Defendant appeals from the award of attorney's fees to counsel for plaintiff and from the denial of the Motion to Amend.

The dispositive issue on appeal is whether the trial court abused its discretion in awarding counsel fees for plaintiff's attorney.

Pursuant to North Carolina General Statutes section 6-21.1, attorney's fees may be allowed as part of court costs in certain cases. The statute reads as follows:

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

N.C. Gen. Stat. § 6-21.1 (1997). By the express language of section 6-21.1, attorney's fees are allowed in the discretion of the trial court. The ruling of the trial court will not be disturbed on appeal absent a showing of abuse of discretion. *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999) (citations omitted).

In *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973), our Supreme Court enunciated the underlying rationale for section 6-21.1, stating:

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly

> superior bargaining power in settlement negotiations . . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

However, the trial court does not have unbridled discretion in awarding attorney's fees. *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334 (1999).

> While the statute is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, we do not believe that it was intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated.

Id. at 352, 513 S.E.2d at 335 (quoting *Harrison v. Herbin*, 35 N.C. App. 259, 261, 241 S.E.2d 108, 109, *cert. denied*, 295 N.C. 90, 244 S.E.2d 258 (1978)).

In *Horton*, a case arising out of a motor vehicle collision, the plaintiffs made settlement demands prior to verdict ranging from $30,000.00 to $50,000.00. The defendant made two offers of settlement prior to trial, the first in the amount of $5,573.21 and the second in the amount of $8,004.00. Following trial, the jury returned a verdict for the plaintiffs in the amount of $3,782.31. The trial court awarded a sum of $4,000.00 in attorney's fees to counsel for plaintiffs.

On appeal, this Court reversed and remanded the award of attorney's fees for reconsideration. The *Horton* Court ordered the trial judge on remand to consider the entire record, including the following pertinent factors:

> (1) whether any settlement offers were made prior to the institution of the action; (2) whether the defendant unjustly exercised superior bargaining power in the settlement negotiation process; (3) the timing of the settlement offers; (4) the amount of the settlement offers as compared to the jury verdict.

Id. at 351, 513 S.E.2d at 334-35 (citations omitted).

Similarly, in *Harrison*, 35 N.C. App. 259, 241 S.E.2d 108, the defendant made a settlement offer of $200.00 prior to trial and the jury returned a verdict of $250.00 for plaintiff. The trial court declined to award attorney's fees and this Court affirmed the decision of the trial court. Most recently, in *Blackmon*, 135 N.C. App. 125, 519 S.E.2d

335, this Court affirmed the trial court's denial of attorney's fees where the defendant made a substantial offer of judgment prior to trial and the amounts offered in settlement were greater than the amount plaintiff recovered at trial.

In the present case, defendant contends that plaintiff refused a reasonable pretrial settlement offer. Plaintiff denies that such a settlement offer was made. In any event, the trial court failed to make any findings of fact regarding the existence or amount of any settlement offer. Even while hearing the Motion to Amend, the trial court failed to appreciate the significance of settlement offers. In addressing said motion, the trial court stated:

> FURTHER, the Court did specifically consider the statements made by the defendant during the argument made by the defendant during the hearing on July 1, 1998 and re-stated in the defendant's Motion to Amend Order as paragraph 4, sub-parts . . . (d) and (e), but did not find the factors of such consequence as to be made a part of the final order.

According to *Horton*, the timing and amount of settlement offers and the amount of the jury verdict are significant factors for the trial court to consider in determining whether to award attorney's fees.

The trial court abused its discretion in awarding attorney's fees to counsel for plaintiff without considering the guidelines established by *Horton*. As such, we hold that the award of attorney's fees in the present case must be vacated and the case remanded for the trial court to consider the entire record in the proper exercise of its discretion. The trial court is required to make additional findings of fact regarding the timing and amount of any settlement offers, the bargaining position of the parties, and the amount of the settlement offers as compared to the jury verdict.

For the foregoing reasons, we hold that the trial court erred in awarding attorney's fees to counsel for plaintiff. Therefore, we vacate and remand. Having determined that the trial court erred, we need not address defendant's remaining assignments of error.

Vacated and Remanded.

Judges GREENE and WALKER concur.

MICHELLE R. BROWN, PLAINTIFF v. SCOTTIE K. SMITH, DEFENDANT

No. COA99-304

(Filed 21 March 2000)

1. Paternity— sexual encounters—clear, cogent, and convincing evidence

The trial court did not err in a child support case by concluding that defendant is the biological father of plaintiff's child, based on the findings that the parties' sexual encounters during the pertinent period were sufficient to result in such conception, because the trial court found plaintiff established by clear, cogent, and convincing evidence, as required by N.C.G.S. § 49-14, that defendant is the father since: (1) an expert at trial testified the sexual relations of the parties were consistent with conception of a child and with a pregnancy which came to term on the pertinent date; (2) plaintiff testified at trial that she did not have sexual contact with any other man in 1990 or 1991; and (3) exhibits at trial indicated the child bears a strong resemblance to defendant.

2. Paternity— genetic marker testing—admission

Even though defendant made a written objection to the presumption of paternity relevant to genetic marker testing as required by N.C.G.S. § 8-50.1(b1)(4) based on the theory that the lab conducting the test determined the prior probability to be .5 instead of 0 and the record does not reveal a ruling on this objection, the trial court did not err in a child support case by admitting into evidence the test which determined a 99.91 percent probability that defendant is the father because an expert testified that paternity by defendant was a factual possibility and it would have been error to assign 0 as the prior probability of paternity.

Appeal by defendant from orders entered 18 March 1997 and 14 December 1998 by Judge Thomas G. Foster and Judge Joseph E. Turner, respectively, in Guilford County District Court. Heard in the Court of Appeals 8 December 1999.

Gabriel, Berry & Weston, by M. Douglas Berry, for the plaintiff-appellee.

Carol A. Simpson for the defendant-appellant.

LEWIS, Judge.

On 19 October 1995, plaintiff filed a complaint seeking custody of and support for her minor child, Luke Thomas Brown, born 14 October 1991. Plaintiff later amended the complaint to include a demand that defendant be adjudicated the biological father of the child and that he be required to pay expenses incident to the pregnancy and birth. On 8 April 1996, defendant filed an answer denying the allegations of the amended complaint.

On 15 November 1996, upon stipulation of the parties, the trial court entered partial summary judgment for defendant as to pregnancy, birth and any other expenses incurred for the support of the child prior to 23 October 1992 on the ground that those claims were barred by the statute of limitations. Following a bench trial, the court entered an order on 18 March 1997 declaring defendant to be the father of the minor child. On 14 December 1998, the court entered an order requiring defendant to pay child support. Defendant appeals from both the 1997 and 1998 orders.

[1] Defendant first argues the evidence does not support the trial court's conclusion that defendant is the biological father of Luke Thomas Brown. The duty of a putative father to support his illegitimate child is predicated on the judicial establishment of his paternity with respect to such child pursuant to N.C. Gen. Stat. § 49-14. G.S. 49-14(b) provides that at trial, the plaintiff must establish by clear, cogent and convincing evidence that defendant is the father of the minor child.

Where the legislature has set forth the weight of evidence required in the trial court to establish paternity, as it has done in G.S. 49-14(b), our only function on appeal is to determine whether there is competent evidence in the record to support the facts found by the court and whether the facts found support the conclusions of law reached by the court. *Nash County Dept. of Social Services v. Beamon*, 126 N.C. App. 536, 539, 485 S.E.2d 851, 852, *disc. review denied*, 347 N.C. 268, 493 S.E.2d 655 (1997). " 'It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing.' " *Id.* (quoting *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 781 (1978)).

As in this case, where the trial court sits as both finder of fact and arbiter of law, it is within the court's discretion to consider some, none or all of the evidence, and to determine the appropriate weight

to place on the testimony. *Id.* Thus, if there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary. *Newland v. Newland*, 129 N.C. App. 418, 420, 498 S.E.2d 855, 857 (1998).

The defendant contests the trial court's findings that the most likely time of conception would have been during the latter part of January to approximately 4 February 1991, and that the parties' sexual encounters during this time were sufficient to result in such conception. Indeed, an expert at trial testified that the sexual relations of the parties were consistent with conception of a child and with a pregnancy which came to term on or about 14 October 1991. The plaintiff testified at trial that she had sexual contact with no man other than defendant either in 1990 or 1991. Further, exhibits at trial indicate that Luke Thomas Brown bears a strong resemblance to defendant. This evidence is competent to support the facts found by the trial court which defendant has challenged. It is apparent the court found the plaintiff's testimony to be clear, cogent and convincing evidence sufficient to conclude that defendant is the father of Luke Thomas Brown.

[2] In his second argument defendant contests the trial court's admission of the genetic marker test which determined a 99.91 percent probability that defendant is the father of Luke Thomas Brown. Although the trial court stated in its 1997 order that paternity by the defendant was established even without this DNA analysis, because the evidence was admitted by the trial court we address defendant's argument. Specifically, defendant argues the trial court should not have applied the presumption of paternity relevant to genetic marker testing set forth in N.C. Gen. Stat. § 8-50.1(b1)(4). G.S. 8-50.1(b1)(4) provides:

> (b1) . . . Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis for the objections and shall serve copies thereof upon all other parties *not less than 10 days prior to any hearing at which the results may be introduced into evidence* . . . If no objections are filed within the time and manner prescribed, the test results are *admissible* as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. The results of the blood or genetic marker tests shall have the following effect:
>
> . . . .

(4) If the experts conclude that the genetic tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher, the alleged parent is presumed to be the parent and this evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence.

(emphasis added). Defendant made written objection to the admissibility of this test within the time prescribed by G.S. 8-50.1(b1), but contends the trial court never ruled on this objection. In its order, the trial court concluded the parties stipulated to the admissibility of the genetic marker test and therefore admitted it into evidence. We have found neither a ruling as to defendant's written objection nor any stipulation to admit this evidence in the record, yet we conclude the test was properly admitted.

Defendant argues that the genetic marker test in this case was inadmissible because the lab conducting the test determined the prior probability to be .5 when it should have been 0. Plaintiff submitted an affidavit by an expert in paternity testing, which explains that the "prior probability," in a paternity testing context, is a numerical representation of the nature and value of the non-genetic evidence. In further explaining prior probability, the affidavit states:

> Its value is used in the conversion of the combined paternity index into the probability of paternity. It is typically expressed as a number between 0 and 1, with 0 indicating that paternity is factually impossible, and 1 indicating that paternity is factually certain. A neutral assessment of the non-genetic evidence would result in a prior probability of 0.5. This would give equal weight to paternity and non-paternity from a non-genetic aspect. Most, if not all, laboratories in the United States use a prior probability of 0.5 in calculating the genetic probability of paternity.

Case law supports this testimony. See *Cole v. Cole*, 74 N.C. App. 247, 254, 328 S.E.2d 446, 450, *aff'd* 314 N.C. 660, 335 S.E.2d 897 (1985) ("In paternity cases, where the defendant has not been previously excluded as the father, and where 50% is used as the prior probability, the Bayes Theorem ensures that every alleged father is 'probably' the father, *i.e.*, the blood test results only improve upon the 50% prior probability of paternity"); *Griffith v. State*, 976 S.W.2d 241, 245 (Ct. App. Texas 1998) (In genetic testing, "courts in the United States typically use a .5 or 50% prior probability because it is a neutral probability . . . [;] this calculation [is] a generally accepted principle, and

[is] standard methodology in parentage testing, having been used for twenty or thirty years.").

Because there is expert testimony in this case indicating that paternity by defendant was a factual *possibility*, it would have been error to assign 0 as the prior probability of paternity. We reject defendant's argument that the genetic marker test in this case was inadmissible, and conclude that the court properly applied the presumption of parentage pursuant to G.S. 8-50.1(b1)(4).

Affirmed.

Judges WYNN and MARTIN concur.

REBECCAH JOYCE BROWN AND GLEN HAMPTON HOUSE, INC., PLAINTIFFS v. THE CITY OF GREENSBORO, DEFENDANT

No. COA99-472

(Filed 21 March 2000)

Civil Rights— uneven enforcement—parking regulations

The trial court did not err by granting summary judgment for defendant-City in an action alleging discrimination in the uneven enforcement of required parking space regulations for businesses. Even if plaintiff's assertion that several businesses in the same neighborhood do not obey current regulations is true, plaintiff neither alleged nor presented evidence that the City engaged in conscious and intentional discrimination, done with "an evil eye and an unequal hand." Evidence that parking enforcement is not uniform does not alone support the conclusion of illegal discrimination; moreover, plaintiff did not address whether any of the non-uniform businesses adhered to previous regulations or whether any variances were granted for illegitimate reasons.

Appeal by plaintiffs from order entered 18 November 1998 by Judge Henry E. Frye, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 17 February 2000.

Douglas, Ravenel, Hardy & Crihfield, L.L.P., by Robert D. Douglas, III, for plaintiff-appellants.

Office of the Greensboro City Attorney, by Becky Jo Peterson-Buie, Deputy City Attorney and A. Terry Wood, Chief Deputy City Attorney, for defendant.

WYNN, Judge.

To survive a motion for summary judgment, a plaintiff must be able to provide evidence tending to establish all essential elements of her claim. In the case at bar, the plaintiff, Rebeccah Joyce Brown, argues that the City of Greensboro illegally discriminated against her by unevenly enforcing its parking requirements. However, because Ms. Brown failed to offer evidence of an essential element of her claim—that the City of Greensboro acted in a consciously evil manner—the trial court properly entered summary judgment against her.

The facts pertinent to this appeal show that Ms. Brown owns a tract of land at 104 State Street, Greensboro, North Carolina. She is the president of Glen Hampton House, Inc., a hair salon located on the property. (Throughout this opinion, we will refer to the plaintiffs collectively as Ms. Brown.)

Ms. Brown's property contains ten paved, striped off-street parking spaces. When Ms. Brown first purchased the property, it was still being used by Accessory Design Services, a retail store. She began altering the property to make it suitable for use as a hair salon with stations for ten stylists. Glen Hampton House opened in October 1995.

While making the necessary changes to the premises, Greensboro's building inspector, Richard Brown, informed Ms. Brown that she should call the City'a Planning Department to determine various requirements for the change in use of the property. The Planning Department told her that her business would need three off-street parking spaces for each salon operator. Since the property had ten spaces, the regulations limited Glen Hampton House to three operators.

On 27 November 1995, Ms. Brown appeared before the Greensboro Board of Adjustment and requested a variance from the minimum off-street parking requirements for her salon. She asked that she be allowed to operate a salon with seven operators (which would have required 21 parking spaces) although she could only pro-

vide ten spaces. The Board applied the criteria provided by N.C. Gen. Stat. § 160A-388(d) (1994) and Greensboro Code of Ordinances § 30-9-6.10 (1993); found that Ms. Brown could still use her property without undue hardship; and voted five to one to deny the variance. Ms. Brown did not appeal that decision.

After being denied a variance, Ms. Brown signed a parking encumbrance agreement with an owner of a tract of land across the street from Glen Hampton House for more parking spaces. The agreement increased her parking spaced to 18, allowing for six operators.

Nonetheless, Ms. Brown conducted an informal survey of the surrounding businesses in the State Street area—stores, restaurants, and other salons—and found that most businesses did not comply with the *current* parking requirements. She made no determination of whether the properties conformed to *past* parking requirements or whether any variances had been granted for illegal or improper reasons.

On 13 December 1996, Ms. Brown brought an action in the Superior Court of Guilford County alleging that the City of Greensboro discriminated against her in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution by enforcing its parking requirements against her but not against other businesses in the area. The City of Greensboro denied the allegation and moved for summary judgment. Superior Court Judge Henry E. Frye, Jr. granted summary judgment for the City of Greensboro and Ms. Brown appealed to this Court.

Ms. Brown argues that the trial court erred in granting summary judgment in favor of the City of Greensboro because there are issues of fact which preclude the court from granting summary judgment. We disagree because even if her factual allegations are true, Ms. Brown cannot establish an essential element of her claim.

Summary judgment is proper when, upon consideration of the pleadings, interrogatories, admissions and affidavits, there is no genuine issue as to any material fact, and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Summary judgment should be granted in favor of the defendants if the record shows the absence of evidence tending to establish an essential element of the plaintiff's claim. *See Anderson v. Canipe*, 69 N.C. App. 534, 537-38, 317 S.E.2d 44, 47 (1984).

Greensboro Code of Ordinances, Table 30-5-3.1 (1993), requires a beauty salon to have three paved, striped off-street parking spaces for each operator station, plus one additional space for each non-operator employee. Retail establishments need one paved, striped off-street parking space for every 200 square feet of gross area. Restaurants need one paved, striped off-street parking space for every four chairs, plus two additional spaces for every three employees in the largest shift.

The parking requirements set forth in Table 30-5-3.1 are qualified by Greensboro Code of Ordinances § 30-4-11.2 (1993), which reads in pertinent part,

> . . . any nonconforming use legally existing at the time of adoption or amendment of this Ordinance, or any nonconforming use created by the extension of the jurisdiction, may be continued subject to conditions provided in Section 30-4-11.2(B).

This ordinance allows businesses that were in operation before the enactment of the current parking requirements to continue to use the same number of parking spaces they already used. In other words, the ordinance is a grandfather clause.

In *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987), our Supreme Court set forth guidelines to determine when a municipality is illegally discriminating against a resident. The Court held that "mere laxity" in enforcing a regulation does not satisfy the elements of the claim of discriminatory enforcement in violation of the equal protection clause. *Id.* at 445, 358 S.E. 2d at 376. Instead, the party alleging selective enforcement must demonstrate a pattern of conscious and intentional discrimination, done with "an evil eye and an unequal hand." *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L. Ed. 220, 227 (1886)). Further, the Court held that there is no illegal discrimination when a city prohibits one owner from using his property in a certain way while permitting his neighbor in the same zone who has been using his property in this way in the past to continue so using. *Id.* at 447, 358 S.E.2d at 377.

In the case at bar, Ms. Brown contends that several businesses in the neighborhood of Glen Hampton House do not obey the current parking requirements. However, even if this factual assertion is true, Ms. Brown neither alleged nor presented evidence showing that the City of Greensboro engaged in conscious and intentional discrimination, done with "an evil eye and an unequal hand." *See Yick Wo*, *supra*. While she presented evidence that the enforcement of the parking

requirements was not uniform, that evidence alone did not support her conclusion of illegal discrimination. Moreover, she did not address whether any of the non-uniform businesses adhered to previous parking requirements, nor did she demonstrate that any variances were granted for illegitimate reasons. Since she failed to meet her burden of proof that the City of Greensboro illegally discriminated against her, Judge Frye properly awarded summary judgment in favor of the City of Greensboro.

Affirmed.

Judges MARTIN and HUNTER concur.

ANNIE MITCHELL REID, AND JAMES DONALD REID, PLAINTIFFS/APPELLEES v. TOWN OF MADISON, AND RICHARD KEITH TUCKER, DEFENDANTS/APPELLANTS

No. COA99-489

(Filed 21 March 2000)

1. **Appeal and Error— appealability—interlocutory order—governmental immunity—substantial right**

Although the trial court's denial of defendants' motion for summary judgment is an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right warranting immediate appellate review.

2. **Immunity— governmental—town—garbage collection—no allegation of waiver**

In an action seeking damages for personal injuries arising out of an accident involving plaintiffs' vehicle and one of defendant Town of Madison's garbage trucks, the trial court erred in failing to dismiss plaintiffs' claim against the town on the basis of governmental immunity because garbage collection is a governmental function and plaintiffs failed to allege the town's waiver of immunity through the purchase of insurance.

3. **Immunity— governmental—public employee—official capacity**

In an action seeking damages for personal injuries arising out of an accident involving plaintiffs' vehicle and one of defendant

Town of Madison's garbage trucks, the trial court erred in failing to grant defendants' motion for judgment on the pleadings as to defendant public employee driver of the garbage truck because in the absence of a clear statement indicating the capacity in which this defendant is being sued, a plaintiff is deemed to have sued the public employee in his official capacity, and therefore, this defendant is entitled to the same immunity as the Town of Madison.

Appeal by defendants from order entered 24 March 1999 by Judge James M. Webb in Rockingham County Superior Court. Heard in the Court of Appeals 21 February 2000.

No brief filed by plaintiff-appellees.

McCall Doughton & Blancato, PLLC, by William A. Blancato, for defendant-appellants.

EAGLES, Chief Judge.

This case presents the question of whether the Town of Madison and its employee are entitled to immunity from plaintiffs' suit for negligence.

Plaintiffs filed this action on or about 14 September 1998 seeking damages for personal injuries allegedly suffered by Annie Mitchell Reid in a motor vehicle accident and for the subsequent loss of consortium suffered by her husband, James Donald Reid. Plaintiffs alleged that Ms. Reid was driving her automobile on 7 September 1995 in Madison, North Carolina, when she saw one of the defendant Town of Madison's ("the Town") garbage trucks. Defendant Richard Keith Tucker, an employee of the Town, was driving the garbage truck. Ms. Reid alleged that the garbage truck started backing up toward her car. She contended that she steered her vehicle to the edge of the roadway and came to a stop, but the truck did not stop and crashed into her before she could take any further evasive action.

On 4 February 1999, defendants moved for judgment on the pleadings on the grounds that plaintiffs' claims were barred by governmental immunity. On 24 March 1999, the trial court denied defendants' motion. Defendants appeal.

[1] At the outset, we note that the order denying defendants' motion for judgment on the pleadings is an interlocutory order. However,

"while, as a general rule, such orders are not immediately appealable, this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted). Accordingly, defendants' appeal is properly before this Court.

Defendants' sole argument is that the trial court erred in denying their motion for judgment on the pleadings because they were protected by governmental immunity and plaintiffs did not allege a waiver of immunity through the purchase of insurance. *Mullins v. Friend,* 116 N.C. App. 676, 449 S.E.2d 227 (1994).

[2] We first consider the defendants' argument as to the Town of Madison. The allegations in plaintiffs' complaint are deemed admitted for the purpose of deciding the motion for judgment on the pleadings. *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 556-57, 359 S.E.2d 792, 797 (1987). Under the doctrine of governmental immunity, a municipality is immune from suit for torts committed by officers or employees while performing a governmental function. *Mullins*, 116 N.C. App. at 680, 449 S.E.2d at 230. We note that garbage collection is a governmental function. *Schmidt v. Breeden*, 134 N.C. App. 248, 253, 517 S.E.2d 171, 175 (1999) (citing *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990)). However, a city can waive its immunity by purchasing liability insurance. *Mullins*, 116 N.C. App. at 680, 449 S.E.2d at 230. The city waives immunity only to the extent the insurance contract indemnifies it from liability for the alleged acts. *Id.* at 681, 449 S.E.2d at 230. "If a plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Id.* Here, plaintiffs have failed to allege the waiver of liability through the purchase of insurance. Accordingly, the trial court should have dismissed plaintiffs' claim against the Town of Madison on the basis of governmental immunity.

[3] Next, we consider plaintiffs' claim against defendant Richard Keith Tucker. All parties agree that defendant Tucker is a public employee rather than a public official. In order to determine whether Tucker is immune from suit, we must determine whether the complaint seeks recovery from Tucker in his official or individual capacity or both. *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999).

"A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit

against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997). The term "official capacity" is not synonymous with the term "official duties." *Id.* at 111, 489 S.E.2d at 888. Indeed, the performance of an employee's "duties" is irrelevant to the determination of whether a defendant is being sued in an official or individual capacity. *Isenhour*, 350 N.C. at 609, 517 S.E.2d at 126. In fact, it is questionable that an employee even has official duties, because official duties are reserved for public officers. The term "official capacity" is in actuality "a legal term of art with a narrow meaning—the suit is in effect one against the entity." *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888 (citing Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67 at 7 (Inst. Of Gov't Univ. Of N.C. at Chapel Hill) Apr. 1995). Accordingly, in a suit against a public employee in his official capacity, the law entitles the employee to the same protection as that of the entity. *Warren v. Guilford County*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 241, 516 S.E.2d 610 (1998). In contrast, a public employee sued in his individual capacity is liable for mere negligence. *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888.

> 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 110, 489 S.E.2d at 887. Our Supreme Court has expounded on this point by holding that "a pleading should clearly state the capacity in which the defendant is being sued." *Warren*, 129 N.C. App. at 839, 500 S.E.2d at 472 (citing *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998)). The plaintiffs should include this statement of "capacity" in the caption, the allegations, and the prayer for relief. *Mullis*, 347 N.C. at 554, 495 S.E.2d at 724-25. According to our Supreme Court, this statement will allow defendants to have an

opportunity to prepare for a proper defense and eliminate the unnecessary litigation that arises when parties fail to specify the capacity. *Id.* Our courts since *Mullis*, have held that in the absence of a clear statement of defendant's capacity a plaintiff is deemed to have sued a defendant in his official capacity. *Mullis*, 347 N.C. 548, 495 S.E.2d 721; *Warren*, 129 N.C. App. 836, 500 S.E.2d 470; *Johnson v. York*, 134 N.C. App. 332, 517 S.E.2d 670 (1999).

Here, neither the caption, allegations, nor the prayer for relief contain any suggestion as to whether the plaintiffs are suing the defendant in an official or individual capacity. *See Mullis*, 347 N.C. at 554, 495 S.E.2d at 725; *Warren*, 129 N.C. App. at 839, 500 S.E.2d at 472. Our precedent binds us to treat the complaint as a suit against the individual defendant in his official capacity. *Id.* As we noted previously, a suit in an official capacity is another way of "pleading an action against the governmental entity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725. Since the Town of Madison was immune from this suit, Tucker is as well. Accordingly, the trial court should have granted defendants' motion for judgment on the pleadings as to Defendant Tucker. We note that if the plaintiffs had sued the employee individually, the result might have been different.

For the foregoing reasons we reverse the decision of the Superior Court and remand for action consistent with this opinion.

Reversed and remanded.

Judges WALKER and SMITH concur.

DEBORAH HUSSEY, PLAINTIFF v. JERRY W. SEAWELL, DEFENDANT

No. COA99-487

(Filed 21 March 2000)

Premises Liability— lawful visitor—foreseeable danger—warnings required

In a negligence case in which plaintiff, a lawful visitor, was injured while moving two of defendant's horses from one pasture to another when a gate located on defendant's property swung closed hitting the second horse before it cleared the passageway, causing the horse to rear up and trapping plaintiff between the

two horses where she was kicked in the face by one of the two horses, the trial court did not err by denying defendant's motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, because a reasonable juror could conclude the gate was not safe in light of the use plaintiff was required to make of it, and therefore, defendant had a duty to warn plaintiff of foreseeable danger, where the evidence shows that defendant knew that the gate would close on its own, one of the horses had a "spirited" nature, and horses would "tend to spook" if hit from behind.

Appeal by defendant from verdict and judgment filed 18 September 1998 and from order filed 8 October 1998 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 25 January 2000.

Van Camp, Hayes & Meacham, P.A., by James R. Van Camp and Michael J. Newman, for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for defendant-appellant.

GREENE, Judge.

Jerry Wade Seawell (Defendant) appeals from the denial of his motion for a directed verdict at the close of all of the evidence, a judgment filed 17 September 1998 in favor of Deborah Faye Hussey (Plaintiff), and an order filed 8 October 1998 denying Defendant's motion for judgment notwithstanding the verdict and alternatively Defendant's motion for a new trial.

On 12 December 1996, at Defendant's request, Plaintiff was moving two of Defendant's horses from one pasture to another. One of these horses was a "spirited horse" and had on previous occasions attempted to kick people. To make the transfer, Plaintiff and the horses had to pass through an iron tubing gate located on Defendant's property, and the gate was installed on posts with hinges. When the gate was first installed, the gate would remain open after it was swung open. Sometime after its installation, Defendant modified the hinges so the gate would not remain open after opening and instead would swing closed a short time after being opened.

Defendant did not inform Plaintiff about the condition of the gate and did not inform her about the prior kicking incidents with one of

the horses.[1] Plaintiff approached the horses in the pasture, placed halters on them, and began leading them to the other pasture. As she approached the gate, she opened it, swung it back, and began leading the horses through the gate. Before the second horse cleared the passageway, the gate swung closed hitting this horse in the hindquarters. The horse "reared straight up in the air," taking Plaintiff into the air and trapping her between the two horses. She was kicked in the face by one of the horses, receiving injuries requiring several surgeries and leaving her with some partial paralysis.

Defendant's motion for a directed verdict was denied. The case was submitted to the jury on negligence and contributory negligence. The jury was instructed Plaintiff was an invitee on Defendant's land and Defendant had a duty to "keep the premises in a reasonably safe condition," and to warn Plaintiff "of any hidden or concealed dangerous condition about which [Defendant] knows or, in the exercise of ordinary care, should have known." The instruction further provided that Defendant was not "required to warn of obvious dangers or conditions."

The jury found Defendant was negligent and Plaintiff was not contributorily negligent, and it entered a damage award of $60,000. Defendant's motion for a judgment notwithstanding the verdict and alternatively, for a new trial was denied.

The dispositive issue is whether there exists substantial evidence Defendant, a landowner, breached his standard of care to Plaintiff, a lawful visitor on his property.

Defendant first submits this case must be judged by the law as it existed prior to *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), because this case was tried prior to the decision in *Nelson* and consistent with the law as it existed prior to *Nelson*. We disagree. The teachings of *Nelson* are to be applied retrospectively, as well as prospectively, *Nelson*, 349 N.C. at 633, 507 S.E.2d at 893, and we must, therefore, review the issues raised in this appeal in that context.

Defendant argues he had no duty to warn Plaintiff of the "free-swinging" nature of the farm gate, because it did not present a "hazardous or dangerous condition." In any event, he contends, the con-

1. Defendant testified he knew if a horse gets hit by something, particularly a gate from behind, it will tend to spook or act up.

dition of the gate was obvious to Plaintiff and, therefore, no warning was required.

Under *Nelson*, a landowner has a duty to any lawful visitor on his property "to take reasonable precautions to ascertain the condition of [his] property *and* to either make it reasonably safe or give warnings as may be reasonably necessary to inform . . . of any foreseeable danger." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, — S.E.2d — (1999). Whether the actions of the landowner are reasonable are to be judged against the conduct of a reasonably prudent person under the circumstances. *Id.* at 161, 516 S.E.2d at 646. "[T]here is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered." *Id.* at 162, 516 S.E.2d at 646.

In this case, the evidence shows Defendant was aware the gate through which Plaintiff would have to pass with the horses would not remain open, one of the fenced horses had a "spirited" nature, and horses "tend to spook" if hit from behind. Under the circumstances, was the gate reasonably safe? A reasonable juror could accept the evidence as sufficient to support the conclusion it was not safe in light of the use Plaintiff was required to make of the gate. *See Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (directed verdict not proper if there exists substantial evidence in support of claim). If not safe, Defendant had a duty to warn Plaintiff of foreseeable danger, and a reasonable juror could accept the evidence in this case as sufficient to support the conclusion that the incident causing Plaintiff's injuries was foreseeable.[2] It follows the trial court correctly denied both the motion for directed verdict and the motion for judgment notwithstanding the verdict.[3] *Jacobsen v. McMillan*, 124

2. This duty to warn would not exist if the danger to Plaintiff was "so obvious and apparent that [it] reasonably may be expected to be discovered" by Plaintiff. *Lorinovich*, 134 N.C. App. at 162, 516 S.E.2d at 646. Defendant appears to suggest the evidence supports a determination as a matter of law that the danger to Plaintiff was "obvious and apparent." That is not the case. Indeed, it is questionable whether there is any evidence to support an instruction on this issue. Plaintiff, however, did not object to the instruction, and, therefore, it was properly submitted to the jury.

3. In affirming the denial of these motions, we also reject Defendant's alternative argument that the evidence shows Plaintiff was contributorily negligent as a matter of law. Plaintiff's contributory negligence was a matter properly submitted to the jury. *Norwood v. Sherwin Williams Co.*, 303 N.C. 462, 468-69, 279 S.E.2d 559, 563 (1981) (directed verdict on contributory negligence proper only where plaintiff's negligence is established "so clearly that no other reasonable inference or conclusion may be drawn").

N.C. App. 128, 131, 476 S.E.2d 368, 369-70 (1996) (same standard to be applied to both motions).

We also reject Defendant's argument that the trial court erred in denying his motion for a new trial. The record does not reveal any abuse of the discretion by the trial court. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

No error.

Judges LEWIS and EDMUNDS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 MARCH 2000

BANE v. MOWERY No. 98-579-2	Guilford (96CVS1187)	Reversed and Remanded
BURNETTE v. CITY OF GASTONIA No. 99-394	Gaston (98CVS3703)	Affirmed and Remanded
HARVEY v. STOKES No. 99-952	Guilford (97CVS5981)	Affirmed
IN RE SNIPES No. 98-1459	Forsyth (95J413)	Affirmed
JOHNSON v. HERITAGE MOTORS No. 99-346	Forsyth (97CVD5474)	Dismissed
KAMALBAKE v. ANIMAL HOSP. OF FAYETTEVILLE No. 99-572	Ind. Comm. (700588)	Affirmed
POPKIN BROS. ENTERS. v. BOARD OF ADJUST. OF JACKSONVILLE No. 98-1630	Onslow (98CVS1313)	Affirmed
SOUTHERN HOMES DEV. CORP. v. CITY OF BELMONT No. 99-383	Gaston (98CVS1078)	Affirmed
STATE v. BODIE No. 99-280	Iredell (96CRS3766)	No Error
STATE v. CONLEY No. 99-371	Mecklenburg (96CRS38295) (96CRS38297) (96CRS38299) (96CRS38300)	No Error
STATE v. EVANS No. 99-251	Wake (97CRS35133) (97CRS88751)	Larceny from the person: No error. Habitual Felon: Vacated. Sentencing: Remanded for resentencing.
STATE v. GILL No. 99-219	Rowan (97CRS10402) (97CRS10403) (97CRS10404)	No Error

STATE v. GRIFFIN No. 98-1345	Pasquotank (98CRS231) (98CRS232) (98CRS233) (98CRS234) (98CRS235)	No Error
STATE v. HARDWICH No. 99-427	New Hanover (97CRS32677) (97CRS32678) (97CRS32679) (98CRS6928) (98CRS6929) (98CRS6930)	No Error
STATE v. JEFFREYS No. 99-556	Wake (97CRS2293)	No Error
STATE v. MACK No. 99-182	Durham (97CRS15123)	Vacated and remanded for new trial on the charge of worthless check
STATE v. McDANIEL No. 99-298	Alamance (98CRS3024) (98CRS3025) (98CRS3026) (98CRS3027)	No Error
STATE v. RAINEY No. 99-571	Forsyth (98CRS39476) (98CRS50215) (98CRS50261)	No Error
STATE v. TOOTLE No. 99-91	Carteret (97CRS11226) (97CRS11227) (97CRS11228) (97CRS11229) (97CRS11381)	New Trial
WINSTON-SALEM WRECKER ASS'N v. BARKER No. 99-58	Forsyth (98CVS4369)	Affirmed

CHARLOTTE McLAIN, PLAINTIFF v. TACO BELL CORP., TAYLOR FOODS, INC., THOMAS ORR AND MICHELLE RAYNOR, DEFENDANTS

No. COA98-750-2

(Filed 4 April 2000)

1. Evidence— spoliation—destruction or non-production—adverse inference

In a case where plaintiff-employee placed numerous entries in a company logbook during the course of her employment concerning the sexual harassment of plaintiff by two co-workers, a partial new trial must be granted on the issue of defendant Taylor Foods' ratification of the conduct of defendant Raynor in committing a battery upon plaintiff since the trial court erred in failing to give a requested jury instruction concerning the alleged destruction or non-production of corporate records by defendant Taylor Foods, which would have allowed the jury to determine that spoliation of evidence gives rise to an adverse inference.

2. Judgments— default—pretrial motion—no prejudicial error

The trial court did not commit prejudicial error in failing to grant plaintiff-employee's pretrial motion for default judgment against a non-answering individual defendant, against whom default had been entered, in light of the interrelationship of plaintiff's claim against the individual defendant with those against corporate defendants Taylor Foods and Taco Bell, and the requirement of a verdict against either of the individual defendants as an element of plaintiff's claims against the corporate defendants.

Appeal by plaintiff from judgment entered 6 May 1997 by Judge Ernest B. Fullwood in Onslow County Superior Court. Originally heard in the Court of Appeals 29 March 1999. An opinion was filed by this Court 18 January 2000. Defendants' Petition for Rehearing was granted 7 March 2000 and heard without oral argument. The present opinion supersedes the 18 January 2000 opinion.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy III, Harvey L. Kennedy and Annie Brown Kennedy, for plaintiff-appellant.

Hunton and Williams, by A. Todd Brown and Matthew P. McGuire, for defendant-appellee Taco Bell Corporation.

Poyner and Spruill, L.L.P., by Cecil W. Harrison, Jr. and Susanna K. Gibbons, for defendant-appellee Taylor Foods, Inc.

JOHN, Judge.

Plaintiff contends the trial court erred, *inter alia*, in failing to charge the jury on the alleged destruction or non-production of evidence by defendant Taylor Foods, Inc. (Taylor Foods). We hold that, under the circumstances *sub judice*, the lack of such instruction constituted reversible error entitling plaintiff to a partial new trial.

Relevant facts and procedural information include the following: On 24 February 1995, plaintiff Charlotte McLain instituted claims against 1) defendants Thomas Orr (Orr) and Michelle Raynor (Raynor) for battery and intentional infliction of emotional distress based upon alleged sexual harassment, 2) defendants Taco Bell Corporation (Taco Bell) and Taylor Foods for wrongful discharge, negligent hiring and/or retention of Orr and ratification of Orr's and Raynor's alleged intentional misconduct, and 3) defendant Taco Bell for negligent supervision of its alleged agent, Taylor Foods.

The case was tried before a jury during the 7 April 1997 Civil Session of Onslow County Superior Court. Evidence at trial tended to show the following: On 25 April 1994, plaintiff began work as assistant manager in a Jacksonville, North Carolina, Taco Bell restaurant (the restaurant) owned and operated by Taylor Foods pursuant to a franchise agreement with Taco Bell. As a manager, plaintiff was required to make daily entries in a three-ring binder with looseleaf paper referred to as the manager's logbook (the logbook). The logbook was kept locked in the restaurant office and reviewed only by managers and Matt Clark (Clark), Taylor Foods' district manager. Plaintiff understood from Clark that entries were mandatory so as to enable managers to record and be aware of customer complaints, crew situations and concerns arising during each shift, as well as to keep Clark and the other managers in communication with each other. Plaintiff testified that Orr, the unit manager,

informed her that he and Clark regarded reading the logbook as an "everyday occasion."

At trial, plaintiff related that approximately one week following commencement of her employment, Orr and Raynor, the first assistant manager, began to make sexually suggestive statements and physical advances towards plaintiff in the restaurant. Other witnesses related similar accounts of sexual misconduct by Orr and Raynor directed towards themselves or others.

Plaintiff testified she immediately began leaving notes in the manager's logbook, seeking to speak with Clark about the actions of Orr and Raynor, and that she continued to do so throughout her employment, expressly raising the issue of sexual harassment in subsequent entries. According to plaintiff, Clark never contacted her concerning the entries, although he had informed her he reviewed the logbook "on a daily basis" and she had observed Clark reading the logbook on at least one occasion.

Plaintiff further testified that following repeated instances of sexually suggestive statements by both Orr and Raynor and sexually explicit touching by Orr, the latter cornered plaintiff in the restaurant stockroom in early June 1994. Orr thereupon physically assaulted plaintiff, dropped his trousers while saying he wanted to have sexual relations with her and, upon her refusal, began masturbating, ultimately ejaculating upon plaintiff's clothing.

Clark discharged plaintiff the next day on grounds she had violated numerous work regulations. Plaintiff contacted Clark's superior, Ronnie Matthews (Matthews), vice president of operations at Taylor Foods, asserting she had not been treated fairly and accusing Orr and Raynor of sexual misconduct. Matthews met with plaintiff and Clark 8 June 1994 to discuss plaintiff's complaints. In the presence of plaintiff and Clark, Matthews interviewed Taylor Foods employees Susan Lacy (Lacy), Deborah Rush (Rush) and Rick Morgan (Morgan), each of whom described similar incidents of sexual misconduct by Orr and Raynor.

Clark related he interviewed Gina Berkner (Berkner), a current manager, who informed Clark and testified during trial that she had heard Orr and Raynor making sexually suggestive comments to other employees. On 9 June 1994, Clark terminated Orr and Raynor based in part upon the alleged sexual misconduct, and plaintiff was reinstated to her position as assistant manager. Plaintiff resigned shortly after her reinstatement.

The jury returned a verdict in favor of Taylor Foods, Taco Bell and Orr, but found for plaintiff against Raynor. Judgment was entered 6 May 1997, awarding plaintiff $15,000.00. Plaintiff appeals. Only defendants Taylor Foods and Taco Bell (defendants) have responded to plaintiff's appeal.

[1] Plaintiff contends the trial court erred in refusing to give the following requested jury instruction:

> I instruct you that evidence has been presented in this case which tends to show that the Defendant, Taylor Foods, Inc. either destroyed or failed to produce corporate records in its exclusive possession requested by the plaintiff in this case. If you determine this to be the case, then those [sic] would be a presumption or adverse inference against the Defendant, Taylor Foods, Inc. that the evidence withheld would have injured the Defendants, Taylor Foods, Inc.'s defense in this case. If you find that Taylor Foods, Inc. destroyed or failed to produce said corporate records, there would be a strong presumption that Taylor Foods, Inc. is liable for the intentional acts of Thomas Orr and Michelle Raynor.

Plaintiff argues the trial court's failure to instruct the jury substantially as requested constituted reversible error. Upon examination of the record and review of the applicable law, we agree.

Pursuant to N.C.G.S. 1A-1, Rule 51 (1990), the trial court is "required to instruct a jury on the law arising from the evidence presented," *Lusk v. Case*, 94 N.C. App. 215, 216, 379 S.E.2d 651, 652 (1989). Further,

> when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.

Calhoun v. Highway Com., 208 N.C. 424, 426, 181 S.E. 271, 272 (1935).

Pertinent to the issue *sub judice*, our Supreme Court in *Yarborough v. Hughes*, 139 N.C. 199, 51 S.E. 904 (1905), stated the rule as follows:

> where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case.

Id. at 208-09, 51 S.E. at 907-08. The foregoing refers to the well-established principle of "spoliation of evidence," Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 60, at 194 (5th ed. 1998) [hereinafter *Brandis and Broun on North Carolina Evidence*], similar to the "rule applie[d] to the failure to call an available witness with peculiar knowledge of the fact to be established," *Yarborough*, 139 N.C. at 209, 51 S.E. at 908. Application of the principle presents "a significant fact for the consideration of the jury," *id.* at 210, 51 S.E. at 908, and allows strong "circumstantial proof[]," *id.* (citing *Black v. Wright*, 31 N.C. 447, 451-52 (1849)), against a party which withholds evidence in its possession because of the "supposed knowledge that the truth would have operated against [it]," *id.*

Accordingly,

> "[i]f a man by his own tortious act withholds evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted, for where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him."

Id. at 209, 51 S.E. at 908 (quoting Broom Legal Maxims 938 (8th Am. Ed.)); *see also Rhode Island Hospital Trust National Bank v. Eastern General Contractors, Inc.*, 674 A.2d 1227, 1234 (R.I. 1996) ("[u]nder the doctrine *omnia praesumuntur contra spoliatiorem*, 'all things are presumed against a despoiler' ").

Notwithstanding use of the term "presumption" in *Yarborough*, "[i]t is doubtful if [the principle] was ever intended to mean anything except that an *inference* might be drawn against the spoliator." *Brandis and Broun on North Carolina Evidence* § 60, at 194; *see also Beers v. Bayliner Marine Corporation*, 675 A.2d 829, 832 (Conn. 1996) ("rule of the majority of the jurisdictions that have addressed the issue in a civil context . . . is that the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it").

However, the inference does not

> supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced.

Doty v. Wheeler, 182 A. 468, 471 (Conn. 1936) (citations omitted).

"Destruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality." *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988). Although destruction of evidence in bad faith "or in anticipation of trial may strengthen the spoliation inference, such a showing is not essential to permitting the inference." *Rhode Island Hospital*, 674 A.2d at 1234 (citations omitted); *see Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (adverse inference proper where plaintiffs, although not acting in bad faith, permanently destroyed relevant evidence during investigative efforts), and *Henderson v. Hoke*, 21 N.C. 119, 146 (1835) ("[i]t is sufficient if [the evidence] be suppressed, without regard to the intent of that act"); *see also Hamann v. Ridge Tool Co.*, 539 N.W.2d 753, 756-57 (Mich. Ct. App. 1995) ("[w]hether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice").

However, "[i]f the evidence alleged to be withheld or destroyed is shown to be . . . equally accessible to both parties," *Gudger v. Hensley*, 82 N.C. 482, 486 (1880), or "there is a fair, frank and satisfactory explanation," *Yarborough*, 139 N.C. at 211, 51 S.E. at 908, for nonproduction, the principle is inapplicable and no inference arises, *see id.* ("[i]t may be that the defendants will be able to show that, after due and diligent search prosecuted in good faith, they are unable to produce [the evidence] or they may in some other manner explain away any inference to be drawn from the failure" to produce the evidence). On the other hand,

> if . . . no satisfactory explanation is forthcoming, the maxim of the law will apply, and the jury must pass upon the case, aided by the [inference], giving to it such force and effect as they may think it should have under all of the facts and circumstances.

Id. (citations omitted).

> Nonetheless, even though the adverse inference may be drawn, it is permissive, not mandatory. If, for example, the factfinder believes that the documents were destroyed accidentally or for an innocent reason, then the factfinder is free to reject the inference.

Blinzler v. Marriott International, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996).

Bearing the foregoing in mind, we turn to an examination of the instant record. Evidence at trial concerning the logbook tended to show that plaintiff had placed numerous entries therein during the course of her employment requesting to speak with Clark. Significantly, according not only to plaintiff's testimony but also that of Lacy, examination of the logbook three days prior to the 8 June 1994 investigation revealed nineteen such entries.

Moreover, on the date of the investigation, plaintiff, Lacy, Rush and Morgan each related to Matthews and Clark, as representatives of Taylor Foods, instances of sexual misconduct by both Orr and Raynor towards themselves and/or other employees. Matthews thereupon directed Clark to retrieve from the restaurant any materials pertinent to the allegations of sexual harassment. While at the restaurant, Clark also interviewed Berkner who reported observing both Orr and Raynor make sexual statements and advances towards other employees.

Clark returned to the investigation site approximately one to two hours later with various materials, including the logbook. Plaintiff and Lacy viewed the logbook at that time and discovered that no entries by plaintiff requesting to speak with Clark were to be found. Plaintiff and Lacy informed Matthews they had counted nineteen such entries three days earlier, all directed to Clark and requesting to speak with him, some expressing concern over sexual harassment by Orr and Raynor. Lacy as well as plaintiff further described the logbook as two to three inches thick and containing between one and two hundred pages when they had examined it, whereas it was barely one-half inch thick and held approximately fifty pages when delivered to Matthews by Clark. Clark denied having removed any pages prior to returning to the investigation site.

Plaintiff also testified she reviewed the logbook during pre-trial discovery and found it contained only twenty to twenty-five pages at that time and was missing documents she had seen 8 June 1994, the

date of the investigation. Clark explained that, following 8 June 1994, he had "removed everything [from the logbook] that [he] felt was pertinent to Mr. Orr and Ms. Raynor's termination and . . . put those in his file," and "threw everything else away," including "a lot" of plaintiff's and other managers' notes.

It is thus undisputed that Clark became aware of plaintiff's sexual harassment allegations 8 June 1994 upon hearing her statement as well as those of Rush, Morgan and Berkner. In addition, prior to going to the restaurant during the investigation, Clark also was aware of plaintiff's assertion that she had made numerous logbook entries which might be of significance in supporting her allegations. It is also noteworthy that Clark conceded he personally had destroyed a portion of the contents, although he denied any "pertinent" material was missing.

As described in the testimony of plaintiff and Lacy, the logbook entries allegedly lost or destroyed by Clark would have been relevant to the allegations of plaintiff against Taylor Foods. Offered into evidence in the format described by plaintiff and Lacy, the logbook would have established that Clark was on notice of sexual harassment of plaintiff by Orr and failed to act upon such knowledge, thereby defeating defendants' contention they lacked knowledge of plaintiff's complaints or of Orr's actions.

Without doubt under such circumstances, were the jury to find that Clark, whether in bad faith or not, misplaced, suppressed or destroyed the logbook pages described in the testimony of plaintiff and Lacy, such determination reasonably would permit the jury to infer, "giving to [the inference] such force and effect as they may think it should have under all of the facts and circumstances," *Yarborough*, 139 N.C. at 211, 51 S.E. at 908, that "the document[s], if produced, would probably militate against," *id.* at 210, 51 S.E. at 908, Taylor Foods. As one court has observed,

> [t]he proponent of a "missing document" inference need not offer direct evidence of a coverup to set the stage for the adverse inference. Circumstantial evidence will suffice.

Blinzler, 81 F.3d at 1159.

The evidence *sub judice*, both direct and circumstantial, tended to show suppression and destruction by Taylor Foods of documents capable of "rebutting and explaining the evidence adduced against

[it]," *Yarborough*, 139 N.C. at 209, 51 S.E. at 908, without a "fair, frank and satisfactory explanation," *id.* at 211, 51 S.E. at 908, sufficient to preclude instruction on the adverse inference. Accordingly, the trial court committed reversible error in failing, upon plaintiff's tender of "a specific instruction . . . supported by evidence," *Calhoun*, 208 N.C. at 426, 181 S.E. at 272, "to give the instruction, in substance at least," *id.*, and, as in *Yarborough*, "there must be a new trial," *Yarborough*, 139 N.C. at 211, 51 S.E. at 908.

Notwithstanding, defendants interject that Taylor Foods "produced all documents from the manager's logbook that were in its possession when litigation was initiated," and that it was not on notice the destroyed documents were relevant prior to institution of the suit. The former assertion is in no way dispositive of the issue in question. As to the latter contention, we believe the evidence that Clark, as representative of Taylor Foods, was "aware of circumstances that [we]re likely to give rise to future litigation," *Blinzler*, 81 F.3d at 1158-59, on 8 June 1994 and also that the logbook was relevant to plaintiff's allegations and needed to be preserved, was sufficient to allow the jury's consideration of the adverse inference.

First, it appears defendants correctly argue that in order to qualify for the adverse inference, the party requesting it must ordinarily show that the "spoliator was on notice of the claim or potential claim at the time of the destruction." Robert L. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction*, 27 U. Tol. L. Rev. 67, 79 (1995). While notice of the importance of certain documents may ordinarily be derived from institution of suit, *see Yarborough*, 139 N.C. at 208, 51 S.E. at 907 ("complaint itself was sufficient notice to the defendants of the importance of these writings as evidence to them"), "[t]he obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced," *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991), and the "spoliator [must] do . . . what is reasonable under the circumstances," *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993) (citation omitted).

For example,

> [w]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized

> inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case.

Blinzler, 81 F.3d at 1158-59. The logbook, which according to the testimony of Lacy and plaintiff, recorded the latter's requests to meet with Clark and her concerns about sexual harassment, was a pertinent piece of evidence potentially supportive of plaintiff's allegations or of defendants' defense of lack of knowledge. Defendants' argument that "no lawsuit was pending or even threatened at the time of the alleged destruction" is diminished by the 24 February 1995 filing date of the instant suit coming only a few short months following 8 June 1994, on which date Clark indisputably was put on notice of the significance of, and the need to preserve, the logbook as relevant to plaintiff's claims of being treated unfairly in her termination and of being sexually harassed in the workplace. Moreover, it is circumstantially pertinent that the record further reveals that Clark's investigation notes and consultation documents concerning Orr's termination and the 8 June 1994 investigation also apparently "disappeared" prior to plaintiff's institution of suit, in addition to the personnel files of plaintiff, Rush and Berkner, each of whom gave statements indicating sexual harassment at the restaurant. *See Blinzler*, 81 F.3d at 1159 (circumstantial evidence sufficient to allow adverse inference); *see also Reingold v. Wet 'N Wild Nevada, Inc.*, 944 P.2d 800, 802 (Nev. 1997) (defendant's policy of destruction of accident reports and first aid logs following each season resulted in "accident records [being] destroyed even before the statute of limitations ha[d] run on any potential litigation for that season," and "[d]eliberate destruction of records before the statute of limitations has run on the incidents described in those records amounts to suppression of evidence").

Lastly, defendants contend that "even had plaintiff carried her burden of proof," the last sentence of her proffered instruction which stated "there would be a strong presumption that Taylor Foods, Inc. is liable for the intentional acts of [Orr] and [Raynor]," was erroneous and warranted the trial court's denial. Defendants' final contention is also unavailing.

Although we have determined that spoliation of evidence gives rise to an adverse inference as opposed to a presumption, *see Brandis & Broun on North Carolina Evidence* § 60, at 194, we also noted the maxim *omnia praesumuntur contra spoliatiorem*, *see Rhode Island Hosp.*, 674 A.2d at 1234, and use of the term "presumption" in an early decision of our Supreme Court, *see Yarborough*, 139

N.C. at 209, 51 S.E. at 907-08. While defendants correctly argue the trial court may properly reject a tendered instruction not correct in its entirety, *see King v. Higgins*, 272 N.C. 267, 270, 158 S.E.2d 67, 70 (1967) (requested instruction not a correct statement of law in its entirety may be refused), the prior ambiguity as to the "correct" law in this jurisdiction regarding spoliation of evidence giving rise to an adverse inference militates against endorsement of defendants' argument. Further, the dialogue between the trial court and plaintiff's counsel during the charge conference reveals that the focus of plaintiff's proposed instruction was "on the fact that . . . the jury has not been told—will be told nothing about the effect of the destruction of records" as opposed to the precise nature of that effect. Finally, absent the last sentence and an earlier reference to "presumption," plaintiff's requested instruction related a correct statement of the law applicable to spoliation of evidence, providing a substantially proper basis for the requested instruction. *See Calhoun*, 208 N.C. at 426, 181 S.E. at 272 (upon request for proper instruction supported by evidence, trial court, "while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least").

[2] Prior to concluding, we note plaintiff also complains that the trial court erred in failing to grant plaintiff's pre-trial motion for default judgment as to the non-answering individual defendant Orr, against whom default had been entered, and in failing to instruct the jury on the failure of Orr to appear and offer evidence. We determine the trial court committed no prejudicial error in either instance.

As to plaintiff's latter contention, assuming error *arguendo*, we conclude such error was not "sufficiently prejudicial to constitute reversible error." *Wall v. Stout*, 310 N.C. 184, 190, 311 S.E.2d 571, 575 (1984).

Regarding plaintiff's first argument concerning Orr, suffice it to state that in light of the interrelationship of plaintiff's claim against Orr with those against Taylor Foods and Taco Bell, and the requirement of a verdict against Orr and/or Raynor as an element of plaintiff's claims against the corporate defendants, we perceive no error by the trial court. *See Frow v. De La Vega*, 82 U.S. 552, 554, 21 L. Ed. 60, 61 (1872) (defaulting defendant in "joint c[ase] against several defendants" merely loses "standing in court" and cannot "appear in the [case] in any way"; procedure "is simply to enter a default" against that defendant "and proceed with the cause upon the answers of the other defendants"; if case decided against plaintiff, it is "dis-

missed as to all the defendants alike—the defaulter as well as the others"), *Vandervoort v. Gateway Mountain Ppty. Owners Assn.*, 114 N.C. App. 655, 658, 442 S.E.2d 350, 352 (1994) ("principle and reasoning" enunciated in *Frow* applicable "to cases where several defendants have closely related defenses"), and *Leonard v. Pugh*, 86 N.C. App. 207, 210-11, 356 S.E.2d 812, 815 (1987) (in instances of "joint claim against more than one defendant," entry of "default judgment pursuant to G.S. § 1A-1, Rule 55 . . . should await an adjudication as to the liability of the non-defaulting defendants"); *see also Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991) (entry of default against lessee defendant does not preclude guarantor defendant from raising counterclaims and defenses), and *Harris v. Carter*, 33 N.C. App. 179, 183, 234 S.E.2d 472, 474-75 (1977) (entry of default against one defendant does not bar answering defendants from asserting all available defenses to plaintiff's claim); *cf. Harlow v. Voyager Communications V*, 348 N.C. 568, 570-71, 501 S.E.2d 72, 73-74 (1998) (because case "can be decided individually against one defendant without implicating the liability of the other defendants," not error to enter default judgment against one defendant prior to trial in case of *joint and several* liability; however, *Frow* principle "should be applied where the defendants have been alleged only as jointly liable").

As to plaintiff's remaining assignments of error, we believe they are unlikely to recur on retrial and therefore do not address them.

To summarize, therefore, the absence of a jury instruction on spoliation of evidence under the circumstances *sub judice* entitles plaintiff to a new trial on the issue of Taylor Foods' ratification of the conduct of Raynor in committing a battery upon plaintiff. However, in that Raynor has failed to appeal and we have resolved against plaintiff those assignments of error directed at her claim against Orr, the jury's verdicts as to Orr and Raynor stand. Moreover, because the jury found no liability on the part of Orr, plaintiff's claims against Taylor Foods asserting ratification of Orr's actions and negligent retention of Orr may not be revived. Similarly, the jury having rejected plaintiff's claim of infliction of emotional distress by Raynor, plaintiff's claim against Taylor Foods alleging ratification of such action by Raynor also does not survive.

Further, in that we do not perceive the error identified herein concerning Taylor Foods' alleged spoliation of evidence to have

affected the jury's verdict on the issue of plaintiff's damages for injuries inflicted by Raynor, *see Yarborough*, 139 N.C. at 208-10, 51 S.E. at 907-08 (spoliation of evidence inference applies against *party which has suppressed or destroyed the evidence*), nor believe injustice would result in lack of retrial of that issue, *see Weyerhaeuser Co. v. Godwin Supply Co.*, 292 N.C. 557, 561-62, 234 S.E.2d 605, 607-08 (1977) (partial new trial decision based upon three criteria: 1) whether error confined to one issue, 2) whether there exists "danger of complications" as to other issues, and 3) whether injustice to either party will result), we do not order retrial of the issue of plaintiff's damages for personal injury inflicted by Raynor, *see Housing, Inc. v. Weaver*, 305 N.C. 428, 441, 290 S.E.2d 642, 650 (1982) (quoting *Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974)) (decision of appellate or trial court to grant partial new trial is " 'entirely discretionary' "), and *Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997) (if issue "erroneously submitted did not affect the entire verdict, there should not be a new trial on all issues"). Resolution of the ratification issue in favor of plaintiff upon remand would simply result in a judgment against Taylor Foods, jointly with Raynor, for the previously established amount of damages. *See Poole v. Copland, Inc.*, 125 N.C. App. 235, 246, 481 S.E.2d 88, 95 (1997) (employer's vicarious liability under theory of ratification or *respondeat superior* is limited to the amount of damages awarded against employee), *rev'd on other grounds*, 348 N.C. 260, 498 S.E.2d 602 (1998), and *Pinnix v. Griffin*, 221 N.C. 348, 351, 20 S.E.2d 366, 369 (1942) (where "liability, if any, of a principal or master to a third person is purely derivative and dependent entirely upon the principle of *respondeat superior*," the "plaintiff can have but one satisfaction—payment of the damages caused by the wrongful act of [the servant]"); *see generally Thompson v. Lassiter*, 246 N.C. 34, 38, 97 S.E.2d 492, 496 (1957) ("where the doctrine of *respondeat superior* is or may be invoked, the injured party may sue the agent or servant alone, and if a judgment is obtained against the . . . servant and such judgment is not satisfied, the injured party may bring an action against the principal or master . . . [but] the recovery against the principal . . . may not exceed the amount of the recovery against the . . . servant"); *cf. Watson v. Dixon*, 132 N.C. App. 329, 334-35, 511 S.E.2d 37, 40-41 (1999) (punitive damages against employer in amount greater than against employee proper where employer's liability appears "based upon more than mere ratification," but dissent reiterates that liability of employer under theory of ratification "cannot be in excess of that of the employee").

Finally, the remaining issues involving Taylor Foods and Taco Bell unanswered by the jury at the first trial may be resubmitted upon remand only should the matter of ratification be resolved against Taylor Foods and only should the trial court deem such consideration of such issues proper and appropriate under the law as well as the evidence adduced.

Partial New Trial.

Chief Judge EAGLES and Judge EDMUNDS concur.

TED F. CASH, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. COA99-375

(Filed 4 April 2000)

1. Unfair Trade Practices— insurance advertising—settlement of fraudulent claims

The trial court did not err by granting defendant State Farm a 12(b)(6) dismissal on a claim for unfair and deceptive practices arising from State Farm's settlement of a claim which plaintiff insured contended was fraudulent and following advertising in which State Farm claimed it did not want to pay for fraudulent losses. The alleged statement does not indicate that State Farm will not pay fraudulent claims, only that it does not wish to do so.

2. Insurance— settlement practices—fraudulent claim

The trial court did not err by granting a 12(b)(6) dismissal for defendant State Farm on a claim under N.C.G.S. § 58-63-15(11)(a) or (b) arising from settlement of an allegedly fraudulent claim where plaintiff insured made no allegation that State Farm engages in the general business practice of misrepresenting pertinent facts or insurance policy provisions, that State Farm failed to acknowledge and act reasonably promptly upon communications with respect to claims arising under plaintiff's policy, or that State Farm failed to adopt and implement reasonable standards for the prompt investigation of claims arising under plaintiff's policy.

3. Civil Procedure— prior Rule 41 dismissal—claim not brought in prior action—statute of limitations—not raised in current action

The issue of the statute of limitations was beyond the purview of an appeal from a Rule 12(b)(6) dismissal where a claim for tortious breach of contract had not been brought in a prior action dismissed pursuant to Rule 41(c) but the current complaint nowhere indicated that the tortious breach of contract action was not brought in the prior action and the order appealed from did not indicate that the motion was converted into a Rule 56 motion.

4. Insurance— settlement of alleged fraudulent claim—tortious breach of contract action by policyholder

The trial court did not err by granting a 12(b)(6) dismissal on a tortious breach of contract claim in an action arising from the settlement of personal injury insurance claims which plaintiff-policyholder alleged were fraudulent. Plaintiff failed to allege facts indicating a sufficient level of aggravation or an intentional wrong by defendant. An insurance company acts in its own interest when settling claims with third party outsiders.

5. Civil Procedure— 12(c) dismissal—12(b)(6) dismissal—different standards

The trial court did not err by dismissing claims for breach for contract and constructive fraud under N.C.G.S. § 1A-1, Rule 12(c) following the denial of defendant's motions for dismissal under Rule 12(b)(6). Neither Rule employs the same standard.

6. Insurance— settlement of alleged fraudulent claim—breach of contract—12(c) dismissal

The trial court did not err by dismissing plaintiff's claim for breach of contract under N.C.G.S. § 1A-1, Rule 12(c) where plaintiff had alleged that defendant-insurer settled fraudulent claims against plaintiff arising from an automobile accident. An affidavit which was part of the pleadings presented evidence that defendant investigated the accident and acted in the interest of plaintiff in settling the claims, as they were settled for less than demanded and within policy limits, and plaintiff was released from further liability. The settlement by defendant insurer has not affected plaintiff's rights or precluded him from seeking redress against claimants for alleged fraudulent activity.

7. Fraud— constructive—settlement of insurance claim—fiduciary duty of insurer

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(c) a claim for constructive fraud against an insurer arising from the settlement of personal injury claims against plaintiff by third parties. Plaintiff failed to present evidence of a fiduciary relationship between defendant insurer and plaintiff.

Appeal by plaintiff from an order entered 29 October 1998 and from judgment entered 19 January 1999 by Judges Loto Greenlee Caviness and Richard L. Doughton, respectively, in Cleveland County Superior Court. Heard in the Court of Appeals 6 January 2000.

Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiff-appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, for defendant-appellee.

HUNTER, Judge.

Ted F. Cash ("plaintiff") appeals the granting by the trial court of motions by State Farm Mutual Automobile Insurance Company ("State Farm") to dismiss for failure to state a claim for which relief may be granted and for judgment on the pleadings, pursuant to Rule 12(b)(6) and Rule 12(c), respectively, of the North Carolina Rules of Civil Procedure. We affirm.

Plaintiff's pleadings indicate that he was driving his 1969 GMC truck on 26 December 1993 when he backed into a 1978 Chevrolet Camaro ("Camaro"). Plaintiff alleges that he was traveling at approximately one mile per hour and the Camaro was occupied by the driver Dameion Poston, and two other occupants, Darrell Jackson and Deron Thompson. Plaintiff, who is a medical doctor, determined that no one involved suffered any apparent injury at the time of the accident. Additionally, all occupants of the Camaro declined medical assistance at the scene.

Following the accident, claims were made for personal injuries by Poston, Jackson and Thompson, and in addition, a claim for personal injuries and property damage was made by a fourth individual, Arthur Poston, Jr., the owner of the Camaro. Plaintiff informed his car insurance carrier, State Farm, that there were more claims for per-

sonal injuries than there were occupants of the vehicles and that it appeared that these were fraudulent claims which should be denied. Despite plaintiff's contentions, State Farm paid the claims within the confines of the limits of the policy issued to plaintiff. Dameion Poston, Darrell Jackson and Deron Thompson were paid the sum of $250.00 for their personal injuries and Arthur Poston, Jr., was paid the sum of $350.00 for his personal injuries. Plaintiff alleges claimants were also paid certain medical and other expenses despite his objection, and that as a result of settlement of these fraudulent claims, plaintiff's insurance premiums with State Farm increased by fifty-three percent (53%).

The record reveals that plaintiff filed suit against State Farm in 1996, but it was dismissed pursuant to Notice of Voluntary Dismissal without prejudice pursuant to Rule 41(c) of the North Carolina Rules of Civil Procedure. He brought the present action against State Farm in August 1998 with claims for (1) breach of contract of insurance, (2) constructive fraud in the form of a breach of fiduciary duty, (3) unfair methods of competition or unfair and deceptive acts or practices, and (4) tortious breach of the insurance contract, specifically the implied duties of good faith and fair dealing. Plaintiff asked for relief in the form of compensatory and punitive damages. State Farm made a motion to dismiss and the trial court granted it under North Carolina Rule of Civil Procedure 12(b)(6) as to plaintiff's claims for unfair methods of competition or unfair and deceptive acts or practices, and tortious breach of the insurance contract. After filing its answer, State Farm made a motion for judgment on the pleadings. The trial court allowed State Farm's motion based on Rule 12(c) of the North Carolina Rules of Civil Procedure, dismissing all other claims of plaintiff with prejudice.

[1] Plaintiff first contends that the trial court erred in granting State Farm's Rule 12(b)(6) motion on its claims for unfair and deceptive acts or practices and tortious breach of the insurance contract. In the determination 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 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, 670, 355 S.E.2d 838, 840 (1987). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your*

House of Raleigh, 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.*

In plaintiff's claim for unfair and deceptive practices and acts, he asserts that State Farm violated N.C. Gen. Stat. § 58-63-15 by settling fraudulent claims after advertising

> at State Farm, we pay what we owe to settle a claim, but we don't want to pay for fraudulent losses. If we all do our part to help fight insurance fraud, the result will be more reasonable premiums for everyone.

N.C. Gen. Stat. § 58-63-15 provides that unfair methods of competition and unfair and deceptive acts or practices in the business of insurance include:

> (1) Misrepresentations and False Advertising of Policy Contracts.—Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby . . . .
>
> (2) False Information and Advertising Generally.—Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

N.C. Gen. Stat. § 58-63-15(1), (2) (1999). In the present case, State Farm's alleged statement does not indicate that it will not pay fraudulent claims, only that it *wishes* not to do so. Plaintiff does not allege in his pleadings that State Farm does, in fact, *wish* to pay fraudulent claims. Therefore, the complaint does not state facts sufficient to give rise to a cause of action under this section.

[2] Plaintiff also argues that State Farm also breached N.C. Gen. Stat. § 58-63-15(11)(a), (b), and (c), which provide that "[u]nfair [c]laim

[s]ettlement [p]ractices" occur when, as a general business practice, an insurer:

a. Misrepresent[s] pertinent facts or insurance policy provisions relating to coverages at issue;

b. Fail[s] to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

c. Fail[s] to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies[.]

N.C. Gen. Stat. § 58-63-15(11)(a)-(c) (1999). N.C. Gen. Stat. § 58-63-15 specifically states that it does not "of itself create any cause of action in favor of any person other than the [Insurance] Commissioner." N.C. Gen. Stat. § 58-63-15(11). However, "a remedy ' "in the nature of a private action' " for the conduct described by and in [N.C. Gen. Stat.] § 58-63-15(11)" is created by N.C. Gen. Stat. § 75-1.1. *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172, *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997) (quoting *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 302, 435 S.E.2d 537, 542 (1993)). "Violation of any form of conduct listed in § 58-63-15(11) operates as a *per se* instance of unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1." *Id.* In order for plaintiff to prevail on a claim for unfair or deceptive trade practices, plaintiff must demonstrate the existence of three factors: " '(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business.' " *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (quoting *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542). The plaintiff must also allege that State Farm engaged in the prohibited practices with such frequency as to indicate that the acts are its general practice. *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 60, 370 S.E.2d 695, 698 (1988).

In the present case, plaintiff has made no allegation that State Farm engages in the "general business practice" of "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." N.C. Gen. Stat. § 58-63-15(11)(a). Thus, he fails to state facts sufficient to make a claim based on conduct in violation of

N.C. Gen. Stat. § 58-63-15(11)(a). Therefore, our review is limited to whether plaintiff has alleged a cause of action based on conduct in violation of N.C. Gen. Stat. § 58-63-15(11)(b), "[f]ailing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies," and (c), "[f]ailing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies." N.C. Gen. Stat. § 58-63-15(11)(b), (c).

The pleading in the present case alleges in pertinent part, on the issues of State Farm's promptness in acting on plaintiff's communication and promptness in investigation:

> 24. That, upon information and belief, after Plaintiff's automobile accident or collision on December 26, 1993, claims for personal injury were submitted to Defendant for alleged personal injuries sustained in the collision on December 26, 1993, hereinbefore described, by not only the driver of the described Camaro, Dameion Poston, and the other two occupants, Darrell Jackson and Deron Thompson, all three of whom were occupants of said Camaro at the time of the collision, but also a claim for personal injury from Arthur Poston, Jr., who was the owner of said Camaro but was not an occupant of said Camaro at the time of the collision alleged herein.
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> 25. That Plaintiff demanded of Defendant that it deny and defend against said claims and Plaintiff insured [sic] that Defendant had full knowledge of Plaintiff's observations and opinions as well as those of the investigating officer.
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> 26. That Defendant owed Plaintiff a contractual, a fiduciary and a statutory duty to act in good faith in it's [sic] investigation, evaluation and determination as to whether to settle or defend against the above-referenced claims for personal injury against Plaintiff, Defendant's insured.
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> 27. That in the exercise of a good faith effort to fulfill the aforesaid duties owed to the Plaintiff, Defendant knew or should have known that aforesaid claims for personal injury were false and fraudulent and that settlement or payment of said claims was contrary to the public policy of the State of North Carolina in that such settlement or payment of false and fraudulent claims promoted, encouraged or acquiesced in criminal conduct on the part of the claimants; further said settlement or payment of the false

and fraudulent claims was contrary to Defendant's own advertising campaign and contrary to it's [sic] contractual and fiduciary and statutory duties owed Plaintiff.

28. That, upon information and belief, Defendant, nevertheless, thereafter settled with and paid claimants Dameion Poston, Darrell Jackson, and Deron Thompson . . . [and] Arthur Poston, Jr. . . . .

29. That not only did Defendant fail to act in good faith but in fact acted in bad faith by its failure to make adequate investigation and evaluation of the false and fraudulent claims and by its failure to honor its duty to defend against the false and fraudulent claims in that Defendant was motivated by considerations of its own pecuniary gain . . . .

While plaintiff alleges that State Farm's investigation was not adequate in that it should have revealed that the claims in question were false and fraudulent, nowhere does plaintiff allege that State Farm failed to "acknowledge and act *reasonably promptly* upon communications with respect to claims arising under" plaintiff's policy, or failed to "adopt and implement *reasonable standards for the prompt investigation* of claims arising under" plaintiff's policy. N.C. Gen. Stat. § 58-63-15(11)(b), (c) (emphasis added). Again, plaintiff has failed to state facts sufficient to make claims under N.C. Gen. Stat. § 58-63-15(11)(b) and (c). Accordingly, plaintiff's first assignment of error is overruled.

[3] Next, plaintiff asserts that it was error to dismiss his claims for tortious breach of the insurance contract and punitive damages for failure to state a claim for which relief may be granted. State Farm argues that plaintiff brought a prior suit similar to the one at bar, which was dismissed pursuant to Rule 41(c) of the North Carolina Rules of Civil Procedure, except that the tortious breach of contract claim was not included in the former suit; therefore, Rule 41(c) did not preserve this claim and because it was brought beyond the statute of limitations period, the trial court correctly dismissed it.

Our review of the amended record reveals that the prior suit did not contain a tortious breach of contract claim. However, the trial court stated that this issue was ruled on only after reviewing the complaint, its amendment, and applicable law. Plaintiff's complaint nowhere indicates that the tortious breach of contract action was not brought in the prior action. Matters outside the complaint are only

considered in a 12(b)(6) motion if the motion has been converted into a motion for summary judgment:

> If, on a [12(b)(6)] motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (1990). The order appealed from does not indicate that this motion was converted into a Rule 56 motion, therefore our review is limited to the same standard as the trial court. Because the statute of limitations defense is outside our purview, we shall determine if plaintiff has stated a claim for which relief may be granted under Rule 12(b)(6).

[4] Tortious breach of contract has been recognized as a cause of action in North Carolina. *Olive v. Great American Ins. Co.*, 76 N.C. App. 180, 333 S.E.2d 41, *disc. review denied*, 314 N.C. 668, 336 S.E.2d 400 (1985).

> It is well-settled that punitive damages are generally not allowed for a breach of contract with the exception of breach of contract to marry. Punitive damages are not allowed even when the breach is wilful, malicious or oppressive. However, "when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages." Mere allegations of an identifiable tort are "insufficient alone to support a claim for punitive damages." Furthermore, in order to sustain a claim for punitive damages, there must be an identifiable tort which is accompanied by or partakes of some element of aggravation.

Shore v. Farmer, 133 N.C. App. 350, 361, 515 S.E.2d 495, 501-02 (1999) (Walker, J., concurring in part and dissenting in part) (citations omitted) (quoting *Taha v. Thompson*, 120 N.C. App. 697, 704-05, 463 S.E.2d 553, 558 (1995), *disc. review denied*, 344 N.C. 443, 476 S.E.2d 130, *disc. review denied*, 344 N.C. 443, 476 S.E.2d 131 (1996)). Therefore, assuming plaintiff has sufficiently pled a breach of contract action, he must also allege a tort which partakes some element of aggravation, along with the breach, in order to withstand State Farm's 12(b)(6) motion.

"Aggravation includes 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, [and] willfulness.' " *Taha v. Thompson*, 120 N.C. App. 697, 705, 463 S.E.2d 553, 558 (quoting *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976)). While plaintiff alleges claimants have committed fraud, he nowhere alleges that State Farm has, in fact, committed fraud. Plaintiff does allege that State Farm's action "promoted, encouraged or acquiesced in criminal conduct on the part of the claimants" and was made "in total and reckless disregard of [plaintiff's] . . . protestations." However, State Farm had the right to settle the subject claims without the approval of plaintiff. N.C. Gen. Stat. § 20-279.21(f)(3). Our Supreme Court has recognized that an insurance company, when settling claims with third party outsiders, is acting in its own interest. *Lampley v. Bell*, 250 N.C. 713, 110 S.E.2d 316 (1959). "It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims." *Alford v. Insurance Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958). Therefore, we can deduce that settling a potentially fraudulent claim may cost an insurance company less than actually litigating it, and thus is in the insurer's best interest. Plaintiff has not indicated that State Farm acted illegally, as it was not under any obligation to gain his consent before settling the claims in question. Plaintiff has also failed to state facts indicating State Farm was in collusion with claimants.

Based on the foregoing, we hold that plaintiff has failed to state facts indicating that State Farm's settlement with claimants rose to the level of aggravation defined in *Taha v. Thompson*. Plaintiff has also failed to allege facts indicating an intentional wrong by State Farm. Punitive damages are only awarded as punishment for intentional wrongful conduct. *Transportation Co. v. Brotherhood*, 257 N.C. 18, 30, 125 S.E.2d 277, 286, *cert. denied*, 371 U.S. 862, 9 L. Ed. 2d 100, *reh'g denied*, 371 U.S. 899, 9 L. Ed. 2d 131 (1962). Accordingly, we hold that plaintiff has failed to state a claim for which relief may be granted and this assignment of error is overruled.

[5] Plaintiff next assigns error to the dismissal of his breach of contract and constructive fraud claims. Plaintiff argues that because the trial court considered these claims in State Farm's 12(b)(6) motion and did not thereupon dismiss them, they should have survived State Farm's 12(c) motion. As we have recognized, a complaint is subject to dismissal under 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. On the other hand, a motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when "the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984). Neither rule employs the same standard. It is plainly evident under our Rules of Civil Procedure that because a plaintiff has survived a 12(b)(6) motion, and thus has alleged a claim for which relief may be granted, his survival in the action is not the equivalent of the court determining that conflicting issues of fact exist and no party is entitled to judgment as a matter of law under Rule 12(c). Accordingly, this assignment of error is overruled.

[6] Next, plaintiff contends the trial court incorrectly dismissed his claim for breach of contract under Rule 12(c) of the North Carolina Rules of Civil Procedure.

> Judgment on the pleadings, pursuant to Rule 12(c), is appropriate " 'when all the material allegations of fact are admitted in the pleadings and only questions of law remain.' " [*Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 460, 261 S.E.2d 260, 261] (quoting *Ragsdale* [*v. Kennedy*], 286 N.C. [130,] 136-37, 209 S.E.2d [494,] 499 [(1974)).] The trial court must " 'view the facts and permissible inferences in the light most favorable to the non-moving party[],' " taking all well-pleaded factual allegations in the non-moving party's pleadings as true. *Id.* at 461, 261 S.E.2d at 262 (quoting *Ragsdale*, 286 N.C. at 136-37, 209 S.E.2d at 499.
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> When ruling on a motion for judgment on the pleadings, the trial court "is to consider only the pleadings and any attached exhibits, which become part of the pleadings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

Terrell v. Lawyers Mut. Liab. Ins. Co., 131 N.C. App. 655, 659-660, 507 S.E.2d 923, 926 (1998). In a Rule 12(c) motion, "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the [appellate] briefs of the parties or the testimony of allegations by the parties in different proceedings." *Minor v. Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867. Therefore, matters outside of the pleadings and

their attached exhibits were not considered by the trial court and are not subject to our examination in a determination of the issue at hand.

Plaintiff alleges that the breach of contract occurred when the settlement of claims was made by State Farm absent good faith. State Farm argues that settlement of the claims, if the claims were fraudulent, may have been a bad judgment, but such conduct did not rise to the level of bad faith.

The insurance policy in the present case provides that State Farm may "settle or defend" any claim or suit as it considers "appropriate." This provision is supported by our statutory code, which provides that an auto insurer, has the right to settle without an insured's consent under N.C. Gen. Stat. § 20-279.2(f)(3). N.C. Gen. Stat. § 20-279.21 provides, in pertinent part: "The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability . . . ." N.C. Gen. Stat. § 20-279.21(f)(3). In North Carolina, "[r]egardless of any contractual provision reserving to the insurer the exclusive right to settle a claim as it sees fit, any settlement must be made in good faith." *Nationwide Mutual Ins. Co. v. Public Service Co. of N.C.*, 112 N.C. App. 345, 350, 435 S.E.2d 561, 564 (1993); *see* N.C. Gen. Stat. § 20-279.21. Good faith is defined as "absence of malice . . . . Honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry." Black's Law Dictionary 693 (6th ed. 1990).

We have found no case in this state which considers the issue of whether an insurance company can be held liable for settling a claim where the insured notified his insurer that the claim was fraudulent. In a similar case from Ohio, *Marginian v. Allstate Insurance Co.*, 18 Ohio St. 3d 345, 481 N.E.2d 600 (1985), an insured had instructed his insurer not to pay two claims asserted against his policy due to an automobile accident because the insured was not at fault, and payment of the claims would be fictitious and fraudulent. The Ohio Supreme Court held that "where a contract of insurance provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging a breach of the insurer's duty of good faith will not lie where the insurer has settled such claim within the monetary limits of the insured's policy." *Id.* at 348, 481 N.E.2d at 603. It is undisputed that State Farm settled within the monetary limits of plaintiff's policy in the present case.

Many jurisdictions mandate that a liability insurer must consider the insured's interests in accepting or rejecting a compromise offer, 7A Am. Jur. 2d *Automobile Insurance* § 374 (1990). Similarly, our Supreme Court has stated:

> The law imposes on the insurer the duty of carrying out in good faith its contract of insurance. The policy provision giving the insurer the right to effectuate settlement was put in for the *protection of the insured as well as the insurer.* It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims. It is for this reason that courts have consistently held that an insurer owes a duty to its insured to act diligently and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy. Liability has been repeatedly imposed upon insurance companies because of their failure to act diligently and in good faith in effectuating settlements with claimants.

Alford, 248 N.C. at 229, 103 S.E.2d at 12 (emphasis added). "An insurance company is expected to deal fairly and in good faith with its policyholders." *Robinson v. N.C. Farm Bureau Ins. Co.*, 86 N.C. App. 44, 50, 356 S.E.2d 392, 395 (1987), *disc. review improv. allowed*, 321 N.C. 592, 364 S.E.2d 140 (1988). However, as we have previously noted, "[i]nsurance companies and their agents . . . do not act as agents for the insured when settling claims. An insurance company, if it admits that its insured is liable, without its insured's knowledge or consent, is acting in its own interest, and not as the agent of the insured." *Anderson v. Gooding*, 43 N.C. App. 611, 614, 259 S.E.2d 398, 400, *appeal dismissed*, 299 N.C. 119, 261 S.E.2d 921 (1979), *rev'd on other grounds*, 300 N.C. 170, 265 S.E.2d 201 (1980).

Based on the foregoing, it is evident that State Farm owed the duty of good faith in carrying out its contract of insurance. The affidavit with attached exhibits of State Farm's claims superintendent were part of State Farm's pleadings and indicate in pertinent part that: (1) an investigation was conducted by State Farm, and revealed that the investigating officer did not remember how many occupants were in the Camaro and this was not indicated on the accident report; (2) plaintiff was most likely responsible for the accident, as plaintiff admitted driving in reverse down a city street after dark when he failed to see claimants' vehicle and collided with it; (3) it is not uncommon for medical treatment to be rendered following an accident, although there is no report of injury at the scene; (4) all claims

were settled for substantially less than claimant's medical expenses; (5) as a result of settlement, plaintiff was released from any further liability; and (6) plaintiff's premiums were increased pursuant to the North Carolina Rate Bureau requirements, and plaintiff's points assessment would be the same whether or not the personal injury claim of Arthur Poston, Jr., the individual plaintiff alleged was not in the Camaro at the time of the accident, was settled. The affidavit presents evidence that State Farm investigated the accident and acted in the interest of plaintiff in settling the claims, as they were settled for less than demanded and plaintiff was released from any further liability. As previously noted, the claims were settled within policy limits. Plaintiff has not contested any of these facts. Similar to the *Marginian* court, we hold that a cause of action alleging breach of good faith will not lie when the insurer settles a claim within the monetary limits of the insured's policy; however, in doing so, we believe the insurer has the duty to consider the insured's interest. *See Alford*, 248 N.C. 224, 103 S.E.2d 8. In so holding, we recognize that an insurer may act in its own interest in settlement of the claim, *see Anderson*, 43 N.C. App. 611, 259 S.E.2d 398, and has statutory authority to settle claims without the consent of the insured. N.C. Gen. Stat. § 20-279.21(f)(3). Our review indicates that no issues of material fact remain, and based on our holding, State Farm was entitled to judgment as a matter of law under Rule 12(b)(c) on plaintiff's breach of contract claim. We note that the settlement of any fraudulent claim by State Farm with claimants appears not to have affected plaintiff's rights or precluded him from seeking redress against claimants for alleged fraudulent activity:

> The standard automobile liability insurance policy provides that the insurer may, in its discretion, settle any claim against the insured for which it would be liable under the terms of the policy. When exercised in good faith these provisions are valid and binding on the insured. However, it is now settled law in this State that the exercise of this privilege by the insurer will not bar the right of the insured, or anyone covered by his policy, to sue the releasor for his damages where he has neither ratified nor consented to such settlement.

Bradford v. Kelly, 260 N.C. 382, 383-84, 132 S.E.2d 886, 887-88 (1963) (citations omitted). "[A] liability carrier cannot impair the rights of the insured by settling his claim without his authority." *Phillips v. Alston*, 257 N.C. 255, 259, 125 S.E.2d 580, 583 (1962). Accordingly, this assignment of error is overruled.

[7] Lastly, plaintiff assigns error to the trial court's dismissal of its claim for constructive fraud pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The North Carolina Supreme Court has summarized the law pertaining to constructive fraud as follows:

> Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less "exacting" than that required for actual fraud. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981). When a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. "This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so." *Atkins v. Withers*, 94 N.C. 581, 590 (1886). The superior party may rebut the presumption by showing, for example, "that the confidence reposed in him was not abused, but that the other party acted on independent advice." 37 Am. Jur. 2d *Fraud and Deceit* § 442, at 603. Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud.
>
> In stating a cause of action for constructive fraud, the plaintiff must allege facts and circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950).

Watts v. Cumberland County Hosp. System, 317 N.C. 110, 115-16, 343 S.E.2d 879, 884 (1986) (citations omitted). Plaintiff in the present case has failed to present evidence of a fiduciary relationship between State Farm and plaintiff. While we have recognized that an insurance agent has a fiduciary duty to keep the insured correctly informed as to his insurance coverage, *R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 303 S.E.2d 573 (1983), we have not held that an insurance company or an adjuster has a fiduciary duty to an insured with respect to settlement of claims. Accordingly, this assignment of error is overruled, and the order of the trial court is affirmed.

Affirmed.

Judges JOHN and McGEE concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF/APPELLEE v. DOUGLAS S. HARRIS, ATTORNEY, DEFENDANT

No. COA99-580

(Filed 4 April 2000)

1. Discovery— attorney disciplinary hearing—privileged documents

The Disciplinary Hearing Commission did not err in an attorney discipline case for misappropriation of client funds by denying defendant's motion to compel discovery of the reports and witness interview notes of the State Bar's investigator because witness statements and notes taken by the bar counsel or bar investigator are privileged and not discoverable absent a showing of substantial need and that the person seeking the materials was unable, without undue hardship, to obtain the substantial equivalent. N.C.G.S. § 1A-1, Rule 26(b)(3).

2. Discovery— attorney disciplinary hearing—interrogatories—answers by counsel

The State Bar did not err in allowing its counsel to answer defendant's interrogatory questions in an attorney discipline case for misappropriation of client funds because the State Bar's counsel, as an agent of that governmental agency, was the proper party to answer the interrogatories under N.C.G.S. § 1A-1, Rule 33.

3. Attorneys— disciplinary hearing—evidence not concealed

In an attorney discipline case for misappropriation of client funds, the State Bar did not improperly conceal evidence of the identity of the client's organ teacher, whose deposition testimony was admitted into evidence, and a statement by the client's brother because: (1) the record reveals that the organ teacher was listed as a State Bar witness in the pretrial stipulations; and (2) the State Bar's investigator did not take any notes when he talked to the client's brother, and defendant failed to

comply with the requirement of showing undue hardship under N.C.G.S. § 1A-1, Rule 26(b)(3) since he could have deposed the client's brother.

4. Attorneys— disciplinary hearing—questions of expert not improper

The Disciplinary Hearing Commission did not allow one of its members to act as a handwriting expert witness during the questioning of the State Bar's forensic handwriting expert in an attorney discipline case for misappropriation of client funds because a review of the evidence reveals the Hearing Committee member merely requested that the expert compare defendant's known handwriting sample with the client's purported signature on the release and settlement check.

5. Attorneys— disciplinary hearing—notary certification—presumption of truth rebutted

Even though there is a presumption in North Carolina that the recitations contained in a notary's certificate or acknowledgment are true, the Disciplinary Hearing Commission did not err in an attorney discipline case for misappropriation of client funds by finding that the notary certificates on the release and power of attorney were false because the presumption was rebutted by clear, cogent, and convincing evidence that the client was in Florida at the time defendant's secretary allegedly witnessed the client sign the forms at the attorney's office.

6. Attorneys— disciplinary hearing—finding of fact—misappropriation of client funds—clear, cogent, and convincing evidence

The Disciplinary Hearing Commission did not err in an attorney discipline case for misappropriation of client funds by finding as fact that defendant's bank account balance was below $8,900 in support of the allegation that defendant appropriated his client's portion of a settlement check for defendant's own use or purpose in violation of former Rule 10.1(C) of the North Carolina Rules of Professional Conduct, because: (1) the operating account is the basis of the finding rather than defendant's aggregate accounts; (2) defendant acted on behalf of the client in settling the claim with the insurance company when defendant's employment had already been terminated; and (3) defendant wrote a check to the Internal Revenue Service out of the same operating account into which he deposited the settlement check,

and the balance remained below the portion of the settlement owed to the client.

7. Attorneys— disciplinary hearing—finding of fact—client testimony—clear, cogent, and convincing evidence

The Disciplinary Hearing Commission did not err in an attorney discipline case for misappropriation of client funds by finding as fact by clear, cogent, and convincing evidence that in July 1997 defendant sent a private investigator to Florida to give $8,900 to the client based on the clients's testimony because: (1) even though defendant challenges the client's testimony regarding statements allegedly made by the private investigator during their telephone conversation as inadmissible hearsay, defendant waived this argument under N.C. R. App. P. 10(b)(1) by failing to object during the hearing; and (2) even though defendant appears to challenge the credibility of the client's testimony, the court is concerned only with the sufficiency of the evidence.

8. Attorneys— disciplinary hearing—finding of fact—improper advance of financial assistance—clear, cogent, and convincing evidence

The Disciplinary Hearing Commission did not err in an attorney discipline case for misappropriation of client funds by finding as fact by clear, cogent, and convincing evidence that defendant advanced financial assistance to three clients in violation of former Rule 5.3(B) and former Rule 1.2(A) of the Rules of Professional Conduct when the evidence reveals defendant loaned money from his brother's company to one client for surgery; to another client for rent and payments on a car note; and to yet another client for payment of surgical, medical, and travel expenses.

Appeal by defendant from order entered 6 November 1998 by the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 24 February 2000.

Fern Gunn Simeon for the North Carolina State Bar.

Douglas S. Harris, Pro Se.

WYNN, Judge.

The North Carolina State Bar brought this action before the Hearing Committee of the Disciplinary Hearing Commission of the

State Bar by a complaint alleging that the defendant, a licensed attorney, violated various Disciplinary Rules of the Code of Professional Responsibility while representing Brenda Capps in a personal injury action.

A hearing on this matter was held before the Hearing Committee on 8 and 9 October 1998 and 6 November 1998. The evidence showed that Capps discharged the defendant by letter dated 16 August 1996. Then she consulted with another attorney whom she hired later to represent her in the action. That attorney sent the defendant a letter dated 22 August 1996 requesting that he notify Allstate Insurance Company, the insurance carrier for the tortfeasor under Capps' claim, of his discharge.

On 23 August 1996, the defendant negotiated a settlement of Capps' claim with an adjuster of Allstate Insurance Company. Under the settlement agreement, the adjuster sent the defendant a check in the amount of $12,000.00, issued to the defendant and Capps in full and final settlement of the claim. Along with the check, the defendant received a form releasing any further claims in the settled matter.

The defendant presented evidence that on 18 January 1997, Capps came to his office in Greensboro, North Carolina and signed the release form and a limited power of attorney authorizing him to sign her name to the settlement check. In fact, the defendant's secretary, a public notary, testified during the hearing that she had acknowledged Capps' signature on the release and power of attorney on that particular day. Also, the defendant testified that he wrote a check for $8,900.00 out of his operating account and gave Capps the check during her visit to his office.

The State Bar, however, presented evidence that on 18 January 1997 Capps was in Largo, Florida attending organ lessons in the morning; attending an organ concert in the afternoon; and dining out with friends in the evening. Further, the State Bar's audit revealed no evidence of a check clearing the defendant's operating account in the amount of $8,900.00 made payable to Capps.

Following the hearing, the Hearing Committee entered an order disbarring the defendant from the practice of law. From this order, he appeals.

The appellate courts' standard of review for attorney discipline cases is the "whole record test." *See N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985). Under that standard, this Court examines all competent evidence in the whole record on appeal to determine whether the agency decision is supported by substantial evidence. *See In re Meads*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (quoting *Rector v. N.C. Sheriff's Educ. & Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991)). Therefore, under the whole record test, the Hearing Committee's ruling should be affirmed if it is supported by substantial evidence which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Retirement Villages, Inc. v. N.C. Dept. of Human Resources*, 124 N.C. App. 495, 498, 477 S.E.2d 697, 699 (1996); *In re Meads*, 349 N.C. at 663, 509 S.E.2d at 170.

I. DISCOVERY INFORMATION

The defendant challenges the Hearing Committee's order of discipline on the grounds that his due process rights were violated when he was denied access to necessary discovery information by: (A) the Hearing Committee and (B) the State Bar.

A. The Hearing Committee

[1] The defendant first contends that the Hearing Committee erred in denying his motion to compel discovery of the reports and witness interview notes of the State Bar's investigator because that evidence was not protected under the attorney-work product privilege. We disagree.

In *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 2d 451 (1947), the United States Supreme Court held that oral and written statements of witnesses obtained or prepared by an adverse party's counsel in the course of preparation for possible litigation are not discoverable without a showing of necessity. In effect, the *Hickman* Court recognized the attorney-work product rule which is "a qualified privilege for witness statements prepared at the request of the attorney and an almost absolute privilege for attorney notes taken during a witness interview." *In re PCB*, 708 A.2d 568, 570 (Vt. 1998); *see also Hickman*. Also, under the attorney-work product rule, the mental impressions, conclusions, opinions and legal theories of an attorney are absolutely protected from discovery regardless of any showing of need. *See Hickman*.

Indeed, the North Carolina Rules of Civil Procedure provide for the attorney-work product privilege by stating that

> a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the materials sought or work product of the attorney or attorneys of record in the particular action.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (1990).

Although our courts have applied the attorney-work product rule in many different contexts, the question of its applicability in the context of an attorney discipline case is a matter of first impression for our Courts. *See Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976) (holding that any materials prepared in anticipation for any litigation by a party from whom discovery is sought are protected under the rule of civil procedure governing the scope of discovery); *Hall v. Cumberland County Hospital System*, 121 N.C. App. 425, 466 S.E.2d 317 (1996) (holding that the trial court erred reversibly by releasing certain documents to plaintiffs without addressing defendants' claims that those documents were privileged).

We are, however, aware of a recent decision of the Vermont Supreme Court, which addressed the question presently before this Court—whether a bar investigator's reports and witness interview notes are protected under the attorney-work product rule. *In re PCB*, 708 A.2d 568. In that case, the Vermont Supreme Court determined that witness statements and notes taken by the bar counsel or bar investigator are privileged and not discoverable absent a showing of substantial need and undue hardship and a finding of good cause by the Professional Conduct Board. *See id.* at 571.

As in *In re PCB*, the discovery information requested in the case at bar includes notes and witness statements taken by the State Bar's

investigator. And, the investigator in the case at bar is a representative or agent of the State Bar. *See* N.C. Gen. Stat. § 84-31 (1995) (stating that "the North Carolina State Bar . . . may authorize counsel to employ assistant counsel, investigators . . . in such numbers as it deems necessary. . . ."). Since we are persuaded by the reasoning in *In re PCB*, we hold that the notes and reports in this case were not discoverable until there was a showing by the defendant that he had a "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent." N.C.G.S. § 1A-1, Rule 26(b)(3).

Assuming for the sake of argument that the defendant in this case has shown a substantial need of the materials in preparation of his case, he has failed to show that he was unable to obtain the substantial equivalent without undue hardship. In fact, he failed to exercise his right to depose the witnesses who were the subject of the investigator's notes and reports which would have given him the substantial equivalent of the requested information. Since he failed to make the appropriate showing under our attorney-work product rule, the investigator's notes and reports were privileged and not discoverable by the defendant.

Because the investigator's notes and reports were privileged, the Hearing Committee was not required to examine the evidence before ruling on the defendant's motion to compel. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977) (holding that a judge must order *in camera* inspection when a specific request is made at trial for disclosure of evidence which is in the State's possession and which is obviously relevant, competent and not privileged). Therefore, the Hearing Committee acted properly in denying the defendant's motion to compel.

B. The State Bar

The defendant next contends that the State Bar erred in: (1) allowing its counsel to answer defendant's interrogatory questions and (2) concealing certain requested evidence.

[2] We find meritless the defendant's contentions that it was improper for the State Bar's counsel to answer the interrogatory questions. Under Rule 33 of our North Carolina Rules of Civil Procedure, governing a party's interrogatories,

> [a]ny party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a

> public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

N.C. Gen. Stat. § 1A-1, Rule 33 (1990).

Therefore, the State Bar's counsel, as an agent of that governmental agency, was the proper party to answer the interrogatories.

[3] Next, we examine the defendant's contentions that the State Bar concealed evidence including: (1) the identity of Capps' organ teacher, David Craycroft, whose deposition testimony was admitted into evidence and (2) a statement made by Capps' brother, Harold Shelton.

In this case, the record shows that Craycroft was listed as a State Bar witness, via deposition transcript, in the pre-trial stipulations. Craycroft's testimony was introduced into evidence for the limited purpose of showing the 18 January 1997 student roster of the organ class was an authentic business record and to corroborate Capps' testimony as to her whereabouts on that particular day. Although Craycroft had not yet been deposed when the State Bar responded to the defendant's interrogatories, the class roster was listed in response to the interrogatory requesting identification of "each and every document known to plaintiff, its agents, and/or attorney which plaintiff knows or believes may contain [facts] or information relating to the claims asserted in the Complaint and/or the defenses raised in any answer interposed thereto."

Moreover, the record shows that when the State Bar's investigator discussed Capps' case with Shelton, he did not take any notes. Even if he had taken notes during that conversation, the defendant again has failed to comply with the requirement of showing undue hardship in obtaining the substantial equivalent of the requested discovery evidence under Rule 26(b)(3). In short, he could have deposed Shelton, but failed to do so. Therefore, the State Bar did not improperly conceal evidence from the defendant.

Accordingly, we find compliance with due process requirements by both the Hearing Committee and the State Bar.

II. STATEMENTS OF A MEMBER OF THE HEARING COMMITTEE

Next, the defendant argues that the Hearing Committee erred in allowing one its members to: (A) act as a handwriting expert wit-

ness in questioning the State Bar's forensic handwriting expert and (B) offer testimony as to whether the notary certificates on the release and power of attorney were false. We examine each argument separately.

A. Statements To The State Bar's Handwriting Expert

[4] In support of his argument that one of the Hearing Committee's members acted as a handwriting expert, the defendant points to the following colloquy between the Hearing Committee member and the State Bar's handwriting expert witness:

> Q. . . . And I know you said you can't determine who wrote this, but can you look at certain letters and see that they have the same characteristics?
>
> A. I see certain writing habits, the way the letters are formed.
>
> Q. Okay. I happen to have to do some of this in my profession, too. So "High Point Road," "R-D" in Exhibit 30, and its also on your Exhibit 34.
>
> . . .
>
> Q. Mr. Harris's "High Point Road," "R-D," they seem to be extremely similar to me in the down stroke.
>
> A. You mean the "R" in "Road?"
>
> Q. The "D" in "Road."
>
> . . .
>
> Q. The "A" seems to have some similarities.
>
> . . .
>
> Q. The "A" seems to be opened in two or three of his places too.
>
> A. Yes, I agree with you.
>
> Q. The only two "P-P's" I could find where—but he generally does like me, nobody can read his writing, so he prints quite often, but he seems to have this loop in the "P's" the same in the only two I could find.

We do not, however, find the challenged colloquy to be evidence that the Hearing Committee member was acting as an expert witness.

Rather, the colloquy shows that the Hearing Committee member requested that the State Bar's expert witness compare the defendant's known handwriting samples with Capps' purported signature on the release and settlement check. In questioning the expert witness about the comparison between the aforementioned documents, the Hearing Committee member merely observed similarities in the way the defendant wrote the letters "d" and "a" in the known writing samples and the manner in which those letters appeared on the release and settlement check. In effect, the Hearing Committee member was not testifying as an expert but was attempting to get the State Bar's expert witness to explain the significance of his observations of the defendant's handwriting as compared to that on the release and settlement check.

In response, the expert noted that there "was no possible way" that Capps could have signed the release. But the expert—despite the questions of the Hearing Committee member regarding the similarities between the defendant's known handwriting samples and the signatures on the release and settlement check—was unable to determine who signed the release and settlement check.

Given the foregoing evidence, we find no error in the Hearing Committee member's questions to the State Bar's expert witness.

B. Statements About The Notary Certificates

[5] In support of his argument that one of the Hearing Committee's members offered testimony regarding whether the notary certificates on the release and power of attorney were false, the defendant first points out that in North Carolina, there is a presumption that the recitations contained in a notary's certificate or acknowledgment are true. *See Johnson Lumber Co. v. Leonard*, 145 N.C. 339, 59 S.E. 134 (1907) (holding that proof to impeach a notary's certificate must be clear and convincing). This presumption, however, may be rebutted by clear, cogent, and convincing proof. *See id.*

Here, the State Bar offered evidence that on 18 January 1997—the day that the defendant's secretary allegedly witnessed Capps sign a release and power of attorney at the defendant's office—Capps was in Largo, Florida. Such evidence included: (1) Capps' signature on the organ lesson's roster, (2) Capps' testimony, (3) the testimony of a friend who had dinner and went to a karaoke lounge with Capps in Florida during the evening of January 18, and (4) an ATM withdrawal slip and a bank statement reflecting her withdrawal of $50.00 on 18 January 1997 from a bank in Florida.

Based on this evidence, the Hearing Committee found that:

> 30. Defendant allowed Watkins to acknowledge falsely that Capps appeared before Watkins and signed the release on January 18, 1997.
>
> 31. Defendant allowed Watkins to acknowledge falsely that Capps appeared before Watkins and signed the limited power of attorney on January 18, 1997.

We find the evidence supporting the Hearing Committee's findings of fact numbers 30 and 31 to be clear, cogent, and convincing proof that the notary certificates of the defendant's secretary were false.

Next, the defendant supports his argument that the Hearing Committee member offered testimony regarding the veracity of the notary certificates by pointing to the Hearing Committee member's statements to the defendant's secretary:

> I know at home quite frequently, the secretary in a law firm will sign a power of attorney where they have not actually seen a person. The attorney said they were there, and they walk out to the desk or they are back in the back, and I have witnessed this.

Construing the dialogue between the Hearing Committee member and the defendant's secretary as a whole, we find that the Hearing Committee member was merely asking the defendant's secretary whether the statements in her notary acknowledgment were truthful. The Hearing Committee member, however, prefaced his questions with the above-mentioned statements. Thus, the Hearing Committee member did not himself provide testimony that the information contained in the secretary's acknowledgment was false.

Moreover, even if the Hearing Committee member's statements constituted testimony in support of findings of fact numbers 30 and 31, the resulting error would be harmless because there was other evidence which constituted clear, cogent, and convincing proof to support these findings of fact.

III. THE HEARING COMMITTEE'S FINDINGS OF FACT

Finally, the defendant contends that three of the Hearing Committee's findings of fact were not supported by clear, cogent and convincing evidence drawn from the whole record. We disagree.

"The standard of proof in attorney discipline and disbarment proceedings is one of 'clear, cogent and convincing' evidence." *Sheffield*, 73 N.C. App. at 354, 326 S.E.2d at 323; *see also In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979). "Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *Sheffield*, 73 N.C. App. at 354, 326 S.E.2d at 323. And, it "has been defined as 'evidence which should fully convince.' " *Id.* (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363, 177 S.E. 176, 177 (1934)).

[6] The defendant first asserts that the Hearing Committee erred in finding his bank account balance was below $8,900.00 because the "uncontradicted evidence was that . . . at all time [the] aggregate accounts held in excess of $100,000.00."

However, his assertions are without merit because he has mistakenly focused on his aggregate accounts rather than his operating account which was the basis of the Hearing Committee's findings. The Hearing Committee's specific findings relating to the defendant's assertions are:

> 39. The balance in Defendant's CCB operating account remained below $8,900.00 from January 22, 1997 to May 19, 1998.
>
> 40. At all times when Defendant's bank account balance was below $8,900.00, this amount should have been in Defendant's bank account since no check made payable to Capps in the amount of $8,900.00 had cleared Defendant's bank account.
>
> 41. Defendant appropriated $8,900.00 from Capps' Allstate settlement to his own use or benefit.

Clear, cogent and convincing evidence exists in the record to support these findings of fact. For instance, the insurance adjuster who handled the settlement of Capps' claim testified at the hearing that on 23 August 1996 the defendant allegedly acting on Capps' behalf settled the claim for $12,000.00. At that time, however, the adjuster was unaware that the defendant's employment had been terminated, thereby discharging his ability to act on her behalf as an attorney.

Thereafter, on 15 January 1997, the defendant wrote check number 11494 on his Central Carolina Bank operating account to the Internal Revenue Service in the amount of $10,235.89. Six days later, on 21 January 1997, he deposited the following amounts into his oper-

ating account: (1) the $12,000.00 settlement check, (2) a $4,617.19 check and (3) a $10.00 check. That same day, his bank paid check number 11494 to the Internal Revenue Service.

After that check was paid, the balance in the defendant's operating account at Central Carolina Bank remained below $8,900.00—the portion of the settlement owed to Capps—from 21 January 1997 to May 1998. Thus, the defendant appropriated Capps' portion of the settlement for his own use or purpose. *See* Rule 10.1(C) of the North Carolina Rules of Professional Conduct (stating that "[a]ll money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or as reimbursement for expenses properly advanced by the lawyer on behalf of the client shall be deposited in a lawyer trust account.")

[7] The defendant next challenges the Hearing Committee's finding that "[i]n July 1997, [he] sent a private investigator to Largo, Florida to give $8,900.00 to Capps."

At the hearing, Capps testified that in 1997 a private investigator identifying himself as the defendant's courier called her Florida home stating that "he was going to bring [Capps] a replacement for a lost settlement check." During the conversation, Capps informed him not to come to her home and "any business to do with [the defendant] whatsoever he would do with Mr. Snow, [her] attorney in High Point, North Carolina." Several days later, on 4 July 1997, the investigator came to her home but did not discuss the settlement check at that time.

On appeal, however, the defendant challenges Capps' testimony regarding statements allegedly made by the private investigator during their telephone conversation on the grounds that these statements constituted inadmissible hearsay. But, he failed to object to this testimony during the hearing, thereby waiving his right to present such an error on appeal. *See* North Carolina Rules of Appellate Procedure, Rule 10(b)(1) (stating 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 ground were not apparent from the context. . . .").

Also, the defendant appears to be challenging the credibility of Capps' witness testimony by suggesting that the finding of fact at

issue was not supported by sufficient evidence since the only evidence in support of the finding was Capps' testimony. But, our "review is concerned only with the sufficiency of the evidence, not the credibility of witnesses." *Sheffield*, 73 N.C. App. at 355, 326 S.E.2d at 324. Applying this standard of review, we find that Capps' testimony alone constitutes clear, cogent and convincing proof to support the Hearing Committee's finding regarding the defendant's private investigator.

[8] Lastly, the defendant challenges the Hearing Committee's findings that:

> 53. Defendant lent or advanced his brother's company's money to three of Defendant's clients as follows: a) Alan Morton-to pay for his surgery; b) Natashia Nelson-to pay her rent and car note; and c) Pamela Moffit-to pay surgery medical expenses, and travel to doctors. The expenses of Alan Morton, Natashia Nelson, and Pamela Moffit were not litigation expenses.

Based on this finding of fact, the Hearing Committee concluded that the defendant "advanced financial assistance of client in violation of Rule 5.3(B) and violated the Rules of Professional Conduct through the acts of another in violation of Rule 1.2(A)." The defendant also challenges the Hearing Committee's conclusion.

Rule 5.3(B) of the North Carolina Rules of Professional Responsibility provides that:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Rule 1.2(A) states that it is professional misconduct for a lawyer to "[v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . ."

In the present case, the undisputed facts are that: (1) the defendant kept $20,000.00 in his trust account for several years which came from his brother's company, Castle McCullough, and (2) he loaned money from his brother's company to three clients: Alan Morton,

Natashia Nelson and Pamela Moffit. In fact, the money was loaned to Morton for his surgery; to Nelson for rent and payments on a car note; and to Moffitt for payment of surgical, medical and travel expenses.

The foregoing facts constitute clear, cogent and convincing proof to support the Hearing Committee's finding that the defendant loaned money to his three clients. Thus, the Hearing Committee's finding adequately supports its conclusion that the defendant violated Rules of Professional Conduct 5.3(B) and 1.2(A); therefore, we uphold the Hearing Committee's ruling in this regard.

Finding the defendant's remaining assignments of error to be either abandoned or without merit, we need not address them on appeal. *See* North Carolina Rules of Appellate Procedure, Rule 28(b)(5).

The order appealed from is,

Affirmed.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. STEPHEN CLAY JONES, SR.

No. COA99-437

(Filed 4 April 2000)

1. Evidence— hearsay—homicide victim's statements about defendant

There was no plain error in the first-degree murder prosecution of a husband for shooting his wife as she slept in the admission of her statements about his jealousy and threats to kill her. Her statements were arguably no more than recitations of fact; however, the facts she recited were admissible under N.C.G.S. § 8C-1, Rule 803(3) as tending to show her state of mind as to her marriage, were relevant under Rule 402 to show her relationship with defendant, and rebutted testimony by defendant that they had a good marriage.

2. Constitutional Law— confrontation clause—hearsay

The admission of a homicide victim's statements about defendant did not violate defendant's rights under the Confrontation Clause of the Sixth Amendment. Hearsay does not violate the Confrontation Clause if it bears adequate indicia of reliability and reliability can be inferred without more if the hearsay falls within a firmly rooted exception to the hearsay rule.

3. Evidence— telephone calls—identification of caller

There was no plain error in a first-degree murder prosecution where the trial court admitted hearsay evidence of defendant's telephone calls to the victim's workplace. The State failed to properly authenticate the calls because the witnesses did not recognize defendant's voice and simply accepted the caller's self-identification, but the calls were rarely more than to see if the victim was at work and the witnesses only once heard anything even approaching a threatening remark. Moreover, defendant offered evidence of an alternate caller.

4. Criminal Law— automatism—instructions

There was no plain error in a first-degree murder prosecution where the trial court instructed the jury that the burden of proof for the affirmative defense of unconsciousness or automatism lay with defendant. Although defendant argued that this instruction required him to disprove the existence of a voluntary act, a required element of first-degree murder and its lesser included offenses, defendant was only required to overcome the presumption that a person is conscious when he acts as if he were conscious. Unlike *Mullaney v. Wilbur*, 421 U.S. 684, the instructions here did not relieve the State of the burden of proving all of the essential elements of first-degree murder or its lesser included offenses.

5. Evidence— character—victim

There was no plain error in a first-degree murder prosecution where the State introduced evidence of the victim's good character before defendant offered any evidence of her character, but defendant did not object at trial and testified on cross-examination that the victim was the good person others believed her to be. Defendant's decision to offer the same evidence he now objects to negates any claim of error he might otherwise have supported.

6. Constitutional Law— effective assistance of counsel

A first-degree murder defendant was not denied the effective assistance of counsel where, taken as a whole, defendant's attorney's performance was not so deficient as to render his service ineffective. He thoroughly cross-examined witnesses and presented evidence that contradicted the State's evidence, he objected to the admission of evidence, and the trial transcript indicates that he was well prepared and alert. The failures to object cited by defendant involved evidence which was admissible, an instruction which was without error, and errors which were corrected by defendant's own evidence. The one failure to object which was not corrected by defendant's evidence was slight and did not result in prejudice to defendant.

Appeal by defendant from judgment entered 4 August 1998 by Judge George L. Wainwright, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 17 February 2000.

Michael F. Easley, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State.

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

WYNN, Judge.

This appeal arises from the defendant's conviction of first degree murder of his wife. He presents several issues challenging the fairness of his trial including the admission of hearsay evidence, an instruction to the jury on the defense of unconsciousness or automatism, the admission of character evidence and the ineffective assistance of his counsel. We find no prejudicial error in his conviction.

Stephen Clay Jones, Sr. and Frances Riggs Jones were married for 23 years. Up until Ms. Jones' death, they lived with their two children in New Bern, North Carolina.

After an assailant attacked Frances at her home in 1985, she kept four guns—one in her purse, one in her car, one in her dresser, and one .38 caliber pistol under her bed pillow.

The couple awakened early on the morning of 8 June 1997 and Frances cut Stephen's hair. They went out to breakfast, shopped, and visited the grave of Frances' sister. They returned home, relaxed, and

had sexual relations in their bed. Frances showered and the couple took an afternoon nap together in their bed.

According to Stephen, a loud bang woke him up and he found a gun lying next to his face and Frances bleeding. He called 911 crying and telling the operator he had just shot his wife and she needed an ambulance. He said that he did not remember shooting his wife and if he did so, he did not do it deliberately.

Responding to the 911 call, police officers arrived at the Jones' home. Stephen came outside, crying and still holding the phone. He put the phone down and got on the ground as soon as the officers told him to do so.

The police officers found Frances on the right side of her bed. She lay flat on her back with her arms straight down at her sides. Her feet touched the end of the bed and her nightgown was bunched up under her buttocks. Her head lay partially on the pillow, facing right, but blood stains on the pillow failed to help the investigators determine whether Frances was shot lying down. The pillow partially covered the .38 caliber pistol, which had one fired casing and five live rounds. The police officers found a .38 caliber bullet lodged in the window facing next to and above the bed but the bullet was too damaged to determine if it had been fired from the .38 caliber pistol found under the pillow.

Forensic residue tests on Frances' and Stephen's hands were inconclusive as to whether either had recently fired a gun. An autopsy revealed that a bullet entered Frances' skull behind her left ear and exited behind her right ear. The bullet passed through her brain, instantly killing her. The gun fired the bullet six to twelve inches away from her head, but the pathologist could not determine Frances' position at the time of the shooting.

Stephen's evidence at trial showed that Frances could have been lying down when shot from close range. The State's evidence showed that she could have been shot while sitting up.

The State and Stephen presented conflicting testimony at trial as to the nature of the couple's marital relationship. Several State witnesses testified that a man identifying himself as Stephen Jones made several phone calls to Frances' place of employment during the six weeks before her death—usually asking whether Frances was at work, and on occasion, talking to Frances.

Frances' coworkers described her as well-liked, friendly, and hard-working. Some of her coworkers revealed conversations with Frances in the weeks before her death in which she said that she had a jealous husband who had threatened to kill her many times. Some coworkers also testified that on a few occasions, Frances would not let anyone walk her to her car after work, saying that her husband might be waiting for her in the parking lot.

The State also presented evidence that Frances may have had a cut on her mouth. Witnesses for the defendant testified otherwise.

In his testimony, Stephen described Frances as friendly, hard-working, and honest. He revealed a year-long extra-marital affair in 1985, but stated that he had been faithful for a long time and Frances forgave him. He testified that he rarely visited or called Frances' workplace, and that he made no phone calls there between 1 May and 8 June 1997. His cellular phone records showed no calls placed to Frances' workplace during that period.

Stephen also presented telephone records showing that Michael Godwin, a former employee at Frances' workplace, made 41 calls to the mill and eight more to the Jones' residence during May and June 1997. One of Frances' coworkers testified that she had once spent a couple of hours talking to Godwin on the phone. Godwin himself did not testify since he could not be found and subpoenaed.

Jack Jones, the couple's 17-year-old son, testified that he had never seen his parents argue or fight; that he had never seen his father hit his mother; and that Frances had a fever blister on her mouth but no other injuries.

Dr. Rodney Radtke testified that after Frances' death, he diagnosed Stephen as suffering from REM Sleep Disorder—a condition where normal muscle relaxation fails during the dream stage of sleep and the sleeper acts out his dreams. The sleeper usually vividly recollects his REM Sleep Disorder dreams, but not always. Typical behavior while sleeping can include kicking, fighting, cussing, dragging a person down the stairs, and trying to break a person's neck. Dr. Radtke testified that a person with REM Sleep Disorder could fire a gun while asleep, especially if the gun was easily accessible. He based Stephen's diagnosis on his sleep habits aside from the shooting incident.

The defendant's evidence showed that he suffered REM Sleep Disorder episodes anywhere from two-to-three times a year to two-to-

three times a month. On various occasions while sleeping, he kicked and damaged a wall, kicked a bedpost, squeezed and grabbed his wife and put his hand over her mouth, jumped out of bed and ran into a wall, and beat and scratched himself. While in the county jail after his arrest in this case, Stephen's cell mate watched him dive into the cell door while asleep, and twice had to restrain him from running in his sleep.

Dr. Radtke speculated that since Stephen had only an eighth grade education, he could not have read about REM Sleep Disorder and faked the symptoms. Further, Dr. Radtke testified that if Stephen was making up his symptoms, he probably would have claimed to "remember" a dream about shooting a gun.

At the close of all evidence, the trial court instructed the jury on the charges of first degree murder, second degree murder, and involuntary manslaughter. The court also instructed the jury about the affirmative defense of unconsciousness or automatism. The jury found the defendant guilty of first degree murder and the trial judge sentenced him to imprisonment for life without parole. The defendant appealed.

I.

[1] The defendant first argues that the trial court erred by admitting irrelevant and highly prejudicial hearsay evidence concerning his alleged jealousy and threats to kill his wife. We disagree.

Because the defendant did not object at trial to any of the evidence complained of in this assignment of error, we review this issue under the plain error standard of review. N.C.R. App. P. 10(b)(1), *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 357, 376 (1983). Plain error is an error which was "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result. *See State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

The defendant argues that the trial court erroneously allowed the State to introduce under N.C.R. Evid. 803(3)—the state-of-mind exception to the hearsay rule—numerous statements made by

Frances to several coworkers that he was a jealous man and had repeatedly threatened to kill her. He contends that these statements were inadmissible hearsay and also violated his right to confront the witnesses against him.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). Generally, hearsay is not admissible. N.C.R. Evid. 802. However, numerous exceptions to this rule exist, including Rule 803(3) which allows admission of a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed . . . ." Such a statement must also be relevant to a fact at issue in the case (Rule 402) and its probative value must not be substantially outweighed by its prejudicial impact (Rule 403). *See State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990).

In this case, the defendant argues that Frances' statements concerning his alleged jealousy and threats to kill her should not have been admitted because the statements were recitations of remembered facts and not statements about her existing state of mind, emotions, sensation, or physical condition. But our courts have repeatedly found admissible under Rule 803(3) a declarant's statements of fact that indicate her state of mind, even if they do not explicitly contain an accompanying statement of the declarant's state of mind.

Indeed, most recently, in the case of *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), our Supreme Court held that a decedent's factual statements about the status of his marriage exposed how he felt about the marriage and were therefore state-of-mind statements, despite the fact that he did not explicitly state how he felt about the situation. The Court also held that the statements corroborated a possible motive for the defendant's act of murder. *Accord State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Moreover, the decedent's statements in *Brown* rebutted testimony by the defendant that her marriage to the victim was a happy marriage. Rebuttal testimony needs no special rule to allow its admission. *See State v. Lambert*, 341 N.C. 36, 49, 460 S.E.2d 123, 131 (1995).

Earlier, in *State v. Mixion*, 110 N.C. App. 138, 429 S.E.2d 363, *review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993), we held that state-

ments about feelings need not accompany statements of fact to be admissible under Rule 803(3). In *Mixion*, the decedent made statements that the defendant harassed her and threatened her, but she did not express fear or any other emotion. These statements, although entirely factual, in effect showed the decedent's state of mind when she uttered them and were therefore admissible under Rule 803(3). *See also State v. Exum*, 128 N.C. App. 647, 655, 497 S.E.2d 98, 103 (1998) (holding that fact-laden statements are usually purposeful expressions of some state of mind and are therefore admissible under Rule 803(3)). And the factual statements by the decedent in *Mixion* were relevant to the case because they related directly to the decedent's relationship with the defendant. *Accord Exum; State v. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618 (1996) (holding that: "It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant.")

In this case, Frances' statements that her husband was jealous and had repeatedly threatened to kill her were arguably no more than recitations of fact. However, the facts that she recited tended to show her state of mind as to her marriage and were therefore admissible under Rule 803(3). *See Brown*, *supra*; *Exum*, *supra*; and *Mixion*, *supra*. Further, since her statements indicated her relationship with the defendant, they were relevant under Rule 403. *See Exum*, *supra*. Finally, the statements rebutted testimony by the defendant that they had a good marriage and were therefore admissible for that reason. *See Brown* and *Lambert*, *supra*.

[2] The defendant also argues that admitting Frances' statements violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. We disagree.

Hearsay does not violate the Confrontation Clause of the Sixth Amendment if it bears adequate indicia of reliability. *See Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980). Reliability can be inferred without more if the hearsay falls within a firmly rooted exception to the hearsay rule. *See id.* In North Carolina, the state-of-mind exception to the hearsay rule is a firmly rooted exception. *See, e.g., State v. Jackson*, 348 N.C. 644, 654, 503 S.E.2d 101, 107 (1998); *State v. Stager*, 329 N.C. 278, 318, 406 S.E.2d 876, 899 (1991); *State v. Faucette*, 326 N.C. 676, 684, 392 S.E.2d 71, 75 (1990). The defendant's argument that the statements in the case at bar, admitted

under the state-of-mind exception, violated the Confrontation Clause is without merit.

II.

[3] The defendant next argues that the trial court erred by admitting inadmissible and highly prejudicial hearsay evidence of defendant's alleged phone calls to the sawmill—Frances' workplace.

Before a witness may testify as to a telephone conversation, the witness must identify the person with whom he spoke. *See State v. Richards*, 294 N.C. 474, 480, 242 S.E.2d 844, 849 (1978). If the call was from a person whose identity is in question, it is not enough that the caller identify himself by name; rather, the witness must have recognized the caller's voice or otherwise identified him by circumstantial evidence. *See id.*

At trial, the State presented evidence showing that a man who identified himself as Stephen Jones repeatedly called Frances at her place of work during the six weeks before her death. The State failed to properly authenticate the calls in accordance with *Richards* because the witnesses who testified about these phone calls did not recognize his voice; instead, they simply accepted the caller's self-identification. Since the State failed to properly authenticate the phone calls, they were inadmissible under Rule 901. But because the defendant failed to object to the admission of the phone call evidence at trial, we consider this error under the plain error standard and determine whether the admission of this evidence caused the jury to reach a result it would not have reached otherwise. *See Odom, supra.*

The record on appeal shows that the phone calls, while frequent, were rarely more than a call to see if Frances was at work. Occasionally, the caller talked to Frances, but only once did the witnesses hear anything even approaching a threatening remark—when the speaker was told that Frances was at work and he responded "better hope she is." Also, the defendant offered evidence showing that a former coworker, Michael Godwin, had called Frances' workplace 41 times in the weeks before her death. This evidence helped negate any damaging impact the phone call evidence might have had by offering an alternate caller for the jury to consider. In light of this evidence, we believe that the phone call evidence was not so influential or inflammatory that it resulted in the jury reaching a verdict it would otherwise not have reached.

III.

[4] Next, the defendant argues that the trial court erred by instructing the jury that the burden was on the defendant to establish the defense of unconsciousness or automatism. The defendant contends that North Carolina's pattern jury instructions on unconsciousness are unconstitutional under recent United States Supreme Court cases. We disagree.

The defendant himself offered to the trial court the unconsciousness instruction and he obviously did not object to the instruction he offered. We therefore review this assignment of error for plain error only. *See Odom, supra.*

The trial court instructed the jury that if the defendant did not shoot his wife voluntarily because of unconsciousness or automatism, then he was not guilty of any offense. The trial court put the burden of proving unconsciousness or automatism on the defendant. The trial court also instructed the jury on the elements of first degree murder, second degree murder, and involuntary manslaughter, and properly instructed the jury that the burden of proving the defendant's intent was on the State.

In North Carolina, when a person commits an act without being conscious of it, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious. *See State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983). Unconsciousness is a complete defense to a criminal charge because it precludes both a specific mental state and a voluntary act. *See id.* at 264-65, 307 S.E.2d at 353. Significantly, unconsciousness is an affirmative defense and the burden is on the defendant to prove its existence to the jury. *See id.* at 265, 307 S.E.2d at 353; *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975).

The undisputed evidence in this case shows that the defendant and his wife were alone when she was shot, and that he stated during his 911 call that he shot her. Because the gravamen of the evidence showed that the defendant did in fact shoot his wife, his guilt rested upon the State's proof that he acted intentionally. The defendant contends that the jury instruction on automatism constituted plain error because it shifted the burden of proving voluntariness away from the State and instead made him *disprove* that he acted voluntarily.

To support his argument that the jury instructions improperly shifted the burden of disproving an essential element of the State's

case to him, the defendant relies on *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975). In that case, a Maine jury instruction required a defendant in a murder trial to prove that he acted in the heat of passion, as opposed to deliberately and with malice aforethought. In effect, the burden of proof shifted away from the State and to the defendant to prove the defendant's mental state at the time of the crime. The United States Supreme Court held that it was unconstitutional for a state to require a defendant to negate a required element of an offense. *See id.* at 704, 44 L. Ed. 2d at 522.

In this case, the defendant asserts that the jury instructions on unconsciousness or automatism required him to *disprove* the existence of a "voluntary act," a required element of first degree murder and its lesser-included offenses. We hold, however, that the issue in this case is distinguishable from the issue in *Mullaney*.

Under *Mullaney*, the state carries the burden of proving a defendant's culpable state of mind at the time of a crime and the defendant does *not* have the burden of *disproving* a culpable state of mind. However, *Mullaney* did *not* address who has the burden of proof for affirmative defenses, which is the issue before us today. Unlike in *Mullaney*, the jury instructions in this case did not relieve the State of the burden of proving all of the essential elements of first degree murder or its lesser-included offenses. The State still had to carry its burden of proof; otherwise, the jury had to find the defendant not guilty. The jury instructions only placed on the defendant the burden of proving his affirmative defense. *See State v. Blair*, 101 N.C. App. 653, 657, 401 S.E.2d 102, 105 (1991). This affirmative defense did not shift the burden of proving or disproving the elements of the crime; rather, this shift only required the defendant to overcome the presumption that a person is conscious when he acts as if he were conscious. *See Caddell*, 287 N.C. at 298, 215 S.E.2d at 368.

The trial court properly instructed the jury that the burden of proof for the affirmative defense of unconsciousness or automatism lay with the defendant. Since this assignment of error is without merit, we need not address the State's argument that the defendant was not entitled to the jury instruction on unconsciousness.

IV.

[5] The defendant next argues that the trial court erred by allowing the State to present evidence of Frances' good character where he had not presented evidence calling her character into question.

At trial, several witnesses for the State testified as to Frances' good character. They testified that she was well-liked, friendly, treated people well and worked hard. Later, during the defendant's cross-examination, the defendant himself offered testimony that his wife was friendly, honest and a hard worker.

Evidence concerning the victim's character is inadmissible unless it is offered to rebut evidence offered by the defendant. N.C.R. Evid. 404(a)(2). In this case, the State offered evidence of Frances' good character *before* the defendant offered any evidence of her character. The trial court erred when it admitted that evidence. But again the defendant did not preserve this issue for appeal by objecting at trial and we must therefore review the error to determine whether it made the jury reach a verdict it would not otherwise have reached. *See Odom, supra.*

The defendant argues that the admission of the character evidence rose to the level of plain error because the evidence did nothing besides elicit sympathy for the victim. However, after the State introduced evidence of Frances' good character, the defendant himself testified on cross-examination that Frances was the good person that others believed her to be. The defendant's decision to offer the same evidence he now objects to negates any claim of error he might otherwise have supported. The admission of evidence without objection (such as the defendant's own testimony) waives *prior or subsequent* objection to the admission of evidence of a similar character. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Indeed, our Supreme Court has held that a defendant's decision to introduce character evidence is a tactical decision that will not support an assignment of error on appeal. *See Brown*, 350 N.C. at 206, 513 S.E.2d at 65.

We hold that the admission of the evidence concerning Frances' good character was not plain error.

V.

[6] Finally, the defendant argues that he was denied the effective assistance of counsel at trial. We disagree.

To prove ineffective assistance of counsel, the defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *State v. Sanderson*, 346 N.C. 669, 684-85, 488 S.E.2d 133, 141 (1997). To pre-

vail on such a claim, the defendant must show that his "counsel's performance fell below an objective standard of reasonableness" and that "counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable." *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987).

The defendant argues that his attorney's performance was deficient due to the many times his attorney failed to object to evidence presented by the State. He contends that his attorney should have objected to Frances' statements concerning his threats and jealousy, the phone call evidence, evidence of Frances' good character, and the unconsciousness instruction. The defendant also points out that because his attorney did not object to these events at trial, he must now argue under the more stringent plain error standard of review on appeal. Finally, the defendant asserts that "there could be no conceivable strategic or tactical reason to not make these objections."

We have already reviewed the defendant's assignments of error and determined that two of them are without merit. Frances' statements about his jealousy and threats were admissible. Any objection to the admission of this evidence would have been permissibly overruled. Likewise, we found no error in the jury instruction about unconsciousness and thus, an objection to it would have been properly overruled. The admission of evidence of Frances' good character was in error, but the defendant corrected that error when he offered similar testimony during his own cross-examination. On these three points, the attorney's conduct was not deficient.

Only the phone call evidence was both inadmissible and not corrected by the defendant's own evidence. However, the record indicates other evidence, aside from the phone calls, that the jury could have based its verdict on. In addition, the defendant offered evidence that the phone calls were made by another person. This evidence would have reduced some of alleged prejudice of the phone call evidence. Moreover, under the facts of this case, the evidence fails to show that the admission of the phone calls was so damaging to the defendant's case that the jury found him guilty solely because of them. Even assuming that the defendant's attorney erred in not objecting to the admission of the phone calls, this one deficiency of performance was slight and did not result in prejudice to the defendant.

Further, taken as a whole, the defendant's attorney's performance was not so deficient as to render his service "ineffective." He

throughly cross-examined witnesses and presented evidence that contradicted the State's evidence concerning the defendant's alleged threats and jealousy and the phone calls to the mill. He objected to the admission of other evidence and testimony. The trial transcript indicates that he was well-prepared and alert. His performance was far from "ineffective."

We hold that the defendant's argument that he was denied the effective assistance of counsel is without merit.

No prejudicial error.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. GEORGE LESANE

No. COA99-262

(Filed 4 April 2000)

1. Evidence— hearsay—not truth of matter asserted

The trial court did not err in a first-degree murder case by admitting the testimony of the victim's mother concerning what her daughter told her about her problems with defendant, the daughter's ex-boyfriend, and about her request to have someone pick her up at the bus stop, because these statements are not hearsay since they are offered to explain why the victim's mother asked the victim-brother to meet his sister at the bus stop that afternoon, which is a purpose other than for proving the truth of the matter asserted.

2. Evidence— hearsay—state of mind exception—subsequent conduct

The trial court did not err in a first-degree murder case by admitting the testimony of a detective concerning defendant's family not knowing his whereabouts because these statements are not hearsay since they were offered to show the effect the statements had on the testifying witness's state of mind and to explain his subsequent conduct in calling other non-family members to help him try to locate defendant, which is a purpose other than for proving the truth of the matter asserted.

3. Evidence— hearsay—erroneous admission—no prejudicial error

Although the trial court erred in a first-degree murder case by admitting the hearsay testimony of the victim's wife concerning the victim telling her that defendant previously stabbed someone seventeen times, the error was not prejudicial in light of the abundance of evidence implicating defendant, including witnesses who actually saw defendant shoot the victim.

4. Evidence— redirect examination—permissible scope—opened the door—dispel favorable inferences

The trial court did not err in concluding the prosecutor did not exceed the permissible scope of redirect examination of a witness in a first-degree murder case by asking questions concerning defendant's financial support of his child because defendant opened the door to this evidence since: (1) the State has the right to introduce otherwise irrelevant evidence if it tends to dispel favorable inferences arising from defendant's cross-examination of a witness; and (2) defendant elicited testimony during cross-examination of this witness to the effect that defendant had regular visitation with his child in an attempt to raise a favorable inference that defendant was a good father.

5. Evidence— direct examination—leading questions—refreshing recollection or memory

The trial court did not abuse its discretion in a first-degree murder case by allowing the prosecutor to ask a leading question during direct examination in order to elicit testimony that defendant spat on the victim immediately after shooting him because leading questions are permissible if the examiner seeks to aid the witness' recollection or refresh her memory when the witness has exhausted her memory without stating the particular matter required. N.C.G.S. § 8C-1, Rule 611(c).

6. Evidence— lay opinion—shorthand statement of fact

The trial court did not err in a first-degree murder case by allowing the testimony of an eyewitness, stating it looked to him like defendant was trying to shoot the victim in the head, because the statement was a permissible opinion in the form of a shorthand statement of fact. N.C.G.S. § 8C-1, Rule 701.

7. Criminal Law— motion for appropriate relief—mistake of law—parole eligibility—no prejudice

The trial court did not err in a first-degree murder case by denying defendant's post-trial motion for appropriate relief based on an alleged mistake of law with respect to eligibility for parole because there was no prejudice since defendant has not suggested the mistake of law had any effect on his plea discussions or decision not to take a plea, and contrary to defendant's assertions, there is no logical relation between a mistaken understanding of eligibility for parole and the decision to argue imperfect self-defense.

8. Constitutional Law— effective assistance of counsel—misreading of statute—trial strategy

The trial court did not err in a first-degree murder case by concluding defendant was not denied effective assistance of counsel, based on the allegations that defense counsel mistakenly misunderstood the applicable punishment for first-degree murder and the failure to develop a defense of imperfect self-defense, because: (1) the fact that both the district attorney and the trial judge also misread the statute concerning parole eligibility demonstrates that defense counsel's errors were not constitutionally deficient; and (2) a tactical decision that is part of trial strategy is generally not second-guessed by our courts, and the evidence reveals the victim was unarmed and had his back turned at the time defendant shot him.

Appeal by defendant from judgment entered 4 February 1998 by Judge A. Leon Stanback, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 25 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General H. Dean Bowman, for the State.

Bowen & Berry, PLLC, by Sue A. Berry, for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 2 February 1998 Session of Robeson County Superior Court for the first-degree murder of Larry McCormick on 1 December 1994. The jury returned a verdict of guilty on 4 February 1998, and defendant now appeals.

At trial, the State's evidence tended to show that on 1 December 1994, Larry McCormick went to a bus stop to pick up his sister, Tammy McCormick ("Tammy"), from school. Tammy had recently ended her relationship with defendant and knew defendant would be at the bus stop that afternoon to confront her. When Mr. McCormick arrived at the bus stop, he and defendant began arguing. After the school bus arrived, defendant pulled out a gun and shot Mr. McCormick several times. Defendant then rode away on his bicycle.

[1] Defendant begins by arguing that the trial court erroneously admitted several pieces of hearsay evidence. The first evidence to which defendant objects is certain testimony by Aldrena McCormick, the victim's mother. Specifically, Ms. McCormick testified as follows:

Q: Now, when [defendant and Tammy] started having trouble, how long was that before Larry was killed; do you know?

A: Well, I didn't know just when they had start having trouble, but my—my daughter told me sometime afterwards.

[Objection; overruled.]

. . . .

Q: Why was it that you asked your son to go get—

[Objection; overruled.]

A: That morning I walked [Tammy] to the bus stop. She hadn't said anything to me about anything until she got ready to go—the bus came up and she told me—

[Objection; overruled.]

A: She told me that—would I have someone come to the bus stop when she get out—

[Move to strike.]

A: — out of school.

[Denied.]

Q: Go ahead.

A: When she get out of school. I asked her why. And she told me because—

[Objection; overruled.]

A: She asked me—would I have someone come to the bus stop. I asked her why. She said because [defendant] said he would be there when she got off the bus, and that he—she was—he—she was going with him. So I said okay. So the bus came, she got on, and she left.

(Tr. at 25-27.) Defendant contends that Ms. McCormick's testimony with respect to what Tammy told her, both as to her problems with defendant and her request that someone pick her up at the bus stop, constituted inadmissible hearsay. Because we conclude that these statements were not hearsay in the first place, we disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). If a statement is offered for any purpose other than for proving the truth of the matter asserted, it is not objectionable as being hearsay. 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 195 (5th ed. 1998). For example, a statement introduced for the purpose of explaining the subsequent conduct of the testifying witness is not hearsay. *State v. Morton*, 336 N.C. 381, 399, 445 S.E.2d 1, 11 (1994). The statements here with respect to Tammy's problems with defendant and her request that someone meet her at the bus stop were introduced to explain why Ms. McCormick did in fact ask Mr. McCormick to meet Tammy at the bus stop that afternoon. Accordingly, Ms. McCormick's testimony was properly admitted.

[2] The next evidence to which defendant objects is the testimony of Detective Downing, who testified as follows:

Q: You, personally, went to New York to retrieve the Defendant?

A: I did.

[Objection—leading; overruled.]

Q: And did you retrieve him?

A: I did.

. . . .

Q: In your attempt to locate him, did you talk to his family?

A: I did.

Q: Did they indicate to you that they knew where he was?

[Objection; overruled.]

Q: Tell us whether or not they indicated to you that they knew where the Defendant was?

A: They admitted they did not know where he was.

(Tr. at 201-02.) Defendant again argues that this testimony as to his family's lack of knowledge of his whereabouts constitutes inadmissible hearsay that tended to suggest defendant had fled the state. For the same reasons that we articulated earlier, we disagree. This testimony was not offered to prove the truth of the matter asserted; whether or not defendant's family actually knew his whereabouts was immaterial. Instead, this testimony was introduced to show the effect it had on the testifying witness' state of mind and also helped explain his subsequent conduct in calling other non-family members to help him try to locate defendant. *See generally State v. Irick*, 291 N.C. 480, 498, 231 S.E.2d 833, 845 (1977) (allowing evidence of police dispatches in order to explain the officers' subsequent conduct in pursuing a suspect).

[3] Finally, defendant contests the admission of certain testimony by Donna McCormick, the victim's wife, as to what Mr. McCormick purportedly told her before he left to pick up his sister at the bus stop. Specifically, Ms. McCormick testified:

A: And, at that time [immediately before he left for the bus stop], he had an expression on his face. He acted like he didn't want to go.

[Objection; overruled.]

A: And then he told his mother I'm on my—I'm on my way. After he hung up the phone, he was like, Renee—he told me I know [defendant] has stabbed—

[Objection; overruled.]

A: —this guy seventeen times. He told me I don't have no weapons.

[Objection; overruled.]

A: So he got ready to walk out the door.

(Tr. at 195.) The State maintains that this testimony was admissible under the "then existing state of mind" exception to the hearsay rule. We disagree with the State's argument but conclude that the error resulted in no prejudice to defendant.

Rule 803(3) allows hearsay testimony if the testimony is in the form of a statement as to the declarant's then existing state of mind or emotions; the rule excludes the testimony, however, if it is purely a recitation of facts. N.C.R. Evid. 803(3). The rationale for Rule 803(3) has been explained as follows:

> "[T]here is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition" and that such statements are more trustworthy than the declarant's in-court testimony. Mere statements of fact, however, are provable by other means and they are not inherently trustworthy.

State v. Hardy, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (quoting 6 John H. Wigmore, *Evidence* § 1714 (1976)). Statements of emotion include, for example, "I'm frightened" or "I'm angry." *Id.* Our courts have further clarified that testimony that recites both emotions and facts falls within the scope of the 803(3) exception. *State v. Marecek*, 130 N.C. App. 303, 306, 502 S.E.2d 634, 636, *disc. review denied*, 349 N.C. 532, 526 S.E.2d 473 (1998). This is because "factual circumstances surrounding [the declarant's] statements of emotion serve only to demonstrate the basis for the emotions." *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998). Thus, to synthesize, our courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.

In this case, Ms. McCormick testified that her husband said, "I know [defendant] has stabbed this guy seventeen times." This testimony, no doubt, is a recitation of facts. This testimony also ostensibly is a basis for Mr. McCormick's fear of going to meet Tammy at the bus stop, given that he knew defendant would be there. Significantly, however, we have no actual statement of emotion by Mr. McCormick. All we have is Ms. McCormick's opinion testimony that her husband acted frightened. Absent an actual statement of emotion, any statement of fact that could purportedly serve as a basis for this emotion

is outside the scope of Rule 803(3). Were we to allow this statement of fact merely because Ms. McCormick opined that her husband looked afraid, we would be opening the door for the admission of any statement of fact so long as the testifying witness could attribute some emotion or state of mind to the declarant that could be supported by that statement of fact. The hearsay rule would be eviscerated as a result. *Compare Gray*, 347 N.C. at 173, 491 S.E.2d at 550 (allowing statements of prior abuse to explain the basis for declarant's statement that she was afraid) *with Marecek*, 130 N.C. App. at 306, 502 S.E.2d at 636 (disallowing declarant's recitation of facts in the absence of an actual statement of emotion). Accordingly, we hold that Ms. McCormick's testimony with respect to defendant having previously stabbed someone seventeen times was inadmissible hearsay.

Nonetheless, we conclude that the error resulted in no prejudice to defendant. To receive a new trial, defendant must show "a reasonable probability that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (1999). There was an abundance of testimony here that implicated defendant, many of it by witnesses who actually saw defendant shoot Mr. McCormick. We do not see how one isolated statement that defendant had previously stabbed someone seventeen times was so prejudicial to defendant that its exclusion would have probably led to a different result at trial.

[4] In his next assignment of error, defendant argues that the prosecutor exceeded the permissible scope of examination in his re-direct of Aldrena McCormick. Specifically, defendant objects to the following line of questioning:

Q: Did [defendant] support [his] child?

A: He would buy him, you know, things. He would buy him clothes and get his haircut and things like that. He didn't never give—he might have gave her some money straight out, but, as far as I know, I—you know—

Q: Do you know where he—

A: —but it wasn't—

Q: Do you know where he was working at the time?

[Objection; overruled.]

A: As far as I know, he wasn't.

Q: During—during the entire time that he was going with your daughter, was he working then?

[Objection; overruled.]

A: As far as I know, he wasn't.

(Tr. at 58-59.) Defendant contends that any evidence with respect to the support of his child was irrelevant. However, the State has the right to introduce otherwise irrelevant evidence if it tends "to dispel favorable inferences arising from defendant's cross-examination of a witness." *State v. Johnston*, 344 N.C. 596, 605-06, 476 S.E.2d 289, 294 (1996). Here, in cross-examining Ms. McCormick, defendant elicited testimony to the effect that defendant had regular visitation with his child. This evidence with respect to visitation tended to create an inference favorable to defendant, namely that he was a good father. In doing so, defendant thereby opened the door for the State to dispel this inference on re-direct by suggesting that, because he did not contribute much financial support to his child, defendant was not so good a father after all.

[5] Next, defendant argues that the prosecutor impermissibly asked a leading question in order to elicit testimony that defendant spat on Mr. McCormick immediately after shooting him. In examining Gayle Mitchell, a passenger on the bus and eyewitness to the shooting, the prosecutor asked the following questions:

Q: Okay. What, if anything, else did you see [defendant] do?

A: After he shot him, he got on his bicycle and he rode away.

Q: Did he do anything else?

A: (Shakes head from side to side.)

Q: Did you see him spit?

[Objection; overruled.]

Q: Tell us—tell us whether or not you saw him spit.

A: Yeah, I seen him spit.

Q: Who did you see spit?

A: [Defendant].

. . . .

Q: Where—where was he when he spat?

A: He was over [Mr. McCormick] when he spit.

(Tr. at 118-19.) We conclude that the prosecutor's leading question was permissible in the present situation.

Generally, our rules of evidence proscribe the use of leading questions on direct examination. N.C.R. Evid. 611(c). However, our Supreme Court has stated that leading questions are permissible in certain situations, one of which is if "the examiner seeks to aid the witness' recollection or refresh [her] memory when the witness has exhausted [her] memory without stating the particular matters required." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 236 (1974). If such a situation exists, the trial court's ruling as to the leading question is reviewable only for an abuse of discretion. *State v. Marlow*, 334 N.C. 273, 286-87, 432 S.E.2d 275, 282-83 (1993). Here, the prosecutor asked the leading question only after Ms. Mitchell testified that she had seen nothing else; he thus did so in an attempt to refresh her memory. Accordingly, the trial court committed no abuse of discretion by allowing the leading question. *See State v. Aiken*, 73 N.C. App. 487, 497, 326 S.E.2d 919, 925 (holding it was proper to allow two leading questions after the witness said that he had stated all he could remember), *disc. review denied*, 313 N.C. 604, 332 S.E.2d 180 (1985).

[6] Next, defendant contests the admission of certain testimony by Andrew Powell, another eyewitness to the shooting. Specifically, defendant objects to the following:

Q: What—what was the Defendant doing at that time?

A: Which one is you referring to now?

Q: [Defendant].

A: He was standing over him, pointing the gun still at him. And, to me, it looked like he was trying to shoot him in the head.

[Motion to strike; denied.]

(Tr. at 160.) Defendant claims this testimony amounted to an improper lay witness opinion. We disagree.

Rule 701 allows lay witnesses to offer opinions or inferences if they are (1) rationally based on the witness' own observation and (2) helpful to a clear understanding of his testimony. N.C.R. Evid. 701.

There is no question that the first prong is satisfied here. Under the second prong, a lay witness may offer an opinion if it is nothing more than a "shorthand statement of fact." *Id.*, Commentary. A "shorthand statement of fact" is simply an opinion based upon "the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975) (quoting *State v. Skeen*, 182 N.C. 844, 845, 109 S.E. 71, 72 (1921)), *death penalty vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). Allowance of opinions in the form of a "shorthand statement of fact" is premised upon the notion that a description of all the underlying detailed facts that helped to form the witness' opinion may be possible, but is not practical due to the inherent difficulties in articulating one's analytical thought processes. *State v. Loren*, 302 N.C. 607, 610-11, 276 S.E.2d 365, 367 (1981).

The witness' statement here that it looked to him like defendant was trying to shoot Mr. McCormick in the head was a permissible opinion in the form of a "shorthand statement of fact." Asking the witness to recite the precise position of Mr. McCormick, the stance of the defendant, and the angle of the gun simply would have been impractical here. *See generally State v. Eason*, 336 N.C. 730, 746-47, 445 S.E.2d 917, 927 (1994) (allowing a witness' comment that defendant "was enjoying what he was doing" as a permissible "shorthand statement of fact"), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995); *State v. Long*, 302 N.C. 607, 609-11, 276 S.E.2d 365, 367-68 (1981) (allowing witness' opinion that defendant "was acting like he was trying to hide something"); *State v. Woodard*, 102 N.C. App. 687, 695, 404 S.E.2d 6, 11 (allowing police officer's opinion that defendant "pretended" to be asleep in the patrol car), *disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991).

[7] In his next assignment of error, defendant contests the denial of his post-trial motion for appropriate relief. He bases his motion for appropriate relief on a mistake of law made by his trial counsel, the district attorney, and the trial judge. We conclude that the trial court properly denied his motion because the error of law resulted in no prejudice to defendant.

Prior to trial, the district attorney and defense counsel met to discuss possible pleas. As part of their discussions, they talked about the punishment for first-degree murder. Specifically, defense counsel wanted to know when the 1994 amendments to N.C.G.S. § 14-17 took

effect. Under the prior law, defendant's sentence for first-degree murder would be life; under the amendments, his sentence would be life without parole. The district attorney incorrectly read the statute and concluded that the amendment did not go into effect until 1 January 1995, after the date of the killing here. In fact, the amendment took effect 1 October 1994, prior to the killing here. At a subsequent bench conference, the trial judge agreed with the district attorney's interpretation and thus concluded that defendant's punishment if convicted would be a life sentence. Defendant was then tried, convicted, and sentenced to life imprisonment. Hours after sentencing, someone in the district attorney's office realized the mistake and pointed it out to the trial judge. The defendant was then called back into court, informed of the mistake, and re-sentenced to life without parole.

As articulated earlier, in order to receive a new trial, defendant must show that he was prejudiced by any error or mistake. N.C. Gen. Stat. § 15A-1443(a) (1999). Here, although the mistake of law occurred during plea discussions, defendant has not suggested that the mistake of law had any effect on these discussions and his decision not to take a plea. Instead, the only prejudice asserted by defendant is that, had he known his punishment would have been life without parole instead of just life, he would have put on evidence of imperfect self-defense. However, there is simply no logical relation between a mistaken understanding of eligibility for parole and the decision to argue imperfect self-defense. Imperfect self-defense, if viable, would have significantly reduced defendant's initial sentence here by changing his offense from first-degree murder (a class A felony) to voluntary manslaughter (a class D felony); it would have had no effect on his eligibility for parole. Accordingly, defendant's contention that a mistake with respect to eligibility for parole prejudiced him with respect to imperfect self-defense is without merit.

[8] Finally, defendant argues that he was deprived of effective assistance of counsel at trial, in violation of the Sixth Amendment. He alleges two indicia of ineffectiveness here: (1) defense counsel's mistaken understanding of the applicable punishment for first-degree murder; and (2) defense counsel's failure to develop a defense of imperfect self-defense.

In order to substantiate a claim for ineffective assistance of counsel, a criminal defendant must prove two prongs:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors

> so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*"

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668 U.S. 687, 80 L. Ed. 2d 674, 693 (1984)). In analyzing defendant's claim of ineffective assistance here, we first note that courts rarely grant relief based upon such a claim and further place upon defendant a stringent standard of proof. *State v. Sneed*, 284 N.C. 606, 613, 201 S.E.2d 867, 871 (1974). This stringent standard is required because "every practicing attorney knows that a 'hindsight' combing of a criminal record will in nearly every case reveal some possible error in judgment or disclose at least one trial tactic more attractive than those employed at trial." *Id.*

With this strict standard of proof in mind, we conclude that defendant was not constitutionally deprived of effective assistance of counsel. As to his first indicia of ineffectiveness, namely his counsel's mistaken understanding as to punishment, defendant has met neither prong of the test. Although a misreading of the statute may seem inexcusable, the fact that both the district attorney and the trial judge also misread the statute demonstrates that his counsel's errors were not constitutionally deficient. Furthermore, as we concluded earlier, the mistake did not prejudice defendant in such a way that the reliability of his trial's result was called into question.

With respect to defendant's second example of ineffectiveness, i.e., his counsel's failure to argue imperfect self-defense, we again conclude that defendant has not satisfied either requirement. The decision whether or not to develop a particular defense is a tactical decision that is part of trial strategy. Such decisions are generally not second-guessed by our courts. *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). In order to substantiate a claim of imperfect self-defense, defendant would have had to show that he believed it was necessary to kill Mr. McCormick in order to save himself from death or great bodily harm. *State v. Ross*, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994). He would have then needed to show that his belief was reasonable. *Id.* at 283, 449 S.E.2d at 560. Here, however, several eyewitnesses testified that Mr. McCormick was unarmed and his back was turned to defendant at the time he was shot. To develop

imperfect self-defense, defendant therefore would have had to take the stand and contradict this abundance of testimony in order to show that he feared for his life. Accordingly, we cannot question defense counsel's failure to attempt to develop imperfect self-defense. *See id.* at 283-84, 449 S.E.2d at 560 (holding that imperfect self-defense is not even available if the victim is unarmed and had his back turned to the defendant when he was shot). Furthermore, we do not see how this decision prejudiced defendant in light of the overwhelming evidence of defendant's guilt. *See State v. Attmore*, 92 N.C. App. 385, 393-94, 374 S.E.2d 649, 655 (1988) (rejecting ineffective assistance claim based on failure to put forth an insanity defense when there was overwhelming evidence both to convict defendant and to undermine the defense if it had been argued), *disc. review denied*, 324 N.C. 248, 377 S.E.2d 757 (1989).

In sum, we conclude that defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges GREENE and EDMUNDS concur.

GLENN I. HODGE, JR., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND NORRIS TOLSON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. COA99-392

(Filed 4 April 2000)

1. Public Officers and Employees— reinstatement—injunctive relief—subject matter jurisdiction—superior court

The trial court did not err by failing to dismiss plaintiff's action requesting a preliminary injunction ordering defendants to reinstate plaintiff to his former position as Chief Internal Auditor of the DOT and restraining defendants from filling the position with any person other than plaintiff, based on lack of subject matter jurisdiction, because: (1) N.C.G.S. § 7A-245 provides that the superior court is the proper division to enforce claims for injunctive relief; (2) N.C.G.S. § 7A-270 provides that the superior courts have "general jurisdiction" of all justiciable matters of a civil

nature whose jurisdiction is not specifically placed elsewhere; and (3) the State Personnel Act does not place jurisdiction over this matter with the State Personnel Commission since N.C.G.S. § 126-34.1 indicates the specific grounds for appeal to the Commission.

2. Police Officers and Employees— reinstatement—preliminary injunction—failure to show irreparable harm

The trial court erred in granting plaintiff's request for a preliminary injunction to restrain defendants from filling the position of Chief Internal Auditor of DOT with any person other than plaintiff because: (1) plaintiff has failed to show that he would suffer irreparable harm absent issuance of the injunction when plaintiff has been reinstated to a similar position at the same pay grade he enjoyed prior to dismissal; and (2) the potential harm to defendant DOT resulting from the grant of the injunction outweighs any potential harm to plaintiff.

3. Public Officers and Employees— wrongful termination—reinstatement

The trial court erred in denying summary judgment for defendant DOT and in granting summary judgment for plaintiff on the issue of reinstating plaintiff to the position of Chief Internal Auditor of DOT because plaintiff has been reinstated to a similar position at the same pay grade which he enjoyed prior to dismissal, and an order for reinstatement need not mandate that the employee be reinstated to the exact position from which he was dismissed.

Judge WALKER dissenting.

Appeal by defendant from judgment entered 12 February 1999 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 January 1999.

Broughton, Wilkins, Webb & Sugg, P.A., by Randolph Palmer Sugg, for plaintiff-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert O. Crawford, III and Assistant Attorney General Sarah Ann Lannom, for defendant-appellants.

EAGLES, Chief Judge.

Beginning 1 January 1992, Defendant North Carolina Department of Transportation ("DOT") employed Plaintiff Glenn I. Hodge, Jr. as an internal auditor. In May 1992, plaintiff was promoted to Chief of the Internal Audit Section for DOT. The Chief Internal Auditor supervises a staff of auditors who conduct audits of DOT activities and expenditures. In May 1993, the DOT notified plaintiff that his position was reclassified as policymaking exempt pursuant to N.C.G.S. § 126-5(d). Mr. Hodge filed a petition for a contested case hearing in the Office of Administrative Hearings challenging the designation of his position as policymaking exempt. On 30 November 1993, the DOT dismissed Mr. Hodge as Chief of the Internal Audit Section.

A contested case hearing was conducted before an administrative law judge ("ALJ"). The ALJ ruled that the position of Chief Internal Auditor was not a proper policymaking position under N.C.G.S. § 126-5(d). The ALJ found that the Chief of the Internal Audit Section had no inherent or delegated authority to implement recommendations or order action based on audit findings. The ALJ issued a recommended decision reversing the DOT's designation of the position as exempt, and found that the designation of the position as exempt was the equivalent of being dismissed.

In November 1994, the State Personnel Commission adopted the ALJ's findings of fact and conclusions of law as its own and reversed the designation of the position of Chief of the Internal Audit Section as "policymaking exempt" under N.C.G.S. § 126-5(d). Wake County Superior Court affirmed the State Personnel Commission's order. This Court reversed the trial court's order. *See N.C. Dept. of Transportation v. Hodge*, 124 N.C. App. 515, 520, 478 S.E.2d 30, 33 (1996). In 1998, the North Carolina Supreme Court reversed the decision of the Court of Appeals, concluding that Mr. Hodge's final decisionmaking authority at the section level did not rise to the level of authority required by N.C.G.S. § 126-5(b) to be considered policymaking. *See N.C. Dept. of Transportation v. Hodge*, 347 N.C. 602, 499 S.E.2d 187 (1998).

As a result of the North Carolina Supreme Court's decision, Mr. Hodge was awarded back pay and the DOT reinstated him to employment in May 1998. However, the Supreme Court's decision did not deal with whether plaintiff was to be reinstated as Chief Internal Auditor of the Internal Audit Section. Instead, Mr. Hodge was rein-

stated as an Internal Auditor II in the Single Audit Compliance Unit. Mr. Hodge's pay grade as an Internal Auditor II, pay grade 78, is the same as the pay grade that he held at the time of his employment as Chief of the Internal Audit Section.

On 24 July 1998, Mr. Hodge applied to Wake County Superior Court for injunctive relief to compel defendant to reinstate him to the position of Chief of the Internal Audit Section of DOT pursuant to 25 N.C.A.C. 1B.0428, which defines reinstatement as "the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the employee enjoyed prior to dismissal." Mr. Hodge also sought to enjoin the defendant from filling the position of Chief of the Internal Audit Section with any person other than himself. In August 1998, Judge Narley Cashwell granted Mr. Hodge's application for a preliminary injunction. In February 1999, Judge Cashwell denied DOT's motion for summary judgment and granted plaintiff's cross-motion for summary judgment. Defendant DOT appeals.

[1] The appellant first argues that the trial court erred in failing to dismiss plaintiff's action for lack of subject matter jurisdiction. Appellant contends that the superior court lacks jurisdiction over the matter and that the State Personnel Commission has exclusive original jurisdiction pursuant to N.C.G.S. § 126-1.

In general, claims for injunctive relief to enforce a regulation fall within the province of the superior court. Under N.C.G.S. § 7A-245, "[t]he superior court division is the proper division . . . for the trial of civil actions where the principal relief prayed is . . . [i]njunctive relief to compel enforcement of any . . . regulation." N.C.G.S. § 7A-245(a)(2). The superior courts have "general jurisdiction" of all justiciable matters of a civil nature whose jurisdiction is not specifically placed elsewhere. *See* N.C.G.S. § 7A-240. *See also Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994). Accordingly, we must evaluate whether jurisdiction over this matter has been specifically placed with the State Personnel Commission.

The State Personnel Commission has the power to establish policies and rules governing the appointment, promotion, transfer, demotion, suspension, and separation of employees. *See* N.C.G.S. § 126-4. The State Personnel Act, N.C.G.S. 126-1 through 126-90, sets forth grievance procedures available to state employees. *See Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 340, 389 S.E.2d 35, 37 (1990) (disapproved of on other grounds by *Empire Power Co. v. N.C. Dept. of*

E.H.N.R., 337 N.C. 569, 447 S.E.2d 768, *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994)).

The Act confers specific rights upon state employees to appeal "contested cases" to the State Personnel Commission through the Office of Administrative Hearings. *See* N.C.G.S. § 126-37(a). The North Carolina General Assembly has given the State Personnel Commission the jurisdiction to resolve only those contested case issues specifically delineated in the State Personnel Act. *See Dunn v. N.C. Dept. of Human Resources*, 124 N.C. App. 158, 160-61, 476 S.E.2d 383, 385 (1996). N.C.G.S. § 126-34.1(e) provides: "[a]ny issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by this section shall not be grounds for a contested case under Chapter 126." The language of the statute indicates the General Assembly's intent to create grounds for appeal to the Commission only on issues for which appeal has been specifically authorized in N.C.G.S. § 126-34.1. Here, the plaintiff seeks injunctive relief ordering reinstatement of plaintiff to the "same or similar position" pursuant to 25 N.C.A.C. 1B.0428. N.C.G.S. § 126-34.1 does not specifically authorize appeal on this issue. Accordingly, we conclude that the State Personnel Act does not place jurisdiction over this matter with the State Personnel Commission.

In arguing that the superior court lacks jurisdiction over this matter, appellant relies on *N.C. Dept. of Transportation v. Davenport*, 108 N.C. App. 178, 181, 423 S.E.2d 327, 329 (1992), where this Court held that DOT's motion to dismiss plaintiff employee's contempt proceedings should have been granted because the superior court did not have subject matter jurisdiction. Appellant argues that the plaintiff's request for injunctive relief here is analogous to Davenport's motion for contempt.

We note that the North Carolina Supreme Court affirmed the Court of Appeals opinion in *Davenport* solely on the grounds that the superior court lacked authority to hold a state agency in contempt. *See N.C. Dept. of Transportation v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993). Further, the *Davenport* case is distinguishable. In *Davenport*, the plaintiff did not bring a separate, original action in superior court to enforce a regulation. Rather, Davenport made a motion in superior court seeking to hold DOT in contempt for failing to obey the superior court's prior order directing Davenport's reinstatement. Here, Mr. Hodge did not make a motion in superior court seeking to hold DOT in contempt. Finally, we note that *Davenport*

was decided before the General Assembly amended the State Personnel Act to include N.C.G.S. § 126-34.1(e), which specifies that the State Personnel Commission has jurisdiction to resolve only those contested case issues specifically listed in the statute. We infer that the General Assembly, by listing the contested case issues under the jurisdiction of the State Personnel Commission, intended other matters to remain with the superior court. Accordingly, we conclude that the superior court properly determined that it had subject matter jurisdiction over this matter.

[2] Next, we consider whether the trial court erred in granting plaintiff's request for a preliminary injunction and restraining defendants from filling the position of Chief Internal Auditor with any person other than the plaintiff. "In our review of the entry of the injunction by the Superior Court we . . . may consider the evidence and determine independently the plaintiff's right to preliminary injunctive relief." *Williams v. Greene*, 36 N.C. App. 80, 85, 243 S.E.2d 156, 160, *disc. review denied*, 295 N.C. 471, 246 S.E.2d 12 (1978). To justify the issuance of a preliminary injunction, plaintiff must show (1) there is a likelihood that he will succeed on the merits of his case, and (2) that he will suffer an irreparable injury unless the injunction is issued. *See Town of Knightdale v. Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (1989). The burden of proof lies with the party seeking the injunction. *See Comfort Spring Corp. v. Burroughs*, 217 N.C. 658, 9 S.E.2d 473 (1940). The party seeking the injunction must do more than merely allege irreparable injury. *See Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). *See also Town of Knightdale*, 95 N.C. App. at 651, 383 S.E.2d at 461. The applicant is required to set out with particularity facts supporting appropriate allegations so that the court can decide for itself whether irreparable injury will occur. *See Telephone Co.*, 287 N.C. at 236, 214 S.E.2d at 52. "An injury is irreparable, within the law of injunctions, where it is of a 'peculiar nature, so that compensation in money cannot atone for it.' " *Frink v. Board of Transportation*, 27 N.C. App. 207, 209, 218 S.E.2d 713, 714 (1975) (quoting *Gause v. Perkins*, 56 N.C. 177 (1857)).

Here, the plaintiff has failed to show that he would suffer irreparable harm absent issuance of the injunction. The plaintiff attempts to argue that he will be irreparably harmed unless he is allowed to work as the Chief of the Internal Audit Section for DOT. However, under 25 N.C.A.C. 1B.0428, "[r]einstatement means the return to employment of a dismissed employee, in the same or *similar* position, at the same pay grade and step which the employee

enjoyed prior to dismissal." [Emphasis added.] N.C. Admin. Code Tit. 25, r. 1B.0428. An order for reinstatement need not mandate that the employee be reinstated to the exact position from which he was dismissed. Further, there is no requirement under 25 N.C.A.C. 1B.0428 that the employee's job duties be identical if the pay grade, salary and general employment classification are the same.

In *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 462 S.E.2d 824 (1995), a correctional officer who had been demoted was reinstated to a position in a different location with the same pay grade and step level. This Court held that the officer was properly reinstated, even though he was not reinstated to his former position and location. *See N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 462 S.E.2d 824 (1995). Here, the plaintiff was reinstated as an auditor with the DOT. The plaintiff earns a salary of $47,997, pay grade 78, which is the same salary and pay grade he would have earned had he not been dismissed as Chief of the Internal Audit Section. Pursuant to 1B.0428, the plaintiff has been reinstated to a similar position at the same pay grade which he enjoyed prior to dismissal.

In deciding whether to issue an injunction, the judge should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if the injunction is issued. *See Williams*, 36 N.C. App. at 86, 243 S.E.2d at 160. In evaluating the potential harm to the defendant, the trial court must give serious weight to the disruptive effect that granting an injunction would have upon business and administrative operations. *See id.* at 85-6, 243 S.E.2d at 160. Here, the DOT showed that it would be harmed if the position of Chief Internal Auditor could not be filled with anyone other than plaintiff because the section's operations would be disrupted, and the DOT would be unfairly restricted in management of its own operations. In contrast, the plaintiff was unable to show financial loss or other harm, much less irreparable injury, if the injunction were not granted. The potential harm to the Defendant DOT resulting from the grant of an injunction outweighs the potential harm to the plaintiff. Accordingly, we conclude that the preliminary injunction was improperly granted.

[3] We next consider whether the trial court erred in denying summary judgment for the defendant and granting summary judgment for the plaintiff. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The evidence is viewed in the light most favorable to the non-movant. *See Babb v. Harnett County Bd. of Education*, 118 N.C. App. 291, 294, 454 S.E.2d 833, 835, *disc. review denied*, 340 N.C. 358, 458 S.E.2d 184 (1995). Here, there is no genuine issue as to any material fact. Further, the factual evidence before the trial court at the time of the summary judgment hearing was the same as the evidence before the court at the time of the preliminary injunction hearing. The legal arguments at the summary judgment hearing were also similar to those at the preliminary injunction hearing. Based on these arguments, discussed above, we hold that the trial court erred in concluding that the plaintiff was entitled to judgment as a matter of law. It was error to order that the plaintiff be reinstated to the position of Chief Internal Auditor. Accordingly, we reverse the trial court's order granting summary judgment in favor of plaintiff, and remand the case to Superior Court for entry of summary judgment in favor of defendants.

Reversed and remanded.

Judge WYNN concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent and would affirm the trial court's order granting summary judgment to plaintiff. I disagree with the majority opinion that the plaintiff's current position of internal auditor with the DOT is a similar position to the position of Chief of the Internal Audit Section which he formerly held. The only similarity in the two positions is the pay grade plaintiff receives.

Pursuant to 25 N.C.A.C. 1B.0428, plaintiff was entitled to be reinstated to the same or a similar position. Plaintiff was reinstated to the position of an internal auditor in the Single Audit Compliance Unit of the External Audit Branch of the Fiscal Section of the DOT.

In *N.C. Dept. of Transportation v. Hodge*, 347 N.C. 602, 499 S.E.2d 187 (1998), our Supreme Court discussed the unique duties and responsibilities of the Chief Internal Auditor. The Court found:

> Substantial evidence presented by both parties showed that the position of Chief of the Internal Audit Section carried consider-

> able independence and responsibility. . . . Hodge, as Chief Internal Auditor, could recommend action on audit findings. . . . The substantial evidence in the record amply supports a finding that the Chief of the Internal Audit Section had final decision-making authority within that section. . . .

Hodge, 347 N.C. at 606, 499 S.E.2d at 190.

Former Chief Justice Mitchell similarly discussed the responsibilities of the Chief Internal Auditor in his dissent:

> [T]he . . . Chief of the Internal Audit Section . . . independently directs and supervises all activities and personnel in the Internal Audit Section. . . . Auditors are assigned by the Chief of the Internal Audit Section to conduct particular audits, and the Chief of the Internal Audit Section also controls the scope, objectives, findings, and recommendations of any audit conducted in any of the divisions of DOT. Further, the Chief of the Internal Audit Section prepares manuals, guide programs, and audit procedures and gives related instructions for all auditors to utilize in performing audits throughout the entire DOT. The testimony of petitioner Hodge was that his decisions in all the foregoing regards were not reviewable or reviewed by anyone in the DOT or elsewhere.

Hodge, 347 N.C. at 613, 499 S.E.2d at 194. Additionally, as the majority notes, the Chief Internal Auditor supervises a staff of auditors.

Further, the Administrative Law Judge made this finding regarding the Chief Internal Auditor position:

> 3. As Chief of the Internal Audit Section, the Petitioner [Hodge] exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit within the Department. While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

Hodge, 347 N.C. at 604, 499 S.E.2d at 189.

In contrast, plaintiff's affidavit states that in his reinstated position, "I now supervise no employees and report to the Manager of the Single Audit Compliance Unit." Indeed, the defendants concede that plaintiff's current job duties are not similar to his former job duties.

The majority relies on *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 462 S.E.2d 824 (1995) for the proposition that reinstatement does not require placement in an employee's former position and location. *Myers*, however, is distinguishable from the case *sub judice*. In *Myers*, the employee worked as "a unit supervisor for the [Department of Correction] in Davidson County." *Id.* at 439, 462 S.E.2d at 825. Plaintiff was "reinstated to Supervisor III in Davie County with back pay." *Id.* at 440, 462 S.E.2d at 826. This Court held that the plaintiff "was returned to the same pay grade and step as before his demotion even though he works at a different location." *Id.* at 443, 462 S.E.2d at 828.

This Court in *Myers* did not address the duties and responsibilities of the two positions involved. Here, there are numerous differences in the responsibilities and duties required of the positions. Additionally, plaintiff was originally employed with DOT as an internal auditor and was "promoted to the position of Chief of the Internal Audit Section." *Hodge*, 347 N.C. at 603, 499 S.E.2d at 188. A return to the position of internal auditor, albeit with the same pay grade of the Chief Internal Auditor, is not a similar position. Accordingly, the trial court did not abuse its discretion in entering summary judgment for plaintiff.

STATE OF NORTH CAROLINA v. PENNY ELIZABETH JARRETT

No. COA99-441

(Filed 4 April 2000)

1. Evidence— exclusion—other evidence

There was no prejudicial error in a first-degree murder prosecution where the trial court refused to allow an evidence technician to read into evidence the dates on a mental health receipt found at the crime scene, but defendant subsequently was able to elicit the information through another evidence technician.

2. Criminal Law— prosecutor's closing argument—defendant a crackhead

Comments made by the prosecutor during closing arguments in a first-degree murder trial were within permissible bounds

where the prosecutor argued that the defendant was a "crackhead" who shot the victim after he refused her money to purchase drugs and there was evidence that defendant used money taken from the victim to purchase crack cocaine, then sold his pistol and vehicle to obtain more crack. The argument that robbery was the motive was an alternate scenario to defendant's statement and was an inference from the physical evidence.

3. Robbery— shooting and taking—same transaction—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where there was evidence from which it might reasonably be inferred that defendant took money from the victim after shooting him. It is appropriate to instruct the jury on armed robbery where evidence is presented which raises a reasonable inference that the robbery and murder were part of one continuous transaction.

4. Homicide— first-degree murder—manslaughter as lesser included offense

Any error in a first-degree murder prosecution in the court's failure to instruct on voluntary manslaughter was rendered harmless by the jury's verdict finding that defendant had acted with malice, premeditation, and deliberation.

5. Robbery— instructions—constructive possession of firearm

Any error in the trial court's instructions on possession of a firearm in a robbery prosecution was harmless where defendant shot the victim, put the pistol on a table within reach so that she could overcome any resistance while she decided what to do, and removed the victim's money from his pocket. She had already endangered the victim's life by shooting him and her access to the pistol constituted a continuing threat; the issue was whether the use of the pistol was close enough in time to the taking of the property to constitute one continuous transaction, not whether she threatened or endangered the victim's life.

6. Discovery— homicide victim's hospital records—not exculpatory

The trial court did not err in refusing to give defendant access to a homicide victim's entire hospital records where the records were subpoenaed by defendant, the hospital declined to produce

the records, they were reviewed by the trial court in camera, some were provided to defendant with the remainder sealed, and the sealed records were examined by the Court of Appeals and found to contain no exculpatory information.

Appeal by defendant from judgments entered 24 August 1998 by Judge Clarence W. Carter in Guilford County Superior Court. Heard in the Court of Appeals 17 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Robert C. Montgomery, for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender Randle L. Jones, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon her conviction, following a jury trial, of premeditated first degree murder and robbery with a dangerous weapon. Summarized only to the extent necessary to an understanding of the case and the issues raised on appeal, the State offered evidence tending to show that between 8:15 p.m. and 8:45 p.m. on 25 July 1997, defendant went to the High Point home of Johnny and Judy Neeley. Judy Neeley testified that defendant appeared nervous and upset. After recognizing defendant as someone who had previously worked with her daughter, Judy Neeley told defendant to come in and sit down. Defendant said "My life is over", and "I just killed someone." Defendant explained that she had killed a man after he had made sexual advances toward her and that she wanted to sell the man's pistol and vehicle in order to purchase drugs and take her own life. In order to get the pistol away from defendant, the Neeleys paid her $50 for it, but declined to purchase the vehicle. After defendant left their residence, the Neeleys contacted the police. Officer Kinney went to their residence and they turned the pistol, a .357 revolver, over to him.

At about 12:30 a.m. on 26 July 1997, defendant walked into the High Point Regional Hospital Emergency Room and told the triage nurse that she thought she had killed someone. She gave the nurse the name and address of Henry Draughn. The nurse reported this information to a police officer who was at the emergency room and officers were dispatched to the address which defendant had given. When the officers entered the house, they found Henry Draughn, an elderly man, on a sofa with his feet crossed and his hands beside his

body. He had been shot in the lower left side of his chest and was dead when the officers found him. The television was on and Draughn was wearing a nasal cannula connected to an oxygen tank. A medical examiner testified that Draughn's death resulted from the gunshot wound, and that the gun had been in close contact with his clothing and body when it was fired. The medical examiner also testified that Draughn had emphysema.

Defendant was taken from the hospital to the police department, where Detective Kim Soban advised her of her Miranda rights and interviewed her. Defendant indicated that she understood her rights and signed a written waiver. Defendant thereafter made a statement to Detective Soban in which she said that she had answered a newspaper advertisement placed by Draughn seeking someone to live in his house and do light housekeeping. Defendant said that Draughn had initially been nice to her, but on the second night she was there, he had tried to get into bed with her and began making comments of a sexual nature. On the night before Draughn's death, defendant found him peeping into her bedroom window and she became angry and confronted him.

On the next morning, Draughn took defendant shopping and bought an outfit and shoes for her. When they returned to his residence, Draughn asked defendant to put on the outfit so he could see how she looked. She changed into the new outfit and returned to the living room. Draughn began making sexually explicit remarks to her, grabbed her arm, and tried to kiss her. She pulled away and went into Draughn's bedroom and took a pistol from his night stand. She returned to the living room, hiding the pistol behind her back. Draughn made some additional remarks of a sexual nature to defendant and tried to pull her down again, at which time defendant pulled the pistol from behind her back and shot him.

Defendant said that she placed the pistol on a table and paced up and down; Draughn was bleeding and gasping for air. Defendant took $125 from Draughn's pocket and left the residence in Draughn's vehicle, taking the pistol with her. She purchased crack cocaine for $120, smoked it, and then went to the Neeley's. After selling Draughn's pistol to the Neeleys for $50, defendant went to an area known as "The Hood" and attempted to buy more crack cocaine, but she was "ripped off." She then sold Draughn's vehicle for a $50 rock of crack cocaine. After smoking the crack cocaine, defendant walked around for a while and eventually went to the emergency room.

The officers searched Draughn's residence and found a note in the kitchen which said "I lose control of how I feel." There was no evidence of a struggle, and the house had not been ransacked. In defendant's bedroom, the officers found condoms, birth control pills, some of Draughn's medications and a mental health receipt from the Guilford County Area MHDDSA Program.

In her brief, defendant presents arguments in support of seven of the fourteen assignments of error set forth in the record on appeal. Her remaining assignments of error are deemed abandoned. N.C.R. App. P. 28.

I.

[1] Defendant contends the trial court committed reversible error when it refused to allow police evidence technician Denise McGee, during defendant's cross-examination, to read into evidence the dates contained on the mental health receipt found at the crime scene. The trial court's refusal was based on the fact that the document had been neither identified nor offered in evidence. Defendant contends the information contained in the receipt was relevant to show defendant's "diminished capacity and defendant's state of mind at the time of the shooting," because it showed that defendant had recently been to the Mental Health Department for an appointment. Any error in the trial court's ruling was cured when the State subsequently offered the receipt into evidence and defendant was able to elicit information through the testimony of another evidence technician, Jane Poston. See *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992) (holding that any error in the exclusion of evidence is cured by the subsequent admission of the evidence).

II.

[2] Next, defendant contends that comments made by the prosecutor during closing argument were so grossly improper as to warrant a new trial. The first comment about which defendant complains was the prosecutor's characterization of defendant as a "crack head"; the second was his hypothesizing to the jury that defendant shot Draughn after he refused her request for money to purchase drugs, when there was no evidence to support the argument.

The prosecutor is permitted, during closing argument, to argue fully all of the facts in evidence as well as all reasonable inferences which may be drawn therefrom. *State v. Perez*, 135 N.C. App. 543, 522 S.E.2d 102 (1999). A prosecutor is free to pursue a theory of a case,

or argue to the jury a scenario of what happened, so long as he or she does not stray beyond the bounds of the evidence presented at trial. *Id.*

In the present case, there was evidence that shortly after shooting Draughn, defendant used the money taken from his person to purchase a quantity of crack cocaine. After using the drugs, she sold his pistol and his vehicle in order to obtain additional crack cocaine. This evidence permits an inference, which the prosecutor was free to argue to the jury, that defendant's motive for shooting and robbing Draughn was to obtain money for drugs. Furthermore, the fact that defendant sought and used crack cocaine at least twice within a few hours following the shooting gives rise to a reasonable inference that defendant suffered from an addiction to crack cocaine, or at least was an experienced user of the substance. The argument was neither extreme nor of such content as to serve only to prejudice and inflame the jury, and the trial court did not abuse its discretion by overruling defendant's objection to the characterization of defendant as a "crack head."

As to defendant's second contention, the prosecutor's argument hypothesizing that robbery was defendant's motive for shooting Draughn was made in connection with his contention that defendant's statement with respect to the events leading up to the shooting was not entirely credible. The prosecutor stated:

> I ask you to apply your common sense to the evidence here, in thinking about Penny Jarrett's situation. The situation she was in, the way she was able to come in and take advantage of Mr. Draughn. So isn't it more likely to have happened this way. She goes and sees Henry Draughn. We know he's got the TV on. He's sitting in his own home, on his sofa here, watching TV, minding his own business, doing what he had a right to do, drinking some Budweisers, that he had a right to do, hooked up to his oxygen tank. And Penny comes in there and says to him, "I need some money for crack."

The prosecutor argued that another scenario could be inferred by the jury from the physical evidence that Draughn was found seated, with his feet crossed and his hands beside his body, rather than in a position which would have indicated that he was trying to pull defendant toward him when he was shot. We hold the prosecutor's argument was within permissible bounds and overrule these assignments of error.

III.

[3] Defendant contends the evidence was insufficient to support her conviction of robbery with a dangerous weapon and that her motion to dismiss the charges should have been granted. A motion to dismiss must be denied if, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State, there is substantial evidence of each element of the offenses charged. *State v. Jacobs*, 128 N.C. App. 559, 495 S.E.2d 757, *disc. review denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 563, 495 S.E.2d at 760-61.

> G.S. § 14-87 defines the crime of armed robbery as follows:
>
> (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 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, shall be guilty of a Class D felony.

The elements of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim. *State v. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991). In this case, there is substantial evidence, when viewed in the light most favorable to the State, of each of these elements, i.e., there is evidence from which it may be reasonably inferred that defendant took money from Draughn's person after having shot him with a firearm. Although there was evidence from which it might also be inferred that the shooting and the taking of the money were two separate transactions, "[t]he evidence need not exclude every reasonable hypothesis of innocence in order to support the denial of a defendant's motion to dismiss." *Jacobs* at 563, 495 S.E.2d at 761 (quoting *State v. Parks*, 96 N.C. App. 589, 594, 386 S.E.2d 748, 751 (1989)). Where evidence is presented which raises a reasonable inference that the robbery and the murder are part of one continuous transaction, it is appropriate to instruct the jury on armed robbery. *State v. McDonald*, 130 N.C. App. 263, 502 S.E.2d 409 (1998). Defendant's

motion to dismiss the charge of robbery with a dangerous weapon was properly denied.

IV.

[4] In case 97 CRS 12091, the trial court submitted as possible verdicts: guilty of first degree murder on the basis of premeditation and deliberation; guilty of first degree murder by reason of the felony murder rule; guilty of second degree murder; and not guilty. The jury found defendant guilty of first degree murder on the basis of malice, premeditation and deliberation. Defendant assigns error to the trial court's failure to submit the lesser included offense of voluntary manslaughter, arguing the evidence supported a finding that she acted in the heat of passion upon adequate provocation.

Voluntary manslaughter occurs "when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor." *State v. McNeil*, 350 N.C. 657, 518 S.E.2d 486 (1999), *cert. denied*, —— U.S. ——, 146 L.Ed.2d 321 (2000). Any error in the trial court's failure to instruct on voluntary manslaughter was rendered harmless by the jury's verdict finding that defendant had acted with malice, premeditation and deliberation. *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998), *cert. denied*, 526 U.S. 1075, 143 L.Ed.2d 559 (1999); *State v. Singletary*, 344 N.C. 95, 472 S.E.2d 895 (1996); *State v. Exxum*, 338 N.C. 297, 449 S.E.2d 554 (1994). "The finding of premeditation, deliberation and malice required for a first-degree murder conviction precludes the possibility of the same jury finding the defendant guilty of a lesser manslaughter charge." *Exxum* at 301, 449 S.E.2d at 556.

V.

[5] With respect to the charge of robbery with a dangerous weapon, the trial court instructed the jury:

> Now I charge that for you to find the defendant guilty of robbery with a firearm, the State must prove seven things beyond a reasonable doubt:
>
> First, that the defendant took property from the person of another or in his presence.
>
> Second, that the defendant carried the property away.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew she was not entitled to take the property.

Fifth, that at the time of the taking, the defendant intended to deprive that person of its use permanently.

Sixth, that the defendant had a firearm in her possession at the time she obtained the property.

And seventh, that the defendant obtained the property by endangering or threatening the life of that person with the firearm. To be guilty of robbery with a firearm, the defendant's use of the firearm must occur either before the taking of the property, at the same time as the taking, or the use of the firearm be so joined to the taking by time and circumstances as to make the use of the firearm and the taking part of one continuous transaction.

During its deliberations, the jury submitted the following question to the trial court: "Can we have a definition of the term (pocession) [sic] based on the charge of armed robbery?" After a discussion between the court and counsel, the jury was returned to the courtroom and the following exchange took place:

THE COURT: Do you need me to read the entire charge on robbery with a firearm?

JURY FOREMAN: No, sir.

THE COURT: You do not. Are you asking that, if I'm reading your question here, it says: "Can we have a definition of the term 'possession,' based on the charged [sic] of armed robbery." Is that what you're asking the Court?

JURY FOREMAN: Yes, sir. There's some concern as to the legal term of possession based on the firearm and the use of it in the robbery.

THE COURT: All right, I'll do the best I can. Possession of an article may be actual or constructive. A person has actual possession of an article if he has it on his person, is aware of its presence, and has both the power and intent to control its disposition or use. A person has constructive possession of an article if he does not have it on his person, but is aware of its presence, and has

> both the power and intent to control its disposition or use. A person's awareness of the presence of an article, and his power and intent to control its disposition or use, may be shown by direct evidence or may be inferred from the circumstances.

Defendant objected to the foregoing instruction and, on appeal, contends it was error as a matter of law, entitling her to a new trial on the charge of robbery with a firearm.

The trial court is required to instruct the jury as to the essential elements of the offense charged and when the court undertakes to define the law, it must do so correctly. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). The charge must be viewed in context; isolated portions will not be held prejudicial when the instruction as a whole is correct. *State v. Bailey*, 280 N.C. 264, 185 S.E.2d 683, *cert. denied*, 409 U.S. 948, 34 L.Ed.2d 218 (1972).

Defendant cites *State v. Faulkner*, 5 N.C. App. 113, 168 S.E.2d 9 (1969) in support of her argument that the trial court erred in instructing the jury with respect to constructive possession. In *Faulkner*, this Court wrote that "actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon." *Id.* at 119, 168 S.E.2d at 13. In *Faulkner*, however, the issue involved the nature of the alleged weapon, i.e., whether it was real or a toy, rather than the spatial relationship of the defendant to the weapon.

In *State v. Harris*, 281 N.C. 542, 189 S.E.2d 249 (1972), the defendant contended that he could not be convicted of armed robbery because he had placed his pistol on the top of the car while he took the victim's pocketbook from the back seat and removed money from it. He argued there was no evidence that he had the pistol in his possession at the time he took the property. The North Carolina Supreme Court found no merit in his contention; the weapon was "easily within [his] reach" at the time he took the money. *Id.* at 547, 189 S.E.2d at 252.

As earlier noted, G.S. § 14-87(a) uses the words "having in possession or with the use or threatened use of . . ." a firearm or other weapon. The gravamen of the offense of armed robbery is "the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons" in the perpetration of a robbery. *State v. Oliver*, 334 N.C. 513, 526, 434 S.E.2d 202, 208 (1993) (quoting *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375

(1972)). While we are not prepared to hold that one may be convicted of armed robbery based upon his or her constructive possession of a firearm or other dangerous implement, neither are we prepared to say that such could never be the case where a defendant has the power to threaten or endanger a victim's life through the use of an implement which may not be actually in the hand or on the person of the defendant. The resolution of this case does not require such a bright line decision.

In this case, even if the trial court erred in permitting the jury to consider whether defendant actually or constructively possessed the pistol, such error was harmless beyond any reasonable doubt. According to defendant's own statement, after she shot Draughn she put the pistol on a table, easily within her reach so as to overcome any resistance which he might offer, while she decided her course of action and removed the money from his pocket. She had already endangered Draughn's life by shooting him and her access to the pistol constituted a continuing threat. The issue created by the evidence was not whether defendant threatened or endangered Draughn's life with a firearm, rather the issue was whether such use of the pistol to threaten and endanger him was close enough in time to the taking of the property as to constitute one continuous transaction. The trial court's instructions upon this point were clear and correct, and any error in the instructions with respect to possession does not entitle defendant to a new trial. See N.C. Gen. Stat. § 15A-1443(a) (1998).

VI.

[6] In her final assignment of error, defendant contends the trial court erred in refusing to give her access to Henry Draughn's entire medical record maintained by High Point Memorial Hospital. She asks this Court to review the records to determine whether they contain any exculpatory information, to which she is entitled under *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), or information material and relevant to her defense.

Because the State did not possess the medical records, defendant did not make a *Brady* request, but sought disclosure of the records by a subpoena *duces tecum* directed to the hospital. The hospital declined to voluntarily produce the records, relying on the privilege contained in G.S. § 8-53. The trial court reviewed the documents *in camera* pursuant to *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed.2d 40 (1987), ordered that some of the records be provided to defendant, and sealed the remaining records for appellate review. See *State v.*

Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977). We have carefully examined the sealed records and conclude that they contain no information exculpatory of defendant's guilt or material to her defense or punishment.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and HUNTER concur.

L'TANYA D. DAVIS, EXECUTRIX OF ESTATE OF KENNETH A. DAVIS, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS-APPELLANTS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS-APPELLEES AND L'TANYA DURANTE DAVIS, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS-APPELLANTS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS-APPELLEES AND E. ANN CHRISTIAN, AS GUARDIAN AD LITEM FOR LEONARD AARON DAVIS, II, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS-APPELLANTS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS-APPELLEES AND ROBERTA E. JOHNSON, AS ADMINISTRATRIX OF THE ESTATE OF THELMA P. BITTING, PLAINTIFF v. J.M.X., INCORPORATED, AND ESAU ROOSEVELT DIXON, DEFENDANTS-APPELLANTS v. ANTOINETTE PADILLA TOLER, REA CONSTRUCTION COMPANY, PROTECTION SERVICES, INC., AND STATE OF NORTH CAROLINA, *EX REL* NCDOT, THIRD-PARTY DEFENDANTS-APPELLEES

No. COA99-332

(Filed 4 April 2000)

1. Highways and Streets— construction—warning signs—negligence—contractors

The trial court did not err by granting summary judgment for third-party defendants Rea and P.S.I. in a action arising from a collision in a work zone where Rea was a contractor of NCDOT, P.S.I. was a subcontractor of Rea, and the third-party plaintiff alleged negligence in failing to attach a 45 m.p.h. speed advisory sign to the "left lane closed ahead" sign. There was testimony that it was NCDOT's duty to create a traffic control plan and that P.S.I.

only furnished the materials and erected the signs as NCDOT directed; if the signs were not erected as specified by NCDOT, neither Rea nor P.S.I. would be compensated. There was also evidence that NCDOT marked the roadway indicating which signs were to be erected and where, that an NCDOT inspector was present when P.S.I. erected the signs, and that NCDOT inspected the signs almost daily. The only duty of Rea and P.S.I. was to exercise ordinary care in providing and maintaining reasonable warnings.

2. Highways and Streets— construction—warning signs—negligence—NCDOT

The trial court erroneously granted summary judgment for third-party defendant NCDOT in an action arising from a truck rear-ending a van in a construction zone where the third-party plaintiff alleged negligence in the placement of a warning sign and there was evidence that the truck driver would have slowed had he seen the sign and that the signage contributed to the accident. Genuine issues of fact existed as to whether NCDOT breached its duty and whether the signage was a proximate cause of the accident.

Judge WYNN dissenting.

Appeal by defendants and third-party plaintiffs Esau R. Dixon and J.M.X., Incorporated (hereinafter "third-party plaintiffs") from judgments filed 2 July 1998, 8 July 1998, and 9 July 1998, by Judge E. Lynn Johnson in Durham County Superior Court. Heard in the Court of Appeals 3 January 2000.

McDaniel, Anderson & Stephenson, L.L.P., by William E. Anderson and John M. Kirby, for defendants-appellants J.M.X., Incorporated and Esau R. Dixon.

Yates, McLamb & Weyer, L.L.P., by Rodney E. Pettey, for third-party defendant-appellee Rea Construction Company; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr. and Deanna L. Davis, for third-party defendant-appellee Protection Services, Inc.

WALKER, Judge.

On 23 August 1996, a multi-vehicle accident occurred in a construction zone on I-85 North in Durham County, prior to the Glenn

School Road overpass. Plaintiffs initiated four civil actions against third-party plaintiffs J.M.X., Incorporated (J.M.X.) and Esau Roosevelt Dixon (Dixon), alleging that Dixon, an employee of J.M.X., was negligent in operating a tractor trailer owned by J.M.X. Plaintiffs alleged that Dixon negligently drove the tractor trailer into the rear of a John Umstead Hospital van which was stopped in the right northbound lane, causing a chain reaction collision and that J.M.X. was liable under the doctrines of agency and *respondeat superior*. Third-party plaintiffs answered denying negligence and claimed that the accident was unavoidable since Antoinette Toler (Toler), the driver of the hospital van, negligently cut in front of the tractor trailer, leaving Dixon insufficient time to stop.

Third-party plaintiffs later filed third-party complaints against Toler, Rea Construction Company (Rea), Protection Services, Inc. (P.S.I.), and the State of North Carolina, *ex rel* NCDOT (NCDOT), alleging that Toler was negligent in operating the hospital van and that Rea, P.S.I., and NCDOT were negligent in constructing signage for the construction zone since they failed to attach a 45 m.p.h. speed advisory sign to the "left lane closed ahead" sign. Rea was a contractor of NCDOT for this construction project, and P.S.I. was a subcontractor of Rea. Third-party defendants Rea, P.S.I., and NCDOT moved for summary judgment, which was granted after a hearing. The trial court then granted third-party plaintiffs' motion pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, allowing them to immediately appeal the summary judgment orders.

Third-party plaintiffs assign as error the trial court's granting of summary judgment in favor of Rea, P.S.I., and NCDOT since genuine issues exist. "To recover damages for common law negligence, a plaintiff must establish (i) a legal duty, (ii) a breach thereof, and (iii) injury proximately caused by such breach." *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 195, 499 S.E.2d 747, 749 (1998). 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) (1999); *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 affir-

mative 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.* "However, it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979). Thus, summary judgment is "rarely appropriate in negligence actions." *Bernick v. Jurden*, 306 N.C. 435, 450, 293 S.E.2d 405, 415 (1982).

[1] We first address the granting of summary judgment in favor of Rea and P.S.I. Third-party plaintiffs contend that contractors and subcontractors of NCDOT have a statutory duty to maintain the highways and to comply with the standards in the NCDOT manual. Third-party plaintiffs rely on N.C. Gen. Stat. § 136-25 which provides:

> It shall be mandatory upon the Department of Transportation, its officers and employees, or any contractor or subcontractor employed by the said Department of Transportation, to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route while said highways or roads are being improved or constructed, ...

N.C. Gen. Stat. § 136-25 (1999). Rea and P.S.I. argue that a contractor is not required to guarantee the safety of the motoring public. *See Presley v. C.M. Allen & Co., Inc.*, 234 N.C. 181, 184, 66 S.E.2d 789, 791 (1951). Instead, a contractor's duty is simply to "exercise ordinary care in providing and maintaining reasonable warnings and safeguards against conditions existent at the time and place." *C.C.T. Equip. Co. v. Hertz Corp.*, 256 N.C. 277, 284, 123 S.E.2d 802, 808 (1962).

Third-party plaintiffs' expert witness, Don R. Moore, testified that it was NCDOT's duty to create a traffic control plan and that P.S.I. only furnished the materials and erected the signs as NCDOT directed. The evidence indicates that if the signs were not erected as specified by NCDOT, neither Rea nor P.S.I. would be compensated for its work. Here, there is also evidence that NCDOT marked the roadway indicating which signs were to be erected and where, and that a NCDOT inspector was present when P.S.I. erected the signs for this construction project. NCDOT then inspected the signs almost daily to ensure that they remained in conformity with NCDOT's standards. Since NCDOT had sole discretion in determining the signage for this

construction project, the only duty of Rea and P.S.I. was to exercise ordinary care in providing and maintaining reasonable warnings. Therefore, we conclude that no genuine issue exists as to whether Rea or P.S.I. breached their duty to defendants and that the trial court properly awarded summary judgment in their favor.

[2] We next address the granting of summary judgment in favor of NCDOT. Third-party plaintiffs argue that NCDOT is responsible for the "necessary planning, construction, maintenance, and operation of an integrated statewide transportation system" pursuant to N.C. Gen. Stat. § 143B-346 (1999) and that it breached its duty, proximately causing injury. Specifically, third-party plaintiffs contend that NCDOT violated N.C. Gen. Stat. § 136-30 by failing to conform with the NCDOT Manual Standard § 150.03 which requires that an advisory speed sign be attached to the post of a "left lane closed ahead" sign. Relying on an Ohio case, *Lumbermens Mutual Casualty Co. v. Ohio D.O.T.*, 49 Ohio App. 3d 129, 551 N.E.2d 215 (1988), third-party plaintiffs argue that NCDOT did not have discretion in this matter and was required to post a 45 m.p.h. advisory speed sign on the post with the "left lane closed ahead" sign. In *Lumbermens*, the Ohio court found the D.O.T. did not comply with its manual which states that a rough road sign, once installed, "shall" be accompanied by advisory speed signs. *Id.*

The record reveals the parties stipulated that the appeals from the present case and the companion case of *Green v. Dixon, et al*, (NO. COA99-131 filed 4 April 2000), would be consolidated for hearing pursuant to Rule 40 of the Rules of Appellate Procedure. Although NCDOT did not submit a brief for consideration in the present case, this Court, in its discretion, elects to consider the briefs filed by the third-party defendants in both cases. We note, however, that it is a better practice for the parties to file briefs in each case.

In their briefs, third-party defendants contend that the trial court properly granted summary judgment since there is no genuine issue of material fact. Third-party defendants argue that *Lumbermens* is distinguishable from the present case since the advisory speed sign was merely "relocated" within the construction zone rather than completely missing. NCDOT Manual Standard § 150.03 consists of a diagram which illustrates the signage that is to be used for the long term closure of one side of a four-lane divided roadway. There is, however, evidence in the record that the standards set forth in the NCDOT Manual are subject to the discretion of the NCDOT project engineer

and should be adjusted according to the particular field conditions. Furthermore, third-party plaintiffs have failed to cite any provisions in the NCDOT Manual which deprive the project engineer of discretion in this matter.

Third-party defendants further contend that there is no factual issue regarding proximate cause since all of the drivers involved in the accident had actual notice of the construction. Additionally, third-party defendants rely on the testimony of Moore, third-party plaintiffs' expert, who admitted that similar accidents occur in construction zones where the signage is proper, that the majority of drivers does not follow the first advisory speed limit sign encountered, and that the second advisory sign would have been past the section of I-85 where the accident occurred.

Third-party plaintiffs argue that the construction signage was a proximate cause of the accident and that Moore's testimony was sufficient to withstand the summary judgment motion. Moore averred in his affidavit that the "omission of the 45 MPH sign from the post with the LEFT LANE CLOSED AHEAD sign south of the bridge violated applicable safety standards" and that these violations "more likely than not contributed to the causation of the accident on August 23, 1996." Third-party plaintiff Dixon testified that if he had seen a 45 m.p.h. advisory speed limit sign before he reached the Glenn School Road overpass, he would have reduced his speed from 55 m.p.h. to 45 m.p.h. Furthermore, during his deposition, Moore testified that, in his opinion, "this signage did contribute to and was a causation of the accident, and the reason for that is because we have other vehicles that are merging." Moore stated that even if Dixon were not paying attention to the signs, the signage could have contributed to the accident due to the reactions of other drivers on the highway. Based on this testimony, we conclude that this case is distinguishable from *Lumbermens* and that third-party plaintiffs forecasted sufficient evidence tending to establish a *prima facie* case since genuine issues exist as to whether NCDOT breached its duty and whether the signage was a proximate cause of the accident.

In summary, we affirm the trial court's granting of summary judgment in favor of Rea and P.S.I., and we reverse the granting of summary judgment in favor of NCDOT.

Affirmed in part and reversed in part.

Chief Judge EAGLES concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I disagree with the majority's conclusion that no genuine issue exists as to whether Rea or P.S.I. breached a duty to the defendants. Instead, I would find that an issue of fact exists as to whether Rea and P.S.I. breached a duty to exercise ordinary care for the safety of the general public.

First, our case law indicates that a road contractor undertakes such a duty. In *C.C.T. Equip. Co. V. Hertz Corp.*, 256 N.C. 277, 284, 123 S.E.2d 802, 808 (1962), our Supreme Court established that when "a contractor undertakes to perform work under contract with the State Highway Commission, the positive legal duty devolves on him to exercise ordinary care for the safety of the general public traveling over the road on which he is working."

Second, our statutes mandate a duty on road contractors. Under N. C. Gen. Stat. § 136-25, "any contractor or subcontractor employed by [NCDOT]" has a duty "to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route . . . ."

Finally, the testimonial evidence at trial pointed to such a duty. Employees of both Rea and P.S.I. testified that their businesses routinely adopted the safety standards set forth in the NCDOT Manual for Highway Signs. In doing so, they acknowledged that a certain duty of care existed towards those traveling the highways, and that they were aware of this duty.

Thus, existing case law, statutory law and testimonial evidence in this case shows that Rea and P.S.I. owed a duty to the general public to exercise ordinary care in the placement of highway signs for this project. The fact that they may have followed NCDOT's orders as to where to put the signs does not mean that they no longer had a duty to exercise ordinary care. Indeed, such evidence is only part of the proof that the jury would consider in determining whether the contractor and subcontractor breached their existing duty of care to the general public.

JAMES E. WHITAKER, PLAINTIFF v. PEGGY H. AKERS, EXECUTRIX OF THE ESTATE OF RICHARD E. AKERS, M.D., AND/OR MEDICAL CENTER UROLOGY, DEFENDANT

No. COA99-561

(Filed 4 April 2000)

1. **Medical Malpractice— continuing course of treatment— physician assistant's prescription refill**

   A physician assistant's prescription refill constituted treatment under the continuing course of treatment doctrine since the evidence reveals that the physician coordinated plaintiff patient's continuing treatment and supervised his staff in carrying out treatment. N.C.G.S. § 90-18.1(e).

2. **Statute of Limitations— tolling—medical malpractice— continuing course of treatment**

   The trial court did not abuse its discretion in a medical malpractice action by granting a new trial based on errors of law occurring at trial since the trial court failed to give defendant's requested instruction on the statute of limitations issue because the statute of limitations under N.C.G.S. § 1-15(c) stops being tolled under the continuing course of treatment doctrine when plaintiff knew or should have known of his injury.

3. **Appeal and Error— memorandum of additional authority— no argument allowed**

   An appellee may not use a memorandum of additional authority as a reply brief or for additional argument because any summary of the authority or further argument is a violation of N.C. R. App. P. 28(g).

Appeal by plaintiff from judgment entered 28 December 1998 by Judge Julius A. Rousseau, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2000.

Fuller, Becton, Slifkin & Bell, by Charles L. Becton and James C. Fuller, and The Johnson Law Office, by Debra I. Johnson, for plaintiff-appellant.

Brinkley Walser, PLLC, by Stephen W. Coles, for defendant-appellee.

EAGLES, Chief Judge.

This is a medical malpractice case arising out of the treatment of plaintiff James Whitaker by the late Dr. Richard E. Akers, a urologist from High Point. The plaintiff substituted Peggy H. Akers, the executrix of Akers' estate, after Dr. Akers' death.

Plaintiff was in his early sixties when he first visited Dr. Akers. On that visit, plaintiff complained of urological problems. These problems included pain and difficulty in urinating, pain in both hips and his testicles, and nocturnia. Dr. Akers treated plaintiff's condition with a surgical procedure known as a transurethral resection of the prostate (TURP). This procedure involves surgically removing a small portion of the prostate gland. After removal, a pathologist analyzed the gland and determined that the plaintiff had two "microscopic foci" of a carcinoma. Defendant claims that there was no way of knowing whether this carcinoma would have spread. However, plaintiff's experts testified that this type of cancer does not spread and is not life threatening to a man of plaintiff's age.

After this discovery, all parties chose to take an aggressive approach toward treatment, specifically the removal of plaintiff's prostate and lymph nodes on 26 June 1991. There is contradictory testimony whether Dr. Akers properly explained to plaintiff all of his options. Plaintiff's experts testified that the surgery was not necessary and that Dr. Akers' surgical techniques were below the standard of care. These experts opined that Dr. Akers removed excessive skeletal muscle tissue while performing the surgery. Muscle tissue helps control continence.

Defendant's experts testified that Dr. Akers' conduct was within the standard of care. Defendant places the choice of surgery on the plaintiff stating that plaintiff decided after Dr. Akers presented him with all of the options and the potential consequences. Additionally, defendant's experts testified that Dr. Akers performed the surgery properly.

After the surgery, plaintiff became incontinent and impotent. He presented evidence that he no longer goes out in public and that he wears diapers because he cannot control his bodily functions. Plaintiff's experts opined that his condition resulted from Dr. Akers' unnecessary and improper surgery. Additionally, plaintiff presented evidence that Dr. Akers treated him approximately seventeen times after the surgery until August of 1992. On 12 August 1992, plaintiff

called Dr. Akers' office and had a conversation with one of Dr. Akers' physician assistants. The physician assistant refilled a prescription for steroidal creams to treat a groin rash allegedly related to plaintiff's incontinence.

At the close of all evidence, the trial court charged the jury and sent them out for deliberations. After approximately five minutes, the jury sent a note to the trial judge stating: "Could you explain how many foremen we should have in deciding upon a verdict? Maybe some of us don't understand." The judge then brought the jury back into the courtroom and instructed them on the foreperson's purpose. Jury deliberations lasted approximately one hour and resulted in a verdict for plaintiff in the amount of one million five-hundred thousand dollars.

After the verdict, defendant moved for a judgment notwithstanding the verdict pursuant to N.C.R. Civ. Pro. 50(b) or in the alternative for a new trial pursuant to N.C.R. Civ. Pro. 50 and 59. The trial court granted the defendant's motions. In its order the court found that

> 7. The undersigned judge was concerned about the statute of limitations issue when it was first raised by the defendant at the close of plaintiff's evidence. The undersigned judge believes that the charge which he gave to the jury on the statute of limitations was not a correct statement of the law.

From these findings the trial court made the following relevant conclusion of law.

> 4. Errors in law occurred at the trial and were objected to by the defendants concerning the statute of limitations and the motion of the defendants filed pursuant to Rule 59(a)(8) of the North Carolina Rules of Civil Procedure for a new trial on that ground should be allowed as a matter of law and in the discretion of the court.

Plaintiff appeals.

A motion for judgment notwithstanding the verdict "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). A motion for judgment notwithstanding the verdict "is cautiously and sparingly granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333,

338 (1985). The bar is high for the moving party; the trial court should deny the motion 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 examining a motion for judgment notwithstanding the verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party. *Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 524 S.E.2d 591 (2000). The court must give the nonmovant the benefit of every reasonable inference that is legitimately drawn from the evidence and it must resolve all contradictions in the nonmovant's favor. *Id.* On appeal our "standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Id.* (citation omitted).

Additionally, the granting or denial of a motion for a new trial lies solely within the trial court's discretion which is "practically unlimited." *See Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 603 (1982) (citation omitted). Appellate review is strictly limited to whether the record "affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington*, 305 N.C. at 482, 290 S.E.2d at 602. Absent a manifest abuse of discretion, this Court will not overturn the trial court's ruling granting a new trial.

Defendant argues that the applicable statute of limitations G.S. § 1-15(c) (1999) bars plaintiff's claim and that the continuing course of treatment doctrine does not save it. In her motion for judgment notwithstanding the verdict and new trial defendant claimed that the trial court improperly instructed the jury on the statute of limitations issue. The court gave the following instruction.

> The statute of limitations for a medical malpractice suit is normally three years. However, this three-year period is tolled or suspended, that is, the clock stops running on it, if the plaintiff remains under a continuing course of treatment by the defendant for the same injury that is issue—that is at issue in this case. That is to say that as long as plaintiff continues to be under the care of the defendant for the initial injury giving rise to the malpractice claim, no time is elapsing under the statute of limitation. Furthermore, it is not necessary that the treatment rendered subsequent to the initial treatment be negligent.

> Now the evidence tends to show that the plaintiff was treated by Dr. Akers for incontinency at least 16 times between June 26, 1991 and August 12, 1992. And further that he saw no other doctor. The burden of proof on this issue is on the plaintiff to satisfy you by the greater weight of the evidence that he continued to be treated by doctor—by the defendant from immediately after his prostate surgery on June 26, 1991, through August 12, 1992, when the treatment was for symptoms that arose from that surgery.
>
> So if you find from the evidence by a greater weight that there was a continuing course of treatment of the plaintiff by the defendant, you must find that the statute of limitations expired on June 12, 1995, and therefore answer this question "yes."

Defendant makes two arguments as to the propriety of the trial court's instructions. First, defendant claims that the prescription given by the physician assistant on 12 August may not constitute a continuing course of treatment.

The continuing course of treatment doctrine operates to toll the statute of limitations. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 781 (1996). The doctrine applies to situations where a doctor continues a particular course of treatment over a period of time. *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978) (citations omitted). The underlying theory of the doctrine is that so long as the doctor/patient relationship continues, the doctor is guilty of malpractice during the entire relationship for not repairing the damage he did and therefore, the cause of action arises at the conclusion of the contractual relationship. *Id.*

In order to benefit from the continuing course of treatment doctrine, "a plaintiff must show both a continuous relationship and subsequent treatment from that physician." *Horton*, 344 N.C. at 137, 472 S.E.2d at 781. It is insufficient to show the mere continuity of the physician/patient relationship. *Callahan v. Rogers*, 89 N.C. App. 250, 255, 365 S.E.2d 717, 720 (1988). Rather, the subsequent treatment must be related to the original act, omission or failure to act that gave rise to the original claim. *Horton*, 344 N.C. at 137, 472 S.E.2d at 781. Additionally, it is not necessary that the subsequent treatment be negligent so long as the doctor continued to treat the plaintiff for the particular condition created by the original negligent act. *Rissolo v. Sloop*, 135 N.C. App. 194, 196, 519 S.E.2d 766, 768 (1999).

[1] Plaintiff has shown that he had a continuous relationship with Dr. Akers. The doctor not only performed the surgery but also rendered post-operative corrective treatment approximately seventeen times after the surgery. Here, the issue is whether the physician assistant's prescription refill constitutes treatment. Defendant claims that the prescription refill in question cannot constitute a continuing course of treatment because Dr. Akers did not directly participate in the prescription refill. We disagree.

Defendant admits that Dr. Akers wrote the original prescription for the steroidal cream in the spring of 1992. Plaintiff's evidence demonstrated that the prescription was corrective treatment for Dr. Akers' alleged negligent surgery. Accordingly, the refill of the prescription also constituted corrective treatment. At trial, the physician assistant, Michael Kreitz, testified that Dr. Akers "is responsible for my actions" when dealing with patients. We also note that G.S. § 90-18.1(e) (1999) states

> [a]ny prescription written by a physician assistant or order given by a physician assistant for medications, tests, or treatments **shall be deemed to have been authorized by the physician** approved by the Board as the supervisor of the physician assistant and the supervising physician shall be responsible for authorizing the prescription or order.

These facts show that Dr. Akers was responsible for any course of treatment chosen by the physician assistant. The physician assistant did not and cannot act without a physician's supervision. Here, that physician was Dr. Akers. Dr. Akers coordinated plaintiff's treatment and supervised his staff in carrying out that treatment. It would be unjust to allow doctors to escape liability by saying that a prescription refill did not constitute treatment by the doctor simply because the physician assistant handled the phone call. Accordingly, under the facts presented, we now hold that the physician assistant's prescription refill constituted treatment under the continuing course of treatment doctrine.

Defendant claims that the case of *Trexler v. Pollock*, 135 N.C. App. 601, 522 S.E.2d 84 (1999), supports her position. We disagree. In *Trexler*, the plaintiff sued an emergency room doctor for failing to diagnose appendicitis properly. This Court stated that the doctor's prescription did not constitute a continuing course of treatment. *Id.* at 605, 522 S.E.2d at 87-88. There plaintiff saw the physician only one time and never had any further contact with that physician. *Id.* Here,

the evidence shows that plaintiff had a continuous relationship with Dr. Akers and that all of his treatment was given by Dr. Akers or individuals who worked under Dr. Akers' employment and guidance. Therefore, *Trexler* does not control the case at bar.

[2] Next, defendant claims that the trial court correctly granted her motion, because it failed to issue an instruction as to whether the plaintiff knew or should have known of his injury. Under the continuing course of treatment doctrine, the statute of limitations is tolled until the earlier of "(1) the termination of the physician's treatment of the patient, or (2) the time at which the patient knew or should have known of the injury." *Rissolo*, 135 N.C. App. at 196, 519 S.E.2d at 768. It is the second possible termination date that has caused confusion here.

We begin by dealing with plaintiff's arguments. Plaintiff claims that the Supreme Court has disavowed the discovery exception under the continuing course of treatment doctrine. *See Horton*, 344 N.C. at 137, 472 S.E.2d at 781. In *Horton*, our Supreme Court adopted this doctrine for the first time. *Id.* Notably, the *Horton* Court did not discuss any potential termination date for the early discovery of malpractice. *Id.* Plaintiff argues that by limiting its adoption of the doctrine "only as set forth," the *Horton* Court eliminated any exception for the early discovery of malpractice. *Id.* We disagree. While the *Horton* Court only adopted the doctrine "as set forth," it is important to note that the Court expressly declined to rule on other features of the doctrine as developed by this Court. *Id.* Consequently, our Supreme Court has never expressly or implicitly overruled the discovery exception to the continuing course of treatment doctrine. This Court has cited this exception in cases both before and after *Horton*. Accordingly, the potential exception still remains the law in this state and defendant was entitled to an instruction on it.

Next, we consider the precise nature of the instruction to which defendant is entitled. Defendant's arguments seem to suggest that plaintiff may not benefit from the continuing course of treatment doctrine, so long as he knows that he has sustained an injury. However, a careful review of the case law refutes this argument.

Under the continuing course of treatment doctrine, the statute of limitations stops being tolled when the patient discovers not only that he is injured but also the negligent act that caused his injury. *Ballenger*, 38 N.C. App. at 60, 247 S.E.2d at 294. An injury may be readily apparent but the fact of wrong may lay hidden. *Id.* It is only

when the plaintiff knew or should have known that this wrongful act caused his injury that the plaintiff loses the benefit of the continuing course of treatment doctrine. *Id.; see Callahan v. Rogers*, 89 N.C. App. 250, 365 S.E.2d 717 (1988); *see Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 483 (1985) (holding that the term "bodily injury" under G.S. § 1-15(c) denotes bodily injury from wrongful conduct in a legal sense). Here, while there is no question that the plaintiff knew he was incontinent and impotent, there is some question whether he knew or should have known that defendant's conduct was wrongful and whether that conduct caused his incontinence and impotence, prior to the running of the statute of limitations. Accordingly, defendant was entitled to her requested jury instruction as modified by this opinion.

In light of the above discussion we now hold that the trial court erred by entering judgment for the defendant and we now reverse that ruling. Plaintiff presented sufficient evidence to send this case to the jury. However, we hold that the trial court did not abuse its discretion in granting a new trial. In its order, the trial court concluded in its discretion that errors of law occurred at trial in regard to the statute of limitations issue and that these errors entitled the defendant to a new trial. As we discussed earlier, we agree with the trial court's assessment as to its failure to give defendant's requested instruction on the statute of limitations issue. Therefore, we discern no abuse of discretion and affirm the trial court's judgment setting aside the verdict and granting a new trial. Accordingly, it is unnecessary to consider the remaining assignments of error.

[3] Lastly, we note that the appellee has submitted a purported "memorandum of additional authority." We caution the bar that it may not use a memorandum of additional authority as a reply brief or for additional argument. N.C.R. App. P. 28(g) (1999). A memorandum of additional authority "shall simply state the issue to which the additional authority applies and provide a full citation of the authority." *Id.* Any summary of the authority or further argument is a violation of Rule 28(g).

Affirmed in part, reversed in part, and remanded for new trial.

Judges McGEE and HORTON concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY ELLIOTT

No. COA99-272

(Filed 4 April 2000)

1. **Criminal Law— handcuffs on defendant—outside courtroom**

The trial court did not err in an assault inflicting serious injury case by denying defendant's motion for a mistrial based on a juror seeing defendant in handcuffs outside of the courtroom during a recess of the trial, because: (1) the restraint of a defendant outside the courtroom is within the sound discretion of the officer charged with the custody of defendant; and (2) the handcuffing of defendants as they are transferred between the courtroom and the jail is a common practice well-known by the general public.

2. **Criminal Law— jury instruction—continuation of deliberations**

The trial court did not coerce the jury in an assault inflicting serious injury case by instructing the jury to return to the jury room at 5:30 p.m. to discuss whether the jury wanted to continue with deliberations because the trial court simply informed the foreperson to confer with the other members of the jury and determine whether it wanted to continue its deliberations that afternoon or to come back the next day.

3. **Evidence— character—propensity for violence**

The trial court erred in a prosecution for assault on a female and assault inflicting serious injury by admitting evidence of a 1994 incident where defendant hit the female victim in the face because this evidence was inadmissible character evidence to show defendant's propensity for violence in violation of N.C.G.S. § 8C-1, Rule 404(b).

Judge EDMUNDS concuring in the result with a separate opinion.

Judge LEWIS dissenting.

Appeal by defendant from judgment dated 22 October 1998 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 25 January 2000.

Attorney General Michael F. Easley, by Associate Attorney General Susana E. Honeywell, for the State.

Kevin P. Bradley, for defendant-appellant.

GREENE, Judge.

Michael Anthony Elliot (Defendant) appeals from a conviction of assault inflicting serious injury in violation of N.C. Gen. Stat. § 14-33(c). Defendant had been charged with assault on a female and assault inflicting serious injury.

On 17 July 1997, an altercation occurred between Defendant, his sister Linda Elliot Vereen (Vereen), and Vereen's fiancé Wilbert Lee Jones, Jr. (Jones). Vereen testified the altercation started when Defendant began yelling at her and, in response, she retrieved a knife from her house. Upon her return, Defendant approached Vereen making disparaging remarks about her, and he told her "I'm going to hit you in your eye like I did before." Defendant then hit Vereen on the side of her face. In response to a question from the State as to what she meant "by he hit you before[,]" Vereen responded over Defendant's objection that in "1994 [Defendant] hit me in my face because he got mad at me[,] because I wouldn't let him hit my son in the head with a coffee cup simply because he was talking back at him." After Defendant hit Vereen, he struck Jones twice on the hand and arm with a mailbox and post.

During the recess after the State rested its case, a juror saw the handcuffed Defendant in the courtroom hallway. Once court reconvened, Defendant moved for a mistrial on the ground one of the jurors saw him in handcuffs during the recess. The trial court denied Defendant's motion. Defendant offered evidence of self-defense and rested. The trial court instructed on self-defense.

After deliberating for nearly two hours, the jury returned to the courtroom at 5:30 p.m. The jury informed the trial court it had reached a unanimous verdict on one charge but was divided on the other charge. The conversation between the trial court and the jury foreperson continued as follows:

> THE COURT: Alright. It's 5:30 and I'm about to let the court personnel go. The options are we can stay a little longer and try to resolve that matter this afternoon or do you feel like it will require further deliberations tomorrow?

THE FOREPERSON: I'm willing to stay a little while longer, but I don't know if the rest of the jurors are.

THE COURT: Well, I know you say that you do not have a unanimous decision as to both charges. You have one of them. The law requires that I require you to continue to deliberate as long as you're making progress. The only way I can release you is if you arrive at a unanimous decision or if you tell me you are hopelessly deadlocked and further deliberations will not result in a unanimous decision. At that time I would declare a mistrial and have that matter heard by some other jury. I'll let you step back to the jury room for a moment and let you discuss whether you want to continue.

After this conversation between the trial court and the jury foreperson, the jury again retired and soon thereafter returned to the courtroom with unanimous verdicts finding Defendant "not guilty" of assault on a female and "guilty" of assault inflicting serious injury.

The issues are whether: (I) Defendant is entitled to a mistrial because he was seen in handcuffs by a juror, while being transferred to the courtroom; (II) the trial court coerced the jury into reaching a verdict; and (III) evidence Defendant had previously assaulted the female victim was admissible under Rule 404(b).

I

[1] Defendant contends he was denied a fair trial, in violation of Article I, Sections 19 and 24 of the North Carolina Constitution, when the trial court denied his motion for a mistrial on the ground a juror saw Defendant in handcuffs during a recess of the trial, in the hall of the courthouse. We disagree.

If a trial court physically restrains a defendant "in the courtroom," it is required, "[u]nless the defendant or his attorney objects," to "instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt." N.C.G.S. § 15A-1031 (1999). The restraint of a defendant, outside the courtroom, is within the sound discretion of the officer charged with the custody of the defendant and that officer is permitted to take whatever action is necessary to prevent escape and to protect the public. The handcuffing of defendants, as they are transferred between the courtroom and the jail, is a common practice well known by the general public. Thus, a defendant's right to a fair and impartial trial is not

impaired when jurors observe him outside the courtroom in handcuffs. *State v. Montgomery*, 291 N.C. 235, 252, 229 S.E.2d 904, 914 (1976). The trial court, therefore, correctly denied Defendant's motion for a mistrial.

II

[2] Defendant argues the trial court coerced the jury into reaching a verdict when it instructed it to return to the jury room at 5:30 p.m. "to discuss whether [it] want[ed] to continue" with its deliberations. We disagree.

The jury returned to the courtroom at 5:30 p.m. and informed the trial court it had reached a verdict as to one charge but had not been able to reach a verdict on the second charge. The foreperson informed the trial court he was willing to "stay a little while longer" that afternoon, and was not sure "if the rest of the jurors" were prepared to deliberate further that afternoon. The trial court simply informed the foreperson to confer with the other members of the jury and determine "whether [it] want[ed] to continue" its deliberation that afternoon or come back tomorrow. This did not constitute coercion on the part of the trial court and, thus, was not error. *State v. Griffin*, 308 N.C. 303, 316, 302 S.E.2d 447, 456 (1983) (no error for trial court to return jury to its room for ten minutes of additional deliberation).

III

[3] The State questioned Vereen, its witness, about a 1994 incident where Defendant hit her in the face. Defendant contends this constitutes inadmissible character evidence in violation of Rule 404(b). The State contends the testimony was admissible under Rule 404(b) in that it shows Defendant's "motive, intent, plan and knowledge to assault" Vereen. We agree with the Defendant.

Evidence of other "crimes, wrongs or acts" are not admissible to "show that the defendant has the propensity or disposition to commit an offense on the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990); N.C.G.S. § 8C-1, Rule 404(b) (1999). This evidence is admissible, however, "so long as it 'is relevant for some [other] purpose.' " *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). The evidence is relevant for some other purpose if it "tends to prove a material fact in issue in the crime charged." *See State v.*

Johnson, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986). Whether the evidence is relevant

> "is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."

State v. McClain, 240 N.C. 171, 177, 81 S.E.2d 364, 368 (1954) (quoting *State v. Gregory*, 4 S.E.2d 1, 4 (S.C. 1939)).[1]

In this case, the evidence of Defendant's prior assault on Vereen in 1994 does show his disposition to indulge in that kind of conduct and consequently makes it more probable that he is guilty of the current assault charges. This, however, is not a proper purpose, within the meaning of Rule 404(b), and thus cannot support its admissibility. *See* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 94, at 271 (5th ed. 1998). Furthermore, evidence of the 1994 assault does not tend to prove a material fact in issue in the crimes charged.[2] Indeed, we see no connection between the 1994 assault and the 1997 assaults, other than to show Defendant's propen-

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1. We acknowledge our Supreme Court has held Rule 404(b) is a "rule of *inclusion*" rather than a "rule of exclusion." *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. To be admissible, however, there remains the requirement the evidence be " '*relevant to any fact or issue other than* the character of the accused.' " *Id.* (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). We do not read *Coffey* as overruling *McClain* and thus its language, relied on in this opinion, for judging the relevancy of the prior "crimes, wrongs, or acts" remains viable. Indeed, since *Coffey*, this Court has relied on *McClain* in resolving a Rule 404(b) issue. *State v. Irby*, 113 N.C. App. 427, 437-38, 439 S.E.2d 226, 233 (1994).

2. The State contends the 1994 assault is relevant to show Defendant's ill will and thus is admissible, relying on *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998). We disagree. *Gary* is a first-degree murder case and ill will was relevant on the material issues of malice, premeditation, intent, and deliberation. In the present case, the charged assaults are not specific intent crimes, *see State v. Curie*, 19 N.C. App. 17, 20, 198 S.E.2d 28, 30 (1973), and thus intent is not a material issue in the case. *See State v. Bagley*, 39 N.C. App. 328, 331, 250 S.E.2d 87, 89 (1979) (intent is not an essential element of general intent crimes); *cf. McClain*, 240 N.C. at 175, 81 S.E.2d at 366 ("Where a *specific mental intent* or state is *an essential element* of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish *the requisite mental intent* or state, even though the evidence discloses the commission of another offense by the accused.") (emphasis added). It follows, therefore, evidence of the 1994 assault, and any ill will it reveals, is not admissible under Rule 404(b) in this case.

sity for violence.[3] The trial court, therefore, erred in allowing this evidence. Because we are unable to determine the error was harmless, Defendant is entitled to a new trial. N.C.G.S. § 15A-1443(a) (1999).

New trial.

Judge EDMUNDS concurs in the result with a separate opinion.

Judge LEWIS dissents.

Judge EDMUNDS concuring in the result with a separate opinion.

Because our Supreme Court has held that Rule 404(b) permits evidence of another wrong to be admitted to establish intent where the crime at trial is a general intent offense, *see State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997), I cannot agree with that portion of the opinion addressing intent or with footnote 2. However, I concur that admission of defendant's 1994 assault in this instance merely showed his propensity to indulge in that kind of conduct and that its improperly prejudicial effect outweighed any probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1999).

Judge LEWIS dissenting.

I respectfully dissent. Significantly, defendant was being tried here for both the assault on Mr. Jones and the assault on his sister, Ms. Vereen. I believe evidence of the prior 1994 assault of Ms. Vereen was admissible, at least with respect to the present assault on Ms. Vereen. Rule 404(b) explicitly allows evidence of other crimes, wrongs, or bad acts when such evidence is used to show intent. Although neither misdemeanor assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1) nor misdemeanor assault on a female under N.C. Gen. Stat. § 14-33(c)(2) are specific intent crimes, that does not mean, as the majority suggests, that intent is not an element of each offense. Both assaults are still general intent crimes and thus require a showing that defendant acted intentionally. *See State v.*

3. There is some evidence in this record tending to support an argument Defendant was acting in self-defense at the time he assaulted Vereen and Jones. Indeed, the trial court instructed the jury on self-defense. The State, however, makes no contention in its brief to this Court that the 1994 assault on Vereen was admissible under 404(b) because it tends to show Defendant was the aggressor in the 1997 assaults and thus not acting in self-defense. We note, however, use of the 1994 assault for this purpose is prohibited. *Morgan*, 315 N.C. at 638, 345 S.E.2d at 92.

Davis, 68 N.C. App. 238, 244, 314 S.E.2d 828, 832 (1984) ("[I]ntent is an essential element of [misdemeanor] criminal assault . . . ."); *State v. Musselwhite*, 59 N.C. App. 477, 481, 297 S.E.2d 181, 184 (1982) ("All that is necessary to sustain a conviction for assault is evidence of an overt act showing an *intentional* offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm.") (emphasis added); N.C.P.I., Crim. 208.60 (instruction for assault inflicting serious injury); N.C.P.I., Crim. 208.70 (instruction for assault on a female).

Because intent is an essential element of the two assault offenses here, intent became a material issue; therefore, evidence of defendant's prior bad acts was admissible if such evidence tended to show his intent. And here, I believe defendant's prior assault of Ms. Vereen in 1994 did tend to establish his intent with respect to the present assault on her. In this regard, I find *State v. Wilborn*, 23 N.C. App. 99, 208 S.E.2d 232 (1974), particularly instructive. In *Wilborn*, the defendant was charged with discharging a firearm into an occupied vehicle, assault with a deadly weapon, and misdemeanor assault by pointing a shotgun. *Id.* at 99-100, 208 S.E.2d at 232. None of these offenses were specific intent crimes. In its case-in-chief, the State attempted to introduce evidence of an assault by defendant against one of the victims that had occurred three years beforehand. *Id.* at 101, 208 S.E.2d at 233. The *Wilborn* Court held that the evidence of the prior assault was indeed admissible to show defendant's state of mind. *Id.* I believe *Wilborn* is sufficiently analogous to the case at hand, as both cases involve three-year-old assaults being introduced to show intent for purposes of misdemeanor assaults. Accordingly, I conclude that the trial court committed no error in admitting evidence of the 1994 assault. *See also Musselwhite*, 59 N.C. App. at 479-80, 297 S.E.2d at 183 (allowing evidence of prior threats and a slap on the victim's face to show intent in a case involving both felony and misdemeanor assaults).

Furthermore, even if it was error to admit evidence of the prior assault, I believe the error was harmless. To receive a new trial, defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (1999). I fail to see how introduction of the evidence with respect to defendant's prior assault of Ms. Vereen amounted to prejudicial error. First, the evidence of the 1994 assault was sparse, to say the least. The transcript from the trial contains fifteen pages of detailed testimony by Ms.

Vereen regarding the assaults for which defendant was tried. In that testimony, she made one passing reference to the prior assault, which then elicited three brief follow-up questions by the prosecutor. I doubt that these limited and rather non-descript references to the prior assault so affected the minds of the jury that there was a reasonable possibility of acquittal absent such references. I also note that defendant, in taking the stand, had an opportunity to explain that assault. In fact he did so, claiming that the 1994 assault was in self-defense. The jurors might very well have believed this testimony, too, as they acquitted him of the charge of assault on Ms. Vereen.

Second, and more importantly, there was ample evidence before the jury to convict defendant of the assault on Mr. Jones in the absence of evidence with respect to the prior assault on Ms. Vereen. The testimony of Ms. Vereen and the two other State's witnesses all affirmatively pointed to defendant as the aggressor in this incident, refuting the notion that defendant acted in self-defense. In light of this abundance of inculpatory evidence, the admission of the sparse references to the 1994 assault did not prejudice defendant in such a way as to tip the scales of justice against him.

STEPHANIE F. OFFERMAN (MEYERS), PLAINTIFF-APPELLEE v. MARK A. OFFERMAN, DEFENDANT-APPELLANT

No. COA99-473

(Filed 4 April 2000)

1. Divorce— equitable distribution—marital interest in business—valuation

The trial court erred in an equitable distribution action in its valuation of the parties' business. The business, Mark Made, had a relationship with a corporation (Design Compendium) which creates window display designs for New York retail stores; funding for Mark Made was obtained either from an equity line or from plaintiff-wife's parents; Design Compendium subcontracted to Mark Made replicas of a particular sculpture for a Christmas display in all of Gucci's stores in the United States and Japan; when defendant contacted the bank for funds from the credit line he found that it had been frozen by plaintiff on 9 August 1996; defendant obtained an advance from Design Compendium and

Gucci but the business relationship was destroyed; the parties separated on 16 September; and it could not be determined from the findings whether the value reached by the court reasonably approximated the value of the company on the date of separation. There was neither an indication of the valuation method relied upon by the trial court nor an indication as to what portion of the assigned value represented good will, and it appears that the trial court relied heavily upon events which occurred after the date of separation, which are to be considered only as distributional factors because the case arose prior to the 1997 amendments to the Equitable Distribution Act.

2. Divorce— equitable distribution—unequal distribution—distributional order

A distributional order in an equitable distribution action was vacated where the action was remanded on other grounds. The trial court was directed to make a specific finding of the value of the parties' business as of the date of distribution so that it could be certain that its distributional intent is carried out.

Appeal by defendant from a judgment entered 12 October 1998 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 12 January 2000.

Stephanie F. Offerman (plaintiff) and Mark A. Offerman (defendant) were married on 30 May 1987, and separated on 16 September 1996. During the course of their marriage they acquired various assets subject to equitable distribution, including a closely held corporation which they formed on 10 October 1991. Originally known as New Elements, Inc., the corporate name was changed to Mark Made, Inc. (Mark Made) in 1993. Mark Made's operations included the manufacture of candlestick holders, candlesticks and eventually expanded to include the manufacture of store window displays. Mark Made was a Sub-chapter S corporation with 100 outstanding shares of stock issued in the names of plaintiff and defendant as joint tenants with right of survivorship.

Mark Made developed a relationship with Design Compendium, a corporation which creates window display designs for major New York retail stores. Beginning in 1993, Mark Made provided custom manufactured goods to Design Compendium for use in the creation of window displays. It was customary for Mark Made to bear all "start-up" and production expenses associated with a project and to receive

payment from Design Compendium upon completion of the job and delivery of the product. The evidence indicates that prior to the date of separation, funding for Mark Made was obtained either from an equity line or from the parents of plaintiff-wife.

In August 1996, Design Compendium and Gucci entered into a contract for the manufacture of a Christmas window display which included a replica of a particular sculpture. Design Compendium subcontracted with Mark Made to produce the replicas at a total contract price of $254,000.00. The replicas were to be shipped to all of Gucci's stores in the United States and Japan. In order to begin work on the project, defendant contacted his bank to obtain funds from the credit line he and plaintiff had established using their marital home as security, but discovered that the credit line had been "frozen" by plaintiff on 9 August 1996. At trial, plaintiff testified that she froze the credit line with full knowledge of the contract between Mark Made and Design Compendium and of the expenses Mark Made would have to advance in order to complete the project. Having no funds with which to begin the project, Mark Made sought an advance of $90,000.00 from Design Compendium. Design Compendium advanced Mark Made $60,000.00 from its own credit line and obtained the remaining $30,000.00 from a very reluctant Gucci. According to the testimony of Godfrey Raynor, co-owner of Design Compendium, Mark Made's request for an advance significantly altered their business relationship. Mr. Raynor stated that he "wanted to end the relationship. I didn't see Mark Made as a vendor to continue with. . . . I didn't like what had happened to me and I would never let that happen to me again." When asked whether he discussed Mark Made's ability to finance future jobs with the defendant, Mr. Raynor testified that he "didn't want to work with him [defendant] in that capacity again." The plaintiff and defendant separated shortly thereafter, and this action was instituted.

At the equitable distribution trial the parties' assets, including Mark Made, were identified, valued, and distributed. The trial court found that Mark Made had a net fair market value of $365,000.00 on the date of separation. The trial court arrived at that value by including in its calculations the anticipated profit from the Design Compendium-Gucci contract, even though the contract was only about 10% performed on the date of separation. The trial court found that on the date of distribution, the market value of Mark Made was sharply reduced, and did not exceed the fixed assets of the corporation. The trial court valued the net marital estate at $831,670.54 and

distributed 56% of the marital estate, including Mark Made, to the defendant and 44% of the marital estate to plaintiff. Defendant appealed, assigning errors.

Johnson & Lambeth, by Carter T. Lambeth, for plaintiff appellee.

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

HORTON, Judge.

Defendant brings forward four assignments of error, the first three focusing on the trial court's valuation of Mark Made, and the fourth assignment of error challenging the trial court's distribution of the marital estate. Because the first three assignments of error are interrelated, we will discuss them together.

I. Valuation of Mark Made

[1] This action for equitable distribution was filed on 16 April 1997, prior to the effective date of the 1997 amendments to the Equitable Distribution Act which created the category of divisible property. For actions filed before 1 October 1997, the trial court is to identify and classify the property of the parties, determine the net value of the property as of the date of the separation of the parties, and distribute the marital property in an equitable manner. *Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202-03, *disc. review denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), *rev'd in part*, 336 N.C. 575, 444 S.E.2d 420 (1994). The appreciation or depreciation in value of marital assets is to be treated as a distributional factor under N.C. Gen. Stat. § 50-20(c)(11a) or (12). *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988).

In this case, defendant does not assign error to the identification and classification of assets, but argues that the trial court erred in its valuation of Mark Made and in its subsequent distribution. We agree with defendant, and remand the case for a new hearing on the value of Mark Made and for entry of a new distribution order.

In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which "reasonably approximates" the net value of the business interest. *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). In *Poore*, this Court stated that

> a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

Poore, 75 N.C. App. at 422, 331 S.E.2d at 272. "[T]he requirements and standard of review set forth [in *Poore*] apply to valuation of other business entities as well," and we have extended the *Poore* standards to the valuation of a marital interest in a closely held corporation. *Smith*, 111 N.C. App. at 487, 433 S.E.2d at 212; *Patton v. Patton*, 318 N.C. 404, 348 S.E.2d 593 (1986).

Here, each of the parties offered the testimony of an expert in valuation. An expert appraiser testified for the defendant that he valued Mark Made by using three different methods: capitalized earnings, capitalized excess earnings, and a revenue multiple. The appraiser then averaged the values he obtained from those three methods and obtained a figure of $37,391.00, which he testified was, in his opinion, the net fair market value of Mark Made on the date of separation. An expert appraiser testified for plaintiff-wife that he used the capitalization of excess earnings method to arrive at a fair market value of $378,800.00 for Mark Made on the date of separation. The trial court rejected the opinions of both experts, making the following finding:

> 4.8.6 Two experts testified about the value of the corporation on the date of separation. The court is persuaded that the corporation had substantial value, and finds that the testimony of both experts contains biases which make their valuations extreme. Husband's expert, whether consciously or unconsciously, places too much weight on those events which occurred after separation in making a judgment as to how to treat the increase in income from the Gucci contract, and therefore has proposed an absurdly low value. Wife's expert treats the Gucci contract as a reliable indicator of its income stream but fails to give adequate weight to one important critical factor: the lack of sufficient corporate assets with which secure a reliable line of credit to meet on-going operating expenses to fulfill these types of contracts. While the court believes Wife's expert provides a more realistic valuation, both valuations are therefore problematical.

Having rejected the valuations of both experts, the trial court then attempted to arrive at a net fair market value for Mark Made, and diligently set out its approach in the following specific findings of fact:

> 4.8.7 The court further finds that with respect to the Gucci account, a contract had been fully formed, and the contract obligated Mark Made to obtain all of the materials before the date of separation, and this was an obligation of the corporation. The court further finds that Gucci was obligated before the date of separation to pay the contract price, and this was an enforceable contract right and an asset of the corporation. Any accounting method which ignores these realities on the date of separation does so to the prejudice of the martial [*sic*] estate and is not a fair or accurate analysis of the corporate assets. The corporation did not employ an accounting method which would justify ignoring the account receivable or treating the obligation to produce the product as non-existent. These were both fully vested marital contract rights and obligations on the date of separation.
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> * * * *
>
> 4.8.9 This court lacks the kind of expertise to revise discount rates chosen by the expert witnesses and to choose appropriate comparables and recalculate a value using the approaches which both experts believe to be an appropriate method of valuation. However, the court is not required to accept the opinions of experts. And where the experts have provided an approach to valuation which appears to be appropriate, the court may use the opinions as the starting points to arrive at a fair market value on the date of separation. Using the information provided by the experts, this court can arrive at a value which the evidence shows that a willing seller, under no compulsion, would have accepted, and what a willing buyer, under no compulsion would have paid, on the date of separation. Therefore, no further reference is required and the evidence supports a valuation by the court as follows.
>
> 4.8.10 This company is relatively unique, and had a potential with a certainty that goes beyond speculation of becoming a substantial economic success. Therefore, taking into consideration the shortcomings of the approaches of both experts, the court has made an independent assessment of the value of the corporation based upon those facts and circumstances which the court

believes a reasonable buyer and seller would have considered on the date of separation, without considering the unusual and unpredictable events which occurred thereafter which impaired the value.

* * * *

4.8.12 The court notes that this approach to valuation of the corporation (i.e., to include the Gucci contract as marital property and part of the corporate value) is the only one not prejudicial to either party based upon the evidence. If the court were to treat the funds received after separation as non-marital, then a dollar for dollar accounting would be required for all post-separation corporate transactions, including labor, debts, purchases, payments, receipts and taxes, on the Gucci account. The value of labor, the value of use of the marital assets and equipment in production, and an accounting for the use by Husband of the funds payable to the marital corporation but received and spent by him for living expenses after separation would be required. The court would then be required to consider all of these circumstances as distributional factors. Neither party has adduced evidence sufficient for such an accounting, and the court doubts whether such an accounting is possible. Therefore, this is the only fair way to value the Gucci contract as an asset based upon the evidence presented.

* * * *

4.8.14 Since separation, Husband has been in possession of the corporation and its assets, and has received all of the income from the corporation except for $15,000 received on the Gucci contract, which was paid over to Wife by court order of another judge.

4.8.15 On the date of separation, the court finds and concludes that the marital corporation, Mark Made, Inc., would have had a fair market value of approximately $365,000.00. This value includes the full value of the Gucci contract on the date of separation, including the profits subsequently received and taking into account the taxes Husband subsequently paid. On the date of trial, the value was substantially reduced, and probably did not exceed the value of its equipment and fixed assets plus the discounted value of the post-separation profits of the corporation which had been spent by Husband for his own personal use without the consent of wife, who was an equal shareholder.

We cannot determine from these findings whether $365,000.00 "reasonably approximates" the value of Mark Made on the date of separation. Other than the trial court's finding that its valuation was arrived at by considering the "full value of the Gucci contract," there is neither an indication of the valuation method relied upon by the trial court nor an indication as to what portion of the assigned value represents the value of Mark Made's goodwill.

Furthermore, in valuing Mark Made, it appears that the trial court relied heavily on the events which occurred *after* the date of separation. Since this case arose prior to the 1997 amendments to the Equitable Distribution Act, events which occurred following the date of separation were to be considered only as distributional factors under N.C. Gen. Stat. § 50-20(c)(11)(a) or § 50-20(c)(12). *See Christensen v. Christensen*, 101 N.C. App. 47, 398 S.E.2d 634 (1990). Thus, the trial court erred in considering post-separation events in determining the value of Mark Made.

Moreover, while we agree that the trial court has the authority to reject the findings of the experts enlisted by the parties it is yet required to state specifically how the court arrived at its valuation. *See Smith*, 111 N.C. App. at 488-94, 433 S.E.2d at 213-16 (1993) (trial court rejected expert's opinion as to value based on a capitalization of excess earnings approach, but properly recalculated the value using the expert's approach and figures as adjusted). We note that in valuation cases the trial court has the authority to enlist the aid of a court-appointed expert in order to receive an independent opinion as to the valuation of a business. N.C. Gen. Stat. § 8C-1, Rule 706(a) (1999); *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272.

It appears that the wide disparity in values assigned to Mark Made may be explained in large part by the emphasis on the Design Compendium-Gucci contract and its treatment as a corporate asset. Yet, it appears from the findings of the trial court that the relationship between Mark Made and Design Compendium was, for all practical purposes, destroyed when Mark Made had to seek an advance from Design Compendium in order to carry out the contract. Furthermore, it seems from the testimony of plaintiff-wife that she froze the equity line on 9 August 1996, prior to the separation of the parties on 16 September 1996. Both husband and wife testified that the wife's action occurred *prior* to their separation. Yet, the trial court found that "[i]mmediately *following* the separation of the parties, Wife caused the equity line of credit . . . to be frozen, and Husband had no

access to other operating capital." (Emphasis added.) The trial court apparently relied on this finding when it found that "[o]n the date of separation, had nothing else occurred, the evidence is persuasive that Mark Made was in fact a promising company with a bright future possessing a valuable contract right and had a sufficient operating history and prospects to make it a highly marketable entity."

The freezing of the equity line and its effects on Mark Made could be properly considered in an appraisal of Mark Made's value on the date of separation. Upon remand, the trial court may receive such additional evidence as is necessary to allow it to arrive at a figure which "reasonably approximates" the valuation of Mark Made.

II. Distribution

[2] Defendant also assigns error to the distribution made by the trial court. The distribution of the marital estate is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith*, 111 N.C. App. at 470-71, 433 S.E.2d at 203; *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). However, since we are remanding the case for a new valuation of Mark Made, we also vacate the distribution order entered by the trial court. On remand the court should enter a new distribution order following its revaluation of Mark Made. We note that in the prior distribution, the trial court weighed the distributional factors and concluded that an unequal distribution in favor of defendant would be equitable. However, it is not clear from the record that the trial court considered that by its assignment of a sharply devalued Mark Made to the defendant, the net effect of the distribution may have been an unequal distribution in favor of plaintiff-wife. On remand, the trial court should make a specific finding as to the value of Mark Made as of the date of distribution, so that it can be certain its distributional intent is carried out.

Those portions of the trial court's order which identify and value marital property, other than Mark Made, are affirmed. We vacate those portions of the order which value Mark Made and remand for a new valuation of Mark Made and entry of a new distribution order.

Affirmed in part, vacated in part and remanded.

Judges MARTIN and TIMMONS-GOODSON concur.

WENDY H. ALLEN, EMPLOYEE, PLAINTIFF v. K-MART, EMPLOYER; SELF-INSURED (KM ADMINISTRATIVE SERVICES), CARRIER, DEFENDANTS

No. COA99-48

(Filed 4 April 2000)

Workers' Compensation— witnesses—right to cross-examine

The Industrial Commission abused its discretion in a workers' compensation action by allowing significant new evidence to be admitted from physicians but denying defendants the opportunity to depose or cross-examine the physicians or requiring plaintiff to be examined by defendant's experts. Where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence.

Appeal by defendants from an opinion and award for the Full Commission by Commissioner Christopher Scott filed 24 September 1998 and of the amended opinion and award for the Full Commission by Commissioner Christopher Scott filed 23 October 1998. Heard in the Court of Appeals 19 October 1999.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan, for defendant-appellants.

HUNTER, Judge.

K-Mart and KM Administrative Services (collectively "defendants") appeal from an amended opinion and award of the North Carolina Industrial Commission ("Commission"), awarding Wendy H. Allen ("plaintiff") workers' compensation benefits for her fibromyalgia. Because we conclude that the Commission denied defendants their right to cross-examine plaintiff's independent medical examiners upon which the Commission based its decision and denied defendants an opportunity to be heard by the Commission with regard to those examiners' reports, we hold that the Commission manifestly abused its discretion with regard to admitting those reports into evidence. Therefore, we reverse and remand.

Plaintiff began working as a night stocker for K-Mart on 27 March 1995. On 30 May 1995, plaintiff sustained a compensable workers'

compensation injury when she lifted a box of stationery to put into a shopping cart and pulled a muscle in her left side. Several days later pursuant to defendants' safety coordinator's urging, plaintiff went to Urgent Care to see a doctor who diagnosed plaintiff as having a left shoulder strain. The doctor prescribed muscle relaxers and immobilized plaintiff's arm in a sling. He further took plaintiff out of work for four days and sent her to physical therapy. After several days, the doctor released plaintiff to go back to work with light duty restrictions of no lifting, pushing, or pulling. Plaintiff returned to work on 20 June 1995 as a telephone operator to comply with her light duty restrictions. In her new position, plaintiff worked various shifts as she was filling in for other employees when they were away from work.

As a result of plaintiff's subjective complaints of pain, defendants sent plaintiff to see Dr. Whitehurst, an orthopedic surgeon. Dr. Whitehurst stated that plaintiff's clinical findings could not be explained on a physiological basis. On 6 July 1995, Dr. Whitehurst released plaintiff to return to work without any restrictions, stating that he "would project that she would be considered to have reached her maximum medical improvement in 10-14 days." He further stated that he did "not project any permanent partial impairment rating."

Defendants offered plaintiff her night stocker's position; however, plaintiff declined, requesting instead to be moved to a day shift. Because there was no day stocker position available, plaintiff was assigned and accepted a customer specialist position. Because of the shift change, plaintiff's pay was reduced. During her trial return to work, plaintiff never mentioned having any difficulty doing any of the work assigned her. In fact, plaintiff performed all of her assigned job duties upon returning to work.

Plaintiff continued to work through the summer, until she had a disagreement with personnel officer, Ms. Strickland. Although plaintiff never reported the argument to anyone in her employer's company, plaintiff never returned to work after 30 August 1995. In her briefs to the Commission and to this Court, plaintiff cites her disagreement with Ms. Strickland as the reason—stating that she believed Ms. Strickland "fired" her. However, plaintiff concedes that no words to that effect were ever spoken. One week later, pursuant to company policy, K-Mart fired plaintiff for "fail[ing] to show up for work or call in."

After more than two months from the time she last saw Dr. Whitehurst on 6 July, and without expressing further complaint to defendants, plaintiff began seeing a family physician ("Dr. Miller") on 22 September 1995, complaining of back pain. Plaintiff did not seek authorization from either defendants or the Commission. Initially, Dr. Miller diagnosed plaintiff as having a "cervical muscle strain, lumbar muscle strain." She further noted that plaintiff had been depressed and suffering from anxiety/panic attacks for more than one and one-half years. Although Dr. Miller did not contact plaintiff's previous physician to obtain plaintiff's medical history, Dr. Miller continued prescribing the same medication for plaintiff's emotional problems that plaintiff had been taking during that period of time. On 28 September 1995, plaintiff returned to Dr. Whitehurst demanding testing which Dr. Whitehurst believed to be unnecessary. Nevertheless, upon plaintiff's insistence, Dr. Whitehurst conducted an MRI of plaintiff's back and an EMG and nerve conduction studies on her left arm. All tests on plaintiff returned with normal results.

Dr. Miller, upon receiving plaintiff's test results, forwarded the MRI results to a Duke Hospital neuroradiologist for interpretation. He, too, determined that the MRI was normal. Nonetheless, Dr. Miller referred plaintiff to Dr. Ezzeddine, a radiologist at Duke for further examination. He conducted another MRI and EMG on plaintiff, both of which again returned with normal results. Dr. Ezzeddine "noted that plaintiff had a physical exam displaying hysterical tendencies and that the likelihood of a neuropathy [that is, any disease of the nerves] or a radiculopathy [any diseased condition of roots of spinal nerves] accounting for her symptoms was quite slim." Finally, Dr. Miller diagnosed plaintiff with fibromyalgia "sort of by exclusion because all of the other tests . . . looked pretty normal." However, prior to the hearing before the deputy commissioner, plaintiff never sought out a specialist familiar with fibromyalgia.

Deputy Commissioner John Hedrick made his findings and set out an opinion and award filed 22 July 1997, denying plaintiff any further workers' compensation, finding that "[a]s of 30 August 1995, plaintiff was no longer disabled as a result of her injury on 30 May 1995 [and awarding plaintiff] payment of all medical expenses incurred as a result of her musculoskeletal strain on 30 May 1995, but . . . not . . . for treatment of fibromyalgia. . . ."

On 31 July 1997, plaintiff filed her notice of appeal to the Full Commission. Five months later on 29 December 1997, plaintiff

filed a motion for independent psychiatric and fibromyalgia specialist examinations. On 12 January 1998, defendants filed their brief to the Full Commission and included their first objection to plaintiff's request, stating:

> To allow the plaintiff to submit additional evidence at this late date would essentially allow the plaintiff to re-litigate this claim after a decision has been rendered and would require a whole new hearing in order to obtain additional lay witness evidence, *depositions* of the new physicians, contentions and then possible appeals.

(Emphasis added). Further, if plaintiff's request was allowed, defendants requested in the alternative that plaintiff be required to submit to an independent medical examination by a physician of defendants' choosing. The matter was heard by the Full Commission on 26 January 1998. By interlocutory order, the Full Commission allowed plaintiff sixty days from 3 February 1998 to obtain psychiatric and rheumatology expert opinions. It never addressed defendants' objection. On 10 February 1998, defendants requested clarification of the order from the Commission, specifically as to whether the physicians plaintiff was to see would be chosen by mutual agreement and again requesting that afterward, plaintiff be required to submit to "an independent medical examination by a qualified rheumatologist and/or psychiatrist of defendants[']' choosing." Based on the record, that request also went without response.

On 6 April 1998 (sixty-three days after the order allowing plaintiff a sixty-day extension of time), plaintiff requested another sixty-day extension claiming that she had been unable to find a rheumatologist willing to accept a workers' compensation patient and that she had a psychiatric evaluation set up for 1 May 1998. Commissioner Scott extended plaintiff's time to file medical reports on or before 8 June 1998. Plaintiff submitted a psychiatric report by Dr. Margaret Dorfman on 26 May and at the same time requested the Commission to allow her to see Dr. Alan Spanos, "a general practitioner with experience in the diagnosis and treatment of fibromyalgia," instead of seeing a rheumatologist. Plaintiff stated the reason being that no rheumatologist would take her case for fear of not being paid. Plaintiff did not request the Commission's assurance of payment to any rheumatologist. However, she did request the Commission assure Dr. Spanos "that payment would be forthcoming immediately after approval from the Industrial Commission." Defendants objected (for a third time) stating that

> the original basis for plaintiff's motion for an I.M.E. with a rheumatologist was Dr. Miller's testimony in her deposition that a rheumatologist would be in a better position to make a diagnosis of fibromyalgia and testify regarding the causation issue. If plaintiff now wishes to see a physician other than a rheumatologist, then her original basis for her motion for an IME is not substantiated by any evidence whatsoever.

Without ruling on defendants' objection, Commissioner Scott allowed plaintiff's request in his order of 4 June 1998. Dr. Spanos' report was submitted to the Commission on 16 July 1998.

On 22 September 1998, defendants filed with the Commission a fourth objection to plaintiff's independent medical examinations. Again, the Commission did not respond to defendants' objection. On 24 September 1998, the Full Commission issued its opinion and award for plaintiff, finding in pertinent part that:

> 28. Plaintiff's fibromyalgia, related pain syndromes and her musculoskeletal and neuropathic disfunctions as diagnosed by Dr. Spanos, were caused or significantly aggravated by her injury by accident on 30 May 1995.
>
> 29. Plaintiff's psychiatric problems, panic attacks and depression as diagnosed by Dr. Dorfman, were caused or significantly aggravated by her injury by accident on 30 May 1995.

Defendants have preserved six assignments of error. However, because we are remanding this case to the Commission for further action consistent with this opinion, we choose to address only one. Defendants assign error to the Commission's use of discretion in allowing and considering the independent medical examinations of Drs. Dorfman and Spanos as evidence, without permitting defendants to depose or cross-examine either physician or requiring plaintiff to submit to an independent medical examination by a physician of defendants' choosing. Defendants contend the Commission abused its discretion, committing reversible error. We agree. Defendants should have been allowed the opportunity to discredit the doctors' reports.

In the record, we find that defendants filed five separate objections to the Commission's allowance of the independent medical examinations (12 January 1998, 2 June 1998, 12 August 1998, 22 September 1998, and 9 October 1998), one request to depose the new physicians (9 October 1998)—aside from having argued the need for

the physicians' depositions in their brief to the Full Commission filed on 12 January 1998, and six requests to have plaintiff submit to an independent medical examination by a physician of defendants' choosing (12 January 1998, 10 February 1998, 2 June 1998, 12 August 1998, 22 September 1998, and 9 October 1998). Case law establishes that, in this regard, the Commission is governed by "general rules of practice . . . . [And it], in turn, must formally enter [its] ruling[s] into the record *before* making the award." *Ballenger v. Burris Industries*, 66 N.C. App. 556, 562, 311 S.E.2d 881, 885 (1984) (emphasis added). However, from the record, the Commission responded to none of defendants' objections or requests. Only in its amended opinion and award filed 23 October 1998, addressing defendants' "Motion for Reconsideration" filed after the Commission had already issued its opinion and award in plaintiff's favor, did the Commission finally deny "defendant[s'] requests that it be allowed to obtain the deposition testimony of Dr. Dorfman and Dr. Spanos and that plaintiff be ordered to submit to an independent medical examination by a rheumatologist and psychiatrist of its choosing." We note that in its ruling, the Commission never states that defendants' requests, motions or objections were not timely made, thus they were properly before the Commission. The failure of the Commission to timely address defendants' pending requests, motions and objections without a doubt prejudiced the defendants in that they had no reason to seek other means by which they could protect their interests. The Commission's untimely ruling of 23 October 1998 left defendants without the option of fervently seeking from the Commission its permission to depose the physicians, effectively denying them due process because they lacked the opportunity to discredit the evidence submitted by Drs. Spanos and Dorfman.

Our courts have long held that "[s]trictly speaking, the rules of evidence applicable in our general courts do not govern the Commission's own administrative fact-finding. . . ." However, the Commission must "conform to court procedure [where] required by statute or to preserve justice and due process." *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987) (citations omitted). It has long been the law in North Carolina that:

> a party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation.

State ex rel. Everett v. Hardy, 65 N.C. App. 350, 352, 309 S.E.2d 280, 282 (1983) (*quoting State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 903 (1954). Furthermore,

> Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party.

Hart at 711, 80 S.E.2d at 903. *See also Warren v. Jackson*, 125 N.C. App. 96, 101, 479 S.E.2d 278, 281 (1997). The evidence offered by Drs. Spanos and Dorfman was completely different from any other evidence admitted up to then. Therefore, upon its admittance of the reports, the Commission necessarily should have allowed defendants the opportunity to "attack the probative value of [the] opinion testimony . . . ." *Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350, 324 S.E.2d 619, 621 (1985).

The opportunity to be heard and the right to cross-examine another party's witnesses are tantamount to due process and basic to our justice system. We agree with defendants that the Commission manifestly abused its discretion by allowing significant new evidence to be admitted but denying defendants the opportunity to depose or cross-examine the physicians, or requiring plaintiff to be examined by experts chosen by defendants. Therefore, we hold that where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence.

We, therefore, reverse and remand to the Full Commission to act in accordance with this opinion.

Reversed and remanded.

Judges GREENE and WALKER concur.

GREEN v. DIXON

[137 N.C. App. 305 (2000)]

PHYLENCIA GREEN AND HUSBAND, ROY GREEN, PLAINTIFFS V. ESAU ROOSEVELT DIXON AND J.M.X., INCORPORATED DEFENDANTS AND THIRD-PARTY PLAINTIFFS V. ANTOINETTE PADILLA TOLER, STATE OF NORTH CAROLINA, *EX REL* NCDOT, REA CONSTRUCTION COMPANY, AND PROTECTION SERVICES, INC., THIRD-PARTY DEFENDANTS

No. COA99-131

(Filed 4 April 2000)

1. Collateral Estoppel and Res Judicata— claim preclusion— different plaintiffs—same accident—same allegations

The trial court did not err in a negligence case involving a multi-vehicle collision by granting summary judgment in favor of third-party defendants Rea and P.S.I. based on res judicata because although the original plaintiffs are different, the accident at issue is the same, and the allegations of negligence as between the third-party plaintiffs and third-party defendants are the same.

2. Collateral Estoppel and Res Judicata— claim preclusion— summary judgment—final judgment on the merits

The trial court did not err in a negligence case involving a multi-vehicle collision by granting summary judgment in the present case in favor of third-party defendants Rea and P.S.I. based on res judicata since the prior cause of action determined by an order for summary judgment is a final judgment on the merits.

3. Collateral Estoppel and Res Judicata— claim preclusion— summary judgment reversed—no longer a final judgment on the merits

The trial court erred in a negligence case involving a multi-vehicle collision by granting summary judgment in favor of third-party defendant NC DOT in the prior case, and therefore, the elements of res judicata are not met with respect to this party in the present action since there is no longer a "final judgment on the merits."

Judge WYNN dissenting.

Appeal by third-party plaintiffs from judgment entered 24 November 1998 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 3 January 2000.

McDaniel, Anderson & Stephenson, L.L.P., by John M. Kirby and William E. Anderson, for Defendant-Appellants.

North Carolina Department of Justice, by E. Harry Bunting, for Third-Party Defendant Appellees, North Carolina Department of Transportation.

Yates, McLamb & Weyer, L.L.P., by Rodney E. Pettey, for Third-Party Defendant Appellees, Rea Construction Company.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr. and Deanna L. Davis, for Third-Party Defendant Appellees, Protection Services, Inc.

EAGLES, Chief Judge.

These two civil actions, *Green v. Dixon* and its companion case, *Davis v. J.M.X.*, COA99-332, relate to a multi-vehicle accident which occurred in Durham County on Friday, 23 August 1996. Plaintiff Phylencia Green was a passenger in a John Umstead Hospital van which was transporting nine patients and four hospital staff persons to Butner, North Carolina. Around 5:30 p.m., the van was involved in a five-vehicle accident on northbound I-85 in a construction zone close to the Glenn School Road overpass. The parties dispute whether the van was stopped or whether the van in traffic cut in front of a tractor trailer owned by Defendant J.M.X., Incorporated ("J.M.X.") and operated by Defendant Esau Roosevelt Dixon ("Dixon"). The van was struck from behind by the tractor trailer. Seven patients in the van died as a result of the accident. Two other patients were injured. Phylencia Green and three other staff members sustained personal injuries. Mr. and Mrs. Green brought this suit alleging personal injuries on the part of Mrs. Green, and loss of consortium on the part of Mr. Green.

J.M.X. and Dixon brought third-party complaints against the driver of the van, Antoinette Toler, and against Rea Construction Company ("Rea"), Protection Services, Inc. ("P.S.I."), and the State of North Carolina, *ex rel* NCDOT ("NCDOT"). Rea was NCDOT's contractor for this construction project, and P.S.I. was Rea's subcontractor. The third-party plaintiffs alleged that Ms. Toler was negligent in operating the hospital van, and that improper roadway traffic control and signage on the part of NCDOT, Rea, and P.S.I. contributed to the accident by failing to give proper warning of the lane merge. The traffic signs posted for the northbound motorists included a sign reading "Left Lane Closed Ahead" without an attached sign posting a 45 m.p.h.

speed limit, as required by NCDOT standards. Additionally, third-party plaintiffs contended that the warning signs should have been located a greater distance from the lane taper.

In 1998, the third-party defendants NCDOT, Rea, and P.S.I. moved for summary judgment in this case. The third-party defendants had previously moved for and obtained summary judgment in four other cases arising out of the same accident. These four cases are the subject of the appeal in the companion case, COA99-332. Here, Judge Robert H. Hobgood allowed the third-party defendants' motions for summary judgment based on *res judicata*. The trial court certified the case for immediate appeal pursuant to Rule 54(b).

We first consider whether the trial court erred in concluding that the summary judgments involved in COA99-332 constitute *res judicata* requiring summary judgment here. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). The evidence is viewed in the light most favorable to the non-moving party. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507, 317 S.E.2d 41, 42 (1984), *aff'd.*, 313 N.C. 488, 329 S.E.2d 350 (1985). The movant bears the burden of proving the absence of any genuine issue of material fact. *See Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 355, 348 S.E.2d 772, 774 (1986).

The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits. *See Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985). "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citing *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). The doctrine of *res judicata* is based on two policy considerations: "(1) that each person have his day in court to completely adjudicate the merits of his claim for relief, and (2) that the courts must demand an end to litigation when a claimant has exercised his right and a court of competent jurisdiction has ruled on the merits of his right." *Blake v. Norman*, 37 N.C. App. 617, 624, 247

S.E.2d 256, 261, *disc. review denied*, 296 N.C. 106, 250 S.E.2d 35 (1978). When a court of competent jurisdiction has reached a decision on facts in issue, neither of the parties are allowed to call that decision into question and have it tried again. *See Baum v. Golden*, 83 N.C. App. 218, 222, 349 S.E.2d 625, 627 (1986), *disc. review denied*, 319 N.C. 102, 353 S.E.2d 104 (1987).

[1] We first analyze the granting of summary judgment in favor of Rea and P.S.I. Here, the third-party plaintiff appellants argue that none of the three elements of *res judicata* are established. First, the appellants contend that the causes of action in the instant case and in COA99-332 are not identical because COA99-332 involves contribution claims for different plaintiffs than the contribution claims here.

We conclude that this element of *res judicata* is satisfied. The causes of action between the third-party plaintiffs and the third-party defendants in this case are identical to those in COA99-332. In *Tarkington v. Printing Co.*, 230 N.C. 354, 53 S.E.2d 269 (1949), the North Carolina Supreme Court held that third-party plaintiffs bringing contribution claims were bound by an earlier judgment under *res judicata*, regardless of the difference in the identity of original plaintiffs in the two suits. *See id.* at 357, 53 S.E.2d at 272. *See also Streater v. Marks*, 267 N.C. 32, 38, 147 S.E.2d 529, 534 (1966); *Herring v. Coach Co.*, 234 N.C. 51, 53, 65 S.E.2d 505, 507 (1951).

The North Carolina Supreme Court reached a similar conclusion in *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E.2d 345 (1953). In *Stansel*, a truck and automobile were involved in a collision which resulted in the death of a passenger in the automobile. The driver of the automobile, Mrs. Austin, was denied recovery from the driver of the truck because of her negligence. Later, when the truck driver was sued for wrongful death, he filed a claim for contribution against Mrs. Austin. The Court held that the earlier judgment was *res judicata* on the question of Mrs. Austin's negligence. The Court stated:

> There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court.

Stansel, 237 N.C. at 154, 74 S.E.2d at 350 (quoting *Current v. Webb*, 220 N.C. 425, 428, 17 S.E.2d 614, 616 (1941)).

Here, although the original plaintiffs are different, the accident at issue is the same, and the allegations of negligence as between the third-party plaintiffs and third-party defendants are the same. The negligence claims in all of the cases against the third-party defendants are based on the allegedly improper placement of the road construction signs. In each case, J.M.X. and Dixon alleged that the third-party defendants were negligent because the road construction signs were deficient and that this deficiency was the proximate cause of the multi-vehicle accident.

"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." *See Coach Co. v. Burrell*, 241 N.C. 432, 436, 85 S.E.2d 688, 692 (1955). Here, J.M.X. and Dixon have already had their day in court against the third-party defendants. These third-party plaintiffs have had an opportunity to participate fully in the determination of their claims against the third-party defendants.

We note that the appellants argue that the two cases have different causes of action because the multi-vehicle collision involved different issues of causation of personal injury from the multiple vehicular impacts. *See Johnson v. Petree*, 4 N.C. App. 20, 165 S.E.2d 757 (1969). However, the facts indicate that the plaintiff in this case, Mrs. Green, was a passenger in the Umstead hospital van and that Thelma Bittings was also a passenger in the van. The administratrix of the Bittings estate is a plaintiff in COA99-332. Because both women were passengers in the same vehicle, the proximate cause issue would be the same. For the foregoing reasons, we conclude that the causes of action between the third-party plaintiffs and the third-party defendants in this case are identical to those in COA99-332.

Next, the third-party plaintiffs assert that *res judicata* should not apply here because there is not an identity of parties in the two actions; the original plaintiffs in the instant case are not plaintiffs in COA99-332. We conclude that this element of *res judicata* is satisfied: the same third-party plaintiffs are bringing claims against the same third-party defendants. In *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E.2d 345 (1953), the North Carolina Supreme Court stated, "[i]t is not necessary that precisely the same parties were plaintiffs and defendants in the two suits; provided the same subject in controversy, between two or more of the parties" has been directly in issue in the former suit, and decided. *Id.* at 154, 74 S.E.2d at 350 (quoting *Current*, 220 N.C. at 428, 17 S.E.2d at 616). Under *Stansel*, *res judicata* may apply in an action for contribution by a third-party plain-

tiff, even when the plaintiff to the later suit was not a party to the earlier action.

[2] Next, the third-party plaintiffs assert that the elements of *res judicata* are not satisfied because there was no final judgment on the merits in the earlier suit. In general, a cause of action determined by an order for summary judgment is a final judgment on the merits. *See Evans v. Cowan*, 122 N.C. App. 181, 183, 468 S.E.2d 575, 577, *aff'd. per curiam*, 345 N.C. 177, 477 S.E.2d 926 (1996) (*citing Loving Co. v. Latham*, 15 N.C. App. 441, 444, 190 S.E.2d 248, 250 (1972)). Here, the third-party plaintiffs contend that the summary judgment in favor of third-party defendants in COA99-332 was not a final judgment, but rather an interlocutory judgment.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). In contrast, "[a]n order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). An order may be interlocutory in cases where multiple parties are involved, and the court enters a final judgment as to fewer than all of the parties. *See Veazey*, 231 N.C. at 361, 57 S.E.2d at 381.

Here, there was a final judgment on the merits in an earlier suit. On 1 September 1998, the plaintiff in the Estate of Bittings case filed a voluntary dismissal which disposed of her claims against J.M.X. and Dixon. Accordingly, there was nothing to be judicially determined between any party in the Bittings matter in the trial court. On 28 September 1998, Judge Hobgood heard the third-party defendants' motions for summary judgment in this matter. At that point, the judgment in the earlier case was final.

In the companion case of COA99-332, we hold that summary judgment was properly entered as to third-party defendants Rea and P.S.I. This summary judgment, a final judgment adverse to the third-party plaintiffs in this matter, is *res judicata* and bars the present action. Accordingly, we conclude that summary judgment was properly granted for third-party defendants Rea and P.S.I.

[3] We next address the granting of summary judgment in favor of NCDOT. In COA99-332, we reverse the trial court's grant of summary

judgment in favor of NCDOT. Because of our disposition of this issue in COA99-332, the elements of *res judicata* are not met with respect to third-party defendant NCDOT; there is no longer a "final judgment on the merits." Accordingly, in the instant case, we reverse the grant of summary judgment in favor of NCDOT.

In summary, we affirm the trial court's grant of summary judgment in favor of Rea and P.S.I. and reverse the grant of summary judgment in favor of NCDOT.

Affirmed in part, reversed in part, and remanded.

Judge WALKER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

In the companion case of *Davis v. J.M.X.*, COA99-332, I disagreed with the majority's finding that Rea and P.S.I. breached no duty to the general public and therefore were entitled to summary judgment. Because I believe that Rea and P.S.I. were erroneously granted summary judgment in *Davis*, I cannot support the conclusion that *res judicata* requires summary judgment in this case. I therefore respectfully dissent.

IN THE MATTER OF: DAKOTA FAIRCLOTH, AMANDA FAIRCLOTH, MARGARET FAIRCLOTH AND JAMES FAIRCLOTH, JR., MINOR CHILDREN

No. COA99-505

(Filed 4 April 2000)

1. Evidence— expert opinion—effect testifying would have on minor children

The trial court did not abuse its discretion in a child abuse and neglect case by admitting the testimony of two therapists as to the effect testifying would have on the minor children because: (1) both witnesses were better qualified than the fact-finder to have an opinion upon the effect that giving testimony would have on the children's behavioral, mental and emotional conditions, N.C.G.S. § 8C-1, Rule 702(a); and (2) preliminary questions con-

cerning the qualifications of a person to be a witness are determined by the trial court, which is not bound by the rules of evidence in making such a determination, N.C.G.S. § 8C-1, Rule 104(a).

2. Witnesses— child—ability to tell truth—improper focus on effect on mental health

The trial court's order in a child abuse and neglect case that declared the three children to be unavailable and unable to testify was erroneous as a matter of law because the voir dire was incorrectly directed to the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and their ability to relate events which they may have seen, heard, or experienced. N.C.G.S. § 8C-1, Rules 601 and 804(a)(4).

Appeal by respondent father from judgment entered 16 December 1998 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 17 February 2000.

Cumberland County Department of Social Services, by David Kennedy, for petitioner-appellee.

Carmen J. Battle and William E. Brown for respondent-appellant James D. Faircloth.

MARTIN, Judge.

On 4 August 1997, the Cumberland County Department of Social Services (CCDSS) filed a juvenile petition alleging that James David Faircloth (d.o.b. 4 June 1987), Dakota Faircloth (d.o.b. 22 September 1990), Amanda Faircloth (d.o.b. 7 August 1992) and Margaret Faircloth (d.o.b. 26 January 1995) were abused and neglected children. The allegations arose as a result of a report made 30 July 1997 by the children's babysitter, who observed the presence of bruises on Amanda. The children were placed in the custody of CCDSS, and such custody was continued by a series of orders until an adjudicatory hearing was commenced on 15 December 1998.

At the adjudicatory hearing, CCDSS presented evidence from the CCDSS social worker, two physicians and a psychologist. Their testimony included hearsay evidence of statements made by the children, to which respondent father did not object. Upon the conclusion of the CCDSS evidence, respondent father sought to call the three older

children as witnesses and forecast that they would testify that the abuse was perpetrated by someone other than defendant. Upon objection by CCDSS and by the children's mother, the court heard testimony from Judith Hill, a therapist for Dakota and Amanda, and Kim Herring, a therapist for James, Jr. The court then made the following findings and conclusions:

> On the respondent father, James Faircloth's, calling as a witness the minor child Dakota Faircloth, this being opposed by the petitioner, by the Guardian ad Litem and by respondent Tisha Faircloth, the court having heard evidence and arguments of counsel, makes the following findings of fact based upon clear, cogent and convincing evidence.
>
> That Dakota Faircloth's date of birth is September 22, 1990; that he has been in the custody of the Department of Social Services since July of 1997; that during that period of time he has been undergoing continuous therapy; that he is currently in a therapeutic group home.
>
> That according to Judith Hill, a clinical social worker and currently the clinical therapist for Dakota, it would be extremely detrimental to the mental well-being of [Dakota] to face the respondent James D. Faircloth.
>
> That according to his clinical social worker, it would be extremely detrimental to Dakota's well-being for him to be questioned in any setting as to these matters.
>
> Based upon the foregoing, the court finds as a matter of law that Dakota Faircloth is unavailable and unable to testify at this hearing due to his current mental status and the harm to him which would occur were he to be forced to testify. The court reserves the right to add additional findings of fact in its final order as to this.
>
> As to Amanda Faircloth, the court finds that Amanda Faircloth's date of birth is August 7, 1992; that she has been in the custody of the Department of Social Services since July of 1997; that she is currently in a therapeutic foster home and has been receiving psychiatric and psychological treatment since being placed in DSS custody, and is still undergoing therapeutic treatment.
>
> That she has been admitted to a psychiatric hospital twice since being in DSS custody; that in the recent past, she has begun

urinating and defecating at inappropriate times and places, an activity which she had done at an earlier time, which she has now regressed to doing again; in addition, she has become physically aggressive.

That according to her clinical therapist, Judith Hill, it would be extremely detrimental to the mental health and well-being of Amanda if she were forced to testify in any setting concerning the matters involved in this case.

Based on the foregoing, the court concludes as a matter of law that Amanda Faircloth is unavailable and unable to testify at this hearing due to her existing mental health and the detriment which would be done her were she called upon to testify.

As to James David Faircloth, Jr., the court finds that his date of birth is June 4, 1987; that he has been in the custody of the Department of Social Services since July of 1997; that he has been receiving psychiatric and psychological treatment and therapy since being in DSS custody.

That according to this therapist, Kimberly Herring, he has expressed great fear of his father and it would be detrimental for James to have to face his father; that due to the nature of this proceeding and the wishes of James to be back with his mother, the therapist is of the opinion that any testimony he might give in this case could be highly suspect and unreliable and based on James' self-perceived needs and wants rather than the truth; that Ms. Herring is of the belief that James being called upon to testify in this proceeding under any setting would be counter-productive to his mental health and well-being and to his ongoing therapy.

The court concludes that James David Faircloth, Jr., is unavailable and unable to testify in this hearing because of his now-existing mental health and the detriment that would be done to him were he forced to testify in this proceeding.

As to all three orders, the court reserves the right to make additional findings of fact prior to signing the order.

Respondent father then offered evidence through other witnesses tending to show that the children had reported to others that they had been abused by their babysitter, rather than by respondent father.

At the conclusion of the hearing, the trial court found that each of the children had been abused in various respects, had been neglected,

and adjudicated them abused and neglected children. Respondent appeals from the final adjudicatory and dispositional order.

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[1] Respondent father first assigns error to the admission of opinion testimony by Judith Hill and Kimberly Herring as to the effect testifying would have on the minor children. He contends that neither witness was competent to provide such testimony.

G.S. § 8C-1, Rule 702(a) provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Whether a witness has the requisite knowledge or training to testify as an expert is within the exclusive province of the trial court, and its decision will not be overturned absent an abuse of discretion. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). "An expert need not have had experience in the very subject at issue, . . . [i]t is enough that through study or experience the expert is better qualified than the fact-finder to render the opinion regarding the particular subject." *In re Chasse*, 116 N.C. App. 52, 59, 446 S.E.2d 855, 859 (1994) (citations omitted).

Judith Hill testified that she is a clinical social worker employed by the Cumberland County Mental Health Center and had been assigned as a therapist for Dakota and Amanda Faircloth for approximately seven months. She has bachelor's degrees in sociology and in social work, a master's degree in social work, and is licensed as a therapist. She has training and experience in determining what kinds of external stimuli affect the behavior of children. Kimberly Herring testified that she had been seeing James Faircloth, Jr., for nearly a year. Ms. Herring is a licensed psychological associate and has a master's degree in counseling. Both testified extensively as to their observations of the children and the children's behavioral histories. Both witnesses, through their education, training, experience, and interaction as therapists for the children were better qualified than the fact-finder to have an opinion upon the effect that giving testimony would have on the children's behavioral, mental and emotional conditions.

Moreover, preliminary questions concerning the qualification of a person to be a witness are determined by the trial court, which is not bound by the rules of evidence in making such a determination. N.C. Gen. Stat. § 8C-1, Rule 104(a). In determining whether a person is competent to testify, the court may consider any relevant information which may come to its attention. *In re Will of Leonard*, 82 N.C. App. 646, 347 S.E.2d 478 (1986). Therefore, to the extent the testimony of Ms. Hill and Ms. Herring was relevant to the issue of the competency of the three children to testify, it was not error for the trial court to admit and consider the testimony.

[2] Respondent father further assigns error to the trial court's order declaring James, Jr., Dakota, and Amanda "unavailable and unable to testify" at the hearing. For the reasons which follow, we must agree.

At the time of the hearing in this case, juvenile proceedings were governed by Subchapter XI of Chapter 7A of the North Carolina General Statutes, the North Carolina Juvenile Code, which was repealed effective 1 July 1999 by Session Laws 1998-202, s.5 and replaced by Chapter 7B of the General Statutes. A policy of the former Juvenile Code, continued in the present Code, was "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents." N.C. Gen. Stat. § 7A-516(2), repealed effective 1 July 1999, S.L. 1998-202, s.5. In furtherance of that policy, the former Code required, in an adjudicatory hearing to determine the existence or nonexistence of the conditions alleged in the juvenile petition, that the rights of juveniles and their parents to due process, including the right to confront and cross-examine witnesses, be protected, G.S. § 7A-631, repealed effective 1 July 1999, S.L. 1998-202, s.5, although the right to confront witnesses in such a civil proceeding is subject to "due limitations." *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715 (1983).

The rules of evidence in civil cases apply in a proceeding where a juvenile is alleged to be abused and neglected. N.C. Gen. Stat. § 7A-634(b), repealed effective 1 July 1999, S.L. 1998-202, s.5. G.S. § 8C-1, Rule 601 provides that every person is competent to be a witness unless the court determines the witness is "(1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth."

N.C. Gen. Stat. § 8C-1, Rule 601(b). As applied to children, " '[t]here is no age below which one is incompetent, as a matter of law, to testify.' " *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)). Likewise, even mentally deficient persons may be called as witnesses if capable of relating information and of understanding the obligation to tell the truth. See *Artesani v. Gritton*, 252 N.C. 463, 113 S.E.2d 895 (1960); Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence*, § 132 (5th ed. 1998). A ruling upon a challenge to competency is a matter within the discretion of the trial court and will not be reversed unless the ruling amounts to an abuse of discretion, *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), or is based on an incorrect legal principle, *Artesani,* 252 N.C. 463, 113 S.E.2d 895.

We believe the trial court's ruling in the present case to have been based upon an incorrect view of the law. When CCDSS objected to respondent father's request to call James, Jr., Dakota, and Amanda as witnesses, the trial court correctly conducted a *voir dire* hearing. However, the focus of the *voir dire* was incorrectly directed to the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and their ability to relate events which they may have seen, heard or experienced. Rather than determining whether all or any of the children were competent to testify under G.S. § 8C-1, Rule 601, the trial court disqualified them as being "unavailable" due to the detriment which would result to them if they testified, apparently relying upon the definition of "unavailability" contained in G.S. § 8C-1, Rule 804(a)(4) (inability to testify due to presently existing physical or mental condition). The question of a potential witness' unavailability becomes relevant, however, only with respect to the issue of admissibility of the witness' hearsay declarations pursuant to the exception contained in Rule 804(b). No issue of availability was presented in this case; no objection was interposed to the admission of the children's hearsay statements. Although we believe it is possible in a case such as the one before us for a child's presently existing mental condition resulting from abuse to so profoundly affect the child's ability to relate events and to understand the obligation to tell the truth as to render the child incompetent to testify, no such evidence was elicited from the therapists in this case, only that the event of testifying would be harmful to the children. Even the testimony of Ms. Herring that James, Jr., was likely not to be a reliable witness does not support his disqualification

where the trial court did not personally observe the child's ability to testify. See *State v. Benton*, 276 N.C. 641, 174 S.E.2d 193 (1970) (witness competent even though psychiatrist testified it was impossible for him to give reliable evidence); *Matter of Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992) (history of lying goes to credibility rather than competency).

We are not unmindful of the troubling aspects of children testifying in court, particularly where a child is called upon to testify against a parent or the perpetrator of sexual abuse. Our courts have long been confronted with this issue, and various mechanisms have been developed to protect both the mental health of the child and the due process rights of those against whom the child might testify. A parent's right to confront witnesses in an abuse and neglect hearing has been found to have been protected where a mother was removed from the courtroom during the child's testimony but her counsel was present for the child's testimony and was afforded cross-examination. *Matter of Barkley*, 61 N.C. App. 267, 300 S.E.2d 713 (1983). In *Matter of Stradford*, 119 N.C. App. 654, 460 S.E.2d 173, *disc. review denied*, 341 N.C. 650, 462 S.E.2d 525 (1995), the testimony of two young girls by closed circuit televison was held sufficient to protect the confrontation rights of a juvenile accused of sexually assaulting them, where there was a showing that the children's testimony in the presence of the accused would have been harmful to them.

Because the trial court applied an erroneous legal standard in denying respondent father's request to call the children as witnesses, we must reverse the adjudication order in this case and remand the matter to the District Court for a new hearing at which the competence of the children to testify, should they be called as witnesses, shall be determined in accordance with G.S. § 8C-1, Rule 601. In the event the children's mental condition does not render them incompetent to testify, and they are called as witnesses, the trial court shall take appropriate measures to mitigate, insofar as possible, any harmful effects to them of being required to testify.

Reversed and remanded.

Judges WYNN and HUNTER concur.

ANTHONY SIMMONS, PLAINTIFF-APPELLANT v. CHEMOL CORPORATION, DEFENDANT-APPELLEE

No. COA99-385-2

(Filed 4 April 2000)

1. Employer and Employee— wrongful discharge—welder—respiratory irritation

The trial court did not err by granting summary judgment for defendant on a wrongful discharge claim where plaintiff, a welder, alleged that his rhinitis, an inflammation of the nasal membrane, rendered him handicapped and that his discharge violated public policy. Plaintiff's medical records establish that his condition is temporary; a discussion of reasonable accommodation is irrelevant under the Equal Employment Practices Act, on which plaintiff's claim is based; plaintiff received evaluation scores below an acceptable level for quality of work, technical application, reliability, and punctuality; and both his supervisor and plant manager thought that plaintiff's respiratory problems had been resolved well before his termination.

2. Emotional Distress— intentional and negligent—employment termination

The trial court did not err by granting summary judgment for defendant on claims for intentional and negligent infliction of emotional distress arising from an employment termination.

Appeal by plaintiff from order entered 10 February 1999 and filed 11 February 1999 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 10 January 2000.

Gray, Newell & Johnson, L.L.P., by Angela Newell Gray, for plaintiff-appellant.

Pinto Coates Kyre & Brown, PLLC, by Martha P. Brown, for defendant-appellee.

WALKER, Judge.

On 15 May 1998, plaintiff filed this action alleging wrongful discharge in violation of public policy pursuant to N.C. Gen. Stat. § 143-422.2, along with a claim for negligent and intentional infliction of emotional distress. Defendant answered and moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil

Procedure on 18 June 1998, which the trial court denied on 13 August 1998. On 15 January 1999, defendant moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, which the trial court granted on 10 February 1999.

Plaintiff began his employment with defendant as a general welder on or about 22 July 1996. Approximately six months later, plaintiff began suffering from a respiratory condition subsequently diagnosed as "rhinitis," an allergic reaction characterized by the inflammation of the nasal membrane. *See* Kenneth G. Trestman, M.D., and Carey Howes, Medical Editor, *Allergies*, *in* Attorneys' Textbook of Medicine par. 65.41 (3d ed. 1998). Plaintiff claims he had difficulty breathing while performing his duties at work and that the quality of his work and his attendance record suffered due to his condition. Further, he requested that defendant provide breathing masks, ceiling fans and other breathing aids that would accommodate his breathing problems; however, these requests were disregarded. Plaintiff also claims he was required to work in a chemical tank without adequate ventilation, was not allowed time off for medical treatment for his condition, and was given a poor evaluation for attendance although the absences were verified by his doctors. As a result, plaintiff contends he suffered chronic headaches, fatigue, financial problems and "significantly exacerbated breathing problems" due to defendant's behavior.

[1] Plaintiff argues that the trial court erred in granting summary judgment to defendant on his claim of wrongful discharge. Specifically, plaintiff produced a sufficient forecast of evidence that his respiratory condition rendered him handicapped as defined in N.C. Gen. Stat. § 168A-3(4)(a) (1998 Cum. Supp.). Additionally, defendant terminated his employment because of his condition, thus violating the public policy set out in N.C. Gen. Stat. § 143-422.2 (1999). Plaintiff also claims that defendant's indifference and failure to provide reasonable accommodations so he could perform his job constitutes intentional and negligent infliction of emotional distress.

Defendant contends that plaintiff's respiratory condition is not a handicap protected under N.C. Gen. Stat. § 143-422.2. Specifically, plaintiff's rhinitis is a temporary condition that did not substantially limit plaintiff's ability to breathe or work. Additionally, defendant contends that plaintiff was terminated for poor performance in his employment. In support of its motion for summary judgment, defend-

ant submitted the affidavits of maintenance supervisor Gary Keegan and plant manager Spencer F. Foster, a job performance evaluation of plaintiff, and other documents from plaintiff's employment file. These show that:

(1) On 30 May 1997, plaintiff was reprimanded by Keegan for plaintiff's excessive personal phone calls during working hours;

(2) On 5 June 1997, plaintiff was counseled for his failure to work required overtime;

(3) On 29 August 1997, plaintiff was again reprimanded for personal phone calls during working hours and was informed that any further violation of this policy would result in his suspension or possible termination; and

(4) Plaintiff's 4 September 1997 performance evaluation resulted in an overall score below the acceptable standard.

Defendant claims that plaintiff's poor quality of work, lack of progress, and failure to meet minimum quality standards within his department were the reasons for his termination on 16 September 1997.

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1 Rule 56(c) (1999). The party moving for summary judgment bears the burden of establishing the lack of any triable issue and may meet this burden by (1) proving that an essential element of the opposing party's claim is nonexistent; (2) showing through discovery that the opposing party cannot produce evidence to support an essential element; or (3) showing that the opposing party cannot surmount an affirmative defense. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

In North Carolina, absent an employment contract for a definite period of time, "both employer and employee are generally free to terminate their association at any time and without reason." *Gravitte v. Mitsubishi Semiconductor America*, 109 N.C. App. 466, 472, 428 S.E.2d 254, 258, *disc. review denied*, 334 N.C. 163, 432 S.E.2d 360 (1993).

An exception to the employment-at-will doctrine exists when an employee is discharged in contravention of public policy. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). "At the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992). The Equal Employment Practices Act of North Carolina (the Employment Act) provides in pertinent part:

> 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. Gen. Stat. § 143-422.2 (1999). The Employment Act does not define "handicap" and thus we turn to other North Carolina statutes relating to the same subject matter to determine legislative intent. *McCullough v. Branch Banking & Trust Co., Inc.*, 136 N.C. App. 340, —— S.E.2d —— (2000).

The North Carolina Handicapped Persons Protection Act (NCHPPA), N.C. Gen. Stat. § 168A-1 *et seq.*, defines a "handicapped person" as:

> 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. Gen. Stat. § 168A-3(4)(a) (1998 Cum. Supp.). Effective 1 October 1999, the NCHPPA was re-titled the North Carolina Persons with Disabilities Protection Act and amended such that "person with a disability" is generally substituted for "handicapped person" throughout the chapter. However, since plaintiff's claim was filed before the amendment took effect, the terminology of the NCHPPA will be used.

"Physical or mental impairment" is defined in part as "any physiological disorder or abnormal condition, . . .caused by. . . illness, affecting one or more of the following body systems: [. . .] respiratory. . . ." N.C. Gen. Stat. § 168A-3(4)(a)(i). "Major life activities" includes "breathing." N.C. Gen. Stat. § 168A-3(4)(b). "Any disorder, condition or disfigurement which is temporary in nature

leaving no residual impairment" is specifically excluded from the meaning of "physical or mental impairment." N.C. Gen. Stat. § 168A-3(4)(a)(iii)(C).

Medical records of the plaintiff dated 21 November 1997 state:

> [Plaintiff] [q]uit vaccine around September [1997] when [he] lost [his] job. [He] had been welding inside "tanks" with fume exposure irritating to [his] nose. [He] is still welding now but outdoors and [he] says the sniffing has stopped. [His] chest feels fine and [he] feels well.
>
> Impression: Allergic and irritant rhinitis, now improved.

Another medical record dated 12 March 1997 states in part: "He has a lot of sniffing, he is irritated, but I think his infection is over. . . ."

Affording plaintiff the required inferences, *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342 (all inferences drawn in favor of non-movant in deciding motion for summary judgment), plaintiff's medical records establish that his condition is temporary and therefore excluded from the statutory definition of "physical impairment." Furthermore, plaintiff is unable to establish that he was "handicapped" under elements (ii) or (iii) of section 168A-3(4).

Plaintiff also argues that he is a "qualified handicapped person" as defined by N.C. Gen. Stat. § 168A-3(9). However, since one's status as a "qualified handicapped person" must be "preceded by a determination that one is a 'handicapped person,' " plaintiff is not "a qualified handicapped person" either. *Gravitte*, 109 N.C. App. at 470, 428 S.E.2d at 257.

Additionally, plaintiff's concern with the defendant's alleged failure to provide reasonable accommodations to the plaintiff is misplaced. Had plaintiff filed a claim under N.C. Gen. Stat. § 168A-11, which provides a civil cause of action under the NCHPPA, such a discussion may have been appropriate. However, since plaintiff's claim is based on wrongful discharge in violation of public policy under N.C. Gen. Stat. § 143-422.2, a discussion of reasonable accommodations under N.C. Gen. Stat. § 168A-3(9) and (10) is irrelevant.

Plaintiff also contends that he was terminated because of his respiratory condition resulting from his employment. In support of his contention, plaintiff cites his performance evaluation which states

that at times his work was excellent and "the only area in which he received less than satisfactory was in attendance." Plaintiff also states that "his supervisor" told him he was being terminated due to his respiratory condition.

However, the affidavit of plaintiff's supervisor, Gary Keegan, states in part:

> 3. Mr. Simmons was terminated from his employment on September 16, 1997 for poor job performance. Mr. Simmons' continued lack of progress in being able to tackle projects, learn basic mechanical repair, refusal to work required overtime and failure to meet minimum quality standards within the department led to his dismissal. The day before his termination, Mr. Simmons left work and refused to work overtime to complete a mechanical repair which he had started.

The "Supervisor Summary" section of the plaintiff's 4 September 1997 performance evaluation states:

> Anthony's overall work and attendance record needs improvement. At times, Anthony can be an excellent employee and team player, and at other times he will fall short of acceptable standards. Increased consistency of excellent work and a better attendance record can bring Anthony into the acceptable range.

Plaintiff received below acceptable standard scores for his quality of work, technical application, and reliability and punctuality. The evaluation noted "numerous absences" and "numerous lateness [sic]." Additionally, the report stated "Anthony is very apprehensive about working on weekends and late during the week. These areas need work."

Plaintiff was terminated approximately eight months after he first complained of experiencing breathing problems. Both Keegan's and Foster's affidavits state that they thought plaintiff's respiratory problems had completely resolved well before his termination.

In sum, defendant has established that plaintiff is unable to prove that he is handicapped and that he was terminated based upon the alleged handicap. These being essential elements of his claim, summary judgment for defendant on the claim for wrongful discharge was proper.

[2] Plaintiff also argues that the trial court erred in granting summary judgment to defendant on his claims for intentional and negligent infliction of emotional distress.

In an action for intentional infliction of emotional distress, the essential elements are "(1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (*quoting Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)). An action for negligent infliction of emotional distress requires a showing that defendant negligently engaged in conduct, which was reasonably foreseeable to cause, and did in fact cause, plaintiff to suffer severe emotional distress. *Fields v. Dery*, 131 N.C. App. 525, 526, 509 S.E.2d 790, 791 (1998), *disc. review denied*, 350 N.C. 308, —— S.E.2d —— (1999). Whether or not conduct constitutes extreme and outrageous behavior is initially a question of law for the court. *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 586, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). To establish the essential element of extreme and outrageous conduct, the conduct must go beyond all possible bounds of decency and "be regarded as atrocious, and utterly intolerable in a civilized community. The liability clearly does not extend to mere insults, indignities, threats, ..." *Id.*

Viewing the evidence in the light most favorable to the non-moving party, the plaintiff is unable to establish a showing of extreme and outrageous conduct on the part of defendant. Furthermore, plaintiff's forecast of evidence fails to support a claim of negligent infliction of emotional distress. Accordingly, the trial court did not err in granting summary judgment to defendant on the claims of intentional and negligent infliction of emotional distress.

Affirmed.

Chief Judge EAGLES and Judge WYNN concur.

STATE OF NORTH CAROLINA v. DURRON BURNNUN RAY, DEFENDANT

No. COA99-506

(Filed 4 April 2000)

1. **Search and Seizure— traffic stop—investigative detention—suppression of evidence unnecessary**

Even assuming that the traffic stop of defendant and his accomplices became an investigative detention, the trial court did not err in a capital sentencing proceeding by denying defendant's motion to suppress evidence, including his confession and items taken from his person linking him to involvement in the crimes, because a lengthy voir dire hearing revealed the officers formed a well-founded suspicion that the men who were detained were involved in the series of robberies earlier that evening, and the limited investigative seizure of the suspects was no longer than necessary.

2. **Sentencing— capital—allocution—no right to testify without cross-examination**

The trial court did not err in a capital sentencing proceeding by denying defendant's motion for allocution, which would have allowed defendant to make an unsworn statement of fact to the jury during the sentencing hearing without being subjected to cross-examination, because: (1) there is no common law, statutory, or constitutional right to allocution in a capital case; (2) N.C.G.S. § 15A-2000(a)(4), which governs sentencing in capital cases, does not give a defendant the right to testify without being subjected to cross-examination or to make unsworn statements of fact during any such argument or otherwise; and (3) defendant concedes he cannot show prejudice since the jury did not impose the death penalty.

Appeal by defendant from judgments entered 17 July 1998 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 21 February 2000.

On 3 March 1997, in response to a "911" telephone call, officers went to a home in Zebulon, North Carolina, where they found a 36-year-old black male, Dewayne Rogers, and a 37-year-old white female, Robin Watkins, lying facedown on the living room floor in pools of blood. Both victims died as the result of gunshot wounds

to the back of their heads. In a bedroom of the home, officers found the dead body of a 14-year-old youth named Dameon Armstrong. Young Armstrong had been shot five times; the fatal wound was made by a bullet which penetrated his lung. Tildren Hunter, Marcus Mitchell, Antonio Mitchell, and Durron Burnnun Ray (the defendant) were indicted for the triple murders. Defendant was tried by a jury at the 22 June 1998 Session of Wake County Superior Court. One of his codefendants, Tildren Hunter, testified for the State and implicated defendant in the murders. The State also introduced defendant's confession to his involvement in the crimes. Defendant was convicted of first-degree murder in each case. After a sentencing hearing, the jury recommended in each case that a sentence of life imprisonment without parole be imposed, and the trial court entered three consecutive sentences of life imprisonment from which defendant appealed.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

John T. Hall for defendant appellant.

HORTON, Judge.

Defendant contends the trial court erred in (I) denying his motion to suppress evidence linking him to his involvement in the crimes, and (II) denying his motion for allocution at the sentencing hearing. We disagree and affirm the rulings of the trial court.

On the early morning of 8 March 1997, prior to defendant's arrest for murder in this case, he was riding as a passenger in a light blue Nissan Stanza automobile driven by Damien Mitchell. Two uniformed officers of the Raleigh Police Department were patrolling an area of Raleigh where the Nissan was located. The officers noticed that one of the automobile's headlights was burned out, and signaled Mr. Mitchell to stop. After Mr. Mitchell pulled over, the officers approached the vehicle and conducted a standard traffic stop.

As the uniformed officers were preparing to give the driver a warning ticket, officers in the Selective Enforcement Unit (SEU) of the Raleigh Police Department arrived on the scene. The SEU officers searched the Nissan automobile with the consent of the driver, and located a pistol under the floor mat in the rear passenger area where defendant was sitting when the Nissan was stopped. While the search was in progress, the SEU officers received additional information

from detectives who were investigating three armed robberies committed earlier in the evening. The SEU officers concluded that they had probable cause to arrest the three occupants of the Nissan automobile, including the defendant. The occupants were arrested and taken to the police station. While defendant was in police custody, he confessed to his role in various armed robberies and his role in the triple slayings in Zebulon. At trial, defendant moved to suppress his confession and various items taken from his person. After a lengthy *voir dire*, the trial court denied defendant's motion to suppress, and defendant assigns error to that denial.

I.

[1] Defendant argues that his arrest was not based on probable cause, and that his confession, as well as the items seized from him, must be suppressed in accordance with the decisions of North Carolina Courts and the United States Supreme Court. *See, for example, State v. Freeman*, 307 N.C. 357, 359-60, 298 S.E.2d 331, 332-33 (1983), and *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963). Our Supreme Court has explained that a " 'warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon.' " *State v. Medlin*, 333 N.C. 280, 289, 426 S.E.2d 402, 406 (1993) (citation omitted).

Here, the trial court conducted a lengthy *voir dire* hearing and concluded that there was probable cause for defendant's arrest, and that his confession and items taken from his person were admissible into evidence. The trial court supported its determination with detailed findings of fact and conclusions of law. It is axiomatic that we are bound by the findings of the trial court if such findings are supported by competent evidence in the record, but the conclusions of law are for our *de novo* review. *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997).

Here, there was competent evidence to support the trial court's findings of fact, and the findings also support the court's conclusions of law. During the *voir dire* hearing on defendant's motion to suppress, the State introduced evidence which tended to show the following: that in the fall of 1996, there were a number of armed robberies in Wake County carried out by three or four black males armed with guns and wearing ski masks, gloves, and baggy clothing; that a task force had been organized to apprehend the robbers; that

on 7 March 1997, police received information from a confidential informant that Antonio Mitchell, Marcus Mitchell, and Tildren Hunter were committing the robberies and Antonio Mitchell was renting a motel room at the Capital Inn in Raleigh; that members of the task force verified that Antonio Mitchell had a room at the Capital Inn and the task force began surveillance of the room; that about 10:30 p.m. that evening, officers received a report of an armed robbery near Lizard Lick, followed by a report of a grocery store robbery, and then a report that a fast food restaurant had been robbed; that all three robberies were carried out by two or three young black males armed with handguns and wearing dark clothing and gloves; that a witness reported that the robbers were driving a light blue automobile; that soon after the third robbery, Antonio Mitchell drove into the Capital Inn parking lot and was arrested.

The State's evidence also tended to show that shortly after Antonio Mitchell's arrest, a light blue Nissan Stanza drove through the parking lot and left; that after the Nissan left the scene, a van occupied by two young black males pulled into the parking lot and stopped; that the two van occupants knocked on Antonio Mitchell's motel room door, but received no response; the two young men looked into Antonio Mitchell's vehicle, then got back into the van and left the scene; SEU officers followed the van a short distance and had uniformed patrol officers stop it; one of the van occupants, David Crummel, told police that he had been in Antonio Mitchell's motel room at the Capital Inn earlier that day, and had smoked marijuana with Antonio Mitchell, Marcus Mitchell, and Tildren Hunter; that the Mitchells and Hunter had bragged about the robberies they were carrying out, and stated that they were going to commit more robberies that night [7 March 1997]; that he, Crummel, knew that Antonio Mitchell, Marcus Mitchell, Tildren Hunter, and Durron Ray, committed the robbery of Byrd's grocery store.

The State offered additional evidence at the *voir dire* hearing of the events which occurred on the early morning of 8 March 1997. We have summarized the events earlier in the opinion, and do not repeat them here. In a detailed order, the trial court found the facts summarized above to be true, and concluded, in pertinent part, that "at the time Sergeant Shermer seized the Defendant[,] Sergeant Shermer had, under the totality of his knowledge and reliable circumstances, probable cause to believe that the Defendant, acting alone or together with others, had committed one or more armed robberies and, therefore, had probable cause to arrest the defendant." A "reasonable man

acting in good faith," armed with the information Sergeant Shermer possessed when he arrested defendant during the early morning hours of 8 March 1997, would have ample probable cause to believe that defendant and the other occupants of the Nissan Stanza had been involved in armed robberies earlier that same evening.

Defendant argues, however, that he was actually arrested prior to the formal arrest by Sergeant Shermer. Defendant contends that, when the uniformed patrol officers had him sit on the ground together with the other occupants of the Nissan automobile, cross his ankles, and place his hands on his knees, he was "in custody," and that the uniformed police officers had no probable cause to arrest him at that time. We disagree.

In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), the United States Supreme Court set forth a standard for testing the conduct of police officers who have effected a warrantless "seizure" of an individual: "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21, 20 L. Ed. 2d at 906. Our Supreme Court, after discussing the holdings of *Terry* and of *Adams v. Williams*, 407 U.S. 143, 32 L. Ed. 2d 612 (1972), has stated that the standard set out in *Terry* and *Adams* "clearly falls short of the traditional notion of probable cause, which is required for an arrest. We believe the standard set forth requires only that the officer have a 'reasonable' or 'founded' suspicion as justification for a limited investigative seizure." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979) (citations omitted).

Here, Officer Carswell testified that when Sergeant Shermer arrived on the scene, the situation escalated from a traffic stop to an "investigative detention." Prior to the stop of the Nissan, the officers had heard a radio broadcast about several different vehicles and suspects having the same description as the men in the Nissan automobile. Before the uniformed officers could give the driver of the Nissan a warning ticket, Sergeant Shermer and other SEU officers arrived on the scene. The two groups of officers exchanged information, and Sergeant Shermer had several conversations with police headquarters. As a result of information relayed to Sergeant Shermer by cell phone, the officers formed the well-founded suspicion that the men who were detained were involved in the series of robberies earlier that evening.

The officers asked for, and received, consent to search the vehicle. We note that Officer Carswell testified that "[a]t that point we had all three individuals exit the vehicle and have a seat on the curb, cross their feet and put their hands on their knees, which is standard procedure for conducting a traffic stop where you're going to search a vehicle." When a handgun and suspicious clothing were discovered in the vehicle, the occupants were placed under arrest. From the time the Nissan vehicle was stopped by the patrol officers in a clearly valid traffic stop, until the suspects were handcuffed and transported to police headquarters for questioning the elapsed time was at most 20 to 25 minutes. Assuming that the traffic stop became an "investigative detention" when the SEU officers arrived on the scene, we hold that the SEU officers were justified under the facts of this case in making a limited investigative seizure of the suspects. We note that the seizure was no longer than necessary, that the defendant and other suspects were not handcuffed during the investigative detention, and that although the officers were armed, they did not draw their weapons or menace the suspects with them. Defendant's assignment of error is overruled.

II.

[2] Defendant also contends that the trial court erred during the sentencing hearing in denying his motion for allocution. Defendant wished to make an unsworn statement of fact to the jury during the sentencing hearing, without being subjected to cross-examination. The trial court denied the motion for allocution, and also denied a motion by counsel for defendant that he or co-counsel be allowed to read a written statement from the defendant to the jury. The trial court properly denied defendant's motions, based on the holding of our Supreme Court in *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). In *Green*, the Supreme Court held "there is no common law, statutory, or constitutional right to allocution in a capital case." *Id.* at 191, 443 S.E.2d at 42. Sentencing in capital cases is governed by the provisions of N.C. Gen. Stat. § 15A-2000(a)(4) (1999), which gives either the defendant or his counsel the right to "present argument for or against sentence of death." That statutory provision, however, does not give a defendant the right "to testify without being subjected to cross-examination or to make unsworn statements of fact during any such argument or otherwise." *Green*, 336 N.C. at 192, 443 S.E.2d at 43. Further, defendant concedes that he cannot show prejudice based on the ruling of the trial court, since the jury in these cases did

not recommend the imposition of the death penalty. This assignment of error is overruled.

We have carefully considered defendant's remaining assignments of error and find them to be without merit. The record of the proceedings below indicates that defendant was represented at all times by competent counsel, and that he received a fair trial before an able trial judge and jury. In that trial we find

No error.

Chief Judge EAGLES and Judge McGEE concur.

JOE NEAL PURSER, EMPLOYEE, PLAINTIFF-APPELLEE v. HEATHERLIN PROPERTIES, EMPLOYER, DEFENDANT-APPELLANT, AND THE PMA GROUP, CARRIER, DEFENDANT-APPELLANT

No. COA99-446

(Filed 4 April 2000)

1. Workers' Compensation— independent contractor—owner of property as general contractor

The Industrial Commission erred in a workers' compensation action by finding that a brick mason was a subcontractor and therefore covered by N.C.G.S. § 97-19 where the owners of the land constructed homes under the business name of Heatherlin Properties, the business was listed as the general contractor on the building permit, and one of the individual owners (Mr. McMahan) built houses on the land under his general contracting license. It has been held that it is unreasonable to assume that a person could contract with himself to do something for his own benefit, making himself a general contractor if he should contract the job to another person. Assuming that Heatherlin Properties and the McMahans are distinct legal entities, the fact that Mr. McMahan was part of two distinct legal entities does not mean that he was legally bound to build himself a home and, since there was no agreement between the property's owner and another party, it must be concluded that McMahon was not a general contractor. Plaintiff, therefore, was an independent contractor rather than a subcontractor.

2. Workers' Compensation— denial of coverage—estoppel

A workers' compensation action was remanded to consider whether the facts supported a conclusion that the employer or the insurance carrier should be estopped from denying coverage where the plaintiff's partnership initially indicated that it had applied for workers' compensation insurance, the employer began deducting an amount to cover workers' compensation premiums when the Certificate of Insurance was not provided, and the Commission failed to consider the application of estoppel.

Appeal by defendants from opinion and award of the Full Industrial Commission entered 25 November 1998 by Commissioner Thomas J. Bloch. Heard in the Court of Appeals 17 February 2000.

Poisson, Poisson, Bower & Clodfelter, by Fred D. Poisson, Jr., for plaintiff-appellee.

Alala Mullen Holland & Cooper P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant-appellant Heatherlin Properties.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Erica B. Lewis and Mel J. Garofalo, for defendant-appellant The PMA Group.

WYNN, Judge.

On 30 June 1993, the plaintiff Joe Neal Purser fell off of a roof while laying bricks for a chimney on a house owned by Ronnie and Linda McMahan. The McMahans rented properties and constructed new homes under the business name of Heatherlin Properties.[1] That entity employed the McMahans—Mr. McMahan built the houses under his general contractor's license, and Ms. McMahan performed administrative work for the entity. When building a house, Mr. McMahan listed himself as the general contractor on the building permit and listed Heatherlin Properties as the owner of the property, although the McMahans actually owned the land separate from their business.

Typically, Mr. McMahan hired contractors to build houses on the property. He required the contractors to show proof of worker's

1. The record on appeal is unclear as to the nature of the McMahan's property ownership. The record is also unclear as to whether Mr. McMahan alone owned Heatherlin Properties or whether both of the McMahans owned the business.

compensation insurance. If a contractor did not have insurance, Mr. McMahan deducted from the contractor's pay an amount sufficient to cover insurance premiums for the workers. In turn, the McMahans' insurer increased the premium amount charged to the McMahans. The McMahans' insurance agents informed them that this was standard practice in the contractor/subcontractor business.

In 1993, Heatherlin Properties hired C & J Masonry to perform bricklaying work on one of the houses owned by the McMahans and destined for sale through Heatherlin Properties. C & J Masonry, a partnership between Mr. Purser and Charles Costner, employed two other bricklayers. While working for Heatherlin Properties, C & J Masonry supplied its own equipment, decided how to perform the work, and set the hours and duties for the employees. On 30 June 1993, Mr. Purser fell off of the roof of the McMahans' house. He suffered displaced heel fractures bilaterally in both heels rendering him unable to work because of pain, joint injury, arthritis, and inability to stand.

Heatherlin Properties owned a worker's compensation insurance policy issued by The PMA Group. The payment provision of the policy provided that "[The PMA Group] will pay promptly when due the benefits required of you by the workers' compensation law." The policy contained a list of Heatherlin Properties' employees, which made no mention of bricklayers or other construction workers. The policy information was subject to verification and change by audit, which would adjust Heatherlin Properties' premiums accordingly.

Before C & J Masonry started work for Heatherlin Properties, Mr. Costner told the McMahans that his partnership had applied for worker's compensation insurance which they expected to take effect soon. They agreed that if the policy did not arrive soon, Heatherlin Properties would deduct worker's compensation premiums from its weekly payments to C & J Masonry to avoid work delay. Indeed, Mr. McMahan called Smith York Insurance Agency to find out what needed to be done to cover C & J Masonry under its policy. An agent of Smith York told him that all he needed to do was deduct the premiums from C & J Masonry's pay, and gave Mr. McMahan the deduction rate.

C & J Masonry began its bricklaying work for Heatherlin Properties in mid-June 1993. Because Mr. Costner told Mr. McMahan that he would leave C & J Masonry's Certificate of Insurance when he came to pick up their first week's pay on 24 June, Mr. McMahan did

not deduct any insurance premiums from that week's pay. However, C & J failed to provide Heatherlin Properties with a Certificate of Insurance by that date. Again, because Mr. Costner informed Mr. McMahan that he would provide the Certificate of Insurance when he picked up the second week's pay on 2 July, Mr. McMahan did not deduct premiums for the second week of work. But again C & J Masonry failed to provide Heatherlin Properties with a Certificate.

For the third week's pay, Mr. McMahan deducted an amount sufficient to cover the insurance premiums for the first three weeks of C & J Masonry's work. These deductions were based on the premium rate given to Mr. McMahan by the Smith York Insurance Agency. Mr. McMahan withheld these amounts so that when The PMA Group performed an audit at the end of the year, he could pay the additional premiums for the C & J Masonry employees.[2]

Mr. Purser injured himself during the course of his employment when he fell off of the roof on 30 June 1993. Ms. McMahan immediately filed a Form 19 ("Employers' Report of Injury to Employee") with the North Carolina Industrial Commission. Thereafter, Mr. Purser filed a Form 33 ("Request that a Claim Be Assigned for Hearing"). Heatherlin Properties filed a Form 33R, indicating that The PMA Group should provide coverage for Mr. Purser's claim if it was compensable. The PMA Group filed its own Form 33R, denying that coverage for Mr. Purser existed under Heatherlin Properties' insurance policy.

Deputy Commissioner Wanda Blanche Taylor found that C & J Masonry was an independent contractor and was therefore not subject to N.C. Gen. Stat. § 97-19 (1991). Accordingly, the deputy commissioner denied Mr. Purser's claim for worker's compensation benefits. But on appeal, the Full Commission reversed that decision holding instead that C & J Masonry was a subcontractor under N.C. Gen. Stat. § 97-19 which therefore entitled Mr. Purser to worker's compensation. Heatherlin Properties and The PMA Group appealed to this Court.

[1] Both appellants argue that Mr. Purser was an independent contractor, not a statutory employee under N.C. Gen. Stat. § 97-19, and

2. On 16 July 1993, Mr. McMahan learned that C & J Masonry had a worker's compensation policy which was effective from 6 July 1993 until 6 July 1994. Mr. McMahan refunded one week's worth of the premiums he had deducted from C & J Masonry's third paycheck.

therefore was not covered by North Carolina's worker's compensation laws. Since the parties challenge the nature of the employment relationship, we must make our own independent findings of fact to determine whether N.C. Gen. Stat. § 97-19 applies to Mr. Purser. *See Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990).

By its own terms, N.C. Gen. Stat. § 97-19 ensures worker's compensation benefits when there is first a contract for work—i.e., the hiring of a general contractor—which is then sublet to a subcontractor. *See id.* at 310, 392 S.E.2d at 760. This statute does not apply to a situation wherein an employer directly hires an independent contractor. *See Cook*; *Mayhew v. Howell*, 102 N.C. App. 269, 401 S.E.2d 831, *aff'd*, 300 N.C. 113, 408 S.E.2d 853 (1991); *Green v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1952).

In the case at bar, the Full Commission awarded benefits to Mr. Purser based on its finding that Mr. Purser was a subcontractor and not an independent contractor. The Full Commission reached this conclusion by finding that Heatherlin Properties was the general contractor for the owners of the land, the McMahans. The Commission reasoned that a "legal entity can be both an owner and a general contractor with respect to real estate" and presumably, it concluded that the McMahans, as owners of their property, contracted with themselves, as partners in Heatherlin Properties, thereby creating an employer/general contractor relationship.

We have previously addressed the issue of whether the owner of a piece of property may also be its general contractor for purposes of N.C. Gen. Stat. § 97-19. We have consistently rejected the concept that the owner of property may also be the general contractor for that property. *See Mayhew*, 102 N.C. App. at 273, 401 S.E.2d at 834; *Postell v. B & D Constr. Co.*, 105 N.C. App. 1, 8, 411 S.E.2d 413, 417, *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992). To the contrary, we have held that it is unreasonable to assume that a person could contract with himself to do something for his own benefit, thereby making himself a general contractor if he should then contract that job to another person. *See Evans v. Lumber Co.*, 232 N.C. 111, 117, 59 S.E.2d 612, 616 (1950); *Mayhew*, 102 N.C. App. at 273, 401 S.E.2d at 833.

In the case at bar, we will assume that Heatherlin Properties and the McMahans are distinct legal entities. However, the fact remains that Mr. McMahan was on both sides of the equation. It is unreason-

able to think that Mr. McMahan as owner of the property contracted with himself as a partner or sole proprietor of Heatherlin Properties to legally force himself to build a house on the property. The fact that Mr. McMahan was part of two distinct legal entities does not mean that he was legally bound to build himself a house. Since there was no agreement between the property's owner and another party, we must conclude that Mr. McMahan was not a general contractor. C & J Masonry, therefore, was not a subcontractor, but was instead an independent contractor. The Industrial Commission erred when it found that Mr. Purser was covered by N.C. Gen. Stat. § 97-19.

[2] But our analysis of this factual scenario is not over because this case involves more than just a determination of whether Mr. Purser is covered by N.C. Gen. Stat. § 97-19. We must also consider the applicability of the doctrine of estoppel.

The doctrine of estoppel is a means of preventing a party from asserting a defense which is inconsistent with his prior conduct. *See Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982). In particular, the rule is grounded in the premise that "it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980).

Although Mr. Purser is not protected by N.C. Gen. Stat. § 97-19, the defendants may nonetheless be estopped from denying liability of his worker's compensation claims. The law of estoppel applies in worker's compensation cases, and may be used to ensure coverage of a work-related injury. *See, e.g., Carroll v. Daniels and Daniels Constr. Co., Inc.*, 327 N.C. 616, 620, 398 S.E.2d 325, 328 (1990).

Carroll v. Daniels and Daniels is factually very similar to the case at bar and is almost directly on point. In that case, a general contractor hired a subcontractor to put siding on a house. The subcontractor did not have insurance of his own, so the general contractor told the subcontractor that his insurance company would provide the subcontractor with worker's compensation insurance. The general contractor agreed to deduct premiums from the subcontractor's pay. Two days after starting work, the subcontractor fell off a scaffold and injured himself. The insurance carrier denied the subcontractor's claim. N.C. Gen. Stat. § 97-19 (1985) as then written imposed liability on a general contractor for injuries to the employees of a subcontractor, but not for the injuries to the subcontractor himself.

The *Carroll* case is similar to the case at bar in that the plaintiff did not have his own insurance coverage and relied on his employer's promise of insurance before beginning work. Also, the plaintiff was not a worker covered by N.C. Gen. Stat. § 97-19. The insurance company did not expressly provide coverage to the plaintiff, it did not know about the plaintiff until after he was injured, and it never actually received the withheld premiums from the general contractor.

The Court in *Carroll* addressed the Industrial Commission's conclusion that because the general contractor had promised coverage, the insurance carrier was estopped from denying coverage. The Court did not fault this conclusion as always erroneous; rather, it said that the Commission failed to make findings of fact as to why the insurance carrier should be estopped from denying coverage. The Court, in remanding the case to the Industrial Commission, left open the possibility that the insurance carrier *could* be estopped from denying coverage, but the Industrial Commission would first have to make the proper findings of fact.

In the case at bar, the Industrial Commission failed to consider the application of the doctrine of estoppel to the factual scenario at hand. Accordingly, as in *Carroll*, we remand this matter to the Industrial Commission to consider whether the facts of this case support a conclusion that the employer or the insurance carrier should be estopped from denying coverage. Should the Industrial Commission determine that the doctrine of estoppel applies, it should determine whether one or both of the defendants are liable for the worker's compensation benefits. The Commission should rely on the findings of fact already made and may make any additional findings it deems necessary.

Remanded with instructions.

Judges MARTIN and HUNTER concur.

BISHOP v. LATTIMORE

[137 N.C. App. 339 (2000)]

DAVID M. BISHOP, TRUSTEE OF THE GEORGE S. GOODYEAR MARITAL TRUST AND THE GEORGE S. GOODYEAR FAMILY TRUST, PLAINTIFF-APPELLANT v. GEORGE F. LATTIMORE, JR., ELIZABETH DARNELL, EXECUTRIX OF THE ESTATE OF WILLIAM J. DARNELL, WILLIAM I. DARNELL, AND PARK HOUSE REALTY, INC., A NORTH CAROLINA CORPORATION, DEFENDANT-APPELLEES

No. COA99-11

(Filed 4 April 2000)

1. **Appeal and Error— appealability—interlocutory order—no substantial right**

Plaintiff's appeal from the trial court's denial of his motion for partial summary judgment on his claim for breach of the settlement agreement is dismissed since it is an interlocutory order that has not been certified by the trial court and plaintiff has not shown he will be deprived of a substantial right.

2. **Venue— motion for change—action incidental to real property**

The trial court did not err in granting defendant's motion for change of venue, even though plaintiff contends N.C.G.S. § 1-76 provides that the action must be tried where the pertinent property is located, because: (1) title to realty must be directly affected by the judgment in order to render the action local; (2) plaintiff's argument focusing on breach of the settlement agreement is incidental to the pertinent real property, rather than direct; and (3) specific performance of the settlement agreement is an in personam action, meaning it is transitory rather than local.

Appeal by plaintiff from judgment entered 21 September 1998 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 1999.

The Bishop Law Firm, P.A., by J. Daniel Bishop, for plaintiff-appellant David M. Bishop.

Farris & Farris, P.A., by Thomas J. Farris, for defendant-appellee George F. Lattimore, Jr.

Boxley, Bolton & Garber, L.L.P., by Ronald H. Garber, for defendant-appellees Elizabeth Darnell, Executrix of the Estate of William J. Darnell, and William I. Darnell.

McGEE, Judge.

George Goodyear (Goodyear) and William J. Darnell (Darnell), both now deceased, along with George Lattimore, Jr. (Lattimore), entered into a partnership on 31 December 1962. This partnership, known as Interstate Investors, was for the purpose of leasing or purchasing real estate for the construction of residential rental property. In accordance with the partnership agreement, the parties leased a 3.45 acre tract of land and erected the Hamilton House Apartments in Charlotte, North Carolina. Each of the parties owned as general partners a one-third interest in the apartments.

The parties agreed in 1967 to refinance the indebtedness of the partnership and formed a corporation known as Park House Realty, Inc. (Park House). The parties executed bills of sale and other instruments transferring the property and assets of the partnership to the corporation. In return, each party received one-third of the stock issued. The parties became the sole shareholders, directors, and officers of the corporation. They also entered into a written agreement which provided that the Hamilton House Apartments were not to be encumbered, mortgaged, sold, or conveyed without the written consent of all three individuals. Additionally, all future disbursements and management of the property, except for items in the normal course of operation, were to be managed by Lattimore, Goodyear and Darnell.

Lattimore filed a complaint in Wake County Superior Court in December 1996 alleging direct and derivative claims purportedly due to the misconduct of the other two shareholders. Executor of Goodyear's estate, B.W. Miller (Miller), filed an answer to the complaint on behalf of David Bishop (Bishop), as Trustee of the Goodyear Trusts. Miller filed a motion for change of venue from Wake County to Mecklenburg County. Bishop filed a motion to intervene and joined in Miller's answer and motion for change of venue. The trial court granted Bishop's motion to intervene, but thereafter denied the motion for change of venue. Our Court affirmed the trial court's decision in an unpublished opinion on 16 February 1999 in *Lattimore v. Miller* (No. COA 98-717). Our Supreme Court denied a petition for discretionary review on 22 July 1999.

In the Wake County suit, Lattimore, Elizabeth Darnell, William I. Darnell (president of Park House), Bishop and Park House were ordered by the trial court to appear in Wake County for a mediated settlement conference on 12 August 1997. At the conference, the par-

ties and their attorneys reached an agreement and signed a "Memorandum of Settlement" (settlement agreement). The terms set forth in the settlement agreement included the following:

> 1. Park House Realty, Inc. ("Park House") will redeem all of the stock of George F. Lattimore, Jr. ("Lattimore") in Park House, upon the following terms:
>
> (a) $50,000.00 payable to Lattimore at closing; provided that Lattimore shall have the option to defer receipt of some part or all of said amount until January 1, 1998; and
>
> (b) $5,000.00 per month principal and interest for a period of 20 years, beginning November 1, 1997, evidenced by the promissory note of Park House in favor of Lattimore or holder[.]
>
> (c) The foregoing obligations of Park House will be secured by a collateral assignment of Park House's interests as tenant under ground lease for Hamilton House apartments, and a collateral assignment of the rents from Hamilton House apartments.
>
> 2. Closing hereunder, including execution of all settlement documents, will take place on or before September 30, 1997 (the "Closing Date").
>
> . . .
>
> 4. All claims, cross-claims and counterclaims in the Suit will be dismissed with prejudice.
>
> 5. All parties to the Suit will execute a mutual general release of all claims. Without limiting the foregoing, it is expressly agreed that Lattimore will release any and all claims, whether or not presently encompassed in the Suit, against the Estate of George S. Goodyear and its Executor, the George S. Goodyear Family Trust and its Trustee, the George S. Goodyear Marital Trust and its Trustee, the Estate of William J. Darnell and its Executor; Mrs. Elizabeth Darnell in her individual capacity; Mrs. Dorris Goodyear in her individual capacity; William I. Darnell, Park House and its officers and directors.
>
> . . .

7. The parties acknowledge that all of their agreements reached in mediation, and every part of every agreement so reached, are set out in this memorandum.

Bishop filed the complaint in this action in Mecklenburg County on 10 March 1998. In an amended complaint against Lattimore, Elizabeth Darnell, William I. Darnell, and Park House, Bishop specifically sought: (1) enforcement of the settlement agreement; (2) to restrain the corporate defendant Park House from paying dividends pending consummation of the settlement agreement; (3) enforcement of a supplemental agreement between Bishop and William I. Darnell; (4) a declaratory judgment to declare the 1968 agreement void; and (5) a preliminary injunction prohibiting a declaration of any dividend or any redemption of William I. Darnell's claimed shares, or other distribution by Park House, except for redemption required by the settlement agreement.

Lattimore moved to dismiss the complaint in Mecklenburg County or alternatively to stay the proceedings until the prior pending action in Wake County was resolved. Lattimore also alleged the proper venue for the trial of the action was Wake County and moved that the case be transferred from Mecklenburg County to Wake County. Bishop filed a motion for partial summary judgment on 10 August 1998 on his claim for breach of the settlement agreement. The trial court denied Bishop's partial summary judgment motion and granted Lattimore's motion for change of venue in an order filed 21 September 1998. Bishop appeals the order of the Mecklenburg County trial court.

I.

[1] "In general, only final orders and judgments may be appealed." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 4, 362 S.E.2d 812, 814 (1987). In *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (citations omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950), our Supreme Court compared final judgments and interlocutory orders:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Although generally no right of appeal lies from an interlocutory order, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies there is no just reason to delay the appeal pursuant to North Carolina Rule of Civil Procedure 54(b), an immediate appeal may lie. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. Second, an appeal is allowed under N.C. Gen. Stat. §§ 1-277(a) (1996) and 7A-27(d)(1) (1995) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Id.* Our Court has held that the *denial* of a motion for partial summary judgment is not appealable as long as a substantial right is not affected. *Travco Hotels v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 661, 403 S.E.2d 593, 594 (1991) (emphasis added), *aff'd and remanded*, 332 N.C. 288, 420 S.E.2d 426 (1992).

Plaintiff contends that the trial court's order denying the motion for partial summary judgment is not interlocutory and is therefore immediately appealable because it deprives him of a "substantial right." In the case before us, the Mecklenburg County trial court's denial of plaintiff's motion for partial summary judgment did not determine all of plaintiff's claims. The record does not show that the trial court certified that there was no just reason for delay under Rule 54(b). Therefore, plaintiff must show that a substantial right will be lost or prejudiced without review before final judgment is rendered. Plaintiff has not shown that he will be deprived of a substantial right if we decline review and plaintiff proceeds to trial on the enforcement of the settlement agreement. Because plaintiff's claim was not certified by the trial court and because no substantial right will be lost or prejudiced, we dismiss plaintiff's appeal.

II.

[2] Plaintiff argues that the trial court erred in transferring the case to Wake County under N.C. Gen. Stat. § 1-76 (1996), which provides in part:

> Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial court in the cases provided by law:

> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

Specifically, plaintiff asserts that "[t]he settlement agreement, if enforced by specific performance, will require an assignment of Park House's land lease on the Hamilton House Apartments as collateral for the payment of the promissory note to Lattimore." Therefore, because plaintiff's action affects title to the Hamilton House Apartments in Mecklenburg County, the case must be tried where the property is located. We disagree.

Initially, we note that an order granting change of venue is an interlocutory order. This Court held that an order denying a motion for change of venue was directly appealable. *McClure Estimating Co. v. H.G. Reynolds Co.*, 136 N.C. App. 176, 178-79, 523 S.E.2d 144, 146 (1999). "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 corrected if no appeal was allowed before the final judgment." *Id.* (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984)). Therefore, the appeal lies properly before us.

In *Thompson v. Horrell*, 272 N.C. 503, 158 S.E.2d 633 (1968), our Supreme Court addressed the question of whether an action is removable as a matter of right to the county where the land is situated. The Court stated:

> The test is this: If judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action.

Id. at 504-05, 158 S.E.2d at 634-35 (citations omitted). "[A]n action is not necessarily local because it incidentally involves the title to land or a right or interest therein[.]" *Rose's Stores v. Tarrytown Center*, 270 N.C. 201, 206, 154 S.E.2d 320, 323 (1967). Instead, "[t]itle to realty must be *directly* affected by the judgment, in order to render the action local[.]" *Id.* (citations omitted) (emphasis added). Therefore,

> "[i]t is the principal object involved in the action which determines the question, and if title is principally involved or if the

judgment or decree operates directly and primarily on the estate or title, and not alone *in personam* against the parties, the action will be held local."

Id. (citation omitted).

In the case before us, plaintiff's argument is focused on a breach of the settlement agreement. Any effect that his claim has on real property is simply incidental rather than direct. Moreover, in order to require security of Park House's interest as tenant and rents from Hamilton House as collateral for payment of the promissory note to Lattimore, the trial court would have to require specific performance of the settlement agreement. Specific performance, as an equitable remedy, acts *in personam*. *See Rose's Stores, Inc.*, 270 N.C. at 204, 154 S.E.2d at 322. "To carry out the idea of a decree acting *in personam*, it may be necessary to consider a suit for specific performance as being transitory instead of local[.]" *Id.* Accordingly, we reject plaintiff's contention that his claim affects an interest in land which would require the present action to be removed as a matter of right under N.C.G.S. § 1-76.

Plaintiff's appeal of the trial court's denial of his motion for partial summary judgment is dismissed. The trial court's order granting defendant's motion for change of venue is affirmed.

Judges LEWIS and JOHN concur.

STATE OF NORTH CAROLINA v. WILLIAM DAVID GRAY, DEFENDANT

No. COA99-201

(Filed 4 April 2000)

1. Evidence— motion in limine—standing objection—no contemporaneous objection

Defendant did not preserve for appellate review the admissibility of a prior conviction because he failed to object when the evidence was offered, despite the fact that the trial court granted a standing objection at the hearing on a motion in limine. The test enumerated in *State v. Hayes*, 130 N.C. App. 154, has been disavowed by our Supreme Court at 350 N.C. 79. In this case, how-

ever, the issue was addressed under the discretionary powers of the Court of Appeals.

2. Evidence— relevancy—homicide—impaired driving—prior conviction

The trial court did not err in a prosecution for impaired driving second-degree murder by admitting a prior conviction for violation of N.C.G.S. § 20-138.3, which makes it unlawful for a person under 21 to drive while consuming alcohol or while having alcohol in his body. A wide range of prior convictions has been held admissible to establish malice for impaired driving second-degree murder; although defendant here contends that the conviction was inadmissible because the offense imposes strict liability based upon age without regard to the quantity consumed, this conviction was relevant to establish a mind utterly without regard for human life and social duty.

3. Evidence— photographs—crash victims' automobile

The trial court did not err in an impaired driving second-degree murder prosecution by admitting photographs of the victims' vehicle. The court instructed the jury that the photographs were being admitted only for the purpose of illustrating the investigating trooper's testimony and, while blood is visible, the photographs are not gruesome, horrifying, or revolting.

4. Homicide— second-degree murder—impaired driving—malice—sufficiency of evidence

There was sufficient evidence of malice in an impaired driving second-degree murder prosecution where defendant's blood alcohol level was .113 three hours after the accident, the collision occurred in the victim's lane of travel, and charges of driving while impaired and driving while license revoked were pending against defendant at the time of the accident.

Appeal by defendant from judgment entered 21 October 1998 by Judge Russell J. Lanier, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 11 January 2000.

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

Johnson & Parsons, P.A., by W. Douglas Parsons and David H. Hobson, for defendant-appellant.

EDMUNDS, Judge.

Defendant appeals his conviction of second-degree murder. We find no error.

On 11 November 1997, at approximately 8:00 p.m., defendant William David Gray was driving a Ford Mustang northbound on a highway near Roseboro, North Carolina. His girlfriend, Donna Johnson, was in the front passenger seat. Defendant crossed the center line and struck head on a Dodge Duster driven by Ricky Lee Ray, Jr. Ray's sister, sixteen year-old Karen Lynn Ray, was in the front passenger seat. Rescue personnel arrived at the scene shortly after the accident to find Ricky and Karen Ray pinned inside their vehicle. All four of those involved in the accident were transported to the hospital. Karen Ray died at approximately 8:40 p.m. due to closed head trauma with multiple fractures of the skull.

Defendant was interviewed at the hospital by a North Carolina Highway Patrol trooper. Defendant admitted driving the vehicle and having consumed beer before driving. The trooper "noticed a strong odor of alcoholic beverage about his person." Defendant was then charged with driving while impaired. After being read his rights, defendant consented to a blood test. The test, taken at 11:22 p.m., showed defendant's blood alcohol level to be 0.113. Thereafter, defendant was indicted and convicted of driving while impaired and second-degree murder. The trial court arrested judgment on the driving while impaired conviction and imposed a mitigated sentence of 94 to 122 months. Defendant appeals.

I.

Defendant first challenges the trial court's admission into evidence a prior conviction of N.C. Gen. Stat. § 20-138.3 (1999), which makes it unlawful "for a person less than 21 years old to drive a motor vehicle on a highway or public vehicular area while consuming alcohol or at any time while he has remaining in his body any alcohol or controlled substance previously consumed . . . ." The State filed a motion *in limine* seeking a pretrial ruling on admissibility of evidence of this prior conviction, contending that the conviction was evidence of malice. Defendant responded with a motion *in limine* seeking a pretrial ruling to exclude the evidence. The trial court entered an order finding that malice was an essential element of second-degree murder. After concluding that the probative value of the evidence exceeded its prejudicial effect pursuant to N.C. Gen.

Stat. § 8C-1, Rule 403 (1999), the court held that evidence of the prior conviction was admissible.

[1] We note at the outset that, after the trial court ruled on the motions *in limine*, defendant sought a standing objection to the evidence pursuant to *State v. Hayes*, 130 N.C. App. 154, 502 S.E.2d 853 (1998). The court granted defendant's motion, and, as a result, no contemporaneous objection was made when the evidence was tendered. The four-part test enumerated in *Hayes* has since been disavowed by our Supreme Court. *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (restating the long-standing rule that "[r]ulings on motions *in limine* are preliminary in nature and subject to change 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 the evidence" ' "). Based on the established law of this State, because defendant failed to object to the admission of the evidence at the time it was offered, he has failed to preserve this issue for our review. *See Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999). Nevertheless, we elect to employ our discretionary powers under N.C. R. App. P. 2 and address this issue.

[2] "Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). North Carolina appellate courts recognize three kinds of malice:

> One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both [of] these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (internal citations omitted). In the case at bar, where the charge of second-degree murder is based upon impaired driving, we focus on the second form of malice. *See State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998), *disc. review denied*, 350 N.C. 102, 533 S.E.2d 473 (1999).

Rule 404(b) of the North Carolina Rules of Evidence permits the State to introduce evidence of other crimes, wrongs, or acts by a defendant to establish malice. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999); *see State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992). Our Supreme Court has held that " 'any act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, . . ." is sufficient to supply the malice necessary for second degree murder.' " *State v. Snyder*, 311 N.C. 391, 394, 317 S.E.2d 394, 396 (1984) (quoting *State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978)).

More specifically, North Carolina courts consistently have held that evidence of prior acts and convictions are admissible under Rule 404(b) as evidence of malice to support a second-degree murder charge. *See, e.g., State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (prior speeding offenses admissible to prove malice where impaired defendant charged with second-degree murder as a result of fatal automobile accident), *disc. review allowed*, 350 N.C. 847, —— S.E.2d —— (1999); *Grice*, 131 N.C. App. 48, 305 S.E.2d 166 (prior convictions of driving while impaired admissible in second-degree murder case where traffic accident caused by impaired defendant); *McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (evidence of defendant driver's prior driving convictions and earlier false statement to vehicle inspector as to ownership of car admissible to show malice where impaired defendant charged with second-degree murder); *Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (evidence that defendant's license was revoked relevant to show malice). As our Supreme Court has held:

> Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

These cases establish that a wide range of prior convictions have been held admissible to establish malice in cases where an impaired driver causes a death and is charged with second-degree murder. Although defendant contends that evidence of the offense was inadmissible because the offense imposes strict liability based upon defendant's age without regard to the quantity consumed, we hold that defendant's prior alcohol-related conviction was relevant in this

case involving impaired driving to establish "a mind utterly without regard for human life and social duty." *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536. Therefore, defendant's conviction of an alcohol-related driving offense pursuant to N.C. Gen. Stat. § 20-138.3 was admissible for the purpose of establishing malice. This assignment of error is overruled.

II.

[3] Defendant next contends the trial court erred in admitting into evidence photographs depicting the victims' vehicle. Defendant argues the impact of these photographs, which show blood in the interior of the vehicle, was improperly prejudicial.

The issue of the admissibility of photographic evidence has been long established in North Carolina. In *State v. Hennis*, our Supreme Court stated:

> Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death. Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder . . . and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death. Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.
>
> . . . .
>
> In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion. Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury.

323 N.C. 279, 283-85, 372 S.E.2d 523, 526-27 (1988) (internal citations omitted). Additionally, " '[t]his Court has rarely held the use of photographic evidence to be unfairly prejudicial . . . .' " *State v. Kyle*, 333 N.C. 687, 702, 430 S.E.2d 412, 420-21 (1993) (quoting *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990)).

The court instructed the jury that the photographs were being admitted only for the purpose of illustrating the investigating trooper's testimony. We have reviewed the challenged photographs and observed that the photos depict a damaged automobile. Although blood is visible in both photographs, and is prominent in one, the photographs are not gruesome, horrifying, or revolting. We perceive no unfair prejudice to defendant in the admission of these two photographs. This assignment of error is overruled.

III.

[4] Finally, defendant contends the trial court erred in denying his motion to dismiss the charge of second-degree murder at the conclusion of the evidence "because there was insufficient evidence to support a finding of malice." When ruling on a motion to dismiss for insufficiency of the evidence, "all of the evidence favorable to the State . . . must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977) (citations omitted).

Although defendant contends the State failed to offer sufficient evidence of malice, the State's evidence showed that defendant's blood alcohol level was 0.113 three hours after the accident. *See State*

v. Purdie, 93 N.C. App. 269, 280, 377 S.E.2d 789, 795 (1989) (reviewing appeal from felony death by vehicle conviction and concluding that evidence that defendant's blood alcohol level was 0.181 "unquestionably demonstrated a willful violation of Section 20-138.1"). The collision occurred in the victim's lane of travel. At the time of the accident, charges of driving while impaired and driving while license revoked were pending against defendant. This evidence is sufficient to support the jury's finding of malice. This assignment of error is overruled.

No error.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. WILLIAM ROOSEVELT HAIRSTON

No. COA99-326

(Filed 4 April 2000)

Sentencing— habitual felon—sufficiency of evidence—prima facie presumption—constitutionality

The trial court did not err by denying defendant's motion to dismiss an ancillary habitual felon indictment where the names on the certified copies of the indictments satisfied the same name requirement of N.C.G.S. § 14-7.4, even though the name on two of the indictments included "Jr." and one did not, and it is not unreasonable or arbitrary to infer from proof of two felony convictions in the name of William Roosevelt Hairston Jr. and one in the name of William Roosevelt Hairston that defendant William Roosevelt Hairston committed three felonies. A permissive presumption that leaves the trier of fact free to credit or reject the inference does not shift the burden of proof and affects the application of the reasonable doubt standard only if there is no rational way the trier could make the connection permitted by the inference. The evidence is sufficient for the issue to go to the jury and the defendant has no burden of proof, but may present his own evidence on the issue if he wishes.

Appeal by defendant from judgments entered 9 November 1998 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 27 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel P. O'Brien, for the State.

Stowers & James, P.A., by Paul M. James, III, for defendant-appellant.

HUNTER, Judge.

William Roosevelt Hairston ("defendant") appeals his conviction of being an habitual felon, on the grounds that the trial court erred by denying defendant's motion to dismiss the habitual felon indictment for insufficiency of the evidence. Defendant's motion was made on the grounds that the statutory creation of a *prima facie* case in N.C. Gen. Stat. § 14-7.4 unconstitutionally shifts the burden of proof to the defendant in violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution. These amendments guarantee that an individual person may be convicted of a crime by the State only if the State proves each element of the crime beyond a reasonable doubt to the trier of fact. We disagree with defendant's interpretation of N.C. Gen. Stat. § 14-7.4, and affirm the trial court's denial of defendant's motion to dismiss.

The following facts are undisputed. On 9 November 1998, defendant was found guilty of two counts of breaking and entering a motor vehicle, and was subsequently tried on an ancillary habitual felon indictment. During the ancillary habitual felon proceeding, the State introduced into evidence certified copies of two prior felony convictions bearing the name William Roosevelt Hairston, Jr. and one prior felony conviction bearing the name William Roosevelt Hairston. This evidence established a *prima facie* case under N.C. Gen. Stat. § 14-7.4. At the close of the State's evidence, defendant moved to dismiss the habitual felon indictment for insufficiency of the evidence that the person named in the three prior convictions was the defendant, arguing that the statutory *prima facie* case in N.C. Gen. Stat. § 14-7.4 violates defendant's due process rights. This motion was renewed at the close of all the evidence. The trial court denied both motions. The jury found defendant guilty of being an habitual felon, and he was sentenced accordingly.

Defendant's only assignment of error is that the trial court erred in denying defendant's motion to dismiss the ancillary habitual felon indictment. We disagree.

In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. *State v. Hodge*, 112 N.C. App. 462, 465, 436 S.E.2d 251, 253 (1993). The court must determine whether substantial evidence supports each essential element of the offense and the defendant's perpetration of that offense. *State v. McCullers*, 341 N.C. 19, 29, 460 S.E.2d 163, 168 (1995). If so, the motion must be denied and the case submitted to the jury. *State v. Styles*, 93 N.C. App. 596, 602, 379 S.E.2d 255, 260 (1989). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

As to N.C. Gen. Stat. § 14-7.4, we first note that our Supreme Court has held that the procedures set forth in our habitual felon statute, N.C. Gen. Stat. § 14-7.1 *et seq.*, comport with a defendant's federal and state constitutional guarantees. *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985). Likewise, this Court has upheld an habitual felon conviction against a due process challenge. *See State v. Hodge*, 112 N.C. App. 462, 436 S.E.2d 251 (1993) (upholding habitual felon statute against due process, equal protection, and double jeopardy challenges). N.C. Gen. Stat. § 14-7.4 provides:

> In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, *shall be prima facie evidence that the defendant named therein is the same as the defendant before the court*, and shall be prima facie evidence of the facts set out therein.

N.C. Gen. Stat. § 14-7.4 (1999) (emphasis added). In creating this statutory *prima facie* case, the General Assembly has dictated what amount of evidence is sufficient for the judge to submit an habitual

felon case to the jury. As we have noted, the State presented *prima facie* evidence in the present case by two certified copies of felony convictions of William Roosevelt Hairston, Jr., and one certified copy of a felony conviction of William Roosevelt Hairston. While two of these convictions had "Jr." in the name, and the other did not, the names on these certified copies are identical to defendant in every other way and therefore satisfy the "same name" requirement of N.C. Gen. Stat. § 14-7.4. *See State v. Petty*, 100 N.C. App. 465, 470, 397 S.E.2d 337, 341 (1990) (absolute identity of name is not required under N.C. Gen. Stat. § 14-7.4, and two identical names, with surplusage in one, are the "same name" for purposes of the statute). Defendant argues that this *prima facie* case unconstitutionally shifts the burden of proof to the defendant on the essential element of identity. We disagree.

Our Supreme Court has consistently stated that *prima facie* evidence is nothing more than presumptive evidence, and does not affect the burden of proof of an issue. *State v. Bryant*, 245 N.C. 645, 647, 97 S.E.2d 264, 266 (1957); *State v. Davis*, 214 N.C. 787, 792, 1 S.E.2d 104, 107 (1939).

> [P]*rima facie* or presumptive evidence does not, of itself, establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfies the jury.

State v. Bryant, 245 N.C. 645, 647, 97 S.E.2d 264, 266 (1957). The statutory *prima facie* case in N.C. Gen. Stat. § 14-7.4 does not shift the burden of proof to defendant on the issue of identity, but merely creates a presumption that allows the jury to decide whether the elements of the crime have been proven beyond a reasonable doubt. Defendant's assignment of error can only be saved if the use of such a permissive presumption in a criminal case violates due process.

The validity of statutory inferences and presumptions under the Due Process Clause vary from case to case based on the connection between the known fact and the inferred fact and on the degree to which the inference or presumption interferes with the factfinder's ability to independently assess the evidence. *Ulster County Court v. Allen*, 442 U.S. 140, 60 L. Ed. 2d 777, 791 (1979). In criminal cases, the ultimate test of any presumption's constitutional validity is that the

presumption must not undermine the factfinder's responsibility at trial to find the ultimate facts beyond a reasonable doubt. *Id.* One common type of statutory presumption is the entirely permissive inference or presumption which allows—but does not require—the factfinder to infer the ultimate fact from proof of the known fact and that places no burden of any kind on the defendant. *Barnes v. United States*, 412 U.S. 837, 37 L. Ed. 2d 380 (1973). Since such a permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the beyond a reasonable doubt standard only if there is no rational way the trier could make the connection permitted by the inference. *Ulster County Court v. Allen*, 442 U.S. 140, 60 L. Ed. 2d 777. The North Carolina Supreme Court has applied this reasoning and held it is within the authority of the General Assembly to provide by statute that proof of certain facts should be *prima facie* evidence of an ultimate fact, provided that there is a rational connection between the fact proved and the ultimate fact assumed. *State v. McAuliffe*, 22 N.C. App. 601, 603, 207 S.E.2d 1, 2-3, *cert. denied*, 285 N.C. 762, 209 S.E.2d 286 (1974). This Court has concluded that in order for a *prima facie* evidence rule to be constitutional there must be a rational connection between the fact proved and the ultimate fact presumed so that the inference of the one from proof of the other is not unreasonable or arbitrary. *State v. Lassiter*, 13 N.C. App. 292, 297, 185 S.E.2d 478, 482 (1971), *cert. denied*, 280 N.C. 495, 186 S.E.2d 514, *appeal dismissed*, 280 N.C. 724, 186 S.E.2d 926 (1972).

Applying the rational connection test to N.C. Gen. Stat. § 14-7.4, it is clear that there is a rational connection between the fact of three prior felony convictions under the same name as an alleged habitual felon, and the ultimate fact that the person so named in the three prior felony convictions is the same as the alleged habitual felon. To put it another way, it is not unreasonable or arbitrary to infer from proof of two felony convictions in the name of William Roosevelt Hairston, Jr., and one in the name of William Roosevelt Hairston, that the defendant William Roosevelt Hairston committed three prior felonies. This evidence merely is sufficient for the issue to go to the jury, and if the defendant wishes he may present his own evidence on the issue. However, he has no burden of proof.

Based on the foregoing, we hold that N.C. Gen. Stat. § 14-7.4 does not shift the burden of proof to defendant on the issue of identity in violation of defendant's due process rights.

No error.

Judges JOHN and McGEE concur.

RICKY JAY MURAKAMI, PLAINTIFF v. WILMINGTON STAR NEWS, INC., DEFENDANT

No. COA98-1471

(Filed 4 April 2000)

1. Arbitration— award—not reduced to judgment—finality and preclusive effect

The trial court did not err by granting summary judgment for defendant on a personal injury claim which had been subject to arbitration. Although plaintiff contended that collateral estoppel did not apply because the arbitration award did not result in a judgment, the finality and preclusive effect of an arbitration award is determined by the agreement to arbitrate; if the agreement to arbitrate states that the decision of the panel is binding on the contracting parties, the award is final and collateral estoppel will bar relitigation of the issues actually decided during the arbitration proceeding. The UIM policy which contained the arbitration terms was not included in this record on appeal, but it is presumed that the trial court acted correctly where the record is silent on a particular point.

2. Collateral Estoppel and Res Judicata— arbitration—issues litigated

Collateral estoppel barred a claim for compensatory damages arising from an automobile accident where plaintiff contended that the issue had not been fully litigated at an arbitration hearing, but the issue was necessary to the outcome of the proceeding and the language of the award indicated that the issue was raised and actually litigated.

3. Appeal and Error— preservation of issues—arbitration—no challenge at trial level

Plaintiff waived the issue of whether arbitrators in an automobile accident case were unduly influenced by the UIM policy limit where nothing in the record indicates that plaintiff took advantage of the procedure set out in N.C.G.S. § 1-567.13 or otherwise challenged the validity of the award at the trial level.

Appeal by plaintiff from judgment entered 18 May 1998 by Judge James R. Vosburgh in Superior Court, Onslow County. Heard in the Court of Appeals 4 October 1999.

Jeffrey S. Miller for plaintiff-appellant.

Marshall, Williams & Gorham, L.L.P., by Ronald H. Woodruff, and Dunn, Dunn & Stoller, by David A. Stoller, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Ricky Jay Murakami ("plaintiff") appeals from an order allowing partial summary judgment for Wilmington Star News, Inc. ("defendant") on the issue of damages arising out of plaintiff's personal injury claim. For the reasons hereinafter stated, we affirm the order of the trial court.

Plaintiff was injured on 1 May 1993 in an automobile accident involving George D. Cathie, an employee of defendant. Cathie had automobile liability coverage with Integon Insurance Company ("Integon"). Cathie's bodily injury policy limit was $25,000.00, and Integon tendered the policy limit to plaintiff on 24 May 1995.

Pursuant to the provisions of plaintiff's underinsured motorist ("UIM") policy with Farm Bureau Insurance Company ("Farm Bureau"), plaintiff requested arbitration with Cathie to determine Farm Bureau's responsibility under the policy. An arbitration hearing was conducted on 1 May 1997, and plaintiff was awarded $77,500.00 for the injuries and damages he sustained as a result of the 1 May 1993 collision. The arbitration award was subject to a credit of $25,000.00 for the amount Integon previously paid plaintiff on Cathie's behalf. The arbitration award, however, was never reduced to a judgment or filed with the court. Following the arbitration, plaintiff executed a "Covenant Not to Sue" with Cathie and a "Settlement and Release Agreement" with Farm Bureau.

On 29 April 1996, plaintiff filed a personal injury action against defendant on the basis of respondeat superior. Defendant filed a motion for partial summary judgment on the issue of damages. Defendant argued that under the theory of collateral estoppel, the arbitration award barred plaintiff from further litigating the issue of compensatory damages arising out of the 1 May 1993 accident. The trial court agreed and granted the motion on 2 April 1998. From the order of partial summary judgment, plaintiff appeals.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and other evidentiary materials demonstrate the absence of any triable issue of fact and the moving party's right to judgment as a matter of law. *Yamaha Corp. v. Parks*, 72 N.C. App. 625, 325 S.E.2d 55 (1985); N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). Collateral estoppel can serve as the basis for summary judgment. *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990). "Under the doctrine of collateral estoppel, or issue preclusion, 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.' " *State ex. rel Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128 (1996) (quoting *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)). Where the doctrine is successfully asserted, the prior judgment operates as an absolute bar to further litigation of the issue previously decided. *Miller Building Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998). "The party opposing issue preclusion has the burden 'to show that there was no full and fair opportunity' to litigate the issues in the first case." *Miller*, 129 N.C. App. at 100, 497 S.E.2d at 435 (quoting 18 *Moore's Federal Practice* § 132.05[1]).

[1] On appeal, plaintiff argues that the trial court committed reversible error by awarding summary judgment to defendant on the issue of compensatory damages. Plaintiff contends that the doctrine of collateral estoppel has no bearing on the instant case because the arbitration hearing did not result in a final judgment. Plaintiff takes the position that for purposes of issue preclusion, an arbitration award may not be treated as a judgment but, rather, the award must be confirmed by an order of the trial court before collateral estoppel will apply. We must disagree.

North Carolina public policy favors settling disputes by means of arbitration, but before a dispute can be settled in this manner, a valid agreement to arbitrate must exist. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 423 S.E.2d 791 (1992). "The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award." *Thomas v. Howard*, 51 N.C. App. 350, 352, 276 S.E.2d 743, 745 (1981). Indeed, "an [arbitration] award is ordinarily presumed valid," *id.* at 353, 276 S.E.2d at 745, and

public policy strongly favors upholding such an award, *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984).

Our research has not directed us to any cases in this jurisdiction or in other jurisdictions resolving the issue of whether an arbitration award that has not been adopted by the court may serve as a final judgment for purposes of collateral estoppel. However, based on well-settled principles of contract law, we are of the opinion that the finality and preclusive effect of an arbitration award is determined by the agreement to arbitrate. To be sure, the right to submit disputes to arbitration is a contractual one, *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985), and "[w]hen both parties consent to an enforceable contract each party is bound by its terms," *Midulla v. Howard A. Cain, Inc.*, 133 N.C. App. 306, 308, 515 S.E.2d 244, 246 (1999); *see also Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992) (recognizing that by agreeing to submit disputes to arbitration, the parties are bound by the terms of the arbitration agreement and the Uniform Arbitration Act). Therefore, we conclude that if the agreement to arbitrate states that the decision of the panel is binding on the contracting parties, the award is final, and collateral estoppel will bar relitigation of the issues actually decided during the arbitration proceeding.

In his brief, plaintiff concedes that he requested arbitration with Cathie pursuant to the terms of his UIM policy with Farm Bureau. The precise terms of the policy are not before us, however, as plaintiff has failed to include the policy in the record on appeal. As a result, we are unable to determine whether under the covenants contained in the arbitration provision, plaintiff is bound by the arbitrators' decision. Nevertheless, "[w]here the record is silent on a particular point, it is presumed that the trial court acted correctly." *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 378, 343 S.E.2d 15, 20 (1986). Accordingly, we presume that the court was correct in concluding that the arbitration award constituted a final adjudication on the merits.

[2] Plaintiff further argues that collateral estoppel does not apply to bar his claim for compensatory damages against defendant because the issue was not "fully and fairly litigated" in the arbitration proceeding. Again, we disagree.

The doctrine of issue preclusion is available as a defense when the following requirements are satisfied:

> "(1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment."

Beckwith, 326 N.C. at 574, 391 S.E.2d at 191 (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)).

The arbitration award in the instant case pertinently provides as follows regarding plaintiff's damages:

> The Arbitrators unanimously find by the greater weight of the evidence that the Claimant, Ricky Murakami, has suffered damages for all personal injuries proximately caused by the collision on May 1, 1993 in the total amount of SEVENTY SEVEN THOUSAND FIVE HUNDRED DOLLARS ($77,500.00). (Emphasis added.)

This language indicates that the issue of plaintiff's compensatory damages was raised and actually litigated in the arbitration proceeding. Furthermore, given that the purpose of the proceeding was to determine what amount Farm Bureau was obligated to pay plaintiff under the UIM policy, the amount of compensatory damages owed to plaintiff was necessary to the outcome of the arbitration proceeding. Therefore, the "identical issues" prong has been met, and plaintiff's argument to the contrary fails.

[3] As an additional matter, plaintiff argues that the arbitration award was invalid because in determining the amount of damages, the arbitrators were unduly influenced by the $100,000.00 UIM policy limit available to plaintiff. Under section 1-267.13 of the General Statutes, a party to an arbitration may seek to have the award vacated upon a showing that "[t]he award was procured by corruption, fraud or other undue means." N.C. Gen. Stat. § 1-567.13 (1999). Nothing of record indicates that plaintiff took advantage of the procedure set out in section 1-567.13 or that he otherwise challenged the validity of the award at the trial level. This issue, then, is waived, as plaintiff is not permitted to raise it for the first time on appeal. *See Laing v. Lewis*, 133 N.C. App. 172, 515 S.E.2d 40 (1999) (stating that theory not presented to trial court and first raised on appeal was not properly before appellate court). Moreover, we have carefully examined plaintiff's remaining arguments and find them to be without merit.

For the foregoing reasons, we hold that the trial court was correct in concluding that plaintiff was collaterally estopped from further litigating the issue of compensatory damages. The order of partial summary judgment is, therefore, affirmed.

AFFIRMED.

Chief Judge EAGLES and Judge MARTIN concur.

TODD A. WENER, PLAINTIFF v. PERRONE & CRAMER REALTY, INC. AND NICHOLAS A. PERRONE, DEFENDANTS

No. COA98-1580

(Filed 4 April 2000)

Statute of Limitations— registration of foreign judgment— Full Faith and Credit

The trial court erred by ordering that a Florida judgment in a fraud action had been properly domesticated in North Carolina where the Florida judgment was procured on 9 September 1987 and plaintiff sought to register that judgment in North Carolina on 1 July 1998, a date beyond the ten year limitation period of N.C.G.S. § 1-47(1) but within Florida's twenty year statute of limitations. North Carolina classifies statutes of limitation as procedural and the Full Faith and Credit Clause is not violated by imposition of forum state rules affecting procedural matters.

Appeal by defendants from order entered 14 October 1998 by Judge Marcus Johnson in Jackson County Superior Court. Heard in the Court of Appeals 6 October 1999.

Henson & Paul, P.A., by Brian Philips, for plaintiff-appellee.

Hunter, Large & Sherrill, P.L.L.C., by William P. Hunter, III, for defendants-appellants.

JOHN, Judge.

Defendants appeal the trial court's order providing that a foreign judgment in favor of plaintiff "has been properly domesticated" against defendants. We reverse the trial court.

Pertinent facts and procedural history include the following:

Plaintiff Todd A. Wener initiated suit alleging fraud against defendants Perrone & Cramer Realty, Inc. and Nicholas A. Perrone in the state of Florida. Summary judgment in favor of plaintiff was entered 9 September 1987 in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida (the Florida judgment), and plaintiff was awarded $180,000.00. Pursuant to the Uniform Enforcement of Foreign Judgments Act, N.C.G.S. §§ 1C-1701-1C-1708 (1999), plaintiff filed the Florida judgment in the Jackson County Office of the Clerk of Superior Court on 1 July 1998, coupled with an affidavit alleging the judgment remained unsatisfied and that interest had accrued at the rate of 12% per annum, the total amount due plaintiff thereby being calculated at $446,139.00.

Defendants filed a Notice of Defense to Foreign Judgment 24 July 1998 in accordance with G.S. § 1C-1705(a), pleading "the statute of limitations, [N.C.G.S. § 1-47(1) (1999)] as defense in bar of plaintiff's filing." G.S. § 1-47(1) prescribes a ten year period for 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." However, the statute of limitations for commencement of similar actions under Florida law is twenty years. Fla. Stat. Ann. § 55.081 (West 1994).

Following a hearing, the trial court issued an order 14 October 1998 providing that

> [t]he Florida Statute of Limitations on a Judgment has a longer period than the North Carolina Statute of Limitations and the application of this Statute of Limitations would effectively shorten the time period for the validity of a Florida Judgment.
>
> The Court hereby finds that [G.S. § 1-47(1)] would be unconstitutional as it applies to this out-of-state Florida Judgment as urged by defense counsel and that the ten (10) year Statute of Limitations does not apply . . . .
>
> WHEREFORE, The Court hereby finds that the Judgment filed by the Plaintiff has been properly domesticated and that the Court hereby denies the Notice of Defense filed by the [defendants].

Defendants timely appealed.

The issue is whether the Constitution of the United States permits courts of this state to bar enforcement of foreign judgments upon

expiration of the ten year period specified in G.S. § 1-47(1) under circumstances where a lengthier limitation period for enforcement of judgments has been effected by the foreign jurisdiction rendering the judgment. Plaintiff understandably complains that, in light of Florida's twenty year statute of limitations, barring his North Carolina action to enforce the Florida judgment would not only violate the Full Faith and Credit Clause of the United States Constitution, but

> would [also] require any party to know the statute of limitations of all fifty (50) states [and] would place the burden upon the creditor to register his judgment in every state in which the Defendant might decide to relocate.

Although sympathetic with plaintiff's policy arguments, we conclude that application of G.S. § 1-47(1) in the instant circumstances withstands constitutional scrutiny.

Prior to commencing, we note G.S. § 1-47(1) affects foreign and domestic judgments alike. *See McDonald v. Dickson*, 85 N.C. 248, 251-52 (1881). Accordingly, we are not confronted with differing periods of limitation for foreign and domestic judgments whereby equal protection concerns might be implicated. *See* U.S. Const. amend. XIV, § 1; *compare Watkins v. Conway*, 385 U.S. 188, 189, 17 L. Ed. 2d 286, 288 (1966) (per curiam) (statute of limitations which discriminates against foreign actions "might well . . . violate[] the Federal Constitution"); *with Carter v. Carter*, 349 S.E.2d 95, 98 (Va. 1986) (Virginia statutes imposing ten year limitation period on foreign judgments and twenty year limitation period on domestic judgments do not violate Equal Protection Clause as foreign and domestic "creditors are not similarly situated").

The Full Faith and Credit Clause of the United States Constitution states that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.

U.S. Const. art. IV, § 1. However,

> [i]t has long been established that the enforcement of a judgment of a sister state may be barred by application of the statute of limitations of the forum state. Application of the forum's statute of limitations entails no violation of the full faith and credit clause of the Constitution since such statutes are deemed to affect procedure only and not the substance of the action.

Matanuska Valley Lines, Inc. v. Molitor, 365 F.2d 358, 359-60 (9th Cir. 1966), *cert. denied*, 386 U.S. 914, 17 L. Ed. 2d 786 (1967) (citation omitted).

The *Matanuska* court relied upon an early United States Supreme Court holding that

> there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments, is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the lex fori, or the suit will be barred.

M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 328, 10 L. Ed. 177, 185 (1839).

In recent years, the United States Supreme Court has re-examined the *M'Elmoyle* decision and found it to be "sound." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 100 L. Ed. 2d 743, 752 (1988). In *Sun Oil*, the Supreme Court held a state "may apply its own procedural rules to actions litigated in its courts," *id.*, noting that statutes of limitation are recognized by most states as procedural rules, *id.* at 724-26, 100 L. Ed. 2d at 754-55. Although the Court commented that such characterization is not mandatory, *id.* at 729, 100 L. Ed. 2d at 756, North Carolina courts have consistently viewed statutes of limitation as procedural:

> [t]he plea of the statute [of limitations], in an action in our State on a judgment obtained in another State, is a plea to the remedy, and consequently the *lex fori* must prevail in such an action.

Arrington v. Arrington, 127 N.C. 190, 197, 37 S.E. 212, 214 (1900) (citing *M'Elmoyle*); *accord, Boudreau v. Baughman*, 322 N.C. 331, 335, 340, 368 S.E.2d 849, 854, 857 (1988) ("statutes of limitation are clearly procedural," therefore courts must apply the "lex fori, the law of the forum").

In *Arrington*, the plaintiff sought collection of alimony payments due from a North Carolina resident under an Illinois judgment. Our

Supreme Court held North Carolina's statute of limitations applied such that the

> sums adjudged in favor of the plaintiff which became due and collectible more than ten years before the institution of this action, are barred . . . .

Arrington, 127 N.C. at 198, 37 S.E. at 214.

A similar result was reached in *Powles v. Kandrasiewicz*, 886 F. Supp. 1261 (W.D.N.C. 1995), wherein a 1979 negligence judgment in favor of the plaintiff had been entered by an Alabama federal district court. Seeking to register the judgment in a North Carolina federal district court some sixteen years later, the plaintiff encountered the objection that North Carolina's ten year statute of limitations had expired. The district court, relying on *Matanuska* and *Arrington*, ruled that

> even though the present judgment has an effective life of twenty years under Alabama law, the ten-year statute of limitations imposed by North Carolina law bars Plaintiff from enforcing such judgment in this state.

Powles, 886 F. Supp. at 1268.

In the case *sub judice*, the Florida judgment was procured 9 September 1987 and plaintiff sought to register that judgment in North Carolina on 1 July 1998, a date beyond the ten year limitation period provided in G.S. § 1-47(1). Under the authorities cited herein, it appears that the Full Faith and Credit Clause of the United States Constitution would not be violated by imposition of forum state rules affecting procedural matters. *See Sun Oil*, 486 U.S. at 722, 100 L. Ed. 2d at 752. As North Carolina classifies statutes of limitation as procedural, *see Arrington*, 127 N.C. at 197, 37 S.E. at 214 and *Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857, plaintiff's argument, *i.e.*, that application of G.S. § 1-47(1) under the instant circumstances is unconstitutional,-must fail, notwithstanding the twenty year limitation period under Florida law, *see Sun Oil*, 486 U.S. at 722, 100 L. Ed. 2d at 752; *Powles*, 886 F. Supp. at 1268.

In sum, the order of the trial court is reversed and this cause remanded for entry of judgment in favor of defendants on grounds that enforcement of the Florida judgment is barred by the applicable North Carolina statute of limitations. *See* G.S. § 1-47(1).

Reversed and remanded with instructions.

Judges LEWIS and McGEE concur.

STATE OF NORTH CAROLINA v. ARCADIA LOGAN JENKINS

No. COA99-518

(Filed 4 April 2000)

Bail and Pretrial Release— domestic violence—pretrial release hearing—reasonable time—procedural due process

The trial court erred in dismissing the assault on a female charge, based on its conclusion that defendant's procedural due process rights were violated by application of N.C.G.S. § 15A-534.1 regarding a timely pretrial release hearing in a domestic violence case when there was a session of court at 9:30 a.m. and defendant's bond hearing was delayed until 1:30 p.m., because the facts of this case reveal: (1) the trial court's usual practice was to hold bond hearings at 1:30 p.m. for the purpose of scheduling cases in a rational and sufficient manner given the nature and volume of cases in district court; and (2) defendant's bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system.

Appeal by the State from order entered 6 January 2000 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 22 February 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General William P. Hart and Assistant Attorney General Amy C. Kunstling, for the State.

Appellate Defender Malcolm Ray Hunter, Jr. for defendant-appellee.

WALKER, Judge.

The State appeals the 6 January 2000 order of the trial court dismissing female assault charges against the defendant. Defendant was arrested in the early morning of 8 May 1998 for allegedly assaulting a female, Ellen Jenkins. After defendant's arrest, he was received at the

detention facility at 6:15 a.m. The magistrate ordered the defendant to be held without bond because of "domestic violence," and set the case for bond hearing in district court at 1:30 p.m. If defendant had not appeared before a district court judge by 6:30 a.m. on 10 May 1998, defendant was to be brought back before the magistrate for a determination of the terms of defendant's release.

Defendant appeared before the district court judge at approximately 1:30 p.m. on 8 May 1998 and was released after a $500.00 unsecured bond was set. On 8 September 1998, defendant was indicted for habitual misdemeanor assault under N.C. Gen. Stat. § 14-33.2 (1999), based upon five prior misdemeanor convictions, four of which were assault on a female.

In superior court, the defendant moved to dismiss the pending charges based on violations of his federal and state procedural due process rights to a timely pre-trial release hearing, which the trial court granted.

The State argues that the trial court erred in concluding that defendant's procedural due process rights were violated by the application of N.C. Gen. Stat. § 15A-534.1 (1999), which states in part:

> A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.

N.C. Gen. Stat. § 15A-534.1(b) (1999).

Our Supreme Court addressed the constitutionality of section 15A-534.1 in *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998). In *Thompson*, the defendant was charged with three misdemeanors, including assault inflicting serious injury, which was a domestic violence charge. The defendant was arrested on Saturday, 28 October 1995, and the magistrate's order of commitment did not authorize defendant's release from jail for a bond hearing until forty-eight hours later, which defendant received the following Monday afternoon. *Id.* at 497, 508 S.E.2d at 285. In *Thompson*, our Supreme Court took judicial notice that two district court judges and two superior court judges were available during morning sessions of court on Monday, 30 October 1995. *Id.* at 498, 508 S.E.2d at 286. The Court emphasized that "defendant was not brought before a judge upon the opening of court on Monday morning. He, instead, remained in jail until Monday after-

noon, almost forty-eight hours after his arrest." *Id.* at 497, 508 S.E.2d at 285-86.

The Court denied defendant's argument that section 15A-534.1 was facially unconstitutional, but held that section 15A-534.1 was applied unconstitutionally and violated defendant's rights to a timely pre-trial release hearing. *Id.* at 498, 508 S.E.2d at 286. The Court held:

> Under these discrete facts, we agree with defendant that the magistrate's order automatically detaining him without a hearing until well into the afternoon, while available judges spent several hours conducting other business, violated his procedural due process rights to a timely pretrial-release hearing under N.C. Gen. Stat. § 15A-534.1(a).

Id. Further, the Court stated that "resolution of whether the statutory procedures as implemented here are constitutionally sufficient requires analysis of the particular circumstances of the case." *Id.*

The Court weighed the importance of the private interests affected, the harm inflicted by any delay, "the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.* at 499, 508 S.E.2d at 287 (*quoting FDIC v. Mallen*, 486 U.S. 230, 242, 100 L. Ed. 2d 265, 279 (1988)). Under this analysis, the Court concluded that "[b]ecause defendant did not obtain his hearing before a judge regarding his bail and conditions of release 'as soon as [was] reasonably feasible,' . . . defendant was detained longer than necessary to serve the State's interest in having a judge, rather than a magistrate, determine the conditions of his pretrial release." *Id.* at 502-03, 508 S.E.2d at 289 (citations omitted).

Our Supreme Court recently revisited this issue in *State v. Malette*, 350 N.C. 52, 509 S.E.2d 776 (1999). *Malette* was heard in the Supreme Court on the same day as *Thompson*, 14 October 1998, but was not filed until 5 February 1999, almost a month after the trial court dismissed the charges in the present case. In *Malette*, the Court held that N.C. Gen. Stat. § 15A-534.1 was applied constitutionally to a defendant who was arrested on 3 December 1995 and did not receive a bond hearing until some time the next day. *Id.* at 55, 509 S.E.2d at 778. The Court, under a case-by-case analysis, reasoned that "[t]here is no evidence here that the magistrate arbitrarily set a forty-eight-hour limit as in *Thompson* or that the State did not move expeditiously in bringing defendant before a judge." *Id.*

Here, defendant argues that his procedural due process rights were violated since there was a session of district court at approximately 9:30 a.m., but his bond hearing was delayed until 1:30 p.m. that afternoon.

The trial court agreed and in its order stated in part:

> (5) Defendant contends that there were sessions of District Court being conducted on the morning—on Friday morning which convened at approximately 9:30. The defendant was not brought before a judge during the morning session.
>
> . . .
>
> (7) The Court . . . finds that it is the common practice to schedule bond hearings in Gaston County at 1:30 p.m. for defendants held in detention, obviously for the purpose of scheduling of District Court cases in a rational and sufficient manner given the nature and volume of the District Court. It is also necessary for the papers regarding the defendant's arrest and detention to be filed in the Clerk of Court's office for the effect of having the matter docketed so that a judicial official authorized under G.S. 15A-534.1 may conduct a hearing.
>
> (8) The defendant was held from 6:15 until sometime in the afternoon of May 8th without benefit of bond pursuant to N.C.G.S. 15A-534.1. According to the case of State of North Carolina vs. Ronnie Thompson, the defendant in that case was held approximately two hours and fifteen minutes longer than the defendant, Mr. Jenkins, in this case when a judge was purportedly available.

The trial court concluded that pursuant to *Thompson*, the "failure to provide defendant with a bond hearing at the first opportunity when a judge was available is . . . constitutionally impermissible."

Here, defendant was arrested in the early morning of 8 May 1998 and was received into the detention facility at 6:15 a.m. At approximately 6:30 a.m., the magistrate's release order set defendant's bond hearing for 1:30 p.m. that afternoon. Defendant's hearing was held at approximately 1:30 p.m. and the defendant was released upon signing an unsecured bond. The trial court found that the usual practice of the district court was to convene at 9:30 a.m. on Friday morning. Also, bond hearings are usually set for 1:30 p.m. for the purpose of "scheduling . . . District Court cases in a rational and sufficient manner given

the nature and volume of District Court" and because of the need to file papers with the Clerk of Court so that the matter may be set for a hearing under N.C. Gen. Stat. § 15A-534.1.

Although defendant was detained for approximately seven hours, we find his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system. In weighing the defendant's private interests and the harm caused by the delay against the governmental interest of processing defendants in a rational, efficient manner, we conclude that, under these facts, defendant's constitutional rights were not violated. Therefore, under the "flexible demands of procedural due process," *Thompson*, 349 N.C. at 498, 508 S.E.2d at 286, N.C. Gen. Stat. § 15A-534.1 was applied constitutionally to this defendant, and we reverse the trial court's order dismissing the charges against defendant.

Reversed.

Judges GREENE and TIMMONS-GOODSON concur.

WILLIE B. TART, PLAINTIFF v. JAMES L. MARTIN AND PEGGY H. MARTIN, DEFENDANTS

No. COA99-401

(Filed 4 April 2000)

1. Motor Vehicles— family purpose doctrine—ownership of vehicle

Summary judgment was properly granted for defendants in an automobile accident case involving their son where plaintiff alleged that the Martins were liable under the family purpose doctrine but Ms. Martin's name did not appear on the certificate of title for the automobile driven by her son and there was no document supporting a contention that she was an owner; and although the automobile was titled in Mr. Martin's name, Mr. Martin did little more than extend credit to his son by providing him with the purchase price of the car and allowing him to repay it over time. The Martins' son had actual, exclusive control of the car.

2. Motor Vehicles— negligent entrustment—knowledge of recklessness

The trial court erred by granting summary judgment for defendants on a negligent entrustment claim arising from an automobile accident involving their son where his three accidents over a two-year period, coupled with a high-speed moving violation during the same period, constitutes sufficient evidence of recklessness to require submission of the negligent entrustment claim to the jury. The Martins' statements that they had no knowledge of their son's recklessness other than a 1993 moving violation does not resolve the issue of whether they should have known.

Appeal by plaintiff from judgment entered 10 February 1999 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals on 10 January 2000.

This appeal arises out of an automobile accident between plaintiff-appellant Willie B. Tart (Tart) and the nineteen-year-old son of defendant-appellees James and Peggy Martin (the Martins). The undisputed facts are that on 6 October 1996, the Martins' son drove a 1984 Ford (the Ford) through a stop sign and collided with a vehicle driven by Tart. The Martins' son was killed and Tart was injured. Tart filed this claim alleging that the Martins were liable for their son's negligence under the family purpose doctrine and/or the theory of negligent entrustment.

The Martins admitted that the Ford was titled in James Martin's name and that their son resided at the Martins' home, but submitted affidavits stating that neither of them had ever operated the Ford on or before 6 October and that they purchased the Ford for their son because he was a minor at the time of purchase and therefore "unable to contract." The Martins also submitted affidavit testimony that their son was making regular payments to his father to reimburse him for the purchase of the Ford, and that their son kept the Ford for his own pleasure and convenience, paid all repair, maintenance, insurance and operations costs, and retained possession of all sets of keys to the vehicle.

In their affidavits, the Martins admitted prior knowledge of their son's 1993 plea to charges of driving 50 mph in a 35 mph zone (reduced from a charge of 75 in a 35). In addition, the Martins acknowledged in their answers to interrogatories that their son had

been involved, but not at fault, in three automobile accidents between 15 March 1993 and 27 November 1994. Specifically, the Martins' affidavits opined that the accidents were caused by (1) the driver of a truck running a stop sign and colliding with their son, (2) their son's efforts to avoid a collision with a car which suddenly stopped in front of him by swerving into a ditch and (3) the failure of a motorcyclist to turn on his lights or signals prior to colliding with their son on a dark, rainy night.

We note that Mrs. Martin's name is not on the vehicle's certificate of title and there is no allegation that she owned the vehicle in any document submitted to the trial court.

Schlosser, Neill & Brackett, by Wilbur L. Linton, Jr., for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Ian J. Drake, for defendant-appellees.

EAGLES, Chief Judge.

Summary judgment is proper if the pleadings, depositions, admissions and affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. N.C.R.Civ.P. 56(c). On motion for summary judgment, the court must closely scrutinize the papers of the party moving for summary judgment, drawing all inferences from proof in favor of the nonmovant. Shuford, N.C.Practice and Procedure, § 56-5 (5th ed. 1998 & Supp).

[1] We therefore must decide whether a material issue of fact remains as to whether the Martins are the "owners" of the Ford for purposes of either theory of liability alleged by Tart.

Because Mrs. Martin's name does not appear on the certificate of title and there appears no document supporting a contention that Mrs. Martin was an owner, we affirm summary judgment as to her.

In order to "afford greater protection for the rapidly growing number of motorists in the United States," the family purpose doctrine may be used to *indirectly* hold a vehicle owner liable for the negligent driving of the vehicle by a member of the owner's household. *Williams v. Wachovia Bank and Trust Co.*, 292 N.C. 416, 420, 233 S.E.2d 589, 592 (1977), citing *Grindstaff v. Watts*, 254 N.C. 568, 119 S.E.2d 784 (1961). However, a vehicle owner's liability under the

doctrine is limited. In *Taylor v. Brinkman*, 118 N.C.App. 96, 453 S.E.2d 560 (1995) (affirming summary judgment in favor of alleged owner under the family purpose doctrine), we held that "the owner or person with ultimate control over the vehicle" may be held liable only if the plaintiff shows that

> (1) the operator was a member of the family or household of the owner or person with control and was living in such person's home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident.

Taylor at *98*, 453 S.E.2d at 562, citing *Byrne v. Bordeaux*, 85 N.C. App. 262, 264-65, 354 S.E.2d 277, 279 (1987).

As in *Taylor*, the issue here was whether Mr. Martin, a parent, "provided" the Ford to his son. We held in *Taylor* that to prove that a parent "provided" a vehicle to his child, the plaintiff must show that the parent had *actual control* of the vehicle at the time of their child's negligent act:

> [I]n determining which family member is liable under the [family purpose] doctrine, the issue is one of control and use of the vehicle. *In deciding who has control of a vehicle, ownership is not conclusive.* Rather, the central inquiry is "who maintains or provides the automobile for the use by the family."

Id. at 98, 453 S.E.2d at 562 (citations omitted; emphasis added). Relevant "control" factors set out in *Taylor* include a parent's payment or repayment of the purchase price; payment of insurance premiums, repairs or operating expenses; possession of vehicle keys; and actually driving the vehicle. *Id.* at 98-99, 453 S.E. 2d at 562-3, citing *Dupree v. Batts*, 276 N.C. 68, 170 S.E.2d 918 (1969) and *Smith v. Simpson*, 260 N.C. 601, 133 S.E.2d 474 (1963).

As in *Taylor*, we conclude that Mr. Martin did little more than extend credit to his son by providing him with the purchase price of the Ford and allowing him to repay the Martins over time. *Id.*, citing *Smith* at 610-11, 133 S.E.2d at 481-82. The Martins' remaining, undisputed affidavit testimony conclusively shows that it was the Martin's son, and not the Martins, who had actual, exclusive control of the Ford after its purchase. Accordingly, we hold that the trial court properly granted summary judgment for the Martins under the family pur-

pose doctrine. We note that because we affirm summary judgment for the Martins under the family purpose doctrine, we need not address the Martins' equitable ownership defense under G.S. § 20-279.1, *et seq.* (Motor Vehicle and Financial Responsibility Act of 1953) and *Ohio Casualty Insurance Co. v. Anderson*, 59 N.C. App. 621, 298 S.E.2d 56 (1982).

[2] Negligent entrustment occurs when the owner of an automobile "entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, . . . likely to cause injury to others." *Coble v. Knight*, 130 N.C. App. 652, 653, 503 S.E.2d 703, 704 (1998); *Swicegood v. Cooper*, 341 N.C. 178, 459 S.E.2d 206 (1995) (reversing summary judgment on negligent entrustment claim where evidence showed that defendant father knew of two of nine prior traffic offenses committed by his son).

Like the family purpose doctrine, the theory of negligent entrustment "undertakes to impose liability on an owner not otherwise responsible for the conduct of the driver of the vehicle". *Coble* at 653, 503 S.E.2d at 704. Unlike the family purpose doctrine, however, *direct* liability for negligent entrustment may be imposed where the plaintiff offers evidence of a defendant's record ownership (and not actual control) of a vehicle. *Id.* at 654, 503 S.E.2d at 704 (negligent entrustment requires "proof of ownership"). Therefore, the Martins may be held liable by virtue of holding title to their son's Ford, but only if their son's prior driving conduct put the Martins on notice of his recklessness.

The key issue is whether evidence of the Martins' son's single 1993 moving violation and his three accidents in 1993 and 1994 creates a material issue of fact as to whether the Martins knew or should have known that their son was an unsafe driver. We hold that it does, and reverse the trial court.

The Martins' statements (in their answers to interrogatories and sworn affidavits) that they had no knowledge of their son's recklessness other than his 1993 moving violation does not conclusively resolve the issue of whether the Martins reasonably *should have known* that their son was a reckless driver. Viewing the evidence in the light most favorable to Tart, we hold that the Martins' son's three accidents over a two-year period, coupled with his high-speed moving violation during the same time period (a guilty plea to driving 50 mph in a 35 mph zone, arising out of a citation for driving at speeds in

excess of 70 mph), constitutes sufficient evidence of recklessness to require submission of the negligent entrustment claim to the jury. We therefore reverse summary judgment as to negligent entrustment.

The trial court's order of summary judgment is

Affirmed in part and reversed in part.

Judges WALKER and WYNN concur.

JOAN COOLEY PORTERFIELD v. KAREN LYNN GOLDKUHLE

No. COA99-1055

(Filed 4 April 2000)

Costs— attorney fees—findings of fact required

The trial court abused its discretion in a negligence case by failing to make the required findings of fact to support the award of attorney fees to plaintiff under N.C.G.S. § 6-21.1.

Appeal by defendant from judgment entered 17 May 1999 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 27 March 2000.

Caudle & Spears, P.A., by L. Cameron Caudle, Jr., for plaintiff appellee.

Burton & Sue, L.L.P., by Gary K. Sue and James D. Secor, III, for defendant appellant.

SMITH, Judge.

Plaintiff brought an action for negligence against defendant for injuries sustained in an automobile accident, seeking damages in excess of $10,000. After a jury awarded her $1,000 in damages, plaintiff filed a post-trial motion for attorney's fees pursuant to N.C. Gen. Stat. 6-21.1 (1999). In support of the motion, plaintiff's counsel submitted an affidavit and time sheets to the court reflecting fees of $6,953.

At the motion hearing, defendant argued against a fee award in light of the limited success enjoyed by plaintiff. Defense counsel

noted the jury's verdict was identical to settlement offers tendered by the defense and well below the inflexible $30,000 settlement position maintained by plaintiff. Defendant alleged making the following three settlement offers at various stages of the action: (1) $1,000 offered by her insurance claims representative prior to the institution of the suit; (2) $1,001 offered at a mediated settlement conference; and (3) $1,001 offered pre-trial. Defendant admitted she never filed an offer of judgment pursuant to N.C.R. Civ. P. 68(a). She also largely accepted the reasonableness of the time sheets submitted by plaintiff's counsel, except for a charge for travel time to Charlotte.

Plaintiff's counsel contested whether any pre-suit offer was made. He noted the offer at the mediated settlement conference came after plaintiff expended $300 in costs.

In granting plaintiff's motion, the trial judge justified the award of attorney's fees as follows:

> I do remember there was a $1,000 offer made at the settlement negotiations right prior to the trial. I remember, too, that there was no willingness to even discuss any negotiations above that; plus the parties were so far apart, there was really no meaningful settlement negotiations at all.
>
> But, anyway, based on the offer and the verdict and the other matters of record, the Court, in its discretion would award attorney fees in the amount of $4,000 . . . .

Defense counsel requested that an order be entered which contained findings of fact, but the court denied the request, stating, "It's all in my discretion, anyway."

In its judgment filed 17 May 1999, the superior court awarded plaintiff $1,000 plus interest from 12 January 1998, reflecting the jury verdict in her favor. The judgment further provided that "the presiding Judge, in his discretion hereby allows $4,000 as a reasonable attorney fee . . . ." Costs totaling $897.52 of and a medical expert fee of $275 were also assessed against defendant.

Defendant filed timely notice of appeal. She argues the trial court abused its discretion in awarding attorney fees under N.C. Gen. Stat. § 6-21.1, without considering the entire record as required by *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999). Defendant claims the court's decision rewarded plaintiff's unreasonable refusal of her pre-suit and pre-trial settlement offers.

Defendant also challenges the award of a fee four times greater than the jury verdict.

In any personal injury action where the judgment for recovery is less than $10,000, the trial judge may award the plaintiff a reasonable attorney's fee as part of costs under N.C. Gen. Stat. § 6-21.1. The award of attorney's fees pursuant to this statute is a matter of judicial discretion. *See Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334 (citing *McDaniel v. N.C. Mutual Life Ins. Co.*, 70 N.C. App. 480, 483, 319 S.E.2d 676, 678, *disc. review denied*, 312 N.C. 84, 321 S.E.2d 897 (1984)). In exercising that discretion, however, the trial court "must make some findings of fact to support the award." *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975).

In deciding whether a fee award under N.C. Gen. Stat. 6-21.1 is appropriate, the court must consider the entire record, including the following factors:

> (1) settlement offers made prior to the institution of the action . . .; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict[.]

Washington, 132 N.C. App. at 351, 513 S.E.2d at 334-35 (citations omitted). If the court elects to award attorney's fees, it must also enter findings to support the amount awarded. "[T]o determine if an award of counsel fees is reasonable, 'the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney' based on competent evidence." *Brookwood Unit Ownership Assn. v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) (quoting *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995) (quoting *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), aff'd, 335 N.C. 183, 437 S.E.2d 374 (1993))).

After carefully reviewing the record on appeal, we find the district court abused its discretion in failing to make the required findings of fact to support the fee award. No findings appear in the written judgment, and the hearing transcript reveals, at most, findings

that a settlement offer "right prior to trial" was rejected and no meaningful negotiations were held due to the parties' intransigence. Absent additional findings of fact, we cannot determine if the court's decision was based on a proper review of the record under *Washington*. We note, for example, that the court left unresolved a factual dispute as to the existence of a $1,000 settlement offer made prior to the institution of the lawsuit, a question of fact significant under factors (1) and (5) of the *Washington* analysis. *See Hicks v. Albertson*, 18 N.C. App. 599, 601, 197 S.E.2d 624, 625, *aff'd*, 284 N.C. 236, 200 S.E.2d 40 (1973). We therefore reverse the award of fees and remand for further review and fact-finding in accordance with *Washington* and *Brookwood*.

Defendant does not challenge the amount of the underlying judgment and expressly abandons her challenge to the costs and expert witness fee awarded plaintiff. Our decision leaves these portions of the judgment undisturbed.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge WALKER concur.

STATE OF NORTH CAROLINA v. TRAVIS SHAWN RUDISILL

No. COA99-1012

(Filed 4 April 2000)

Indecent Liberties— sentencing—aggravating factors—victim's age

An indecent liberties defendant received a new sentencing hearing where the sentencing judge found the statutory aggravating factor that the victim was very young, but the record showed only that the victim was seven years old. There was no finding that this child was more vulnerable simply because of his age; merely checking the AOC form is not sufficient to establish this aggravating factor except in cases where the child is of such tender age that the vulnerability is established by the nature of the crime.

STATE v. RUDISILL

[137 N.C. App. 379 (2000)]

Appeal by defendant from judgment entered 25 February 1999 by Judge Dennis J. Winner in Jackson County Superior Court. Heard in the Court of Appeals 27 March 2000.

Pursuant to a plea arrangement, defendant pled guilty to taking indecent liberties with a child. The plea arrangement left determination of sentence to the trial judge. The trial judge found aggravating and mitigating factors and sentenced defendant to a minimum term of twenty-four months and a maximum term of twenty-nine months imprisonment. The sentence exceeds the presumptive sentences for the offense. From this judgment defendant appeals pursuant to N.C. Gen. Stat. § 15A-1444(a1) (1999).

Attorney General Michael F. Easley, by Assistant Attorney General Michelle Bradshaw, for the State.

Mark R. Melrose for defendant-appellant.

SMITH, Judge.

The sentencing judge found that the statutory aggravating factor that the victim was "very young." Defendant contends the trial court improperly used the victim's age as an aggravating factor because the State did not present evidence that "the victim was more vulnerable than other victims because of his age." We agree.

Defendant was charged under N.C. Gen. Stat. § 14-202.1 (1999) which states that a person is guilty of taking indecent liberties with children if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . under the age of 16 years for the purpose of arousing or gratifying sexual desire," or "[w]illfully commits or attempts to commit any lewd or lascivious act upon . . . any child of either sex under the age of 16 years." Where age is an element of the offense, as here, the trial court can properly find the statutory aggravating factor based on age if "the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime committed against him than he otherwise would have been[.]" *State v. Farlow*, 336 N.C. 534, 540, 444 S.E.2d 913, 917 (1994).

In *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983), our Supreme Court sustained a finding of an aggravating factor that a 24-month-old victim was very young in a felonious child abuse case. The Court reasoned that, "[t]he abused child may be vulnerable due to its tender age, and *vulnerability* is clearly the concern addressed

by this factor." *Id.* Thus, without the need for any special showing by the prosecution that the victim was vulnerable, the victim's vulnerability was established simply by the victim's especially tender age and the nature of the crime.

In *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986), however, our Supreme Court rejected a finding of an aggravating factor that a 13-year-old victim was very young in an indecent liberties case. The Court reasoned that, "[w]hile a thirteen-year-old girl may be more vulnerable than a thirty-year-old woman to sexual assault, we cannot say that the victim's age made her any more vulnerable to the offense of indecent liberties with a minor than other victims of the offense. She was only two years younger than the maximum age used to define the offense." *Id.* at 113, 347 S.E.2d at 402.

Again, in *Farlow*, 336 N.C. 534, 444 S.E.2d 913, our Supreme Court was presented with the question of whether the trial court properly found as an aggravating factor that the victim was very young when defendant committed the offense of taking indecent liberties with the child. The Court stated that the victim was eleven years old and "nothing else appearing as in *Sumpter*, age alone could not be used to aggravate the sentence for the conviction of taking indecent liberties with children." *Id.* at 540, 444 S.E.2d at 917. Distinguishing *Farlow* from *Sumpter*, the Supreme Court nevertheless concluded that the trial court properly aggravated the defendant's sentence. The Court pointed out that the court did not find the statutory aggravating factor that the victim was "very young." Rather, the trial court found a nonstatutory aggravating factor that defendant's, "actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed." *Id.* In addition, the Supreme Court found that evidence of defendant bestowing gifts on the victim supported the aggravating factor of increased vulnerability.

Here, the trial court found the statutory aggravating factor that the victim was "very young." The record shows only that the victim was seven years old. Like *Sumpter*, the victim's age, alone, does not demonstrate that he was more vulnerable to the assault in this case than an older child would have been. There was no finding that this child was more vulnerable simply because of his age. We do not believe that merely checking the AOC form is sufficient to establish this aggravating factor except in cases where the child is of such tender age that the vulnerability is established by consideration of the nature of the crime. (See *Ahearn*, 307 N.C. 584, 300 S.E.2d 603).

Defendant must, therefore, receive a new sentencing hearing on his conviction for taking indecent liberties with a minor.

Other errors assigned in the sentencing hearing are not likely to reoccur; therefore, we refrain from discussing them.

Sentence vacated and remanded for new sentencing hearing.

Chief Judge EAGLES and Judge WALKER concur.

IN THE MATTER OF: JAMES LEE PEGRAM

No. COA99-731

(Filed 4 April 2000)

Appeal and Error— appealability—juvenile—adjudicatory portion of case—not a final order

Respondent-parents' appeal of an adjudicatory portion of a case filed by the Department of Social Services to have a minor child declared "dependent" under N.C.G.S. § 7A-517(13) is dismissed because the appeal is premature since N.C.G.S. § 7A-666 only authorizes the appeal of a final order in a juvenile matter.

Appeal by respondents from an order entered 3 March 1999 by Judge Joseph M. Buckner in Chatham County District Court. Heard in the Court of Appeals 14 February 2000.

Chatham County Department of Social Services, by Lunday A. Riggsbee, for petitioner appellee.

Baddour & Milner, P.L.L.C., by Allen Baddour, for Mary Pegram, respondent appellant.

Gregory W. Stafford, for Ronnie Pegram, respondent appellant.

Karen Davidson for Guardian Ad Litem.

HORTON, Judge.

This appeal arises from an adjudication on a petition filed by Chatham County Department of Social Services (DSS) to have a minor child declared to be "dependent" within the meaning of N.C.

Gen. Stat. § 7A-517(13) (1995). On 20 January 1999, the trial court adjudicated the child to be a dependent child within the meaning of the statute, and gave DSS temporary custody of the child pending a final disposition on 3 February 1999.

Mary and Ronnie Pegram (respondents), the parents of the child, filed notice of appeal on 5 March 1999. Their written notice specifically states that they are appealing the order of the trial court signed 2 March 1999. Because we find that respondents' appeal is premature, we must dismiss the appeal and remand the case for a final disposition.

N.C. Gen. Stat. § 7A-666 (1995) authorizes the appeal of any final order in a juvenile matter. It provides that notice of appeal must be entered either

> 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 . . . .

Id. (emphasis added). The statute does not authorize an appeal following the *adjudicatory* portion of the case. This appeal having been prematurely filed, must be dismissed and the case remanded to the trial court for entry of a dispositional order.

Appeal dismissed and case remanded for disposition.

Chief Judge EAGLES and Judge McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 APRIL 2000

BAREFOOT v. THERMO INDUS., INC. No. 99-249	Carteret (97CVS106)	Affirmed
CLARK v. HOST MARRIOTT CORP. No. 99-713	Durham (98CVS00489)	Affirmed
COATS v. WALL No. 99-310	Wake (95CVD9476)	Vacated and Remanded
IN RE BAILEY No. 99-582	Buncombe (98J223)	Affirmed
IN RE BASS No. 99-1099	Durham (95J75)	Affirmed
IN RE ESTATE OF HOLLAND No. 99-477	Harnett (98E535)	Affirmed
IN RE JARRETT No. 99-1078	Yadkin (97J43) (97J44)	Affirmed
IN RE TAYLOR No. 99-962	Richmond (97J140)	Affirmed
IN RE WILL OF STEWART No. 99-1024	Forsyth (98E393)	Appeal dismissed; petition for writ of certiorari denied.
LEONHARDT v. CAROLINA FREIGHT CARRIERS CORP. No. 99-855	Ind. Comm. (455250)	Affirmed
McNEIL v. PUROLATOR PRODUCTS CO. No. 99-845	Ind. Comm. (638707) (625217) (871825)	Affirmed
OFFERMAN v. OFFERMAN No. 99-458	New Hanover (97CVD1333)	Affirmed
STATE v. ALLEN No. 99-1121	Cumberland (96CRS54899)	No Error
STATE v. BARNES No. 99-1010	Cleveland (98CRS13950)	No Error
STATE v. BLOUNT No. 99-529	Beaufort (98CRS591)	No Error
STATE v. CAMPBELL No. 99-934	Robeson (97CRS00897)	No Error

STATE v. CATES No. 99-930	Durham (98CRS11303) (98CRS28995)	No Error
STATE v. COVINGTON No. 99-389	Durham (97CRS26403)	Vacated and Remanded
STATE v. DICKENS No. 99-137	Wake (95CRS44747)	No Error
STATE v. EWART No. 99-266	Haywood (98CRS1451) (98CRS1452) (98CRS1453) (98CRS1454)	No Error
STATE v. GRAY No. 99-514	Onslow (98CRS008625)	No Error
STATE v. GREEN No. 99-772	Pamlico (98CRS272)	No Error
STATE v. GULLEDGE No. 99-351	Mecklenburg (97CRS47922) (97CRS47923) (97CRS47924)	No Error
STATE v. HARRIS No. 99-988	Lenoir (97CRS10826) (97CRS10827)	No error in the trial. Remanded for correction of judgment.
STATE v. JOHNSON No. 99-525	Durham (97CRS11859) (97CRS27978)	No Error
STATE v. LEAZER No. 99-75	Wake (96CRS25674)	New Trial
STATE v. McBRIDE No. 99-1091	Richmond (96CRS3461) (96CRS3462) (96CRS3463)	No Error
STATE v. MEYERS No. 99-480	Union (96CRS3331) (96CRS3332) (96CRS3333) (96CRS3334) (96CRS3336) (96CRS3339) (96CRS3340) (96CRS3342) (96CRS3343) (96CRS3344)	No Error

STATE v. MIDGETTE No. 99-771	Pamlico (98CRS273)	No Error
STATE v. MOORE No. 99-1147	Guilford (95CRS50459) (95CRS50460) (95CRS64733) (95CRS66207) (95CRS66208) (95CRS66209) (95CRS66210) (95CRS66211) (95CRS66212) (95CRS66213) (95CRS66214) (95CRS66568) (95CRS66569) (95CRS78020)	The sentence on the misdemeanor larceny in 95CRS66212 is vacated and the cause is remanded for resentencing and correction of the judgments.
STATE v. OLLISON No. 99-1089	Pamlico (98CRS1232) (98CRS1517)	No Error
STATE v. PRICE No. 99-373	Rockingham (97CRS8754) (97CRS9762) (97CRS9763)	No Error
STATE v. SMITH No. 99-404	Moore (96CRS7019)	Remanded for resentencing
STATE v. SQUIRE No. 99-1034	Mecklenburg (98CRS1884) (98CRS253) (98CRS707)	No Error
STATE v. TRODY No. 99-898	Carteret (98CRS12954) (99CRS8645)	Remanded
STATE v. WHITE No. 98-1438	Gaston (97CRS22153) (97CRS24484) (97CRS24487)	No Error
STOUT v. EVANS No. 99-615	Gaston (98CVS1158)	Reversed

BRENDA W. WALKER, STANLEY G. LABORDE AND LAWRENCE J. VERNY, PLAINTIFFS v. MACEO K. SLOAN, JUSTIN F. BECKETT, PETER J. ANDERSON, MORRIS GOODWIN, JR., SLOAN FINANCIAL GROUP, INC., NCM CAPITAL MANAGEMENT GROUP, INC., NEW AFRICA ADVISERS, INC., AND AMERICAN EXPRESS FINANCIAL ADVISORS, INC., DEFENDANTS

No. COA98-1541

(Filed 18 April 2000)

1. Appeal and Error— appealability—related issues of fact

Plaintiffs' appeals from dismissal orders were interlocutory but were properly before the Court of Appeals as affecting a substantial right which might be lost without immediate review where all of plaintiffs' claims involved related issues of fact and delaying the appeal would create the possibility of inconsistent verdicts from different juries on the same factual issues.

2. Wrongful Interference— sufficiency of allegations—damages

The trial court did not err by granting a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) on a claim for tortious interference with prospective economic advantage where plaintiffs stated that defendants' actions resulted in actual damage to plaintiffs but the precise damages were unclear.

3. Unfair Trade Practices— employee buyout of business—bad-faith business dealing—ratification

The trial court erred by granting a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) on an unfair trade practices claim against some of the defendants arising from a failed employee buyout of a business where the allegations of misconduct against two of the owners point to the kind of bad faith business dealing which could constitute an unfair trade practice within the meaning of N.C.G.S. § 75-1.1, and the allegations against the board of the business were sufficient to show an implied ratification of the wrongful actions of the owners.

4. Unfair Trade Practices— insufficiency of allegations

The trial court correctly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) against the American Express defendants of an unfair trade practice claim arising from a failed employee buyout of a business where the complaint completely lacked any allegations that any of the American Express defendants committed an act or engaged in a practice that could be characterized as

unfair under N.C.G.S. § 75-1.1 and did not allege sufficient facts to show that the American Express defendants were deceptive in their dealings with the employee group.

5. Fraud— constructive—sufficiency of allegations

The trial court correctly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of claims for constructive fraud in an action arising from a failed employee buyout of a business where the complaint did not allege that defendants sought to benefit themselves through their conduct.

6. Pleadings— amendment—denied

The trial court did not abuse its discretion by denying leave to amend a complaint where plaintiffs moved to amend on 14 May after the complaint was filed on 23 December and the answer on 18 February, with nothing in the record indicating the reason for the delay. Moreover, the proposed amendment would still have failed to state a claim for constructive fraud.

Appeal by plaintiffs from orders entered 10 June 1998, 17 July 1998 and 17 August 1998 by Judge Henry V. Barnette, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 20 September 1999.

Smith Helms Mullis & Moore, L.L.P., by J. Anthony Penry, and Fontana & Lanier, P.A., by Lynn Fontana, for plaintiffs-appellants.

Moore & Van Allen, PLLC, by Lewis A. Cheek and Andrew B. Cohen, for defendants-appellees Maceo K. Sloan, Justin F. Beckett, Sloan Financial Group, Inc., NCM Capital Management Group, Inc., and New Africa Advisers, Inc.

R. Jonathan Charleston for defendants-appellees Peter J. Anderson, Morris Goodwin, Jr., and American Express Financial Advisors, Inc.

TIMMONS-GOODSON, Judge.

Brenda W. Walker ("Walker"), Stanley G. Laborde ("Laborde"), and Lawrence J. Verny ("Verny") (collectively, "plaintiffs") instituted an action on 23 December 1998 against Maceo K. Sloan ("Sloan"), Justin F. Beckett ("Beckett"), Sloan Financial Group, Inc. ("SFG" or "SFG/NCM"), NCM Capital Management Group, Inc. ("NCM" or

"SFG/NCM"), New Africa Advisers, Inc. ("New Africa"), Peter J. Anderson ("Anderson"), Morris Goodwin, Jr. ("Goodwin"), and American Express Financial Advisors, Inc. ("American Express") alleging claims for: (i) tortious interference with prospective economic advantage, (ii) unfair and deceptive trade practices, (iii) constructive fraud, (iv) fraud, (v) breach of contract, (vi) breach of fiduciary duty, and (vii) violation of the North Carolina Wage and Hour Act. On 18 February 1998, Sloan, Beckett, SFG, NCM, and New Africa (collectively, "the Sloan defendants") filed an answer and motion to dismiss plaintiffs' claims for tortious interference with prospective economic advantage, unfair and deceptive trade practices, constructive fraud, and breach of fiduciary duty under Rule 12(b)(6) of the Rules of Civil Procedure. Additionally, Anderson, Goodwin, and American Express (collectively, "the American Express defendants") moved to dismiss the claims brought against them—unfair and deceptive trade practices, constructive fraud, and breach of fiduciary duty—pursuant to Rule 12(b)(6). On 14 May 1998, the trial court heard arguments on the motions, and during the course of the hearing, plaintiffs moved for leave to amend their complaint. The court allowed plaintiffs leave to amend the claims for unfair and deceptive trade practices and breach of fiduciary duty. However, by order dated 10 June 1998, the trial court, in accordance with Rule 12(b)(6), dismissed plaintiffs' claims for tortious interference with prospective economic advantage and constructive fraud, as well as all claims asserted against New Africa.

Plaintiffs filed an amended complaint on 3 June 1998. On 16 June 1998, the Sloan defendants filed a "Renewed Partial Motion to Dismiss" plaintiffs' claims for unfair and deceptive trade practices and breach of fiduciary duty. The American Express defendants likewise moved to dismiss all claims pertaining to them. The Sloan defendants and the American Express defendants also moved to strike portions of plaintiffs' amended complaint, i.e., new allegations concerning those claims that the court had previously dismissed. In an order dated 17 July 1998, the trial court struck paragraphs 60, 65, 87 and 93 of the amended complaint and all references to those paragraphs. Then, on 17 August 1998, the trial court entered an order dismissing plaintiffs' claims for unfair and deceptive trade practices and breach of fiduciary duty. Plaintiffs filed timely notices of appeal from the 10 June, 17 July, and 17 August 1998 orders. On 6 November 1998, the trial court found that the three orders affected a substantial right, and in the alternative, certified them as final judgments pursuant to Rule 54(b) of the Rules of Civil Procedure.

The amended complaint alleges that plaintiffs are senior-level offices of NCM, a registered investment advisory firm that provides investment supervisory services to its clients in exchange for a percentage of the assets under management. In 1991, Sloan, Beckett, and American Express formed SFG, a minority-owned holding company incorporated under the laws of North Carolina for the purpose of acquiring NCM from North Carolina Mutual Life Insurance Company. American Express invested approximately $7,000,000 to fund the acquisition, 60% of which consisted of personal loans to Sloan and Beckett. In connection with the capitalization of SFG/NCM, American Express purchased 40% of the stock. Sloan and Beckett purchased 43% and 17% of the stock, respectively, and both pledged their shares as collateral for the loans from American Express.

American Express elected two representatives, Anderson and Goodwin, to serve on the Board of Directors ("the Board") with Sloan and Beckett. The corporation's bylaws provided that Sloan was to maintain managing control of the company and that American Express would maintain minority voting status on the Board. However, in the event that Sloan failed to pay dividends to American Express for three years, the latter would assume voting control, but not managing control, of SFG/NCM.

In December of 1996, Anderson and Goodwin met with Rodney B. Hare, NCM's Senior Vice President of Marketing and Client Services for the Midwest Region, to discuss their concerns regarding Sloan's management of NCM. During the meeting, Hare inquired as to whether American Express would be willing to sell its share of SFG/NCM to a group of key employees. Goodwin and Anderson responded affirmatively and quoted an expected sale price for the entire company, stating that they could "persuade" Sloan to sell his interest.

On 8 and 9 January 1997, American Express conducted an extensive review of SFG/NCM, which uncovered a series of irregular investment practices that could potentially subject the company to liability. Following the review, Goodwin approached Hare and said that if an employee group was still interested in buying SFG/NCM, "we are very interested in talking to you about that." Relying on the representations of Goodwin and Anderson, a group ("the employee group") consisting of plaintiffs and five other senior-level executives of NCM was formed with the objective of procuring an equity partner to join in the buyout of SFG/NCM. On 10 March 1997, the employee

group met with Sloan and presented him with a formal letter of interest regarding the purchase of SFG/NCM. The employee group sent similar letters to the remaining SFG/NCM Board members.

In anticipation of the purchase, the employee group began negotiations with two potential funding sources—the Edgar Lomax Company ("Lomax") in Springfield, Virginia, and Loomis Sayles & Company ("Loomis") in Bloomfield, Michigan. Representatives of both companies met with the SFG/NCM Board during a 21 March 1997 meeting. The Board expressed its interest in selling the company to the employee group and requested that Randall Eley of Lomax complete a standard form regarding the proposed deal, which was to be forwarded to Eley within 24 hours of the meeting. Goodwin and Anderson also prepared a letter for Sloan to send to Lomax. Sloan delayed in sending the materials, and when Lomax finally received the documents, their contents were different from what Goodwin and Anderson had drafted. Furthermore, without prior approval of the Board, Sloan communicated to Eley that he would only consider a cash deal, rather than the industry-standard installment sale.

Following the 21 March 1997 meeting, Sloan and Beckett terminated several members of the employee group, i.e., Walker, Hare, Verny, and McCaskill. Despite protests from the group, the SFG/NCM Board took no action to intervene and stop the terminations. The instability brought about by the firings impaired the employee group's negotiations with the funding sources, and as a result, they withdrew their offers to finance the purchase.

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[1] Initially, we note that the dismissal orders from which plaintiffs appeal are interlocutory, as they do not dispose of all claims between all parties. *See Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999) (order is interlocutory if it does not dispose of entire controversy between the parties). Ordinarily, interlocutory orders are not immediately appealable. *Id.* Direct appeal may be had from an interlocutory order, however, if deferring the appeal will injure a substantial right of one or more parties. *Abe v. Westview Capital*, 130 N.C. App. 332, 502 S.E.2d 879 (1998).

The original and amended complaints demonstrate that plaintiffs' many claims against defendants involve related issues of fact. This Court has held that although the right to avoid multiple trials is not, itself, a substantial one, the right to prevent separate trials of the same factual issues is, indeed, a substantial right. *Davidson v. Knauff*

Ins. Agency, 93 N.C. App. 20, 376 S.E.2d 488 (1989). The following rationale applies:

> [W]hen common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Id. at 25, 376 S.E.2d at 491 (second alteration in original) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982)). Accordingly, we conclude that the present orders of dismissal are properly before us, because they affect a substantial right of plaintiffs which might be lost if we deny immediate review. That said, we move now to our analysis of plaintiffs' assignments of error.

[2] Plaintiffs first assign as error the order dismissing their cause of action against the Sloan defendants for tortious interference with prospective economic advantage. Plaintiffs contend that the averments made in their original complaint concerning Sloan's and Beckett's conduct with regard to the employee group's efforts to secure financing from Lomax or Loomis were sufficient to state such a claim. We cannot agree.

A motion to dismiss a complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted challenges the legal sufficiency of the pleading. *Kane Plaza Associates v. Chadwick*, 126 N.C. App. 661, 486 S.E.2d 465 (1997). Dismissal is warranted "(1) when the face of the complaint reveals that no law supports plaintiff[s'] claim; (2) when the face of the complaint reveals that some fact essential to plaintiff[s'] claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff[s'] claim." *Peterkin v. Columbus County Bd. of Educ.*, 126 N.C. App. 826, 828, 486 S.E.2d 733, 735 (1997) (emphasis omitted). In ruling on a Rule 12(b)(6) motion to dismiss, the trial court regards all factual allegations of the complaint as true. *Kane Plaza*, 126 N.C. App. at 664, 486 S.E.2d at 467. Legal conclusions, however, are not entitled to a presumption of truth. *Peterkin*, 126 N.C. App. at 828, 486 S.E.2d at 735.

An action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the

plaintiffs from entering into a contract with a third party. *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992). In *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E.2d 647 (1945), our Supreme Court stated the following:

> We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant[s'] own rights, but with design to injure the plaintiff[s], or gaining some advantage at [their] expense. . . . In *Kamm v. Flink*, 113 N.J.L., 582, 99 A.L.R., 1, it was said: "Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results." The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff[s] or gaining some advantage at [their] expense.

225 N.C. at 506, 35 S.E.2d at 656. Thus, to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in "inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference." *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917, *disc. review denied and appeal dismissed*, 307 N.C. 127, 297 S.E.2d 399 (1982).

With respect to their claim for tortious interference with prospective economic advantage, plaintiffs' original complaint alleges the following:

> 54. A valid business relationship existed between plaintiffs, as members of the employee group, and Edgar Lomax and Loomis Sayles.
>
> 55. Plaintiffs reasonably expected that they, as members of the employee group, would contract with either Edgar Lomax or Loomis Sayles regarding the purchase of Sloan Financial and/or NCM.
>
> 56. Defendants knew of the relationship between plaintiffs and Edgar Lomax and Loomis Sayles and induced Edgar Lomax and Loomis Sayles not to contract with plaintiffs.

> 57. In so doing, defendants acted without justification, not in the legitimate exercise of defendants' own rights, but with design to injure the plaintiffs or to obtain some advantage at their expense.
>
> 58. Defendants [sic] actions resulted in actual damage to the plaintiffs.

The complaint further alleges that Sloan delayed in sending necessary information to Lomax and informed the lender that he would only consider a cash deal, rather than an industry-standard installment sale. Plaintiffs aver that these behaviors were motivated by Sloan's desire to cause Lomax to withdraw as a potential funding source for the employee group. Additionally, the complaint alleges that Sloan and Beckett terminated several key members of the employee group, causing Lomax to cease negotiations with the group regarding financing. The complaint also relevantly states the following:

> The motives of Defendants Sloan and Beckett in interfering with plaintiff's [sic] prospective contractual relations with Edgar Lomax and Loomis Sayles were not reasonably related to the protection of a legitimate business interest of Sloan Financial but were for their own personal benefit, including but not limited to preventing further disclosures of their own malfeasance and mismanagement of NCM and Sloan Financial and preventing the repayment of their personal loan to American Express, and were motivated by personal ill will, spite and a desire to retaliate against the employee group for forming an alliance to purchase the company, and for responding to requests for information from the American Express Board members regarding Sloan's and Beckett's mismanagement of Sloan Financial and NCM.

Plaintiffs contend that in stating their claim for wrongful interference with a prospective economic advantage, they were not required to allege that a contract with Lomax or Loomis would have ensued "but for" defendants' actions. Assuming *arguendo* that a "but for" allegation was not necessary, plaintiffs were, nonetheless, required to assert some measurable damages resulting from defendants' allegedly tortious activities, i.e., what "economic advantage" was lost to plaintiffs as a consequence of defendants' conduct. Regarding damages, the complaint states only that "Defendants [sic] actions resulted in actual damage to the plaintiffs." It is unclear from this averment precisely what damages plaintiffs contend they have suffered. Our Supreme Court has stated that "[a] defendant is entitled to know from the complaint the character of the injury for which he

must answer." *Thacker v. Ward*, 263 N.C. 594, 599, 140 S.E.2d 23, 28 (1965). Because plaintiffs have failed to sufficiently plead damages, we conclude that the trial court properly dismissed their claim for tortious interference with prospective economic advantage pursuant to Rule 12(b)(6).

[3] With their next assignment of error, plaintiffs argue that the trial court erred in dismissing their claim for unfair and deceptive trade practices against the Sloan defendants. After careful examination of plaintiffs' amended complaint, we are constrained to agree.

Under section 75-1.1 of the General Statutes, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (1999). The statute defines "commerce" as "all business activities, however denominated." N.C.G.S. § 75-1.1(b). To state a claim for unfair and/or deceptive trade practices, the plaintiffs must allege that (1) the defendants committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiffs or to the plaintiffs' business. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 464 S.E.2d 47 (1995). " 'A [trade] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' " *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986) (quoting *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980)), *disc. review dismissed as improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987). Furthermore, " '[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.' " *Opsahl*, 81 N.C App. at 69, 344 S.E.2d at 76 (alteration in original) (quoting *Johnson*, 300 N.C. App at 264, 266 S.E.2d at 622). The question of whether a particular practice is unfair or deceptive is a legal one reserved for the court. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 282-83, 432 S.E.2d 428, 436 (1993), *aff'd per curiam*, 339 N.C. 602, 453 S.E.2d 146 (1995).

Plaintiffs' amended complaint alleges that the Sloan defendants violated the Unfair Trade Practices Act by engaging in the following "unfair, unethical, unscrupulous, immoral, and oppressive" activities:

> 67. a. On March 10, 1997 Sloan attempted to break up the employee group immediately upon learning of its formation

by attempting to bribe the portfolio managers into withdrawing from the group by promising them they would be "taken care of" later financially if they disassociated themselves from the group. Sloan's intent was to keep the employee group from buying Sloan Financial. Sloan's conduct was immoral, illegal, and unscrupulous.

b. When Sloan's overt effort to break up the employee group failed, he turned to other methods designed to keep the employee group from buying Sloan Financial, including refusing to participate in good faith in due diligence; refusing to send the letter drafted by Goodwin and Anderson to Edgar Lomax as instructed; telling Randall Eley of Edgar Lomax that he would only consider a "cash deal" for the purchase of the entire company when he had absolutely no right or authority to set the terms of the deal; and finally, terminating the plaintiffs. Sloan's conduct was immoral and oppressive and constitutes an inequitable assertion of his power or position.

The complaint further alleges that Sloan's acts "were in or affecting commerce" and that they "proximately caused injury to the plaintiffs, consisting of lost profits, lost wages and other benefits and income, and expenses including attorneys fees." Plaintiffs also aver that "[SFG], NCM, and New Africa are liable for the acts of Sloan under respondeat superior or agency principles." We note, in addition, that plaintiffs specifically incorporate prior allegations that Beckett acted with Sloan and pursuant to the same improper motive in terminating members of the employee group.

The allegations of Sloan's (and Beckett's) misconduct, on their face, point to the kind of bad faith business dealing which, if proved, could constitute an unfair trade practice within the meaning of section 75.1-1 of the General Statutes. Thus, plaintiffs have successfully stated a claim for unfair trade practices against Sloan and Beckett. The complaint also sufficiently alleges an unfair trade practice claim against SFG and NCM on the basis of respondeat superior.

A principal will be liable for the wrongful acts of its agent if the plaintiffs demonstrate the following:

the agent's act [was] (1) expressly authorized by the principal; (2) committed within the scope of the agent's employment and in furtherance of the principal's business—when the act comes within his implied authority; or (3) ratified by the principal.

B.B. Walker Co. v. Burns International Security Services, 108 N.C. App. 562, 565, 424 S.E.2d 172, 174 (1993). Ratification is " 'the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.' " *In re Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (quoting *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982) (citation omitted)), *cert. denied*, 351 N.C. 353, —— S.E.2d —— (2000). To establish ratification, the plaintiffs must show that the principal " 'had knowledge of all material facts and circumstances relative to the wrongful act, and that the [principal], by words or conduct, show[ed] an intention to ratify the act.' " *Phelps v. Vassey*, 113 N.C. App. 132, 136, 437 S.E.2d 692, 695 (1993) (second alteration in original) (quoting *Brown v. Burlington Indus., Inc.*, 93 N.C. App. 431, 437, 378 S.E.2d 232, 236 (1989). Ratification " 'may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act[.]' " *Espinosa*, 135 N.C. App. at 309, 520 S.E.2d at 111 (quoting *American Travel*, 57 N.C. App. at 442, 291 S.E.2d at 895) (citation omitted).

Plaintiffs' cause of action against the Sloan defendants for unfair trade practices incorporates, by reference, the following allegations, in pertinent part:

> 43. Upon information and belief, Board members Anderson and Goodwin knew that Sloan was delaying in sending the financial records, the form, and letter to Randall Eley but failed to intervene to ensure that Sloan acted in the best interests of Sloan Financial. . . .
>
> . . . .
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> 46. Shortly after the April 1 terminations [of Walker and Hare], the employee group asked the Sloan Financial Board to intervene to stop the terminations because they were adversely affecting the stability and value of the company and were interfering with the group's ability to negotiate the purchase of the company.
>
> 47. The Board failed to intervene to stop the terminations. The Board also failed to take any action to ensure that Sloan cooperated as directed in due diligence, such as by providing information and assurances as requested to Edgar Lomax.

48. On or about May 1, 1997 Sloan and Beckett terminated Lawrence Verny and Dennis McCaskill, Jr. Sloan's and Beckett's intent in terminating Verny and McCaskill was to break up the group and stop the group from contracting with Loomis Sayles or Edgar Lomax. Again, the Board failed to intervene to stop the terminations.

These allegations, taken as true, are sufficient to show that the SFG/NCM Board impliedly ratified the allegedly wrongful actions of Sloan and Beckett. Accordingly, we hold that plaintiffs' claim for unfair and deceptive trade practices against Sloan, Beckett, SFG, and NCM were adequately plead so as to withstand a challenge under Rule 12(b)(6). The claim against New Africa for unfair trade practices was properly dismissed, as the complaint is devoid of any factual allegations to support such a claim.

[4] Plaintiffs contend that they also stated a cause of action against the American Express defendants under section 75-1.1 of the General Statutes. We must disagree.

Regarding the American Express defendants, plaintiffs' amended complaint states as follows:

72. . . . the actions described below had the tendency or capacity to deceive the public and plaintiffs and actually deceived plaintiffs, or were unfair to the plaintiffs.

a. Goodwin and Anderson deceived the plaintiffs into believing that American Express had control of Sloan Financial and Sloan's and Beckett's shares and that American Express would take all steps necessary to effectuate the sale of Sloan Financial to the plaintiffs.

b. American Express misrepresented to plaintiffs its intent to sell to the plaintiffs.

c. Goodwin and Anderson actively encouraged the plaintiffs to form a group to buy Sloan Financial yet failed to disclose to plaintiffs the results of the review of January 8-9, 1997 as set forth in paragraph 30.

d. Goodwin's and Anderson's deceptive misrepresentations and omissions caused plaintiffs to incur in excess of $20,000 in attorneys' fees, costs and other expenses related to the formation of the group.

> e. Goodwin's and Anderson's actions were unfair and unethical in that after inducing the plaintiffs' group to form and expend a considerable amount of time and money in their efforts to negotiate with the two funding sources, Goodwin and Anderson stood by and did nothing while Sloan intentionally refused to participate in due diligence, then gutted the firm by terminating the plaintiffs.

In paragraph 30 of the complaint, plaintiffs contend that the review uncovered a multitude of investment activities by NCM which subjected the company to liability for self-dealing and "rais[ed] significant regulatory and liability issues." The complaint further alleges that the actions of Goodwin and Anderson "were in or affecting commerce" and that such actions "proximately caused actual injury to the plaintiffs." Plaintiffs also aver that American Express is liable for the actions of Goodwin and Anderson in that such actions "were taken in the course and scope of their employment with American Express or in furtherance of American Express's business."

As previously stated, an act is "unfair" within the meaning of section 75-1.1 if the act " 'is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' " *Jones v. Capitol Broadcasting Co.*, 128 N.C. App. 271, 276, 495 S.E.2d 172, 175 (1998) (quoting *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)). A practice is deemed to be deceptive if it " 'possess[es] the tendency or capacity to mislead, or creat[es] the likelihood of deception.' " *Forsyth Memorial Hospital v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 170 (1992) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981)). Recovery will not be had, however, where the complaint fails to demonstrate that the act of deception proximately resulted in some adverse impact or actual injury to the plaintiffs. *Miller v. Ensley*, 88 N.C. App. 686, 365 S.E.2d 11 (1988).

At the outset, we note that plaintiffs' complaint completely lacks any allegations suggesting that any of the American Express defendants committed an act or engaged in a practice that could be characterized as "unfair" under section 75-1.1. Similarly, we hold that plaintiffs' complaint does not allege sufficient facts to show that the American Express defendants were deceptive in their dealings with the employee group. The statements or representations of which plaintiffs complain are set out as follows:

> 24. . . . Goodwin and Anderson indicated that American Express would be very interested in selling to an employee group, and stated that since Sloan and Beckett had not paid interest in three years thereby not complying with the agreement between Sloan, Beckett, and American Express, and in fact were in default under that agreement, that the price at which American Express would sell the entire company was ten to eleven million dollars. Goodwin and Anderson also indicated that if necessary they could "persuade" Sloan to sell his interest.
>
> . . . .
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> 30. . . . Goodwin further stated to Hare that if the employee group was interested in buying "we are very interested in talking to you about that." Goodwin assured Hare that American Express would do what was necessary to make the transaction happen. . . .

We have said that dismissal under Rule 12(b)(6) is appropriate if "the face of the complaint reveals that some fact essential to plaintiff[s'] claim is missing" or if "some fact disclosed in the complaint defeats plaintiff[s'] claim." *Peterkin*, 126 N.C. App. at 828, 486 S.E.2d at 735 (emphasis omitted). Plaintiffs allege, as one basis for their claim of deceptive trade practices, that the American Express defendants failed to disclose the results of the 8 and 9 January review, i.e., that SFG/NCM had engaged in various investment practices that subjected the company to potential liability. This fact, even if taken as true, is not a sufficient basis for plaintiffs' claim, because their purchase of SFG/NCM was not achieved, and they cannot show any actual injury resulting from the alleged omission.

Additionally, plaintiffs complain that they relied to their detriment on Goodwin's and Anderson's allegedly fraudulent representations (1) that American Express had control of SFG/NCM, (2) that American Express wanted to sell the company to the employee group, and (3) that American Express would take all necessary steps to effectuate the sale. The pleading, however, contains allegations which would indicate that Goodwin's and Anderson's statements were neither false nor misleading. For instance, plaintiffs allege the following facts:

> 27. . . . On or about January 1, 1997 American Express took control of Sloan Financial and NCM and . . . because Sloan and Beckett had defaulted on their personal loans from American Express for three years, American Express as of January 1, 1997

had actual or de facto control of Sloan's and Beckett's shares of Sloan Financial and NCM.

. . . .

39. . . . Upon information and belief, Goodwin and Anderson instructed Sloan and Beckett to cooperate regarding due diligence and all other steps necessary to effectuate the sell. . . .

. . . .

51. Upon information and belief, at no time relevant to this Complaint did American Express decide that it no longer wanted to sell Sloan Financial to the plaintiffs, and, in fact, American Express has continued to try to sell Sloan Financial to other entities after the two funding sources pulled out of negotiations with the plaintiffs.

These averments necessarily defeat plaintiffs' claim that the American Express defendants violated the prohibition against unfair and deceptive trade practices. Therefore, the trial court was correct in dismissing this claim under Rule 12(b)(6).

[5] Plaintiffs' next assignment of error is that the trial court improvidently dismissed their claims against the Sloan and American Express defendants for constructive fraud. Our review of plaintiffs' original complaint, however, compels us to disagree.

To state a cause of action for constructive fraud, "plaintiff[s] must allege facts and circumstances which created the relation of trust and confidence and 'which led up to and surrounded the consummation of the transaction in which defendant[s] [are] alleged to have taken advantage of [their] position of trust to the hurt of plaintiff[s].' " *Ridenhour v. IBM Corp.*, 132 N.C. App. 563, 566, 512 S.E.2d 774, 777 (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citation omitted)), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999). Moreover, "an essential element of constructive fraud is that 'defendants sought to benefit themselves' in the transaction." *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998) (quoting *Barger*, 346 N.C. at 667, 488 S.E.2d at 224), *cert. dismissed as improvidently granted*, 350 N.C. 57, 510 S.E.2d 374 (1999).

In essence, plaintiffs' action for constructive fraud against the Sloan and American Express defendants states that "[a] relationship

of trust and confidence existed between the plaintiffs and defendants" and that "[t]he defendants failed to act in good faith with respect to the transaction between the parties, to the hurt of the plaintiffs." The complaint does not, however, allege that the Sloan or American Express defendants sought to benefit themselves through their conduct. Accordingly, plaintiffs' claim for constructive fraud must fail.

[6] Plaintiffs further contend that the trial court erred by dismissing all claims in their original complaint against New Africa. However, after thoroughly examining the pleading, we are satisfied that the court did not err, in that the complaint fails to allege any cause of action against New Africa. As to plaintiffs' final contention that the court should have permitted them leave to amend their claims for tortious interference with prospective economic advantage and constructive fraud, we find no abuse of discretion.

Once an answer has been served, plaintiffs must seek leave of court to amend their complaint, and "leave shall be freely given when justice so requires." N.C.R. Civ. P. 15(a). A motion to amend, however, is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent proof that the judge manifestly abused that discretion. *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982). Where the court's reason for denying leave to amend is not stated in the record, " 'this Court may examine any apparent reasons for such denial.' " *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985) (quoting *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 42-43, 298 S.E.2d 409, 411 (1982), *pet. disc. review denied*, 308 N.C. 194, 302 S.E.2d 248 (1983)). Reasons warranting a denial of leave to amend include "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.*

Here, plaintiffs orally moved to amend their complaint during the 14 May 1998 hearing on the motions to dismiss made by the Sloan and American Express defendants. Plaintiffs' original complaint was filed 23 December 1997, and the Sloan defendants filed their answer on 18 February 1998. Nothing in the record before us explains plaintiffs' delay in seeking to amend their complaint. Plaintiffs, therefore, have not met their burden of showing an abuse of the court's discretion. *See Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 340 S.E.2d 518 (1986) (affirming denial of leave to amend where record does not indicate why plaintiff waited three months from filing of answer before moved to amend complaint). Furthermore, we have

reviewed the proposed amendment and conclude that it still fails to state a claim for constructive fraud against any defendant. Thus, we uphold the court's order denying plaintiffs' motion to amend.

In sum, we affirm dismissal of the following claims: (1) tortious interference with prospective economic advantage against the Sloan defendants; (2) unfair and deceptive trade practices against the American Express defendants; (3) constructive fraud against the Sloan and American Express defendants; and (4) all claims against New Africa. We, however, reverse the dismissal of plaintiffs' claim for unfair and deceptive trade practices against the Sloan defendants (excluding New Africa), and remand this cause for further appropriate proceedings.

Affirmed in part, reversed in part, and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ALFRED WILLIAM RILEY, JR.

No. COA99-207

(Filed 18 April 2000)

1. Homicide— first-degree murder—short-form indictment—sufficient

Defendant's motion for appropriate relief (MAR), based on the use of a short-form indictment under N.C.G.S. § 15-144 to charge him with first-degree murder, is denied because: (1) defendant was in a position on a previous appeal to raise the issues in the MAR but failed to do so, N.C.G.S. § 15A-1419(a)(3) and (b); and (2) our Supreme Court has held that the short-form indictment is adequate to charge first-degree murder.

2. Evidence— chain of events—not part of crime charged

The trial court did not abuse its discretion in a non-capital first-degree murder and assault with a deadly weapon inflicting serious injury case by admitting evidence that defendant told another person at the nightclub where the shootings occurred that he "had gotten in some trouble" earlier that evening at a nearby nightclub because: (1) the probative value of the evidence

outweighed any danger of unfair prejudice, N.C.G.S. § 8C-1, Rules 403 and 404(b); and (2) this evidence was not part of the crime charged, but pertained to the chain of events explaining the context, motive, and set-up of the crime.

3. Criminal Law— prosecutor's closing argument—evidence defendant brought a firearm—premeditation

The trial court did not abuse its discretion in a non-capital first-degree murder and assault with a deadly weapon inflicting serious injury case by overruling defendant's objections to statements made by the prosecutor during closing argument discussing the implications of evidence that defendant brought a firearm to the nightclub because the evidence of defendant's preparation for a possible encounter, however unexpected, is admissible evidence of premeditation.

4. Criminal Law— prosecutor's closing argument—characterization of defendant as "evil"—inferences supported by evidence

The trial court did not abuse its discretion in a non-capital first-degree murder and assault with a deadly weapon inflicting serious injury case by overruling defendant's objections to statements made by the prosecutor during closing argument, speculating on the contents of defendant's mind immediately after stating that defendant's thoughts were unknowable, because the prosecutor's characterization of defendant as "evil" was not inconsistent with the record, nor did the argument exceed the bounds permitted in final argument.

5. Criminal Law— prosecutor's closing argument—aider and abettor—inferences supported by evidence

The trial court did not abuse its discretion in a non-capital first-degree murder and assault with a deadly weapon inflicting serious injury case by overruling defendant's objections to statements made by the prosecutor during closing argument, concerning evidence that defendant's automobile was discovered behind his friend's house after the shooting at the nightclub to show the friend hid the car for defendant while helping him to escape, because: (1) the evidence supported a reasonable inference that the friend allowed defendant to hide his car behind her house before he left North Carolina; and (2) the trial court properly instructed the jury to consider the prosecutor's argument as a contention, not as evidence.

6. Criminal Law— requested jury instructions—verbatim not required

The trial court did not err in a non-capital first-degree murder and assault with a deadly weapon inflicting serious injury case by refusing to give the jury defendant's requested additional instruction on premeditation and deliberation because the trial court gave the pattern jury instruction, which viewed in its entirety encompassed the substance of defendant's request.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 8 May 1998 by Judge Henry W. Hight, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 11 January 2000.

Michael F. Easley, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Judge.

Defendant Alfred William Riley, Jr., appeals his conviction of non-capital first-degree murder and assault with a deadly weapon inflicting serious injury. We find no error in his trial.

Defendant's convictions stem from a 24 November 1994 altercation between two sets of brothers at the Pac Jam II nightclub in Burlington. Jacqueline Johnson (Ms. Johnson) was at Pac Jam II that night along with the victim, Vernodia "Buck" Tinnin (Tinnin); Tinnin's brother, Anthony "Pooty" Hurdle (Hurdle); and Michael Faucette (Faucette). While there, Ms. Johnson began a conversation with defendant outside the club. Defendant told her that he "had gotten in some trouble" at the nearby All for One nightclub and that police were looking for him and his little brother, Anthony Lafontant (Lafontant). Defendant asked Ms. Johnson to tell the police that Lafontant was staying with her; in a subsequent conversation, he also asked her to put his gun in her car. She refused both requests. Later in the evening, but before the shooting that led to the instant murder charge, Ms. Johnson noticed defendant speaking with Officer Billy White of the Burlington Police Department.

A fight broke out between the victim's brother, Hurdle, and defendant's brother, Lafontant, between 2:15 and 2:30 a.m. inside Pac

Jam II. When Lafontant stepped on Hurdle's shoe, Hurdle asked Lafontant whether he was going to say "excuse me." Lafontant responded with a curse, and a shoving match ensued. Lafontant stepped back, reached into his pocket, and began to pull out something shiny. At that moment, Tinnin, the eventual victim, picked up a chair and hit Lafontant on the head. Defendant drew a semi-automatic pistol from his pants and began shooting while club patrons ran for the exit. Faucette was hit in the thigh. As defendant shot through the crowd at Faucette, Tinnin yelled and moved to the pool table, crawling, or squatting and running. Defendant stood over Tinnin and fired several shots down toward him, then rolled the victim over with his foot and said, "I got your ass." Apparently Tinnin was not immediately incapacitated by the shots, because he began to struggle with defendant, who held his pistol to Tinnin's head and pulled the trigger. The weapon did not fire, and Tinnin was taken to a hospital, where he died.

Dr. John D. Butts, Chief Medical Examiner of North Carolina, testified that Tinnin suffered two gunshot wounds. One bullet entered the left back, passed through the chest, and exited the middle part of the body. The second bullet entered and exited Tinnin's right leg. These wounds caused Tinnin's death.

Defendant was indicted for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. On 23 February 1996, he was convicted of first-degree murder and assault with a deadly weapon inflicting serious injury. This Court granted defendant a new trial on both charges, *see State v. Riley*, 128 N.C. App. 265, 495 S.E.2d 181 (1998), and upon retrial, defendant was found guilty on 8 May 1998 of the same two charges. Defendant was sentenced to consecutive prison terms of life without parole for the murder and forty-two to sixty months for the assault. Defendant appeals.

I.

[1] We begin by addressing defendant's Motion for Appropriate Relief (MAR), filed with this Court on 30 August 1999 pursuant to N.C. Gen. Stat. § 15A-1418(a) (1999). The substance of defendant's claim in his MAR is that use of a "short form" indictment pursuant to N.C. Gen. Stat. § 15-144 (1999) to charge him with first-degree murder was unconstitutional. The State responds that the MAR should be denied. We agree with the State. That defendant was in a position on a previous appeal to raise the issues in the MAR but failed to do so is

grounds for denial of the motion. *See* N.C. Gen. Stat. § 15A-1419(a)(3) and (b) (1999). As noted above, this case has been tried, appealed, remanded, and retried. At no point in any of these proceedings has the issue of the constitutionality of the short form indictment been raised. Our Supreme Court has held that the short form indictment is adequate to charge first-degree murder. *See State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). Defendant argues that, during the pendency of the instant appeal, the issue of the indictment's constitutionality was reopened by a recent decision of the United States Supreme Court. *See Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999). However, defendant also candidly concedes in his MAR that the issue is not new:

> [T]his constitutional requirement [that all elements be specified in the indictment] existed at the time that Mr. Riley was indicted in 1995.
>
> . . . .
>
> The current statute, N.C.G.S. Section 15-144, which allows a first-degree murder indictment without alleging all the essential elements, is unconstitutional under *Jones v. United States*, and earlier decisions of the Supreme Court . . . .

Therefore, defendant's argument is that *Jones* clarified existing law. "Motions for appropriate relief generally allow defendants to raise arguments that could not have been raised in an original appeal, such as claims based on newly discovered evidence and claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law." *State v. Price*, 331 N.C. 620, 630, 418 S.E.2d 169, 174 (1992) (citing N.C. Gen. Stat. § 15A-1418 official commentary (1988)), *judgment vacated on other grounds*, 506 U.S. 1043, 122 L. Ed. 2d 113 (1993). Because defendant does not contend that *Jones* enunciates a new principle of constitutional law, and because he was in a position to raise the issue during an earlier appeal and did not do so, we deny his MAR.

In its response to defendant's MAR, the State contended that by filing his MAR, defendant was circumventing the thirty-five page limitation on brief length. *See* N.C. R. App. P. 28(j). Defendant thereupon filed a Motion To Strike And To Permit Reply, assuring this Court that his MAR was filed in good faith upon first learning of the *Jones* decision and requesting that he be permitted to reply to the State's response to its MAR. We are fully satisfied that defendant's MAR

was filed in good faith. Although we do not read the paragraph in question as necessarily implying that defendant was acting in bad faith, we nevertheless grant defendant's Motion to Strike the pertinent paragraph of the State's response to defendant's MAR. We deny defendant's Motion to Permit Reply.

II.

[2] We now turn to the issues presented in defendant's brief. Defendant first contends the trial court erred by admitting evidence that when defendant first arrived at Pac Jam II, he told Ms. Johnson that he "had gotten in some trouble" earlier that evening at All for One. Prior to admitting this testimony, the trial court determined that the statement of defendant was relevant and, after conducting the balancing test required by Rule 403, concluded that the probative value of the testimony outweighed any danger of unfair prejudice to defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (1999).

Defendant contends that evidence of his comment was offered to prove bad character. Rule 404(b), which governs the admissibility of evidence of acts of misconduct by a defendant, reads in pertinent part:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999).

> Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes or wrongs committed by a defendant and is subject to but one exception which requires exclusion of such evidence only if offered to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Alston, 341 N.C. 198, 228-29, 461 S.E.2d 687, 703 (1995) (citation omitted). Rule 404(b) "permits the introduction of specific 'crimes, wrongs, or acts' for a legitimate purpose other than to prove the conduct of a person." *State v. DeLeonardo*, 315 N.C. 762, 769-70, 340 S.E.2d 350, 356 (1986); *see* N.C. Gen. Stat. § 8C-1, Rule 404(b).

Assuming that an unspecific statement by defendant that he "had gotten in some trouble" constitutes testimony of another wrong, we consider the statement in the context of other evidence presented in the case. Defendant made the comment to Ms. Johnson when he first arrived at Pac Jam II. As a result of the "trouble" to which defendant alluded, Officer White responded to All for One and spoke with the manager, Billy Williams (Williams). Officer White and Williams then proceeded to Pac Jam II, where Williams located defendant. Officer White asked defendant for his name and address so that Williams could obtain a warrant against defendant if he wished. However, defendant supplied a false name. Officer White left but returned after the shooting. Ms. Johnson approached him and reported that the shooter was the individual he had interviewed earlier about the incident at All for One. Consequently, Officer White placed on his incident report the false name defendant had supplied.

This recitation demonstrates that defendant's comment about having gotten in trouble was not presented in a vacuum, but was part of the narrative that justified Officer White's initial contact with defendant, clarified Ms. Johnson's identification of defendant after the shooting, and explained why an incorrect name was placed on certain documentation in the case.

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990) (alteration in original) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)); *see also State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Therefore, the questioned evidence was not offered to establish defendant's bad character. Instead, it was presented as part of the "chain of events" culminating in the shooting and subsequent investigation and was therefore admissible. The trial court did not abuse its discretion in determining that the probative value of the evidence outweighed any danger of unfair prejudice. This assignment of error is overruled.

III.

[3] Defendant next argues the trial court erred by overruling his objections to statements made by the prosecutor during closing argument and by denying his subsequent motion for mistrial.

A. Argument Pertaining to Premeditation and Deliberation.

During closing argument, the prosecutor addressed the issues of premeditation and deliberation. When the prosecutor discussed the implications of evidence that defendant brought a firearm to Pac Jam II, the following exchange took place:

> [Prosecutor]: The State says yes to you, ladies and gentlemen, and the Supreme Court says to you—and this is 1993—"Evidence that the defendant's actions before the killing was substantial evidence supporting a proper inference of premeditation and deliberation." The evidence tending to show that the defendant was carrying a gun supported an inference—
>
> [Defense Counsel]: Your Honor, I object because that is not what the—that is not the inference of that case. I believe it's Goley or Golden or something like that.
>
> COURT: Overruled.
>
> [Prosecutor]: The evidence tending to show that the defendant was carrying a gun supported an inference that he anticipated a possible confrontation and giving some forethought to how he would deal with a confrontation. If you carry a gun in your pocket, do you ever think about what you're going to do with it?
>
> [Defense Counsel]: Your Honor, again, I object. That is—I'm familiar with that case, and the—the factual circumstance —
>
> COURT: Overruled.
>
> . . . .
>
> [Prosecutor]: If you carry a gun, ladies and gentlemen, do you think about what you're going to do with it?

The parties agree that the case to which the prosecutor referred, and which defendant attempted to recall in his objection, was *State v. Ginyard*, 334 N.C. 155, 431 S.E.2d 11 (1993). In *Ginyard*, the defend-

ant knocked on an apartment door and asked to speak with the victim. A fight ensued, during which the defendant fatally stabbed the victim. Our Supreme Court stated: "[T]he fact that the defendant was carrying a knife was evidence tending to support an inference that he had anticipated a possible confrontation with the victim and that he had given some forethought to how he would resolve that confrontation." *Id.* at 159, 431 S.E.2d at 13. In reaching this result, the Supreme Court relied on *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985). In *Fields*, the defendant and his companions consumed beer and Quaaludes, drove around Wake County in the defendant's truck, then entered the driveway of a private residence and began rummaging through a storage shed. When a concerned neighbor carrying a shotgun approached the men, the defendant fatally shot him. The Supreme Court stated: "The fact that defendant was even carrying a gun was conduct preceding [victim's] murder that evinced defendant's anticipation of a possible confrontation and some forethought of how he would deal with it." *Id.* at 200, 337 S.E.2d at 524.

Review of a trial court's rulings on objections to the jury arguments of counsel is deferential. "[A]rguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts." *State v. Taylor*, 289 N.C. 223, 226, 221 S.E.2d 359, 362 (1976) (citations omitted). "Ordinarily we do not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *Id.* at 227, 221 S.E.2d at 362 (citations omitted). While *Ginyard* is distinguishable from the case at bar because the victim and the defendant in *Ginyard* knew each other and the defendant set up the meeting leading to the murder, the initial encounter between the victim and the defendant in *Fields* was the result of chance. They apparently did not know each other, nor did the defendant plan to meet anyone. To the contrary, the defendant took steps to ensure that the owners of the property onto which he was intruding were absent. Nevertheless, the defendant's preparation for a possible encounter, however unexpected, was held to be admissible evidence of premeditation. Accordingly, it was not improper for the prosecutor in the case at bar to argue that defendant's decision to carry a loaded firearm into Pac Jam II supported an inference that defendant anticipated a possible confrontation and gave forethought to the resolution of a possible confrontation. This assignment of error is overruled.

B. Argument Pertaining to Defendant's Character

[4] Defendant assigns as prejudicial error another comment made by the prosecutor during closing argument. When discussing the difficulty of proving premeditation and deliberation with direct evidence, the prosecutor said,

> There is absolutely no way that you can crawl inside of his head and determine what he was believing, what he was premeditating, what he was deliberating. . . . In fact, you don't want to be inside of his head. If you were inside of his head, you would see evil, you would see hate[.]

"On appeal, particular prosecutorial arguments are not viewed in an isolated vacuum," but are considered in context based upon the underlying facts and circumstances. *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (citation omitted). " '[W]hen the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument.' " *State v. Wortham*, 287 N.C. 541, 545-46, 215 S.E.2d 131, 134 (1975) (quoting *State v. Westbrook*, 279 N.C. 18, 39, 181 S.E.2d 572, 584 (1971), *vacated and remanded as to death penalty only*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)).

Our review of similar cases reveals that where a defendant did not object to similar comments by the prosecutor in closing argument, our Supreme Court has not readily held that the trial court should intervene. *See State v. Flowers*, 347 N.C. 1, 37-38, 489 S.E.2d 391, 412 (1997) (holding that trial court's failure to intervene when prosecutor argued that " '[t]o participate in killing another human being in that manner . . . it's outrageous. It's shocking. It's evil. It's vile' " was not error and that "[w]hen read in context, it is clear that the prosecutor's remarks fell well within the wide latitude afforded prosecutors during closing arguments"); *State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812-13 (1995) (holding that prosecutor's statement that " '*[defendant] is the ultimate. He is the quintessential evil.* . . . He is *one of the most dangerous men in this State*, I submit to you' " did not reach the level of gross impropriety requiring the trial court to intervene *ex mero motu*).

We reached a similar result where a defendant raised a contemporaneous objection to a prosecutor's argument. In *State v. Frazier*, a sex abuse case, the prosecutor argued that the defendant and another were " '[j]ust as evil and just as sorry and just as mean as two

despicable people could ever be on this earth.' " 121 N.C. App. 1, 16, 464 S.E.2d 490, 498 (1995) (alteration in original), *aff'd*, 344 N.C. 611, 476 S.E.2d 297 (1996). The trial court apparently sustained defendant's objection to the argument, but the defendant made no motion to strike. We found that the prosecutor's argument was not so prejudicial as to require a new trial. *See id.* at 16, 464 S.E.2d at 499.

In light of these cases, we believe the prosecutor's digression, speculating on the contents of defendant's mind immediately after stating that defendant's thoughts were unknowable, did not exceed the bounds recognized by North Carolina courts in closing argument. The evidence showed that defendant went armed to a nightclub; shot Faucette, who was not involved in the dispute that preceded the shooting; shot Tinnin in the back, while Tinnin was either hiding or on the ground; and attempted to shoot Tinnin in the head. Consequently, the prosecutor's characterization of defendant as "evil" was not inconsistent with the record, nor did the argument exceed the bounds permitted in final argument. This assignment of error is overruled.

C. Argument Pertaining To Witness Tracy Morrow.

[5] Evidence was presented at trial that defendant's automobile was discovered behind Tracy Morrow's house after the shooting at Pac Jam II. Contending that the presence of this car was evidence that Morrow had hidden the car for defendant while helping him escape, the prosecutor argued: "[Morrow] had already hid the defendant's car or had it hid behind her house. I didn't ask her where her daughter was that night, but I warned her." Defense counsel's objection was overruled. The prosecutor continued: "She had already attempted and aided him in getting away." Defense counsel objected again, and the trial court instructed that the jury had the responsibility for determining the facts of the case and that "[a]ny statements made to you on behalf of the District Attorney's office is his contention, it is not evidence in this case, and you must not use the same as evidence."

Although defendant contends that the prosecutor's argument was unsupported by evidence, counsel may properly argue all the facts in evidence as well as any reasonable inferences that may be drawn from those facts. *See State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). Evidence had been presented that: (1) defendant and Morrow were good friends, and he had stayed overnight at her house; (2) Morrow was present at Pac Jam II when defendant shot the victim; (3) defendant's bloodstained car was found parked behind Morrow's home hours after the murder; (4) the car in which defendant was seen

leaving a local hospital with his brother after the murder was also found behind Morrow's home with the motor running; (5) although Morrow said cars typically parked in the unpaved area where defendant's car was found, she could not explain the absence of other tire tracks there; and (6) Morrow spoke by telephone with defendant after he was apprehended in New York and returned to the Alamance County Jail. This evidence supported a reasonable inference that Morrow allowed defendant to hide his car behind her home before he left North Carolina. In addition, the trial court properly instructed the jury to consider the prosecutor's argument as a contention, not as evidence. This assignment of error is overruled.

Finally, defendant argues that the cumulative effect of the prosecutor's arguments constituted prejudicial error. After reviewing the evidence and the arguments, we hold that there was no improper prejudice to defendant from the cumulative effect of the arguments analyzed above. This assignment of error is overruled.

III.

[6] In his last assignment of error, defendant contends the trial court erroneously refused to give the jury his requested additional instruction on premeditation and deliberation. The trial court gave the following pattern instruction:

> [T]he State must prove that the defendant acted with premeditation, that is, that he formed the intent to kill the victim over some period of time, however short, before he acted.
>
> . . . [T]hat the defendant acted with deliberation, which means that he acted while he was in a cool state of mind.
>
> This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.
>
> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim, the conduct of the defendant before, during, and after the killing, threats and declarations of the defendant, infliction of lethal wounds after the victim is felled, and the manner in which or means by which the killing was done.

Defendant requested that the trial court give the following additional instruction:

> On the other hand, you may infer from the circumstances that the defendant did not premeditate or deliberate the killing. For example, you may find that the defendant was enraged, frightened, disoriented, emotionally upset, panic-stricken or agitated when he formed the intent to kill, if he did form this intent. If so, you may consider this finding in deciding whether the defendant formed the intent to kill in a cool state of mind. If you have a reasonable doubt that the defendant formed the intent to kill in a cool state of mind, the state has not proven that the defendant premeditated or deliberated the killing.

"When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error." *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972) (citation omitted). Defendant properly concedes that the pattern instruction given by the trial court has been approved by our Supreme Court. *See State v. Leach*, 340 N.C. 236, 456 S.E.2d 785 (1995). The trial court's instruction required that in order to convict, the jury must find that any intent to kill "was formed with a fixed purpose *not under the influence of some suddenly aroused violent passion.*" (Emphasis added.) Therefore, under this instruction, the jury was required to find that defendant premeditated and deliberated while in a cool state of mind. Although the requested instruction provided examples that would negate such a cool state of mind, the instruction that was given, viewed in its entirety, encompassed the substance of defendant's request. *See Jones v. Development Co.*, 16 N.C. App. 80, 191 S.E.2d 435 (1972). This assignment of error is overruled.

Defendant received a fair trial free of prejudicial error. Defendant's Motion For Appropriate Relief is denied. Defendant's Motion To Strike And To Permit Reply is granted in part and denied in part.

No error.

Judge LEWIS concurs.

Judge GREENE dissents with separate opinion.

Judge GREENE dissenting.

I disagree with the majority that defendant's motion for appropriate relief should be denied, and, therefore, I respectfully dissent.

Procedural Issue

North Carolina General Statute section 15A-1419 provides a motion for appropriate relief must be denied if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (1999). The statute, however, creates an exception to this rule when "failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C.G.S. § 15A-1419(b)(2).

In this case, defendant contends his indictment for first-degree murder violated his Sixth Amendment right to notice and right to due process under the United States Constitution. Assuming defendant's contention has merit, his conviction is based on an invalid indictment, and the trial court was without jurisdiction to enter judgment against him. *See State v. Smith*, 263 N.C. 788, 789, 140 S.E.2d 404, 405 (1965) ("valid bill of indictment is an essential of jurisdiction"). Accordingly, failure to consider defendant's claim would result in a "fundamental miscarriage of justice," and, therefore, I would reach the merits of defendant's motion for appropriate relief. *See* N.C.G.S. § 5A-1412 (1999) (denial of motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1419 is procedural and not determinative of the merits of a party's claim).

Even assuming defendant is not entitled to bring his motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1419(b)(2), defendant's motion alleges, pursuant to N.C. Gen. Stat. § 15A-1415(b)(2), that the trial court did not have subject matter jurisdiction over the charge of first-degree murder on the ground the indictment for first-degree murder was invalid as unconstitutional. *See Smith*, 263 N.C. at 789, 140 S.E.2d at 405. Because a defense based on lack of jurisdiction of the trial court over the subject matter of an action "cannot be waived and may be asserted at any time," *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984), I would reach the merits of defendant's motion for appropriate relief.

Substantive Issue

Defendant argues in his motion for appropriate relief, in pertinent part, that N.C. Gen. Stat. § 15-144, which creates a "short-form" mur-

der indictment,[1] violates his Sixth Amendment right to notice and right to due process under the United States Constitution.[2] I agree.

A defendant's right to notice under the Sixth Amendment and right to due process require an indictment to charge each element of an offense. *Jones v. United States*, — U.S. —, 143 L. Ed. 2d 311, 319, 326 n.6 (1999) (holding that when a "fact is an element of an offense rather than a sentencing consideration," it must be "charged in an indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt"); *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 620 (1974) (indictment must contain elements of offense charged).

Premeditation and deliberation are elements of first-degree murder in North Carolina. *State v. Hamby and State v. Chandler*, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970), *death sentence vacated*, 408 U.S. 937, 33 L. Ed. 2d 754 (1972). North Carolina General Statute section 15-144, which states the requirements for a valid indictment for first-degree murder, does not, however, require the indictment to include the elements of premeditation and deliberation. N.C.G.S. § 15-144 (1999). Section 15-144, therefore, does not comply with the requirements of due process and the right to notice under the Sixth Amendment of the United States Constitution; consequently, the statute is unconstitutional. *See Faretta v. California*, 422 U.S. 806, 818, 45 L. Ed. 2d 562, 572 (1975) (Sixth Amendment right to notice incorporated as applicable to states through Fourteenth Amendment). In this case, defendant was convicted of first-degree murder based on an indictment issued pursuant to section 15-144, and the indictment did not contain the elements of premeditation and deliberation. I, therefore, would arrest judgment entered against defendant for the charge of first-degree murder. *See State v. Simpson*, 302 N.C. 613, 617, 276 S.E.2d 361, 364 (1981) (arresting judgment is appropriate remedy for judgment based on invalid indictment, and arrested judgment does not bar State from bringing valid indictment).

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1. The "short-form" indictment created by section 15-144 states "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed)." N.C.G.S. § 15-144 (1999).

2. The United States Supreme Court, in its recent decision of *Jones v. United States*, — U.S. —, 143 L. Ed. 2d 311 (1999), clarified the federal constitutional requirements of a valid indictment. This Court is bound by holdings of the North Carolina Supreme Court which interpret the federal constitution when those decisions squarely address the issue before this Court. *State v. Adams*, 132 N.C. App. 819, 821, 513 S.E.2d 588, 589, *disc. review denied*, 350 N.C. 836, — S.E.2d —,

STATE OF NORTH CAROLINA v. ROBYN LYNN NOFFSINGER

No. COA99-166

(Filed 18 April 2000)

1. **Child Abuse and Neglect— felonious child abuse—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss indictments for felonious child abuse where there was substantial evidence from which the jury could find that defendant intentionally perpetrated abuse against the child.

2. **Child Abuse and Neglect— felonious child abuse—aiding and abetting**

The trial court properly submitted felonious child abuse to the jury on a theory of aiding and abetting and did not err by instructing the jury on that theory in light of: defendant's admitted presence during the time when some of the injuries to her child occurred; the special duty she owed her child as a parent; and her failure to intervene or take immediate action following the injuries. A reasonable mind could determine that defendant consented to and contributed to the crime.

3. **Child Abuse and Neglect— sentencing—aggravating factor—joinder with more than one person**

The trial court erred when sentencing defendant for felonious child abuse by finding as an aggravating factor that defendant joined with more than one person in committing the offense; the State conceded in its brief that it failed to meet its burden of proof.

4. **Child Abuse and Neglect— sentencing—mitigating factor—passive participant**

The trial court did not err when sentencing defendant for felonious child abuse by failing to find as a mitigating factor that

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cert. denied, — U.S. —, 145 L. Ed. 2d 414 (1999). Although the North Carolina Supreme Court has intimated that section 15-144 is constitutional, it has not directly addressed this issue. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 471 S.E.2d 624 (1996); *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985); *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982); *State v. Lowe*, 295 N.C. 596, 247 S.E.2d 878 (1978). Because this issue has never been squarely addressed by the North Carolina Supreme Court and has not been addressed subsequent to the *Jones* decision, I do not feel bound by previous decisions of the North Carolina Supreme Court regarding the constitutionality of section 15-144.

defendant was a passive participant where defendant offered various explanations for her child's injuries, but the evidence suggested that defendant either perpetrated the abuse or was present when the child was severely and repeatedly injured by another and did not seek medical attention for fear that she would be accused of mistreating the child. Defendant had the burden of proving any mitigating factors by the preponderance of the evidence and failed to present manifestly credible evidence that she was a passive participant.

Appeal by defendant from judgment entered 29 July 1998 by Judge Robert Frank Floyd, Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 5 January 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Marjorie S. Canaday for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 12 April 1997, an emergency medical technician and volunteer ambulance driver, Shannon Parks ("Parks"), answered a call to transport a fifteen month-old child, David Cody Rhinehart ("the child"), to the emergency room of Columbia Brunswick Hospital. The mother of the child, Robyn Lynn Noffsinger ("defendant"), and her boyfriend, David Tripp, Jr. ("Tripp"), transferred the child from their vehicle to the ambulance. At the hospital, Parks observed bruises on the child and believed that he was barely breathing. Parks saw defendant and Tripp outside the emergency room, talking and laughing.

David Crocker ("Crocker"), a detective who was present at the hospital on 12 April 1997, heard defendant express fear that she would be arrested if Tripp left her alone. Around 11:00 p.m., defendant told Tripp that they needed to tell Crocker something, and Tripp told Crocker that the bath water was too hot. Crocker noticed that defendant had small hands and normal length fingernails while Tripp had unusually long fingernails.

Keith Smith ("Smith"), a detective with the Brunswick County Sheriff's Department, arrived at the hospital and observed that the child had bruises and a clouded eye. Smith spoke with defendant, who knew Smith was investigating possible child abuse. Defendant told Smith that she had picked up the child about two weeks earlier

from the home of Frederick and Laura May Proffitt. Defendant noticed that the child had three bruises on his head and was told by the Proffitts that the child had fallen. Acquaintances informed defendant that there may have been drug use in the Proffitt home and that the child had been mistreated there. Defendant also told Smith that after she picked up the child from the Proffitt home, he did not sleep well, cried often, beat his head against the wall, hit himself with a baby bottle, and had a constant fever. Defendant tried to comfort the child by holding him and giving him Oragel, aspirin, and various drinks.

Defendant indicated to Smith that on 11 April 1997, Tripp gave the child a bath and told defendant that the skin on the child's buttocks was coming off. Defendant applied A & D ointment. In defendant's opinion, the burns were a reaction to blueberry Hi-C that the child had drunk. On 12 April 1997, Tripp again bathed the child. According to defendant, she observed through a crack in the door that the child fell in the tub, bumped his head, and slipped several times after Tripp picked him up. After the bath, the child appeared sleepy and Tripp took him upstairs. Soon thereafter, Tripp observed that the child could not breathe and he attempted CPR.

Dr. Richard Alexander ("Alexander"), who was working in the emergency room on 12 April 1997, observed that the child was not breathing, that he had a head fracture, abnormal pupil response, facial bruising, deformity on an arm and a leg, and a burned area in the diaper region, and that the child was having seizures. Alexander placed the child on oxygen, administered medications to support blood pressure and control heart rate, and inserted a catheter. He then made arrangements to transport the child to Duke Medical Center for surgery to relieve pressure on the brain.

According to Alexander, the head injury and bruises were about one or two days old and the injury to the buttocks was not from diaper rash or an allergic reaction. The bruising to the head would have required substantial force by squeezing. Alexander admitted that it was unlikely that a person without medical training would be able to recognize certain of the child's medical problems or know their causes or likely time of occurrence.

Detective Gene Caison ("Caison") accompanied Detective Smith to the Tripp home on 12 April 1997. Defendant had been living in the Tripp home since January of 1997, but the child did not live in the Tripp house until the last Sunday of March 1997. Present in the Tripp

home on 12 April 1997 were David Tripp, Sr., his bedridden wife, James Dodson, Walter, and T.J., defendant's two and one-half year-old son. Caison admitted that David Tripp, Jr. was a caretaker of the child on three dates on which Caison alleged injuries occurred.

Dr. Karen St. Clair ("St. Clair"), a pediatrician at Duke Medical Center, treated the child on 13 April 1997 in the intensive care unit at Duke. St. Clair testified that the child was in critical condition, comatose, and had been placed on life support systems. St. Clair believed that the burns in the buttocks and genital area had been caused by immersion in a hot liquid. She described bruises and lesions and testified that x-rays showed spiral fractures and a buckle fracture in the legs and fractures of the left arm and wrist. St. Clair also described injury to the outer part of the child's eye from some type of trauma as well as blood in the fluid of both eyes. While draining fluid from the brain saved the child's life, the head injury caused brain damage such that only the brain stem remained normal. According to St. Clair, the child would be extremely impaired and would have no thinking processes.

St. Clair testified that the burns occurred within a couple of days of her treating the child. She estimated that the head injury occurred several days before she saw the child. The head injury would have required a forceful impact and could not have been self-inflicted, in St. Clair's opinion. The lower left leg fractures occurred anywhere from minutes before the x-rays were taken to seven days before. Fractures of the left forearm occurred between five days and three weeks before the x-rays. Rib fractures occurred five to seven days before the x-rays. The facial bruising may have occurred a matter of days before she saw it while head bruises were less than seven days old. A split lower lip was two or three days old and puncture marks on the right leg and scratch marks on the face were very recent. The puncture marks appeared to have been made by fingernails. St. Clair testified that the child suffered from battered child syndrome.

When St. Clair interviewed defendant and Tripp after midnight at the hospital, she did not feel that defendant comprehended what she was telling her and defendant occasionally appeared to doze. Defendant and Tripp indicated to St. Clair that the child's injuries had been caused by two baths given by Tripp. Also, they indicated that the child had fallen from a chair onto a vacuum cleaner and that Tripp accidentally hit the child in the eye with his elbow when rising from a settee.

On 1 May 1997 and 9 May 1997, Caison interviewed defendant at the sheriff's department and taped the interview. Caison interviewed Tripp separately. In the interviews, defendant stated that she visited the child while he was living in the Proffitt home from January 1997 until Easter Sunday, 1997. She observed that the child was usually sleepy and stopped walking and talking while there. When she took the child with her on Easter Sunday, she noticed that he had bruises and swelling on his forehead and favored one leg. She believed the leg problem was a result of tight shoes. The child whined and cried frequently during his first week home after Easter, but defendant did not take him to the hospital for fear she would be accused of mistreating him. Defendant denied hurting the child herself and was certain that the Proffitts had caused his injuries.

In his interview, Tripp admitted that he gave the child a bath on 11 April 1997 and that the water may have been too hot, resulting in burns to the child. Defendant was downstairs and heard the child cry out. She asked Tripp if everything was alright and he said yes, but the water was a little too hot. Defendant did not look in the bathroom because the child stopped crying. Later in the evening, defendant saw that the child's skin was peeling off and she applied A & D ointment. Tripp gave the child another bath on the following night and the child fell and hurt himself. When defendant entered the bathroom and asked if the child was alright, Tripp indicated that he was fine. About thirty minutes after the bath, the child began throwing up and acting sleepy.

On 9 May 1997, Caison went to the Tripp home again and arrested defendant and Tripp. According to Caison's description, Tripp was age twenty-four, about six feet tall, with longer than normal fingers and finger nails.

At trial, defense counsel called Tripp to the stand where he asserted the Fifth Amendment and refused to answer any questions. Defense counsel entered into evidence judgments entered on 21 July 1998 sentencing Tripp to active imprisonment for three counts of felony child abuse and suspending sentence against Tripp for a fourth count of felony child abuse. Tripp pled guilty to the four counts of felony child abuse pursuant to an Alford plea.

Following a jury verdict of guilty of three counts of felony child abuse, defendant was sentenced to three consecutive terms of a minimum of thirty-one months with the corresponding maximum of forty-seven months. Defendant appeals.

At issue on appeal is whether the trial court erred in: (I) denying defendant's motion to dismiss the indictments; (II) instructing the jury on aiding and abetting; (III) finding the aggravating factor that defendant joined with more than one other person in committing the offense; and (IV) failing to find the mitigating factor that defendant was a passive participant.

[1] By her first assignment of error, defendant argues that the trial court erred in denying her motion to dismiss the indictments because the prosecution failed to present substantial evidence that defendant was the perpetrator or possessed the requisite intent. We cannot agree.

In ruling on a defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the crime charged and of the defendant's identity as the perpetrator. *State v. Barrett*, 343 N.C. 164, 469 S.E.2d 888, *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Substantial evidence is "existing and real, not just seeming and imaginary." *State v. McKenzie*, 122 N.C. App. 37, 45, 468 S.E.2d 817, 824 (1996) (citations omitted). The motion should be allowed if the evidence merely raises a suspicion or conjecture regarding the commission of the crime or the defendant's identity as the perpetrator, even where the suspicion is strong. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980).

"[A]ll the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *Brown*, 310 N.C. at 566, 313 S.E.2d at 587. The evidence may be direct or circumstantial. *Barrett*, 343 N.C. at 172, 469 S.E.2d at 893. Contradictions in the evidence should be resolved by the jury. *Brown*, 310 N.C. at 566, 313 S.E.2d at 587. The jury also determines the weight and credibility of the evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 104(e) (1999).

The felony child abuse statute provides in relevant part:

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally

> commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony.

N.C. Gen. Stat. § 14-318.4(a) (1993). In determining whether the requisite intent is present, the jury may consider "the acts and conduct of the defendant and the general circumstances existing at the time of the offense charged." *State v. Riggsbee*, 72 N.C. App. 167, 171, 323 S.E.2d 502, 505 (1984).

A child who has been diagnosed with "battered child syndrome" has suffered severe and numerous injuries such that it is logical to presume that the injuries were not caused by accidental means or by an isolated contact with a stranger, but instead were caused intentionally by the child's caretaker. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978); *see also State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). When a child is diagnosed with battered child syndrome, a permissible inference arises that the child's caretakers intentionally inflicted his injuries. *Byrd*, 309 N.C. 132, 305 S.E.2d 724.

In the present case, Dr. St. Clair diagnosed the child with battered child syndrome. According to Dr. St. Clair, the head injury was the result of great force and could not have been caused by accident. Furthermore, Dr. Alexander testified that the bruising to the head would have required substantial force by squeezing. The child suffered numerous, severe injuries which were inflicted on various occasions, including burns, head trauma, fractures to the leg, arm and ribs, facial bruising, and puncture marks. Therefore, it is logical to presume that the child's injuries were not accidental and that they were caused by his caretaker.

According to the testimony of Doctors St. Clair and Alexander, the majority of the child's injuries were inflicted in the two weeks prior to his admission to the hospital on 12 April 1997. Numerous injuries, such as the head injury, bruises, puncture wounds, and burns took place one to three days before the child was admitted to the hospital.

Defendant stated that the child was mistreated while staying in the home of Frederick and Laura May Proffitt and had already sustained injuries when she retrieved him the last Sunday in March of 1997. However, the child had stayed at the Proffitt home more than two weeks before his admission to the hospital. Thus, the evidence

does not support defendant's assertion that the injuries were inflicted at the Proffitt residence.

Defendant and Tripp both had care of the child in the two weeks prior to his admission. The occupants of the Tripp family home also had continuing opportunity to inflict the injuries in that defendant, Tripp, and the child were living in the Tripp home during the two weeks in issue. Defendant stated in an interview which was presented to the jury by video and redacted transcript that no member of the Tripp household abused the child. She further stated that Tripp had not injured the child. "[Tripp's] good with my kids. And ain't nobody going to tell me no different."

We find substantial evidence from which the jury could find that defendant intentionally perpetrated the abuse against the child. Defendant's statements that the child suffered injuries in the Proffitt home are in conflict with the medical testimony and must be resolved by the jury. Furthermore, defendant's statements that the child suffered a series of accidents such as falling onto a vacuum cleaner and that he beat his own head against the wall contradict medical testimony that the injuries could not have been self-inflicted. As defendant's conduct is relevant evidence of intent, we note that according to her own statement, defendant did not take the child to the doctor earlier for fear that she would be accused of mistreating him, even while his injuries and deformities were glaringly apparent. When the child was finally admitted to the hospital in critical condition, the ambulance driver observed defendant laughing and talking with Tripp outside of the emergency room. Defendant appeared to doze as Dr. St. Clair informed defendant and Tripp of the child's condition. In light of the inference that the child's injuries were intentionally inflicted by a caretaker and in light of defendant's statements which exonerate each member of the Tripp household, relevant evidence exists which, when taken in the light most favorable to the State, adequately supports the conclusion that defendant intentionally inflicted the injuries on the child.

[2] Moreover, while the verdict sheets do not indicate on which theory the jury relied, the jury may have found defendant guilty on grounds that she aided and abetted Tripp in committing felony child abuse. A person who aids or abets another in the commission of a crime is equally guilty with that other person as principal. *State v. Owens*, 75 N.C. App. 513, 331 S.E.2d 311, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985).

As a general rule of American jurisprudence, criminal liability is not imposed for failure to rescue another person from harm. *State v. Walden*, 306 N.C. 466, 474-75, 293 S.E.2d 780, 786 (1982). However, a parent owes a special duty to her child which has long been recognized by statute and by the common law. *Id.* at 475, 293 S.E.2d at 786. As such, a parent has a duty to take affirmative action to protect her child and may be held criminally liable if she is present when someone harms her child and she does not take reasonable steps to prevent it. *Id.* "[W]e hold that the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed." *Id.* at 476, 293 S.E.2d at 787.

In the present case, substantial evidence exists that Tripp harmed the child in that he pled guilty pursuant to an Alford plea to four counts of felony child abuse arising out of these facts. According to her own statements, defendant was present when some of the child's injuries occurred. For example, in her taped interview, defendant indicated that she was present when the child inflicted injuries on himself by beating his head against the wall and hitting himself with his baby bottle:

> Lt. Crocker: Yes. How many times did you see him do this? Beat his—
>
> [Defendant]: Beat his head?
>
> Lt. Crocker: Yeah.
>
> [Defendant]: Quite a few.

Later in the interview, when Lieutenant Crocker remarked that the child's injuries could not have been sustained by the child beating his own head, defendant responded, "I'm just saying what I saw." Defendant also stated that she was present when Tripp accidentally hit the child in the face with his elbow:

> [Defendant]: . . . The baby—When [Tripp] went to start to get up [Tripp's] elbow had collided with the baby's eye. And the baby didn't cry or nothing, you know.
>
> Lt. Crocker: But you saw this?
>
> [Defendant]: Yes, I saw that with—

Lt. Crocker: Who else was in the room?

[Defendant]: —my own two eyes.

Defendant also indicated that she was present when the child injured himself by falling from a chair onto a vacuum cleaner.

Defendant owed the child a special duty in that she was his mother. By her own statements, defendant was present when the child sustained injuries, but she did not seek medical attention for the child until his condition was critical even while his injuries were visible to the naked eye. As stated above, we may infer that the child's injuries were not accidental based on his diagnosis as a battered child. We conclude that substantial evidence exists that defendant did not take affirmative steps to protect her child from attack by another person. As such, a reasonable mind could determine that defendant consented and contributed to the crime. Therefore, a jury could have found defendant guilty of felony child abuse beyond a reasonable doubt on a theory of aiding and abetting and the trial court properly submitted the issue to the jury.

By her second assignment of error, defendant argues that the trial court erred in instructing the jury on aiding and abetting in that the instruction was not supported by the evidence. We cannot agree.

"Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). In the present case, on two occasions, the trial court instructed the jury on aiding and abetting as follows:

> A person may be also guilty of felonious child abuse, although she personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that if she does aid and abet, she is guilty of the crime just as if she had personally done all the acts necessary to constitute that crime. Now, I charge that for you to find the defendant guilty of felonious child abuse because of aiding and abetting, the State must prove three things beyond a reasonable doubt. First, that the crime was committed by some other person. I have previously instructed you on the elements of felonious child abuse. Second, that the defendant knowingly encouraged or aided the other person to commit that crime. Third, that the defendant's actions or statements caused or contributed to the commission of the crime by that other person. So, I charge that if you find from the evi-

dence beyond a reasonable doubt that on or about the alleged dates some other persons other than the defendant committed felonious child abuse and that the defendant knowingly encouraged or aided the other person to commit the crimes and that in so doing the defendant's actions or statements caused or contributed to the commission of the crime by the other person, it would be your duty to return a verdict of guilty of felonious child abuse. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

As stated above, we believe that substantial evidence exists from which a jury could find defendant guilty of felony child abuse under a theory of aiding and abetting. In light of defendant's admitted presence during the time period when some of the injuries occurred, her special duty as a parent, and her failure to intervene or take immediate action following the injuries, defendant can be said to have encouraged and contributed to the commission of the abuse. As such, the trial court did not err by instructing the jury on aiding and abetting.

[3] By her third assignment of error, defendant argues that the trial court erred in finding as an aggravating factor that defendant joined with more than one other person in committing the offense in that the State failed to prove the factor by a preponderance of the evidence. We agree.

The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists. N.C. Gen. Stat. § 15A-1340.16(a) (1999). In the present case, the trial court found as a statutory aggravating factor that "[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." The State concedes in its brief that the State failed to meet its burden to prove the aggravating factor. As such, we hold that the trial court erred in finding as an aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. Therefore, defendant is entitled to a new sentencing hearing.

[4] By her fourth assignment of error, defendant argues that the trial court erred in failing to find the mitigating factor that defendant was a passive participant when the evidence in support of the factor was uncontradicted and substantial. We cannot agree.

The defendant bears the burden of proving any mitigating factors by the preponderance of the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). In order to establish that the trial court erred in failing to find a mitigating factor, the defendant must show that the evidence clearly establishes the fact in issue such that no reasonable inferences to the contrary can be drawn. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The trial court errs in failing to find a mitigating factor where the evidence tending to prove the factor is uncontradicted, substantial, and manifestly credible. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983).

In the present case, the evidence suggests that defendant either perpetrated the abuse or was present when her child was severely and repeatedly injured by Tripp and that she did not seek medical attention for her child for fear that she would be accused of mistreating him. Defendant offered various explanations for her child's injuries, stating that the child suffered an allergic reaction to Hi-C, that the child fell on to a vacuum cleaner, and that Tripp accidentally hit the child in the face with his elbow as he arose from a settee. The evidence that defendant was not an active participant in the abuse of her child consisted of her own testimony. However, a reasonable mind could determine that defendant perpetrated the abuse to her child or contributed to the abuse in that she was present when he was injured and she owed him a special duty as his parent. We hold that defendant failed to present substantial, manifestly credible evidence that she was a passive participant in the abuse of her child. As such, the trial court was not required to find as a mitigating factor that defendant was a passive participant.

For the reasons stated herein, we find no error in defendant's trial. However, we find that the trial court erred in finding as an aggravating factor that defendant joined with more than one other person in committing the offense. Therefore, we remand for a new sentencing hearing.

No error; remanded for a new sentencing hearing.

Judges MARTIN and HORTON concur.

THE ESTATE OF KENNETH B. FENNELL, BY AND THROUGH ITS ADMINISTRATOR, ANNIE B. FENNELL, AND ANNIE B. FENNELL, PLAINTIFFS V. RICHARD L. STEPHENSON, IN HIS PERSONAL AND OFFICIAL CAPACITY; THE NORTH CAROLINA STATE HIGHWAY PATROL; AND OTHER UNKNOWN NORTH CAROLINA STATE HIGHWAY PATROL EMPLOYEES IN THEIR PERSONAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA99-538

(Filed 18 April 2000)

1. Statute of Limitations— state claims—federal dismissal and appeal—tolling of state statute

Plaintiffs' claims (arising from the shooting of the deceased by a Highway Patrol officer) were timely filed where they were first filed in federal court within the state period of limitations, the federal district court granted summary judgment for defendant on the federal claims and dismissed the state claims, plaintiffs appealed the federal district court order, the federal court of appeals affirmed on 21 July 1998, and plaintiffs filed their state claims in superior court on 24 July 1998. The state period of limitations is tolled for thirty days following the date of the federal appellate decision.

2. Constitutional Law— Tenth Amendment—Necessary and Proper Clause—federal statute tolling state limitations statute

The federal statute which tolls state statues of limitation while actions are pending in federal court, 28 U.S.C. § 1367(d), is not an unconstitutional interference with state sovereignty in derogation of the Tenth Amendment because it has the effect of tolling a state statute of limitations while a state claim is pending in federal court rather than extending the applicable state limitations law. The tolling of a statue of limitations is procedural and within the power of Congress under the Necessary and Proper Clause of the United States Constitution.

3. Constitutional Law— violation of State constitutional rights by individual—no state action

The trial court properly granted a 12(b)(6) dismissal of state constitutional claims against a Highway Patrol officer in his individual capacity; North Carolina does not recognize a cause of action for monetary damages against a person in his individual capacity for alleged violations of a plaintiff's state constitutional rights.

4. Constitutional Law— state claim for illegal search—trespass as adequate remedy

The trial court did not err by granting a 12(b)(6) dismissal of state constitutional claims based upon allegations that a Highway Patrol officer illegally searched defendant's vehicle; the common law action for trespass to chattel provides an adequate remedy.

5. Constitutional Law— state claim for illegal seizure—false imprisonment as adequate remedy—survival of action

The trial court erred by granting a 12(b)(6) dismissal of a civil claim under the State constitution against a Highway Patrol officer in his official capacity for illegally detaining or seizing the decedent. Although the common law claim of false imprisonment provides an adequate remedy for unlawful restraint, that cause of action does not survive the death of a decedent.

6. Constitutional Law— state claim for excessive force—wrongful death as adequate remedy

The trial court did not err by granting a 12(b)(6) dismissal on civil claim for excessive force under the state constitution against a Highway Patrol officer in his official capacity arising from the death of plaintiff's decedent. Plaintiff's constitutional claim included allegations of malice, recklessness, and negligence for which a wrongful death claim would compensate plaintiff.

7. Collateral Estoppel and Res Judicata— federal action—identical issue litigated and necessary

The trial court properly dismissed plaintiffs' state wrongful death claim against a Highway Patrol trooper under N.C.G.S. § 1A-1, Rule 12(b)(6) where that claim was collaterally estopped by a federal ruling that defendant was entitled to qualified immunity. The issue raised in the federal district court's decision (the standard of defendant's conduct under the circumstances) was identical to the issue raised in the state wrongful death action, the federal court determined that issue in defendant's favor, and the determination was necessary to the federal district court's judgment.

8. Immunity— sovereign—state constitutional claim

The trial court erred by granting a Rule 12(b)(6) dismissal of a claim against a Highway Patrolman alleging a violation of equal protection under the North Carolina Constitution. The doctrine of

sovereign immunity does not bar a direct claim against the State when the claim is based on a violation of the Declaration of Rights of the North Carolina Constitution.

Appeal by plaintiffs from orders filed 15 February 1999 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 15 February 2000.

McSurely & Osment, by Alan McSurely and Ashley Osment, for plaintiff-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III and Assistant Attorney General Reuben F. Young, for defendant-appellees.

GREENE, Judge.

The Estate of Kenneth B. Fennell, by and through its administrator, Annie B. Fennell, and Annie B. Fennell (collectively, Plaintiffs) appeal an order filed 15 February 1999 granting a motion by Richard L. Stephenson, in his personal and official capacity (Defendant), to dismiss Plaintiffs' claims against Defendant, and an order filed 15 February 1999 granting a motion by the North Carolina State Highway Patrol (Highway Patrol) to dismiss Plaintiffs' claims against the Highway Patrol.

The evidence shows that on 30 August 1993 at 7:00 p.m., Kenneth B. Fennell (Fennell), a twenty-three-year-old black male, was driving on Interstate 85 in Guilford County, North Carolina, when he was pulled over by Defendant, a Highway Patrol officer. Defendant was a member of the Highway Patrol's "I-Troop," which engaged in "drug interdiction" on the Interstates. At 7:05 p.m., Defendant issued Fennell a citation for driving without a license. Sometime after the citation was issued, Fennell was "shot four or five times by [Defendant] at close range with a .357 Magnum." On 12 May 1994, the Guilford County District Attorney "ruled the homicide of . . . Fennell was justified."

On 25 August 1995, Plaintiffs filed a complaint in the United States District Court against Defendant and unknown state officials. The complaint alleged claims for violation of Fennell's rights under the Fourth and Fourteenth Amendments of the United States Constitution. Plaintiffs also alleged pendent state claims for wrongful death pursuant to Chapter 28 of the North Carolina General Statutes,

common law conspiracy, and deprivation of equal protection under the North Carolina Constitution.

On 29 July 1997, the United States District Court granted summary judgment in favor of Defendant on Plaintiffs' federal constitutional claims, and declined to exercise supplemental jurisdiction over Plaintiffs' pendent state claims. The court found, in pertinent part, Defendant was entitled to qualified immunity with regard to Plaintiffs' Fourth Amendment claim that Defendant used excessive force, stating "a reasonable officer in the same situation as [Defendant] could have found probable cause to believe that Fennell posed a deadly threat, and, therefore, that [Defendant] would have been authorized to use deadly force to protect himself." Additionally, the court dismissed with prejudice Plaintiffs' claims against "unidentified state officials."

Plaintiffs appealed the federal district court's order, and on 21 July 1998 the United States Court of Appeals for the Fourth Circuit affirmed the order. *See Fennell v. Stephenson*, 155 F. 3d 558 (4th Cir. 1998) (per curiam) (unpublished).

On 24 July 1998, Plaintiffs filed suit against Defendant, the Highway Patrol, and unknown Highway Patrol employees in the Superior Court of Guilford County.[1] On 24 September 1998, Plaintiffs filed an amended complaint pursuant to Rule 15 of the North Carolina Rules of Civil Procedure. Plaintiffs' amended complaint alleged facts consistent with the facts alleged in their federal complaint. The complaint included the following claims for relief against Defendant, Highway Patrol, and unknown employees of the Highway Patrol: (I) "NORTH CAROLINA CONSTITUTIONAL DEPRIVATIONS IN THE STOP, TWO SEARCHES, AND TWO SEIZURES BY DEFENDANT," including, in pertinent part, allegations Defendant unconstitutionally "searched . . . Fennell's vehicle," "detained or seized . . . Fennell," used "excessive . . . force" against Fennell, and killed Fennell "with either [intent,] malice, recklessly, or negligently"; (II) "CONSPIRACY TO DEPRIVE AND COVER-UP DEPRIVATION OF CONSTITUTIONAL RIGHTS AND UNLAWFUL ACTS AGAINST A CITIZEN BECAUSE OF HIS RACE" and "CONSPIRACY TO DEPRIVE THE VICTIM OF A CRIME AND HIS FAMILY HIS RIGHTS UNDER THE NORTH CAROLINA CONSTITUTION," based on the conduct of

1. Although the record in this case does not contain the 24 July 1998 complaint, the pleadings contained in the record state Plaintiffs' original complaint was filed on 24 July 1998.

"[u]nknown employees of the . . . Highway Patrol"; and (III) "WRONGFUL DEATH" on the ground Defendant "committed the tort[] of recklessly causing the wrongful death of . . . Fennell." The complaint also alleged an additional claim against the Highway Patrol for violation of Fennell's constitutional rights on the ground the Highway Patrol "promoted or knew about and did not discipline the I-Troop's pattern and practice of racially-influenced traffic stops of Black motorists."

In an order filed 15 February 1999, the trial court granted Defendant's motion to dismiss Plaintiffs' claims against him. The trial court found all of Plaintiffs' claims were barred by the statute of limitations. In the alternative, the trial court also found Plaintiffs' first and second claims failed to state a claim upon which relief may be granted, and Plaintiffs' third claim was barred by the doctrine of collateral estoppel. In a second order filed on 15 February 1999, the trial court dismissed Plaintiffs' claim against the Highway Patrol on the ground the claim was barred by the doctrine of sovereign immunity.

The issues are whether: (I) the state statute of limitations for Plaintiffs' state claims was tolled, pursuant to 28 U.S.C. § 1367(d), until the federal court of appeals filed a decision on Plaintiffs' appeal of the federal district court's 29 July 1997 order; (II) Congress had the authority, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact 28 U.S.C. § 1367(d); (III) North Carolina recognizes a state constitutional cause of action for monetary damages against a party in his individual capacity, and whether adequate state remedies exist for Plaintiffs' state constitutional claims; (IV) the doctrine of collateral estoppel bars a plaintiff's wrongful death action against an officer when a court has determined the officer is entitled to qualified immunity for the purpose of constitutional claims based on the plaintiff's death; and (V) the State may assert the doctrine of sovereign immunity as a defense to a constitutional claim brought against the State.

I

[1] Plaintiffs contend the statute of limitations for their state claims against Defendant was tolled pending their appeal to the federal court of appeals and, therefore, their claims were timely filed in state court. We agree.

The United States Code provides that when a state claim is brought in federal district court pursuant to 28 U.S.C. § 1367(a), the

state period of limitations for the claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d) (1994). Under this statute, the state period of limitations for a plaintiff's pendent state claims is tolled for a period of thirty days after the federal district court has dismissed the plaintiff's claims. 28 U.S.C. § 1367(d). If, however, a plaintiff appeals the federal district court's dismissal of his claims, the plaintiff's pendent state claims are tolled for a period of thirty days following the date of the decision of the federal court of appeals. *See Huang v. Ziko*, 132 N.C. App. 358, 362, 511 S.E.2d 305, 308 (1999).

In this case, the federal district court filed an order on 29 July 1997 granting summary judgment in favor of Defendant on Plaintiffs' federal claims, and dismissing Plaintiffs' pendent state claims. Plaintiffs appealed the federal district court's order, and on 21 July 1998, the federal court of appeals affirmed the order of the federal district court. *Fennell*, 155 F.3d at 558. On 24 July 1998, Plaintiffs filed suit on their pendent state claims in the Superior Court of Guilford County. Because the period of limitations for Plaintiffs' claims was tolled for thirty days subsequent to the 21 July 1998 decision, Plaintiffs' claims, which were filed three days after the federal court of appeals decision, were timely filed.[2]

II

[2] Defendant argues 28 U.S.C. § 1367(d) is unconstitutional because it "impermissibly interferes with state sovereignty in derogation of the Tenth Amendment." We disagree.

When a federal statute conflicts with a state statute, the federal statute governs the issue provided the federal statute is " 'sufficiently broad to control the issue' " and "represents a valid exercise of Congress' authority under the [United States] Constitution." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27, 101 L. Ed. 2d 22, 29 (1988) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749, 64 L. Ed. 2d 659, 667 (1980)). Because section 1367(d) is sufficiently broad to control the issue in this case,[3] we must determine whether

2. We note Defendant concedes in his brief to this Court that Plaintiffs' pendent state claims were originally filed in federal court within the state period of limitations for those claims.

3. Section 1367(d) directly addresses the issue of whether the state statute of limitations is tolled, and Defendant does not contend otherwise in his brief to this Court.

Congress had authority under the United States Constitution to enact the statute.

Congress has the power, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact statutes creating procedural rules which govern practice and pleading in federal courts, or to enact statutes which create rules regulating matters that "fall[] within the uncertain area between substance and procedure, [and] are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472, 14 L. Ed. 2d 8, 17 (1965). When Congress enacts a statute creating a rule of practice in the federal courts and that statute conflicts with a state provision, the federal provision governs. *Id.* at 473-74, 14 L. Ed. 2d at 18. A statute is procedural in nature if it regulates "the judicial process for enforcing rights and duties recognized by substantive law." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 85 L. Ed. 479, 485 (1941).

Section 1367(d) does not *extend* the applicable state limitations law, as a claim must have been timely commenced in federal court pursuant to the state statute of limitations in order for section 1367(d) to apply to the claim. The statute, rather, has the effect of tolling a state statute of limitations for a state claim while that claim is pending in federal court. The tolling of a statute of limitations is a regulation of "the judicial process," and, therefore, is procedural. Accordingly, Congress had the authority, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact section 1367(d).

III

Plaintiffs argue their complaint alleged constitutional claims against Defendant, in his individual and official capacity, upon which relief could be granted, and these claims, therefore, were improperly dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Rule 12(b)(6) provides a trial court may dismiss a plaintiff's claim for "[f]ailure to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (1999).

Claims Against Defendant in His Individual Capacity

[3] North Carolina does not recognize a cause of action for monetary damages against a person, sued in his individual capacity, who allegedly violated a plaintiff's state constitutional rights. *Corum v.*

University of North Carolina, 330 N.C. 761, 788, 413 S.E.2d 276, 293, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

In this case, Plaintiffs' alleged state constitutional claims against Defendant in his individual capacity, and the trial court, therefore, properly dismissed these claims pursuant to Rule 12(b)(6).

Claims Against Defendant in His Official Capacity

[4] "[A]n individual whose state constitutional rights have been abridged has a direct action for monetary damages against a state official in [his] official . . . capacity[] if there is no adequate remedy provided by state law." *Rousselo v. Starling*, 128 N.C. App. 439, 446-47, 495 S.E.2d 725, 730 (citing *Corum*, 330 N.C. at 783-87, 413 S.E.2d at 290-92), *appeal dismissed and disc. review denied*, 348 N.C. 74, 505 S.E.2d 876 (1998). An adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the *same injury* alleged in the direct constitutional claim. *Id.* at 447, 495 S.E.2d at 731.

In this case, Plaintiffs alleged a state constitutional claim against Defendant on the ground Defendant unconstitutionally "searched . . . Fennell's vehicle."

"[T]he common law action for trespass to chattel provides a[n] [adequate] remedy for an unlawful search," *id.* at 448, 495 S.E.2d at 731, and the trial court, therefore, properly dismissed Plaintiffs' constitutional claim against Defendant for unlawful search of Fennell's vehicle pursuant to Rule 12(b)(6).

[5] Plaintiffs also alleged a constitutional claim against Defendant on the ground Defendant unconstitutionally "detained or seized . . . Fennell."

The common law claim of false imprisonment provides an adequate remedy for unlawful restraint. *Alt v. Parker*, 112 N.C. App. 307, 317-18, 435 S.E.2d 773, 779 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994). A cause of action for false imprisonment, however, does not survive the death of a decedent. N.C.G.S. § 28A-18-1(b)(2) (1999). Because the test for whether an adequate state remedy exists is "whether there is a remedy available to [the] plaintiff for the violation," *Rousselo*, 128 N.C. App. at 448, 495 S.E.2d at 731, Plaintiffs did not have an adequate state remedy. Plaintiffs' claim alleging Defendant unconstitutionally "detained or seized . . . Fennell" was therefore improperly dismissed pursuant to Rule 12(b)(6).

[6] Finally, Plaintiffs alleged a constitutional claim against Defendant on the ground Defendant used "excessive . . . force" against Fennell and killed Fennell "with either [intent,] malice, recklessly, or negligently."

North Carolina General Statute section 28A-18-2 allows the personal representative of a decedent to bring a cause of action for wrongful death. N.C.G.S. § 28A-18-2 (1999). An action for wrongful death may be brought when a person's death "is caused by a wrongful act, neglect or default of another" provided the injured person, had he lived, would have been entitled to bring an action for damages. *Id.* A wrongful act includes the "death of the decedent through malice or willful or wanton conduct," and punitive damages may be available when such conduct is shown. N.C.G.S. § 28A-18-2(b)(5).

In this case, Plaintiffs' constitutional claim included allegations Defendant killed Fennell "with either [intent,] malice, recklessly, or negligently." Because a wrongful death claim would compensate Plaintiffs for these same injuries, the trial court properly dismissed this constitutional claim pursuant to Rule 12(b)(6).[4]

IV

[7] Defendant contends that because the federal district court found Defendant was entitled to qualified immunity regarding Plaintiffs' federal constitutional claims, Plaintiffs are precluded based on the doctrine of collateral estoppel from bringing a wrongful death action against Defendant. We agree.

The doctrine of collateral estoppel provides "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986). A party asserting collateral estoppel must show: (1) "the earlier suit resulted in a final judgment on the merits"; (2) "the issue in question was identical to an issue actually litigated and necessary

4. Plaintiffs argue in their brief to this Court that the trial court erred in dismissing Plaintiffs' claim against Defendant for his "PARTICIPATION IN AN UNCONSTITUTIONAL CONSPIRACY AGAINST . . . FENNELL." Plaintiffs' allegations of conspiracy, however, do not allege Defendant participated in a conspiracy; rather, Plaintiffs allege "[u]nknown employees of the . . . Highway Patrol" engaged in a conspiracy to cover up Defendant's actions. Because Plaintiffs assign error solely to the trial court's dismissal of claims against Defendant and the Highway Patrol, we do not address whether Plaintiffs' claims of conspiracy were properly dismissed. N.C.R. App. P. (10)(a).

to the judgment"; and (3) the party asserting collateral estoppel and the party against whom it is asserted "were either parties to the earlier suit or were in privity with [the] parties." *Id.* at 429, 349 S.E.2d at 557. Because the parties do not dispute the federal district court's judgment was a final judgment on the merits and the parties in this action were parties to the federal suit, the issue before this Court is whether Plaintiffs' wrongful death claim contains an issue identical to an issue litigated in the federal district court and necessary to that court's judgment.

In this case, Plaintiffs alleged a wrongful death claim on the ground Defendant "committed the tort[] of recklessly causing the wrongful death of . . . Fennell." An action for wrongful death must be based on a claim that the decedent would have been entitled to bring against the defendant, had the decedent lived. N.C.G.S. § 28A-18-2(a). Because Plaintiffs allege Defendant's conduct was reckless, Fennell would have been entitled, had he lived, to bring a cause of action for tortious infliction of injury based on willful and wanton negligence. *See Akzona, Inc. v. Southern Railway Co.*, 314 N.C. 488, 495, 334 S.E.2d 759, 763 (1985) (describing the tort of willful and wanton negligence). Willful and wanton negligence requires a showing the defendant " 'knew the probable consequences [of his actions], but was recklessly, wantonly, or intentionally indifferent to the results.' " *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 520, 361 S.E.2d 909, 915 (1987) (quoting *Wagoner v. R.R.*, 238 N.C. 162, 168, 77 S.E.2d 701, 706 (1953)), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

In this case, the federal district court determined Defendant was entitled to qualified immunity. Whether a police officer is entitled to qualified immunity is judged by a standard of objective reasonableness, and the trial court must determine "what a 'reasonable officer on the scene' would have done." *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998) (quoting *Graham v. Connor*, 490 U.S. 386, 396, 104 L. Ed. 2d 443, 455 (1989)). The federal district court found Defendant was entitled to qualified immunity because "a reasonable officer in the same situation as [Defendant] could have found probable cause to believe that Fennell posed a deadly threat, and, therefore, that [Defendant] would have been authorized to use deadly force to protect himself." The federal district court's decision, therefore, raises an issue identical to the issue raised in Plaintiffs' wrongful death action: what was the standard of Defendant's conduct under the circumstances. The federal district court determined that issue in

Defendant's favor and, because the determination was necessary to the federal district court's judgment, we are bound by that finding under the doctrine of collateral estoppel. Plaintiffs, therefore, were collaterally estopped from bringing a wrongful death action against Defendant based on Defendant's alleged reckless conduct. *See Sigman*, 161 F.3d at 789 (plaintiff cannot assert wrongful death claim against officer when trial court found defendant was entitled to qualified immunity and, therefore, acted reasonable under the circumstances as a matter of law). Accordingly, the trial court properly dismissed Plaintiffs' wrongful death claim.

V

[8] Plaintiffs argue their constitutional claim against the Highway Patrol was not barred by the doctrine of sovereign immunity. We agree.

In *Corum*, the North Carolina Supreme Court held the doctrine of sovereign immunity does not bar a direct claim against the State when the claim is based on a violation of the Declaration of Rights of the North Carolina Constitution. *Corum*, 330 N.C. at 786, 413 S.E.2d at 292. The *Corum* court stated "when there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.*

In this case, Plaintiffs alleged the Highway Patrol violated Fennell's constitutional rights by promoting or knowing about "the I-Troop's pattern and practice of racially-influenced traffic stops of Black motorists." Because this claim alleged a violation of Fennell's right to equal protection under the North Carolina Constitution, the Highway Patrol was not entitled to assert the doctrine of sovereign immunity as a defense to this claim. Accordingly, the trial court's dismissal of Plaintiffs' claim against the Highway Patrol is reversed.

Affirmed in part and reversed in part.

Judges WALKER and TIMMONS-GOODSON concur.

JENNIFER JACOBS, PLAINTIFF v. CITY OF ASHEVILLE, DEFENDANT

No. COA99-526

(Filed 18 April 2000)

1. **Appeal and Error— appealability—interlocutory order—order granting jury trial—substantial right**

Although the City of Asheville appeals from an interlocutory order denying its motion to dismiss plaintiff-employee's complaint seeking reinstatement, back wages, and a jury trial for de novo review of the Asheville Civil Service Board's decision to uphold the city manager's termination of plaintiff's employment, the order is appealable because an order granting a jury trial affects a substantial right.

2. **Constitutional Law— State—de novo review of quasi-judicial agency decision—not unconstitutional**

In a case where plaintiff-employee sought reinstatement, back wages, and a jury trial for de novo review of the Asheville Civil Service Board's decision to uphold the city manager's termination of plaintiff's employment, the trial court did not err in determining that the provision of the Asheville Civil Service Law providing for a de novo jury trial to an appellant from the decision of its Civil Service Board is constitutional because: (1) there is a presumption in favor of the constitutionality of a statute enacted by the legislature, and the City of Asheville has not carried its burden to show that the statute is unconstitutional; (2) the legislature may constitutionally provide for a de novo review of a quasi-judicial decision of an agency; (3) review of a quasi-judicial decisions of an agency by certiorari is not mandated when there is a specific act of the legislature providing a different scope of review; (4) a provision for a jury trial merely changes the identity of the fact-finder; and (5) the statutory procedure does not impermissibly allow the superior court to substitute its judgment for that of the Board.

Appeal by defendant from an order denying its motion to dismiss entered 17 February 1999 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 9 February 2000.

Jennifer Jacobs (plaintiff) was hired by the City of Asheville (the City) in 1979, and worked in the City Personnel Office until she was

terminated in 1998. That termination is the subject of this litigation. On 16 December 1997, based on an allegedly unauthorized payroll decision made by plaintiff, the Asheville Personnel Director demoted plaintiff to a lower position in the personnel department. Plaintiff appealed her demotion to the Asheville City Manager, who held a grievance conference on 2 February 1998. At the conference he considered additional information not found in plaintiff's personnel file, but was related to prior disciplinary action taken against plaintiff for a similar misapplication of the City's pay policy. On 27 February 1998, the City Manager terminated plaintiff's employment with the City. Plaintiff appealed her termination to the Asheville Civil Service Board (the Board), which upheld the decision of the City Manager. Pursuant to the Asheville Civil Service Law, plaintiff sought a *de novo* review in the Superior Court of Buncombe County by filing a complaint seeking reinstatement, back wages, and a jury trial. The City moved to dismiss the complaint, alleging that the provision of the Asheville Civil Service Law which allows a *de novo* trial before the superior court upon appeal from a decision of the Board is unconstitutional, and that plaintiff's complaint did not set out a cause of action. The trial court denied the City's motion and the City appealed to this Court. The City acknowledges that its appeal is interlocutory, but argues that it involves a substantial right. However, the City also filed a petition for a writ of certiorari on 26 May 1999.

Van Winkle, Buck, Wall, Starnes, and Davis, P.A., by Michelle Rippon; and George Weaver, II, for plaintiff appellee.

Patla, Straus, Robinson & Moore, P.A., by Sharon Tracey Barrett and Alan Z. Thornburg; and Robert W. Oast, Jr., for defendant appellant.

HORTON, Judge.

[1] The City contends the trial court erred in determining that the provision of the Asheville Civil Service law providing for a jury trial *de novo* is constitutional, and also erred in determining that plaintiff's complaint does state a claim for which relief may be granted. The order entered by the trial court was clearly interlocutory. However, we have previously held that an order *denying* a motion for a jury trial is appealable because it deprives the appellant of a substantial right. *In re Ferguson*, 50 N.C. App. 681, 274 S.E.2d 879 (1981). Our Supreme Court has ruled that an order *granting* a jury trial also affects a substantial right, and thus is immediately appealable.

Faircloth v. Beard, 320 N.C. 505, 507, 358 S.E.2d 512, 514 (1987), *overruled on other grounds by Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989). We hold, therefore, that the order of the trial court in this case affected a substantial right of the City, and the appeal from that order is properly before us. In light of our holding, we need not consider defendant's petition for writ of certiorari.

[2] The City contends that the provision of the Asheville Civil Service Law granting a *de novo* jury trial to an appellant from the decision of its Civil Service Board is unconstitutional because it violates the separation of powers between the branches of state government guaranteed by Article I, § 6 of the North Carolina Constitution. ("The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.") The City argues that a review of the Civil Service Board's decision by the superior court under the *de novo* standard violates this constitutional guarantee because it allows the judicial branch to substitute its judgment for that of the Asheville City Manager on a personnel matter. We disagree for the reasons set out below.

It is familiar learning that there is a presumption in favor of the constitutionality of a statute enacted by the legislature. *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 632 (1968), *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1969). Statutes are to be upheld unless it "clearly, positively, and unmistakably appears" that they are unconstitutional; a "mere doubt" does not justify the courts in declaring an act of the legislature unconstitutional. *Id.* The burden of establishing that a statute is unconstitutional is upon the party challenging the legislation. *Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 668, 174 S.E.2d 542, 548 (1970). We hold that the City of Asheville has not carried the burden of showing the unconstitutionality of the portion of its Civil Service Law allowing a *de novo* review in the superior court of the decision of its Civil Service Board.

As originally enacted in 1953, the Asheville Civil Service Law established a Department of Civil Service as a part of Asheville city government. The Department of Civil Service was to be managed by a Director, acting in cooperation with a Civil Service Board. 1953 N.C. Sess. Laws ch. 757, § 1. The Civil Service Board was to make rules for "the appointment, promotion, transfer, layoff, reinstatement, suspension and removal of employees in the qualified service." After a public hearing, and approval by the city council, the rules were to be in full force and effect. *Id.* at § 4. However, the 1953 Act did not provide

the mechanism for judicial review of a decision of the Board. In *In re Burris*, 261 N.C. 450, 453, 135 S.E.2d 27, 30 (1964), our Supreme Court outlined the proper procedure to secure review of an adverse decision of the Civil Service Board:

> In view of the provisions of the statute creating the Civil Service Board of the City of Asheville, and the procedure outlined in Section 14 thereof, we hold that a hearing pursuant to the provisions of the Act with respect to the discharge of a classified employee of the City of Asheville by said Civil Service Board, is a *quasi*-judicial function and is reviewable upon a writ of *certiorari* issued from the Superior Court.

Id. (citations omitted) (emphasis in original). *Burris* is in accord with the long-settled rule in North Carolina that "*certiorari* is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or *quasi*-judicial functions in cases where no appeal is provided by law." *Russ v. Board of Education*, 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950) (citations omitted) (emphasis in original).

In 1977, the General Assembly amended the Asheville Civil Service Law to provide, among other things, that

> [w]henever any member of the classified service of the City of Asheville is discharged, suspended, reduced in rank, transferred against his or her will, or is denied any promotion or raise in pay which he or she should be entitled to, that member shall be entitled to a hearing before the Civil Service Board of the City of Asheville to determine whether the action complained of is justified.
>
> . . . .
>
> At such hearing, the burden of proving the justification of the act or omission complained of shall be upon the City of Asheville and the member requesting the hearing shall be entitled to inspect and copy any records upon which the city plans to rely at such hearing, provided that such records are requested in writing by the member or his attorney prior to the day set for the hearing.
>
> The civil service board shall render its decision in writing within five days after the conclusion of the hearing. If the board determines that the act or omission complained of is not justified, the

> board shall order to rescind whatever action the board has found to be unjustified and may order the city to take such steps as are necessary for a just conclusion of the matter before the board. Upon reaching its decision, the board shall immediately inform the city clerk and the member requesting the hearing of the board's decision and shall do so in writing.
>
> Within 10 days of the receipt of notice of the decision of the board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the facts upon which the petitioner relies for relief. If the petitioner desires a trial by jury, the petition shall so state.

1977 N.C. Sess. Laws ch. 415, §§ 1, 4, 5, and 6. Later in the 1977 Session, the legislature amended one of the provisions of Chapter 415, but that amendment is not relevant to the questions raised by this appeal. 1977 N.C. Sess. Laws ch. 530, § 1.

Following the 1977 amendments, this Court had occasion to define the scope of a *de novo* hearing in the Buncombe County Superior Court on appeal from a decision of the Board. We stated in *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), that trial *de novo* " 'vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.' . . . *'This means that the court must hear or try the case on its merits from beginning to end as if no trial or hearing had been held by the Board and without any presumption in favor of the Board's decision.'* " *Id.* at 405-06, 328 S.E.2d at 862 (emphasis added) (quoting from *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)).

Warren involved the appeal of an Asheville police officer, whose dismissal from the police force was upheld by the Civil Service Board. Pursuant to the same Civil Service Law before us in this case, Officer Warren appealed to the Buncombe County Superior Court and requested a trial by jury. The jury found that the Asheville Chief of Police was not "justified" in discharging Warren from employment; the superior court entered judgment based on the jury verdict; and the City appealed to this Court, alleging error. This Court affirmed the judgment of the superior court, noting that where a *de novo* standard

applies, the affirmance by the Civil Service Board of the decision of the Chief of Police "is to be given no presumption of validity, and the jury is to make its own determination, under proper instructions from the trial court, on whether the Police Chief had justification for the actions he took against [Officer Warren]." *Id.* at 406, 328 S.E.2d at 862.

We find further support in *In re Hayes* for our view that the legislature may constitutionally provide for a *de novo* review of the quasi-judicial decision of an agency. In *Hayes*, the parents of a school child requested that their child be reassigned to another high school for the coming school year. The Fremont City Board of Education denied their request, and the parents appealed to the Wayne County Superior Court. By consent of the parties, a referee was appointed to hear the evidence, make findings of fact, state his conclusions of law arising from the facts, and report to the Court. The referee held an extensive hearing, and found, among other things, that the student seeking reassignment needed certain courses for college admission not available to her at the school to which she was originally assigned, and concluded that her reassignment would "be for her best interest, and that her reassignment will in nowise interfere with the proper administration of said school . . . ." *In re Hayes*, 261 N.C. 616, 619, 135 S.E.2d 645, 647 (1964). The Board of Education excepted to both the referee's findings of fact and conclusions of law, but the superior court found that "the findings of fact and conclusions of law found by the referee are correct and based upon competent evidence and the law applicable thereto." *Id.* at 620, 135 S.E.2d at 648.

On appeal, our Supreme Court noted that the then-applicable statutory provision (N.C. Gen. Stat. § 115-179) provided that upon appeal from a Board of Education to the superior court the matter was to be heard " '*de novo* in the superior court before a jury in the same manner as civil actions are tried and disposed of therein.' " *Hayes*, 261 N.C. at 622, 135 S.E.2d at 649 (citation omitted). That provision, according to the Supreme Court, "vests the superior court with full power to make the requested reassignment if permitted by law." *Id.* In *Hayes*, the Supreme Court did not question the *de novo* nature of the review by the superior court, including the right to a jury trial, but explained that in that case the parties waived the right to a jury trial by consenting to a reference. Had the parties not consented to a reference, they would have been entitled to a "decision . . . reached through trial of the matter by a jury in the superior court . . . ." *In re Varner*, 266 N.C. 409, 418, 146 S.E.2d 401, 409 (1966).

The City contends, however, that the proper procedure for judicial review should be by means of certiorari to the superior court and a nonjury review of the written record by the superior court. We are aware that our statutes governing the review of quasi-judicial decisions by the superior court usually provide for "proceedings in the nature of certiorari," rather than a *de novo* review. *See, for example,* N.C. Gen. Stat. § 160A-381(c) (1999) (governing the review by certiorari of city council decisions which grant or deny special use permits). However, contrary to defendant's contentions, review of the quasi-judicial decisions of an agency by certiorari is not mandated when there is a specific act of the legislature providing a different scope of review. Based on the decisions of our Supreme Court as discussed above, we hold that proceedings in the nature of certiorari are appropriate only when the applicable act does not provide for review through an appeal. *Russ v. Board of Education*, 232 N.C. at 130, 59 S.E.2d at 591.

We also note that there is a division of authority among our sister states about the scope of review provided to a public employee who has been terminated. "The review by a court may be in the nature of a trial de novo or may not." 4 McQuillin, Mun. Corp. § 12.265 (rev. 3d ed. 1992), p. 699 (citing numerous cases). While a jury trial is ordinarily not authorized in such circumstances, we do not think the provision for a jury trial invalidates the procedure. Assuming that a *de novo* procedure is permissible, provision for a jury trial merely changes the identity of the fact-finder.

Finally, we do not think the statutory procedure impermissibly allows the superior court to substitute its judgment for that of the Board. The question before the superior court is not whether the employee should have been terminated rather than demoted, suspended, or transferred, but whether the action of the employee's supervisor was "justified." *See Warren*, 74 N.C. App. 402, 328 S.E.2d 859. We find support for our position in the decision of our Supreme Court in *In re Revocation of License of Wright*, 228 N.C. 584, 46 S.E.2d 696 (1948), which clarified that Court's earlier opinion reported at 228 N.C. 301, 45 S.E.2d 370 (1947). (For clarity, we refer to the earlier opinion as *Wright I*, the later as *Wright II*.)

In *Wright I*, the North Carolina Department of Motor Vehicles (DMV) was notified by South Carolina authorities that Mr. Wright had been found guilty of driving while intoxicated in that state. In its discretion, DMV suspended Mr. Wright's driving privilege and Mr. Wright

petitioned the superior court for review pursuant to the provisions of the motor vehicle law. The statute then in effect [N.C. Gen. Stat. § 20-25] provided that the superior court was " 'to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this article.' " *Wright I*, 228 N.C. at 303, 45 S.E.2d at 372 (citation omitted).

After a hearing, the superior court found that Wright's license was "wrongfully revoked," and ordered its restoration. On appeal, our Supreme Court affirmed the judgment of the trial court. The Supreme Court described the hearing in superior court as "more than a review as upon a writ of *certiorari*. It is a rehearing *de novo*, and the judge is not bound by the findings of fact or the conclusions of law made by the department. Else why 'take testimony,' 'examine into the facts,' and 'determine' the question at issue?" *Id.*

At rehearing, DMV centered its argument on the constitutionality of the procedure which allowed for review of its discretionary decision by the superior court. DMV argued that a *de novo* hearing before the superior court allowed the superior court to "exercis[e] delegated legislative and administrative authority; that the Act sets up no standards for the guidance of the Court, which is left free to exercise an unbridled discretion; and therefore the statute is unconstitutional in that it delegates legislative authority to the Court without prescribing proper standards for the exercise thereof." *Wright II*, 228 N.C. at 586, 46 S.E.2d at 698.

The Supreme Court rejected the arguments of DMV, holding in part that the "jurisdiction vested in the court by [the statute] does not constitute a delegation of legislative and administrative authority. The review is judicial and is governed by the standards and guides which are applicable to other judicial proceedings." *Id.* at 587, 46 S.E.2d at 698. The Court noted that the superior court has inherent authority to review the discretionary actions of any administrative agency on certiorari, but that in this instance the statute "provides for direct approach to the courts and *enlarges the scope of the hearing.*" *Id.* at 587, 46 S.E.2d at 698 (emphasis added). The *Wright II* Court also pointed out that the statute did not fail because it did not provide "standards" for the guidance of the trial court, since the courts already have their own rules of procedure. "Any litigant may rest assured that those standards and rules to which the courts adhere give full assurance against any unbridled exercise of discretionary

power." *Id.* Most important for our analysis in the case before us is the following statement by the *Wright II* Court:

> It must be noted, however, that the discretion to suspend or revoke, or not to suspend or revoke, is vested in the department, subject to a judicial review of the facts upon which its action is based. No discretionary power is conferred upon the Superior Court. Hence, if the judge, upon the hearing, finds and concludes that the license of the petitioner is in fact subject to suspension or revocation under the provisions of the statute, the order of the department entered in conformity with the facts found must be affirmed.

Id. at 589, 46 S.E.2d at 700.

Thus, in the case here under consideration, the Buncombe County Superior Court may not substitute its judgment for that of the Asheville City Manager, but must determine whether the decision to terminate plaintiff was justified under the provisions of the Asheville Civil Service Law. If that decision was justified, then the superior court must affirm the decision of the Board.

Neither the trial court nor the jury is called upon to decide whether *it* would have discharged Ms. Jacobs. This procedure, admittedly more cumbersome than a nonjury review on the written record, recognizes the interest of the employee in her continued employment, and guarantees full protection of her due process rights prior to termination of that employment. The portion of the Asheville Civil Service Law awarding a *de novo* hearing before the superior court has been in effect since our General Assembly enacted it in 1977. Nothing in this record indicates that the citizens of Asheville have petitioned the General Assembly through their elected representatives to modify the questioned provision.

We have carefully considered all of defendant's arguments and other assignment of error, but find no grounds for disturbing the order of the trial court. Plaintiff alleged she was denied due process because incompetent evidence was considered at the conference. She also alleged that her termination was not based on her conduct, but was in retaliation for her pursuit of her grievance. Those allegations are an adequate recitation of the "facts upon which petitioner relies for relief," as required by the Asheville Civil Service Law and our notice system of pleading. 1977 N.C. Sess. Laws ch. 415, § 6. The judgment of the trial court is affirmed.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD MILLER

No. COA99-431

(Filed 18 April 2000)

1. Search and Seizure— warrant—scope of search

The trial court did not err in an indecent liberties with a minor, first-degree sexual exploitation, statutory sexual offense, and statutory rape case by denying defendant's motion to suppress evidence seized by police officers during the search of his residence pursuant to a search warrant based on an affidavit containing information about a police agent's interview of the minor, as well as information obtained in a consent search of defendant's home, because: (1) even if the minor had been subjected to custodial interrogation in which her statutory rights and constitutional rights had not been protected, defendant is without standing to assert that any violation of the minor's rights would protect defendant; (2) although defendant asserts the minor's statements to the police agent were coerced and untruthful, the veracity of the agent as the affiant, instead of the minor, is at issue; and (3) there is no evidence that the officers exceeded the scope of defendant's initial consent to search since a copy of defendant's written consent to search is contained in the record on appeal, and there were no restrictions.

2. Evidence— hearsay—prior inconsistent statements—credibility—impeachment

The trial court did not err in an indecent liberties with a minor, first-degree sexual exploitation, statutory sexual offense, and statutory rape case by admitting the testimony of three witnesses concerning prior statements made by the minor, acknowledging living with defendant and having engaged in various sexual activities with him, because even if this evidence should have been excluded as hearsay at the time it was offered, the minor's subsequent testimony on defendant's behalf denying sexual contact with defendant prior to their marriage rendered

her earlier statements relevant and admissible as prior inconsistent statements bearing upon her credibility. N.C.G.S. § 8C-1, Rule 607.

3. Indecent Liberties— indictment—sufficiency

The trial court did not commit plain error by entering judgments in 98 CRS 1249, 98 CRS 2875, and 98 CRS 2876 for the convictions of taking indecent liberties with a minor, based on the indictment's alleged insufficient notice of the charges or failure to protect defendant against further prosecution for the same offenses, because: (1) the indictment for this offense is sufficient if it uses the language of N.C.G.S. § 14-202.1 and it does not need to allege the evidentiary basis for the charge; (2) the indictment need not allege specifically which of defendant's acts constituted the immoral, improper, and indecent liberty; and (3) use of the statutory language is also sufficient to satisfy constitutional requirements against double jeopardy.

4. Sexual Offenses— indictment—variance—different offense

The trial court committed plain error and defendant's conviction of statutory sexual offense in case number 98 CRS 2875 is vacated because: (1) a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment; and (2) the trial court instructed the jury with respect to the elements of statutory sexual offense under N.C.G.S. § 14-27.7A(a) when the indictment charges the offense proscribed in N.C.G.S. § 14-27.4(a)(2).

5. Indecent Liberties; Rape— sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charges in cases 98 CRS 1249 and 98 CRS 2875 for taking indecent liberties with a minor, and in case 98 CRS 2876 for statutory rape and taking indecent liberties with a minor, because: (1) defendant neither argued nor pointed to a lack of evidence as to any element of these offenses; and (2) the evidence and testimony from numerous witnesses reveals multiple instances of sexual activity and sexual intercourse between defendant and the minor during the time periods alleged in the three bills of indictment.

6. Criminal Law— jury instruction—continue deliberations

The trial court did not coerce a verdict in violation of defendant's constitutional rights when it received a note from the jury

advising that it was deadlocked by a specific numerical division, and the trial court gave the instruction under N.C.G.S. § 15A-1235 and instructed the jurors to continue to deliberate, because there is nothing indicative of intentional or unintentional coercion on the part of the trial court where the trial court did not inquire into the numerical division of the jury.

7. Sentencing— allocution—request prior to sentencing

The trial court erred by refusing to allow defendant his right of allocution, the opportunity to address the court prior to sentencing, and a new sentencing hearing must be conducted because N.C.G.S. § 15A-1334(b) expressly gives a non-capital defendant the right to make a statement in his own behalf at his sentencing hearing if defendant requests to do so prior to the pronouncement of sentence.

Appeal by defendant from judgments entered 24 September 1998 by Judge Howard R. Greeson, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 17 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Jane T. Friedensen, for the State.

John T. Hall for defendant-appellant.

MARTIN, Judge.

In case number 98 CRS 1207, defendant was charged with statutory sexual offense in violation of G.S. § 14-27.7A and taking indecent liberties with a minor in violation of G.S. § 14-202.1. In case number 98 CRS 1248, he was charged with first degree sexual exploitation of a minor in violation of G.S. § 14-190.16(a)(1) and with taking indecent liberties with a minor. In case number 98 CRS 1249, defendant was charged with taking indecent liberties with a minor. In case number 98 CRS 2874, he was charged with statutory sexual offense, with statutory rape, and with taking indecent liberties with a minor. In case number 98 CRS 2875, defendant was charged with forcible sexual offense and with taking indecent liberties with a minor. In case number 98 CRS 2876, he was charged with statutory rape and with taking indecent liberties with a minor. The indictments allege the offenses occurred at various times between November 1997 and January 1998; in each indictment the victim was alleged to be R.A.H., a minor.

We summarize the evidence in this case only to the extent required to discuss defendant's assignments of error. The State offered evidence tending to show that in January 1998, R.A.H. was fourteen years of age and was in her mother's custody. Based upon information received by her father that R.A.H. was living with defendant, who was thirty years of age, an investigation was undertaken by the North Wilkesboro police and the State Bureau of Investigation. On 11 February 1998, R.A.H. was interviewed by S.B.I. Agent Mike Brown. On the same date, she talked with her father and with a social worker.

Based on information provided by R.A.H. during the interview, Agent Brown and other officers went to defendant's mobile home and obtained his consent to search the residence. Various items, including R.A.H.'s pocketbook and one of her school books, were observed. Because defendant was following them around the residence and urging them to hurry, the officers ceased the consent search and obtained a search warrant. After resuming the search pursuant to the search warrant, the officers seized R.A.H.'s pocketbook and schoolbook, numerous articles of her clothing, a camera and undeveloped film, pornographic videos and magazines, and other items. The undeveloped film was developed and contained photographs of R.A.H. nude and clad in a negligee, nude photographs of defendant, and photographs of R.A.H. engaged in sexual acts with other young women.

The State also offered the testimony of several other women who testified as to various occasions between November 1997 and January 1998 when they had seen defendant having sexual intercourse with R.A.H., performing oral sex upon her, and inserting his fingers into her vagina. Defendant directed some of these women to perform sexual acts, including oral sex, with R.A.H. and photographed them while so engaged. Three witnesses testified that defendant had boasted to them of having torn R.A.H.'s vagina during intercourse.

Defendant offered testimony from various witnesses who had visited defendant's residence during the time periods alleged in the bills of indictment and had observed no sexual activity between defendant and R.A.H. R.A.H. testified that she had been suspended from school in October 1997 and had begun working for defendant during the day, keeping house and answering his telephone. After returning to school in January, she continued to visit defendant in the evenings. She testified that she and defendant were married in South Carolina on

Valentine's Day in 1998, and that they had been driven to South Carolina by her mother. She denied having any sexual relationship with defendant prior to their marriage. She testified that her earlier statements to the police were untruthful and were the product of threats and coercion. She also testified that the sexually explicit photographs of her had been taken by some girls from Boone when defendant was not at his residence.

A jury returned verdicts finding defendant guilty of statutory sexual offense and guilty of taking indecent liberties with a minor in 98 CRS 1207; guilty of first degree sexual exploitation and guilty of taking indecent liberties with a minor in 98 CRS 1248; guilty of taking indecent liberties with a minor in 98 CRS 1249; guilty of statutory sexual offense and guilty of indecent liberties with a minor in 98 CRS 2875; and guilty of statutory rape and guilty of taking indecent liberties with a minor in 98 CRS 2876. The jury found defendant not guilty as to each of the three charges contained in the bill of indictment in 98 CRS 2874.

Judgments were entered sentencing defendant to five consecutive active terms of imprisonment of not less than 19 months nor more than 23 months upon each conviction of taking indecent liberties with a minor, and to an active term of imprisonment of not less than 77 months nor more than 102 months upon his conviction of first degree sexual exploitation, to begin at the expiration of the sentences imposed upon defendant's convictions of taking indecent liberties with a minor. The court consolidated the two statutory sexual offense convictions and the statutory rape conviction and entered judgment sentencing defendant to an active prison term of a minimum of 264 months and a maximum of 326 months. He appeals from these judgments.

I.

[1] Defendant moved to suppress evidence seized by police officers during the search, pursuant to a search warrant, of his residence, contending that the officers exceeded the scope of the limited consent he initially gave for them to search, and that the search warrant was impermissibly based on false information obtained from a coercive interrogation of R.A.H. We reject his arguments.

In denying the motion to suppress, the trial court found that Agent Brown had applied for the search warrant and, to establish probable cause for its issuance, had given an affidavit containing

information which he had obtained during his interview of R.A.H., "as well as information obtained in a consent search of defendant's home." The court found that R.A.H. was not in custody at the time she was interviewed by Agent Brown. The trial court concluded, *inter alia:*

> 1. The statements by [R.A.H.] made to Special Agent Brown and Social Worker Henderson are admissible for use in the search warrant affidavit. The defendant has no legal standing to raise any alleged Constitutional violations on behalf of the 14 year old juvenile.
>
> . . .
>
> 4. Not only was the juvenile not in custody, the juvenile was not interrogated. Any questions by Special Agent Brown were not designed to elicit incriminating statements by and about [R.A.H.], but instead, they were designed to illicit information as to James Miller.
>
> 5. All statements contained in the search warrant affidavit were truthful and not made with reckless disregard for their truthfulness. Any involuntariness attributed to the juvenile's statements were not attributable to law enforcement, Social Worker Henderson or Ms. Greene but instead is attributed to the fact that the juvenile did not want to betray her boyfriend, James Miller.

Defendant did not assign error to any of the trial court's findings of fact; the findings are presumed to be correct. N.C.R. App. P. 10(b)(2); *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986). Our review, therefore, is limited to a determination of whether the trial court's conclusions of law are correct. We hold that they are.

Even if R.A.H. had been subjected to a custodial interrogation in which her statutory and constitutional rights had not been protected, which the trial court found had not occurred, defendant is without standing to assert that any such violation of her rights would entitle him to protection. See *State v. Greenwood*, 301 N.C. 705, 273 S.E.2d 438 (1981) (in context of Fourth Amendment, only those whose personal rights have been violated are entitled to benefit from exclusionary rule). Moreover, though defendant asserts R.A.H.'s statements to Agent Brown were coerced and untruthful, it is the veracity of Agent Brown, as the affiant, not R.A.H., which is at issue. See N.C. Gen. Stat. § 15A-978(a) (1999) (stating that "truthful testimony is tes-

timony which reports in good faith the circumstances relied on to establish probable cause"); *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (holding that probable cause for issuance of search warrant anticipates "truthful" showing in affidavit; "truthful" means the information given by affiant is believed to be true).

Defendant also argues the officers exceeded the scope of his initial consent to search and that Agent Brown's inclusion, in the probable cause affidavit, of a description of items observed during that consent search tainted the search warrant. However, defendant did not object or assign error to the trial court's finding that the officers had conducted a consent search of his residence and such finding is therefore binding. In any event, a copy of defendant's written consent to search is contained in the record on appeal and no restrictions on the scope of defendant's consent appear thereon. Defendant's assignments of error related to the denial of his motion to suppress evidence seized from his residence are overruled.

II.

[2] Defendant also assigns error to the admission into evidence, during the State's case, of testimony by Agent Brown, Detective Holland of the North Wilkesboro Police Department, and R.A.H.'s father concerning statements which R.A.H. made to them when she was interviewed on 11 February 1998. In these statements, R.A.H. acknowledged having lived with defendant from October 1997 until January 1998 and having engaged in various sexual activities with him during that time period. Defendant argues the statements were hearsay and were not admissible under any exception to the rule prohibiting the admission of hearsay evidence.

Assuming, without deciding, that this testimony should have been excluded as hearsay at the time it was offered, R.A.H.'s subsequent testimony on defendant's behalf, during which she denied sexual contact with him prior to their marriage, rendered her earlier statements relevant and admissible as prior inconsistent statements bearing upon her credibility. See N.C. Gen. Stat. § 8C-1, Rule 607. "Inconsistent statements are not made inadmissible for impeachment because of some rule making them inadmissible as substantive evidence." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence*, § 159, p. 512 (5th Ed. 1998). Any error in admitting such statements prematurely may be cured if the person who made the statements later testifies in such a way as to render the statements admissible. *Id.* at 511. These assignments of error are overruled.

III.

[3] Defendant contends the trial court committed plain error by entering judgments upon defendant's convictions of taking indecent liberties with a minor in cases 98 CRS 1249, 98 CRS 2875, and 98 CRS 2876 because neither the indictments nor the jury verdicts returned thereon specified the acts which constituted the indecent liberties for which he was convicted. Thus, he contends, the indictments were insufficient to give him notice of the charges against him or to protect him against further prosecution for the same offenses. However, his arguments have been considered by our appellate courts and have been resolved against him.

In *State v. Blackmon*, 130 N.C. App. 692, 507 S.E.2d 42, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998), this Court held that an indictment which charges a statutory offense, such as taking indecent liberties with a minor in violation of G.S. § 14-202.1, by using the language of the statute is sufficient, and need not allege the evidentiary basis for the charge. The indictment need not allege specifically "which of defendant's acts constituted the 'immoral, improper and indecent liberty.' " *Id.* at 699, 507 S.E.2d at 47 (quoting *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987)). Use of the statutory language is also sufficient to satisfy constitutional requirements against double jeopardy. *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987) (use of short form indictment to charge first degree sexual offense sufficient to satisfy constitutional guarantees against double jeopardy). Defendant's assignments of error relating to the judgments entered upon the verdicts finding him guilty of taking indecent liberties with a minor in these cases are overruled.

IV.

[4] Defendant argues, in support of the thirteenth assignment of error contained in the record on appeal, that the court erred in entering judgment upon his conviction of a statutory sexual offense, a violation of G.S. § 14-27.7A, in case number 98 CRS 2875 because the indictment alleged a forcible sexual offense, a violation of G.S. § 14-27.4. However, defendant's thirteenth assignment of error relates to defendant's conviction of taking indecent liberties with a minor, as alleged in the second count of the bill of indictment, the same error alleged in defendant's tenth assignment of error and considered by the court in Section III above. Assuming defendant intended, by his thirteenth assignment of error, to direct our attention to the first count of 98 CRS 2875, in which defendant is charged with forcible

sexual offense in violation of G.S. § 14-27.4, we elect to exercise the discretion accorded us by N.C.R. App. P. 2 to prevent manifest injustice and we address the issue even though, due to the improper assignment of error, the error was not preserved by defendant in the manner required by N.C.R. App. P. 10.

The first count of the bill of indictment in 98 CRS 2875 alleges:

> I. The jurors for the State upon their oath present that on or about December, 1997, in the county named above, the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [R.A.H.], by force and against the victim's will.

The indictment charges the offense proscribed by G.S. § 14-27.4(a)(2) which provides:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> . . .
>
> (2) with another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon . . .
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

At trial, as to this count, the trial court instructed the jury with respect to the elements of a statutory sexual offense as prohibited by G.S. § 14-27.7A, under which a defendant is guilty of statutory rape or sexual offense if he "engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, ..." N.C. Gen. Stat. § 14-27.7A(a).

"It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986); *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). Though defendant failed to object to the court's instruction, our Supreme Court has held it to be a basic violation of due

process, amounting to plain error, where a jury is instructed as to an offense which is not charged in the bill of indictment. *Id.* Accordingly we must vacate defendant's conviction of statutory sexual offense in case number 98 CRS 2875.

V.

[5] Defendant also contends that because there was insufficient evidence to support his convictions of the offenses charged in cases 98 CRS 1249, 98 CRS 2875, and 98 CRS 2876, the trial court erred in refusing to dismiss those charges. A criminal defendant's motion to dismiss based on the insufficiency of the evidence must be denied if there is substantial evidence of each element of the crime charged. *State v. Talbot*, 123 N.C. App. 698, 474 S.E.2d 143 (1996). The evidence must be viewed in the light most favorable to the State. *Id.*

With the exception of the charge of forcible sexual offense discussed in Section IV above, defendant has neither argued nor pointed us to a lack of evidence as to any element of any of the remaining offenses for which he was convicted in those cases. Indeed, we have reviewed the evidence thoroughly and find testimony from numerous witnesses as to multiple instances of sexual activity and sexual intercourse between defendant and R.A.H. during the time periods alleged in the three bills of indictment challenged by defendant. Thus, we overrule defendant's challenge to the sufficiency of the evidence to support his convictions of taking indecent liberties with a minor in cases numbered 98 CRS 1249 and 98 CRS 2875, and his conviction of statutory rape and taking indecent liberties with a minor in 98 CRS 2876.

VI.

[6] We reject without extensive discussion defendant's contention, in support of his first assignment of error, that the trial court coerced a verdict in violation of his constitutional rights. After receiving a note from the jury advising they were deadlocked by a specific numerical division, the trial court gave the instruction contained in G.S. § 15A-1235 and instructed the jurors to continue to deliberate. Under the circumstances of this case, where the trial court did not inquire into the numerical division of the jury, we find nothing indicative of intentional or unintentional coercion on the part of the trial court, and no violation of defendant's rights under the State or Federal Constitutions. See *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984).

VII.

[7] Finally, we consider defendant's argument, in support of his third assignment of error, that his rights to a fair trial and to equal protection of the law under the State and Federal Constitutions, and his rights pursuant to G.S. § 15A-1334(b), were violated by the trial court's refusal to permit him to address the court prior to sentencing.

At sentencing, defendant's counsel first made a statement on defendant's behalf, after which the following colloquy occurred:

> THE COURT: All right, anything further.
>
> MR. BREWER: No, sir.
>
> THE COURT: Mr. Green?
>
> MR. GREEN: No, sir.
>
> THE COURT: Stand up.
>
> DEFENDANT MILLER: (Standing).
>
> THE COURT: All right, now, Madam Clerk, you need the verdicts?
>
> CLERK: (Shakes head negatively).
>
> MR. BREWER: Your Honor, may he be heard?
>
> THE COURT: No, sir. No, sir. In the second degree, in all second degree. . . .

Allocution, or a defendant's right to make a statement in his own behalf before the pronouncement of a sentence, was a right granted a defendant at common law. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994). The right of allocution was codified in G.S. § 15A-1334(b) which provides in pertinent part:

> (b) Proceeding at Hearing.—The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

This Court has said "N.C. Gen. Stat. § 15A-1334(b) expressly gives a non-capital defendant the right to 'make a statement in his own behalf' at his sentencing hearing" if the defendant requests to do so prior to the pronouncement of sentence. *State v. Rankins*, 133 N.C. App. 607, 613, 515 S.E.2d 748, 752 (1999). Because the trial court failed to do so, we must remand these cases for a new sentencing hearing.

For the reasons stated, we must vacate defendant's conviction of statutory sexual offense in case number 98 CRS 2875. As to defendant's convictions of statutory sex offense contained in the first count of the bill of indictment in case number 98 CRS 1207 and statutory rape contained in the first count of the bill of indictment in 98 CRS 2876, defendant's conviction of taking indecent liberties with a minor contained in the second count of the bill of indictment in 98 CRS 1207, defendant's conviction of taking indecent liberties with a minor and first degree sexual exploitation in 98 CRS 1248, defendant's conviction of taking indecent liberties with a minor in 98 CRS 1249, defendant's conviction of taking indecent liberties with a minor contained in the second count of the bill of indictment in 98 CRS 2875, and defendant's conviction of taking indecent liberties with a minor contained in the second count of the bill of indictment in 98 CRS 2876, we find no error in defendant's trial but remand the cases to the trial court for a new sentencing hearing.

No error in part, vacated in part, and remanded for resentencing.

Judges WYNN and HUNTER concur.

GETTY DALE LONG AND DALE A. LONG, PLAINTIFFS v. RON RUSSELL HARRIS, DEFENDANT

No. COA99-454

(Filed 18 April 2000)

1. Evidence— habit—driving

The trial court did not abuse its discretion in an action arising from an automobile accident by excluding testimony from plaintiffs' son that he had been home recovering from an injury, that he had observed defendant's driving every day, that defend-

ant had driven "wide open as usual" the day before the collision, and that defendant had driven the same way on each previous occasion. It cannot be said that the court's ruling was unsupported by reason, given the vague and imprecise nature of the testimony regarding defendant's speed and the witness's potential interest in the outcome. N.C.G.S. § 8C-1, Rule 406.

2. Motor Vehicles— negligence—collision while avoiding a third vehicle

The trial court did not err in an action arising from an automobile accident by denying a directed verdict for plaintiffs where, construing all inferences in defendant's favor, the record reflects evidence that a truck suddenly crossed in front of the automobile operated by defendant, causing him to brake and swerve to his right to avoid colliding with that truck, whereupon defendant struck plaintiffs' car as it turned into a driveway. Although plaintiffs presented conflicting evidence as to defendant's speed and opportunity to avoid the collision at issue, defendant's showing permitted the inference that he was not negligent.

3. Motor Vehicles— negligence—sudden emergency—perception of emergency

The trial court did not err in an action arising from an automobile collision by instructing the jury on the doctrine of sudden emergency where the evidence was in conflict on whether defendant perceived the emergency circumstance and reacted to it and whether defendant's negligence contributed to the emergency. Furthermore, the jury was properly instructed at length on the doctrine.

4. Appeal and Error— use of unpublished opinions

Defendant violated Appellate Rule 30(e) by citing as authority and extensively quoting from an unpublished opinion. While his contentions were reviewed, the unpublished opinion was not considered and counsel are reminded of the explicit provisions of the rule prohibiting the citation of unpublished opinions and their use as precedent.

Appeal by plaintiffs from judgment entered 30 November 1998 by Judge Claude S. Sitton in Burke County Superior Court. Heard in the Court of Appeals 13 January 2000.

Tippens & Zurosky, L.L.P., by Kirk S. Zurosky, for plaintiffs-appellants.

Crosswhite & Crosswhite, P.A., by William E. Crosswhite, for defendant-appellee.

JOHN, Judge.

Plaintiffs Dale A. Long and Getty Dale Long (Mr. and Mrs. Long) appeal, assigning error to certain aspects of a jury trial resulting in a verdict in favor of defendant Ron Russell Harris. We conclude the trial court committed no error.

Relevant factual and procedural information includes the following: On 22 December 1995, Mrs. Long and defendant were each operating their automobiles in the same direction on U.S. Highway 70 in Burke County. As Mrs. Long conducted a right turn into the driveway of the residence of her son, Gary Long (Gary), defendant's automobile veered off the side of the roadway, jumped the curb, and impacted Mrs. Long's vehicle on the passenger side.

Plaintiffs filed the instant suit 20 November 1996, seeking damages for injuries to Mrs. Long's left ankle, foot, neck and back, and for loss of consortium by Mr. Long. Defendant answered denying negligence and asserting that

> he was confronted with a certain sudden emergency, to which he did not contribute in any manner, when an unidentified motor vehicle pulled into the path of the [d]efendant and in such close proximity to him, whereupon [d]efendant immediately applied his brakes and turned to the right and left the roadway in order to avoid colliding with the vehicle that had pulled into his path of travel, and in so doing, the [d]efendant was unable to avoid colliding with [Mrs. Long's] vehicle . . . .

The case was tried before a jury 18 November 1998. Plaintiffs offered testimony from both Mr. and Mrs. Long and their son, Gary. During Gary's testimony, plaintiffs sought to introduce his observations of defendant's habitual manner of driving. Following a *voir dire* hearing, the trial court rejected the tendered evidence.

At the close of plaintiffs' evidence and again at the close of defendant's evidence, plaintiffs moved for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50(a) (1999), which motions were denied by the trial court. Over plaintiffs' objections, the trial court instructed

the jury on the doctrine of sudden emergency. The jury returned a verdict in favor of defendant and plaintiffs timely appealed.

[1] Plaintiffs first assign error to the exclusion of Gary's testimony regarding defendant's driving habits. This assignment of error is unfounded.

During the *voir dire* hearing conducted by the trial court, Gary testified he had been at home "every day" recovering from an eye injury during the "previous month before this accident happened," and that he had observed defendant operating his automobile on Highway 70 "every day" from a "picture window facing the road." According to Gary, defendant passed in front of his residence driving "[w]ide open as usual" on the day prior to the collision. Further, defendant had driven the "same way" on each previous occasion.

The North Carolina Rules of Evidence provide that

> [e]vidence of the habit of a person . . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice.

N.C.G.S. § 8C-1, Rule 406 (Rule 406) (1999).

> [O]ur case law establishes that "habit" may be proven by testimony of a witness who is sufficiently familiar with the person's conduct to conclude that the conduct in question is habitual.
>
> . . . .
>
> . . . Before evidence of . . . conduct may be admitted to prove habit, however, the trial court must . . . determine the reliability and probative value of the proffered evidence.

Crawford v. Fayez, 112 N.C. App 328, 332, 335, 435 S.E.2d 545, 548, 549 (1993), *disc. review denied*, 335 N.C. 553, 441 S.E.2d 113 (1994).

Further, whether the proffered evidence is

> sufficient to establish habit is a question to be decided on a case-by-case basis, and the trial court's rulings thereon will not be disturbed absent an abuse of discretion.

Id. at 335, 435 S.E.2d at 550; *see also State v. Wortham*, 80 N.C. App. 54, 62, 341 S.E.2d 76, 81 (1986) (decision to admit evidence rests in discretion of trial court), *rev'd on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987). An

> [a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Given the vague and imprecise nature of Gary's testimony regarding defendant's speed (defendant was driving "wide open") and Gary's potential, albeit understandable, interest in the outcome of the case as the son of plaintiffs, we cannot say the trial court's ruling appears "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Id.* The court therefore did not abuse its discretion by excluding Gary's testimony on this issue, *see Crawford*, 112 N.C. App. at 335, 435 S.E.2d at 550, and plaintiffs' first assignment of error fails.

[2] Plaintiffs next assign error to the trial court's denial of their motions for directed verdict. Originally, plaintiffs also assigned error to the denial of their new trial motion. However, as that point was not argued in plaintiffs' appellate brief, it is deemed abandoned under our Rules of Appellate Procedure (the Rules). *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

Plaintiffs insist the evidence adduced at trial led to "no other possible logical conclusion other than that [defendant] was negligent" in that he operated his vehicle "at a speed that was greater than [wa]s reasonable and prudent under the conditions then existing" and did not "keep a reasonably careful lookout."

> The question presented by a motion for a directed verdict is whether the evidence is sufficient to entitle the non-movant to have a jury decide the issue in question.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). Upon a motion for directed verdict, the evidence must be considered in the light most favorable to the non-movant, resolving all conflicts in the latter's favor, *id.*, and giving to the non-movant "the benefit of all reasonable inferences that may be drawn from that evidence," *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993).

> Moreover, if there is conflicting testimony that permits different inferences, one of which is favorable to the non-moving party, a

directed verdict in favor of the party with the burden of proof is improper.

United Laboratories, 322 N.C. at 662, 370 S.E.2d at 386.

In addition, we note our courts have repeatedly observed that it "is seldom appropriate to direct a verdict in a negligence action," *Stanfield v. Tilghman*, 342 N.C. 389, 394, 464 S.E.2d 294, 297 (1995), particularly in favor of the party with the burden of proof, *see La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 484, 350 S.E.2d 889, 891 (1986) (directed verdicts for party with burden of proof "rarely granted, because there will ordinarily remain in issue the credibility of the evidence"), *cert. denied*, 319 N.C. 459, 354 S.E.2d 888 (1987). Further, "[n]egligence is not presumed from the mere fact of injury." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992).

Review of the evidence adduced at trial in the light most favorable to defendant, *see United Laboratories*, 322 N.C. at 661, 370 S.E.2d at 386, reveals the latter's testimony that he was driving at "[a]bout thirty, thirty-five" miles per hour when suddenly a "truck pull[ed] out . . . [and] swerv[ed] in front of" him. According to defendant, he "turned [his] wheels to keep from hitting it and . . . hit the brakes" and then "hit that curb thing and that's when [he] hit" Mrs. Long. Roger Willis, a witness to the collision, also testified that a truck crossed over Highway 70 just before the accident "quick like he saw somebody coming [and] wanted to speed up and hurry and get across."

Construing all inferences in defendant's favor as we must, *see Abels*, 335 N.C. at 215, 436 S.E.2d at 825, the record thus reflects evidence that a truck suddenly crossed in front of the automobile operated by defendant, causing him to brake and swerve to his right to avoid colliding with that truck, whereupon he struck Mrs. Long's vehicle as she was turning into the driveway of her son's residence. Although plaintiffs presented conflicting evidence as to defendant's speed and opportunity to avoid the collision at issue, defendant's showing permitted the inference that he was not negligent. The trial court therefore properly denied the directed verdict motion of plaintiffs, the party with the burden of proof. *See United Laboratories*, 322 N.C. at 662, 370 S.E.2d at 386; *see also La Notte, Inc.*, 83 N.C. App. at 484, 350 S.E.2d at 891.

[3] Lastly, plaintiffs contend the trial court erred by instructing the jury on the doctrine of sudden emergency. We do not agree.

> [T]he doctrine of sudden emergency provides a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others.

Holbrook v. Henley, 118 N.C. App. 151, 153, 454 S.E.2d 676, 677-78 (1995). For the doctrine to apply, two elements must coincide. First, "an emergency situation must exist requiring immediate action to avoid injury." *Conner v. Continental Industrial Chemicals*, 123 N.C. App. 70, 73, 472 S.E.2d 176, 179 (1996). To satisfy this element, the party asserting the doctrine "must have perceived the emergency circumstance and reacted to it." *Pinckney v. Baker*, 130 N.C. App. 670, 673, 504 S.E.2d 99, 102 (1998). Second, "the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Conner*, 123 N.C. App. at 73, 472 S.E.2d at 179.

A sudden emergency jury instruction is properly rendered if substantial evidence on each of the two essential elements of the doctrine has been presented. *Banks v. McGee*, 124 N.C. App. 32, 34, 475 S.E.2d 733, 734 (1996). In determining whether the substantial evidence test has been satisfied, "the evidence must be considered in the light most favorable" to the party requesting the benefit of the instruction. *Holbrook*, 118 N.C. App. at 153, 454 S.E.2d at 678.

Plaintiffs maintain defendant failed to present sufficient evidence on either element of the doctrine, asserting he failed to "perceive the emergency circumstance compelling him to act instantly to avoid a collision" and "by his own negligent conduct created any emergency that may have existed." We address plaintiffs' contentions *ad seriatim*.

Plaintiffs cite *Pinckney* and point to defendant's testimony as supporting their contention he did not "perceive[] the emergency circumstance" he claimed caused the collision at issue. In *Pinckney*, plaintiff Robin Pinckney (Pinckney) sued defendant Joseph Baker (Baker) for injuries resulting from a collision between Baker's vehicle and one operated by Kimi Luces (Luces), in which Pinckney was a passenger. The evidence adduced at trial indicated Luces was attempting to merge in front of Baker into Baker's lane of travel when the vehicles collided.

> According to Baker, the alleged emergency circumstance . . . was the action of Luces in pulling suddenly and unexpectedly in front of Baker's van. However, Baker repeatedly testified he did not see

> Luces' vehicle prior to the collision, and that his attention was directed to it *only upon impact. . . . [T]he sole indication in the record* is that Baker was unaware of the alleged emergency until the actual collision.

Pinckney, 130 N.C. App. at 674, 504 S.E.2d at 102 (citation omitted) (emphasis added). We therefore held the trial court's instruction on the sudden emergency doctrine was improper in that Baker's testimony demonstrated he never "perceived the emergency circumstance" and thus could not have been "react[ing] to it" when the collision occurred. *Id.* at 673, 504 S.E.2d at 102.

Notwithstanding plaintiffs' argument to the contrary, defendant in the case *sub judice* testified he saw "a little Chevrolet, like an S-10," that "pulled out in front of [him]," causing him to "hit the brake and turn[] the wheel." Defendant thus presented evidence indicating he perceived the truck in his path and then reacted to the emergency by applying his brakes and turning his automobile to the right.

Nonetheless, plaintiffs further seize upon a statement by defendant in which he agreed he did not see the truck until "it was right in front of [him and] at no other time." Such circumstance, however, is not equivalent to that in *Pinckney*, wherein the "*sole* indication in the record," *id.* at 674, 504 S.E.2d at 102 (emphasis added), was that Baker did not see the vehicle alleged to have caused the emergency *until the impact* and took *no* evasive action. By contrast, defendant herein presented evidence he indeed saw the truck alleged to have caused the sudden emergency in time to apply his brakes and swerve to avoid colliding with that truck.

Finally, plaintiffs highlight defendant's admission he failed to see *Mrs. Long's* automobile until impact. However, defendant's acknowledgment is irrelevant to whether an instruction on the sudden emergency doctrine was appropriate. Defendant must only have "perceived the emergency circumstance" herein, *id.* at 673, 504 S.E.2d at 102, *i.e.*, the truck which pulled out in front of him. There is no requirement that he must have observed prior to impact *other* vehicles involved in the collision, such as that of Mrs. Long, which in no way contributed to the "emergency circumstance." *Id.*

Plaintiffs also contend the sudden emergency doctrine was inapposite at trial because defendant's "inattention and failure to maintain a proper lookout was a cause in the accident." Specifically, plaintiffs maintain defendant was traveling too fast and should

have seen both the truck and Mrs. Long's vehicle in time to avoid the collision.

Viewing the evidence in the light most favorable to defendant, *see Holbrook*, 118 N.C. App. at 153, 454 S.E.2d at 678, it appears that a truck suddenly crossed in front of defendant's automobile which was traveling at thirty miles per hour, and that a collision would have resulted between the truck and defendant's vehicle but for defendant's quick maneuvering.

> A driver is under no duty to anticipate disobedience of law or negligence on the part of others, but he has the duty to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered . . . .

Rouse v. Jones, 254 N.C. 575, 581, 119 S.E.2d 628, 633 (1961).

Although

> a party cannot by his own negligent conduct permit an emergency to arise and then excuse himself for his actions or omissions on the ground that he was called to act in an emergency,

Holbrook, 118 N.C. App. at 153, 454 S.E.2d at 678, we are not persuaded that "*all* of the evidence . . . show[ed] that [defendant] by his negligence brought about or contributed to the emergency," *Day v. Davis*, 268 N.C. 643, 647, 151 S.E.2d 556, 559 (1966). The issue thus was a "matter[] . . . for jury determination under proper instructions . . . ." *Id.*

In the foregoing regard, we note the trial court's jury instructions correctly charged the jury that the doctrine of sudden emergency would not apply if it found defendant's negligence contributed to the emergency:

> the doctrine of sudden emergency is not applicable to one who, by his own negligence, has brought about or contributed to the emergency.

The court further emphasized that requirement while expounding on the doctrine:

> [A] person who, *through no negligence of his own*, is suddenly and unexpectedly confronted with imminent danger . . . is not

> required to use the same judgment that would be required if there was more time to make a decision . . . .
>
> . . . .
>
> . . . [A] person's conduct which might otherwise be negligent in and of itself would be—would not be negligent if it results from a sudden emergency *that is not of that person's own making.*

(emphasis added).

In sum, the evidence was in conflict on the sudden emergency element of whether defendant "perceived the emergency circumstance and reacted to it," *Pinckney*, 130 N.C. App. at 673, 504 S.E.2d at 102, and on the element of whether defendant's negligence contributed to the emergency. Further, the jury was properly instructed at length on the doctrine of sudden emergency. *See Day*, 268 N.C. at 677, 151 S.E.2d at 559. Plaintiffs' final assignment of error is therefore unavailing.

[4] Prior to concluding, we are compelled to address a violation by defendant of the Rules. In his appellate brief, defendant cited as authority, and quoted extensively from, an unpublished opinion of this Court filed in 1998.

> A decision without a published opinion is authority only in the case in which such decision is rendered and *should not be cited in any other case in any court for any purpose*, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

N.C.R. App. 30(e)(3) (emphasis added). An unpublished opinion "establishe[s] no precedent and is not binding authority," *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997).

Compliance with the Rules is mandatory and violation thereof subjects a party to sanctions. *See* N.C.R. App. P. 25(b) (Court may "impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with" the Rules). Notwithstanding, we have elected in our discretion pursuant to N.C.R. App. P. 2 to review defendant's contentions herein, but without consideration of the unpublished decision cited in his appellate brief. *See Harris v. Duke Power Co.*, 83 N.C. App. 195, 199, 349 S.E.2d 394, 397 (1986) (Court of Appeals "decline[s] to con-

sider" unpublished opinion cited by party), *aff'd*, 319 N.C. 627, 356 S.E.2d 357 (1987). Nonetheless, we "remind counsel of the [explicit] provisions of [N.C.R. App. P.] 30(e)," *id.*, prohibiting citation of unpublished opinions and use thereof as precedent.

No error.

Judges McGEE and HUNTER concur.

NOVACARE ORTHOTICS & PROSTHETICS EAST, INC., PLAINTIFF v. ELMER SPEELMAN, DEFENDANT

No. COA99-564

(Filed 18 April 2000)

1. Injunction— preliminary—anti-competition covenant—ambiguity

The trial court did not err in denying plaintiff-employer's motion for a preliminary injunction against defendant-employee to enforce an anti-competition covenant, stating the employee shall not engage in a competing business prior to two years following the date of termination of the employee's employment by the employer or any other member of the company group, because: (1) the anti-competition clause is ambiguous and unclear as a matter of law as to whether the covenant was triggered when defendant resigned from his employment, and the ambiguity is construed against the drafter; and (2) plaintiff has not made the requisite showing that it is likely to succeed on the merits with respect to the claim

2. Injunction— preliminary—anti-competition covenant—trade secrets

The trial court did not err in denying plaintiff-employer's motion for a preliminary injunction against defendant-employee to enforce an anti-competition covenant to prevent defendant from misappropriating the company's "trade secrets," including its customer lists and other compilations of customer data, because: (1) plaintiff has failed to present evidence to show that the company took any special precautions to ensure the confidentiality of its customer information; (2) any information used

to contact the clients would have been easily accessible to defendant through the local telephone book; and (3) defendant had been treating the particular clients he contacted after his resignation since he began employment with plaintiff, and the personal relationship meant one could expect those clients would follow defendant to a competing business.

3. Civil Procedure— motion to dismiss—application to stay litigation and compel arbitration

The trial court erred in granting defendant-employee's motion to dismiss plaintiff-employer's claims for breach of contract and misappropriation of plaintiff's trade secrets under N.C.G.S. § 1A-1, Rule 12(b)(6) because defendant's motion was an application to stay litigation and compel arbitration pursuant to N.C.G.S. § 1-567.3(a), and thus, the trial court was required to conduct the appropriate inquiry and enter an order compelling or denying arbitration.

Appeal by plaintiff from order entered 4 December 1998 by Judge E. Lynn Johnson and from order entered 9 March 1999 by Judge Ronald L. Stephens in Superior Court, Cumberland County. Heard in the Court of Appeals 22 February 2000.

Maupin Taylor & Ellis, P.A., by Michael C. Lord, for plaintiff-appellant.

Reid, Lewis, Deese, Nance & Person, L.L.P., by Renny W. Deese, for defendant-appellee.

TIMMONS-GOODSON, Judge.

This appeal involves an action brought by NovaCare Orthotics & Prosthetics East, Inc. ("plaintiff" or "NovaCare") against Elmer Speelman ("defendant") seeking injunctive relief and other appropriate relief for breach of contract and misappropriation of plaintiff's trade secrets. Plaintiff appeals from an order denying its motion for a preliminary injunction and from an order dismissing all remaining claims against defendant pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. The pertinent factual and procedural information follows.

Plaintiff is in the business of providing individuals with custom bracing (orthotics) and artificial limbs (prosthetics). In December of

1997, plaintiff acquired the assets of Health Care Connection, Inc. ("HCC"), a provider of orthotics and prosthetics with offices at 4320 Fayetteville Road in Lumberton, North Carolina and 2444 Owen Drive in Fayetteville, North Carolina. At the time of the acquisition, HCC employed defendant as a BOC (Board for Orthotist Certification) Orthotist/Prosthetist. On 31 December 1997, plaintiff offered to employ defendant as its Center Manager in Fayetteville, and the parties executed an Employment Agreement ("the Agreement") for a period of three years.

Under Paragraph 7 of the Agreement, the "Confidential Information" provision, defendant agreed that, without prior written authorization, he would "not in any manner use any confidential material of [NovaCare] . . . outside of the scope of [his] duties and responsibilities under this Agreement or in any way that is detrimental to [NovaCare]." The Agreement defined "confidential material" as follows:

> [A]ll information in any way concerning the activities, business or affairs of [NovaCare] or any of the customers or clients of [NovaCare], including, without limitation, information concerning trade secrets, together with all sales and financial information concerning [NovaCare] and any and all information concerning projects in research and development or marketing plans for any products or projects of [NovaCare], and all information in any way concerning the activities, business or affairs of any of such customers or clients, which is furnished to the Employee by [NovaCare] or any of its agents, customers or clients, or otherwise acquired by the Employee in the course of [his] employment with [NovaCare]; provided, however, that the term "confidential material" shall not include information which (i) becomes generally available to the public other than as a result of a disclosure by the Employee, (ii) was available to the Employee on a non-confidential basis prior to his employment with [NovaCare] or (iii) becomes available to the Employee on a non-confidential basis from a source other than [NovaCare] or any of its agents, customers or clients, provided that such source is not bound by a confidentiality agreement with [NovaCare] or any of such agents, customers or clients.

Additionally, under the terms of the "Non-Competition" clause contained in the Agreement, defendant agreed to the following:

> [I]n consideration of his employment hereunder, Employee shall not, prior to two (2) years following the date of termination of the Employee's employment by [NovaCare] or any other member of [NovaCare] (i) engage . . . in any activity or business venture, anywhere within 50 miles of [NovaCare's] facilities [in Fayetteville and Lumberton] . . ., which is competitive with the business of [NovaCare] on the date of termination, . . . (iii) solicit or entice or endeavor to solicit or entice away any of the clients or customers of [NovaCare], either on the Employee's own account or for any other person, firm, corporation or organization, . . . or (v) at any time, take any action or make any statement the effect of which would be, directly or indirectly, to impair the good will of [NovaCare] or the business reputation or good name of [NovaCare], or be otherwise detrimental to [NovaCare], including any action or statement intended, directly or indirectly, to benefit a competitor of [NovaCare].

In August of 1998, defendant notified plaintiff of his resignation, which plaintiff accepted effective 19 August 1998. Defendant then joined A.O.P. Inc. ("AOP") at its facility located at 4140 Ferncreek Drive in Fayetteville, North Carolina which was approximately three and one-half miles from his former place of employment with plaintiff. AOP, like plaintiff, is in the business of providing orthotics and prosthetics.

On 20 November 1998, plaintiff filed a complaint against defendant seeking, *inter alia*, injunctive relief restraining him from further breaching the "Confidential Information" and "Non-Competition" provisions of the Agreement. The complaint also alleged that defendant misappropriated plaintiff's trade secrets in violation of the North Carolina Trade Secrets Protection Act ("the Trade Secrets Act"). Based on the averments in the complaint, the trial court entered a temporary restraining order enjoining defendant's allegedly wrongful activities. The court thereafter conducted a hearing on plaintiff's motion for a preliminary injunction and, on 4 December 1998, entered an order denying the motion.

On 8 January 1999, plaintiff served defendant with its first set of interrogatories and simultaneously noticed his deposition for 1 March 1999. Defendant filed "Motions in the Cause" seeking a protective order and asking the court to dismiss plaintiff's action under Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. The trial court granted defendant's motions to dismiss on 9 March 1999. From the 4 December 1998 order denying its motion for a preliminary injunction

and from the 9 March 1999 order dismissing its action, plaintiff appeals.

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[1] Plaintiff's first contention is that the trial court improvidently denied its motion for a preliminary injunction because plaintiff demonstrated a likelihood that its cause of action against defendant would succeed on the merits. At the outset, plaintiff argues that the "Non-Competition" covenant contained in the Employment Agreement was valid and enforceable; therefore, the court should have issued an order restraining defendant from further violating its terms. We disagree.

As our Supreme Court recognized in *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983),

> [A] preliminary injunction "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 [its] 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."

308 N.C. at 401, 302 S.E.2d at 759-60 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Furthermore, "on appeal from an order of [the] 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." *Id.* at 402, 302 S.E.2d at 760.

The initial inquiry on a motion for a preliminary injunction is whether the plaintiff has demonstrated a likelihood of success on the merits of its case. *Id.* at 401, 302 S.E.2d at 760. To establish a likelihood of success where an employer seeks a preliminary injunction to enforce a covenant restraining competition, the employer must make a *prima facie* showing that the covenant is valid and enforceable against the employee. *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 869, 433 S.E.2d 811, 813 (1993). In North Carolina, an anti-competition clause is valid and enforceable if it is " '(1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy.' " *Id.* at 869, 433 S.E.2d at 813 (quoting *A.E.P. Industries*, 308 N.C. at 402-03, 302 S.E.2d at 760).

The pivotal question raised in the instant case, however, is whether the covenant against competition applies to defendant under the present set of facts. The covenant states that "the Employee shall not . . . [engage in a competing business] prior to two (2) years following the date of *termination of the Employee's employment by the Employer or any other member of the Company Group*[.]" (emphasis added). Based on this language, defendant takes the position that his resignation did not engage the provisions of the covenant, because the covenant requires that the employment be terminated by NovaCare. Plaintiff, on the other hand, argues that defendant's construction is erroneous and that termination of one's employment with NovaCare, whether by resignation or dismissal, triggers the anti-competition provision. We believe that the language in question is reasonably subject to both interpretations and is, therefore, ambiguous.

A contractual clause is ambiguous if the language used " 'is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Barrett Kays & Assoc. v. Colonial Building Co.*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998) (quoting *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996) (citation omitted)). In short, an agreement contains an ambiguity "when the 'writing leaves it uncertain as to what the agreement was[.]' " *Id.* (quoting *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989)). Furthermore, when an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language. *Station Assoc. Inc. v. Dare County*, 130 N.C. App. 56, 62, 501 S.E.2d 705, 708 (1998), *rev'd on other grounds*, 350 N.C. 367, 513 S.E.2d 789 (1999).

As demonstrated by the parties' dispute, the previously quoted language of the anti-competition clause is reasonably susceptible to either of the proposed constructions. From the language alone, we cannot say that, as a matter of law, the covenant against competition was triggered when defendant resigned from his employment. Plaintiff argues, nonetheless, that defendant's proposed construction is illogical and, as such, is precluded by this Court's decision in *Market America v. Christman-Orth*, 135 N.C. App. 143, 520 S.E.2d 570 (1999), *disc. review denied*, 351 N.C. 358, —— S.E.2d —— (2000).

In *Market America*, the covenant restraining competition provided that the employee would not "enter into competition with

Market America . . . for a period of six months from [her] written resignation or termination as an Independent Distributor of Market America[.]" *Id.* at 154, 520 S.E.2d at 579. The employee argued that the covenant was factually inapplicable to her, because she had not yet resigned or been terminated from her distributorship with the company when she engaged in the allegedly competitive activity. We rejected this argument, however, stating that in this jurisdiction, a contract " 'encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion.' " *Id.* (quoting *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 569, 500 S.E.2d 752, 755-56, *disc review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998) (citation omitted)). Thus, we concluded that the anti-competition provision was impliedly operative during the employee's distributorship with the company. Because the contract language in *Market America* did not present an ambiguity, but a question as to what terms were included by implication, that decision does not bear on the facts of the instant case. Plaintiff's argument, then, fails. Accordingly, we hold that plaintiff has not made the requisite showing that it is likely to succeed on the merits with respect to the claim seeking enforcement of the covenant.

[2] Plaintiff further argues that a preliminary injunction should have issued to prevent defendant from misappropriating the company's "trade secrets" in violation of North Carolina's Trade Secrets Protection Act. Again, we find that plaintiff has failed to establish the likelihood of its ultimate success on the merits regarding this claim.

Section 66-152 of the General Statutes provides the following definitions for "misappropriation" and "trade secret":

> (1) "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.
>
> . . . .
>
> (3) "Trade Secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable

through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(1),(3) (1999).

Plaintiff contends that its "customer lists and other compilations of customer data" are protected under section 66-152. Plaintiff further contends that defendant's post-resignation contact with several of the clients he had treated while in plaintiff's employ constituted a misappropriation of the company's trade secrets within the meaning of section 66-152. However, plaintiff has not come forward with any evidence to show that the company took any special precautions to ensure the confidentiality of its customer information. Indeed, any information used to contact the clients would have been easily accessible to defendant through a local telephone book. As for his treatment of their orthotic and prosthetic needs, the evidence suggests that defendant had been treating these particular clients since his employment with HCC. He had developed a personal relationship with them, and one could expect that they would follow him to a competing business. Thus, we conclude that plaintiff has failed to establish likelihood of success on the merits regarding its claim for trade secrets protection, and the trial court was correct in denying plaintiff's motion for a preliminary injunction.

[3] Next, we consider plaintiff's contention that the trial court erred in granting defendant's motion to dismiss plaintiff's claims pursuant to Rule 12(b)(6). Because we conclude that defendant's motion was an application to stay litigation and compel arbitration pursuant to section 1-567.3(a) of the General Statutes, we vacate the order of dismissal and remand this matter to the trial court for further appropriate proceedings.

Under section 1-567.2 of the General Statutes, an agreement to arbitrate is compulsory and irrevocable:

(a) 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) (1999). Section 1-567.3 sets forth the procedure for compelling arbitration:

> (a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

N.C. Gen. Stat. § 1-567.3(a) (1999).

In the instant case, defendant sought a dismissal based on "the terms and provisions of the parties [sic] Employment Agreement which provides for binding arbitration" as follows:

> The parties shall attempt amicably to resolve disagreements by negotiating with each other. In the event that the matter is not amicably resolved through negotiation, any controversy, dispute or disagreement arising out of or relating to this Agreement (a "Controversy") shall be settled exclusively by binding arbitration[.]

Defendant's motion is one " 'showing' an agreement described in G.S. 1-567.2," *id.*, and, as such, constitutes an application for arbitration within the meaning of section 1-567.3(a). *Cf. Adams v. Nelsen*, 313 N.C. 442, 447, 329 S.E.2d 322, 325 (1985) (holding that "motion to dismiss, which conspicuously omitted any reference to an arbitration agreement, was not the proper method to stay litigation and compel arbitration," as it was not "a motion 'showing' an agreement to arbitrate" under section 1-567.3). Therefore, the trial court was required to conduct the appropriate inquiry and enter an order compelling or denying arbitration. Given our decision in this regard, we need not address plaintiff's remaining arguments.

For the foregoing reasons, we affirm the order denying plaintiff's motion for injunctive relief. The order of dismissal, however, is vacated and this matter remanded to the Superior Court, Cumberland County, for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

Judges GREENE and WALKER concur.

ALMA JEAN CALLOWAY, EMPLOYEE, PLAINTIFF v. MEMORIAL MISSION HOSPITAL, EMPLOYER, SPECIALTY INSURANCE SERVICES, INC., SERVICING AGENT, DEFENDANTS

No. COA99-402

(Filed 18 April 2000)

1. **Workers' Compensation— findings of fact—drafted by plaintiff's attorney—independent decision made by Commission**

The Industrial Commission did not err in adopting the findings of fact from the proposed findings written by plaintiff's attorney because the Commission can request one side or the other to prepare the proposed opinion and award so long as the Commission made its own decision.

2. **Workers' Compensation— pre-existing psychiatric problem—aggravated by work-related injury—competent evidence**

Even though plaintiff-employee had a pre-existing history of psychiatric problems and her work-related injury was a physical one, the Industrial Commission did not err in awarding plaintiff compensation for aggravation of her psychiatric problems because there is competent evidence in the record revealing that a psychiatrist testified that plaintiff's back injury in and of itself caused her psychiatric problems, the injury was very stressful to plaintiff and viewed as potentially catastrophic, and the injury contributed to the severity of the relapse.

3. **Workers' Compensation— credibility—determination by full Commission**

The Industrial Commission did not assign undue weight to the opinion testimony of plaintiff-employee's treating psychiatrists in awarding plaintiff compensation for psychiatric problems because: (1) a physician's opinion testimony with respect to causation is not rendered incompetent unless his opinion is based on mere speculation, and the fact that plaintiff herself might have

been unbelievable and her physicians might have acknowledged this lack of credibility does not transform their opinion into one based upon sheer speculation; and (2) the full Commission could consider the opinion testimony and assign whatever weight it deemed appropriate.

Appeal by defendants from opinion and award filed 23 November 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 February 2000.

Ganly Ramer Finger Strom & Fuleihan, by Thomas F. Ramer, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton, for defendant-appellants.

LEWIS, Judge.

This case falls within a growing number of cases on appeal in which the Full Commission has reversed or disregarded the Deputy Commissioner's findings and substituted its own judgment as to an employee's credibility. *See, e.g., Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 523 S.E.2d 439 (1999); *Toler v. Black & Decker*, 134 N.C. App. 695, 518 S.E.2d 547 (1999); *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 478 S.E.2d 223 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997). Nonetheless, since our Supreme Court, in *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998), interpreted N.C. Gen. Stat. § 97-85 such that the Full Commission need not give any deference, indeed consideration, to the Deputy Commissioner's credibility findings, the subject has been sharpened.

Our federal courts have long recognized the need to accord significant weight to any determinations administrative hearing officers make that are based solely on witness demeanor and credibility. *See, e.g., Ryan v. Commodity Futures Trading Comm'n*, 145 F.3d 910, 918 (7th Cir. 1998) ("The Commission must attribute significant weight to an ALJ's findings based on a witness's demeanor because it does not have the opportunity to observe a testifying witness."); *NLRB v. Stor-Rite Metal Prods., Inc.*, 856 F.2d 957, 964 (7th Cir. 1988) ("Because only the ALJ can view the demeanor of the witnesses, any of the ALJ's findings that turn on express or implied credibility determinations take on particular significance on review."); *Kopack v. NLRB*, 668 F.2d 946, 953 (7th Cir. 1982) ("One must attribute significant weight to

an ALJ's findings based on demeanor because neither the Board nor the reviewing court has the opportunity similarly to observe the testifying witnesses."); *Penasquitos Village, Inc.*, 565 F.2d 1074, 1078-79 (9th Cir. 1977) ("Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.' ") (citation omitted).

In the workers' compensation setting, at least twelve states have now borrowed from the federal system and judicially established a requirement that places greater weight on any hearing officer's findings that hinge on credibility. 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 80.12(c)(1),(c)(2),(d) (1999 & Supp. 1998). Another six states have, at least to some degree, done so statutorily. *Id.* § 80.12(c)(3), (5)-(9). Nonetheless, we are bound by decisions of our Supreme Court. Until either that body or the General Assembly acts, we must therefore consider the present appeal in light of *Adams*.

This case contains a complex and confusing web of facts involving interrelated claims of physical injuries, psychiatric problems, and alleged inappropriate employer actions. In order to untangle this web, the following rather lengthy recitation of facts is necessary.

Plaintiff worked in the materials management department of defendant Memorial Mission Hospital ("the Hospital"). Her job duties involved delivering various medical supplies to different departments throughout the Hospital. On 6 August 1996, while unloading a box of dialysis bags, plaintiff twisted her back. She subsequently checked herself in to the emergency room, complaining of pain in her upper back. At this time, she was not experiencing any pain in her lower back. The emergency room diagnosed her as having acute back pain and restricted her to light duty work. Plaintiff did not report to work the following two days and did not return to work until August 9. Upon her return, she continued to experience pain in her upper back, and she began to feel pain in her lower back as well. She went to the emergency room again, whereupon she was referred to an orthopaedist. Eventually, plaintiff came to see Dr. Eric Rhoton, a neurosurgeon. Due to plaintiff's continuing complaints of upper and lower back pain, Dr. Rhoton recommended that plaintiff undergo a lumbar MRI.

Prior to her work accident, plaintiff had been placed on probation by her employer due to excessive absenteeism and tardiness.

Following her accident, plaintiff did not report to work on either August 26 or 27. These absences were unexcused. She did not show up for work again on September 3, 4, 5, or 6. Learning that she might be in trouble for not reporting to work, plaintiff visited Dr. Rhoton's office on September 6 and was given a note excusing her from work from September 4 through September 13 while Dr. Rhoton awaited authorization from defendants for the lumbar MRI he was recommending. The out-of-work note was not signed by Dr. Rhoton himself; instead his signature was just stamped on it by his office staff. In fact, plaintiff did not even see Dr. Rhoton that day.

On 10 September 1996, defendants informed Dr. Rhoton that they were denying authorization for the MRI. Defendants felt the MRI was unrelated to her work accident, given that plaintiff's initial complaints were only to her upper back and the MRI was for her lower back. Defendants, however, did not seek any clarification from Dr. Rhoton as to whether the MRI was in fact related to her injury before they denied authorization for it.

Even though plaintiff received the out-of-work note on September 6, she did not fax it to her employer (or otherwise contact her employer) until September 10, the same day defendants denied authorization for her MRI. Two days later, on September 12, the Hospital terminated plaintiff's employment. After specifically finding plaintiff to be not credible, the deputy commissioner concluded that her termination was due to continued absenteeism, in violation of her probationary status. The Full Commission disagreed, gave plaintiff the benefit of the doubt, and found her termination to be wrongful in that it was due to her work-related injury.

Following her injury and subsequent termination, plaintiff became quite depressed. Due to this acute depression and related suicidal ideations, plaintiff was admitted to Charter Hospital ("Charter") for psychiatric treatment. Prior to her work accident, plaintiff had a history of psychiatric problems, including anxiety attacks and depression. The Full Commission concluded that plaintiff's back injury and defendants' poor handling of her claim, especially their denial of authorization for her MRI, exacerbated these psychiatric problems that necessitated her treatment at Charter.

Plaintiff was discharged from Charter on 22 November 1996. With respect to her psychiatric problems, plaintiff has been able to work since that time but will require ongoing medical treatment. With respect to her physical injury in her back, Dr. Freeman Broadwell

concluded that, as of 16 January 1997, plaintiff had attained maximum medical improvement. He then assigned her a three percent (3%) permanent partial disability rating. Despite her being able to work, however, plaintiff has refused to look for employment since her discharge from Charter.

Based upon these facts, the Full Commission awarded plaintiff temporary total disability compensation for the period from 13 September 1996 until 22 November 1996. The Commission then awarded her permanent partial disability for a period of nine weeks. Finally, the Commission ordered defendants to pay all of plaintiff's medical expenses, including the lumbar MRI and the cost of hospitalization at Charter, as well as any future psychiatric expenses plaintiff may incur as a result of her ongoing treatment. From this opinion and award, defendants appeal.

As alluded to earlier, our standard of review in workers' compensation cases is quite narrow. Specifically, we are limited to the consideration of two questions: (1) whether the Full Commission's findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by those findings. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). Under the first inquiry, the findings of fact are conclusive on appeal so long as they are supported by *any* competent evidence, even if other evidence would support contrary findings. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Furthermore, any findings with respect to witness credibility are ultimately in the hands of the Full Commission, even though that body does not observe the witnesses or their demeanor, unless it orders a new hearing with witnesses; it did not here. *Id.* at 681, 509 S.E.2d at 413. Because our review of the record reveals some evidence to support the Full Commission's findings and conclusions, we must affirm its opinion and award.

[1] At the outset, defendants argue that the Full Commission did not fulfill its duty to review the entire record before making its ultimate findings. Defendants support this argument by pointing out that the Full Commission's findings are almost mirror images of the proposed findings submitted by plaintiff's counsel. We have previously addressed this argument and rejected it. *See Rierson v. Commercial Service, Inc.*, 116 N.C. App. 420, 422, 448 S.E.2d 285, 287 (1994) ("It is acceptable for the deputy commissioner to request one side or the other to prepare the proposed opinion and award so long as the deputy commissioner has made his own decision . . . ."). Again, our

only task on appeal is to assess the evidentiary basis for the findings, not their source.

[2] In another assignment of error, defendants argue that plaintiff was not entitled to compensation for her psychiatric problems, given that she had a pre-existing history of psychiatric problems and that her work-related injury was purely a physical one. Specifically, defendants contest the following findings by the Commission:

> 13. Plaintiff's initial complaints at the time of her accident focused on pain in her upper back, between her shoulder blades. Because Dr. Rhoton was recommending a lumbar MRI, defendant took the position that the MRI was not related to plaintiff's accident of 6 August 1998 and denied coverage for it. *However, defendant did not make any effort to seek clarification from Dr. Rhoton* . . . .
>
> . . . .
>
> 23. At the time of her back injury, plaintiff was in an emotionally vulnerable condition. Plaintiff's emotional condition was exacerbated by the manner in which defendant handled her injury and claim, particularly the refusal to authorize the MRI which had been recommended by a treating physician.
>
> 24. Plaintiff's back injury and the manner in which it was handled by defendant were significant contributing factors in the development of her anxiety and depression which necessitated her hospitalization at Charter in September 1996.

(Emphasis added.) Defendants maintain that they were handling plaintiff's claim as they felt appropriate and should not be responsible for any psychiatric problems experienced by plaintiff as a result of the way they handled her claim. While we agree with defendants that an employer should not be punished for any psychological effects that result *entirely* from its *good faith* handling of a claim, ultimately that sentiment here can be of no consequence. Here, there was testimony that linked plaintiff's physical injury to the aggravation of her psychiatric problems *irrespective of* defendants' purported mishandling of her claim.

We have previously held that the aggravation of pre-existing psychiatric problems is compensable if that aggravation is caused by a work-related physical injury. *Toler*, 134 N.C. App. 701, 518 S.E.2d at 551. Here, Dr. Ralph Jones, one of plaintiff's treating

psychiatrists, testified that plaintiff's back injury in and of itself caused her psychiatric problems. Specifically, Dr. Jones testified, "The [physical] injury was very stressful [to plaintiff] and was viewed by her as potentially catastrophic." (Jones Dep. at 78.) He then continued as follows:

> Q: . . . Clearly the [physical] injury didn't cause the bipolar disorder but did the injury and any resulting stress, anxiety, or depression cause or contribute to the re-aggravation of the bipolar disorder?
>
> A: Yes, I think it contributed to the severity of the relapse.

(Jones Dep. at 78.) Dr. Jones also clarified that plaintiff's depression was unrelated to her termination from the Hospital as well. (Jones Dep. at 75). Thus, regardless of defendants' purported mishandling of plaintiff's claim and purported wrongful termination, there is competent evidence in the record to support the Full Commission awarding plaintiff compensation for the aggravation of her psychiatric problems.

[3] Next, defendants argue that, in awarding plaintiff compensation for her psychiatric problems, the Full Commission assigned undue weight to the opinion testimony of her treating psychiatrists, who opined that plaintiff's psychiatric problems were caused by the physical injury to her back. Defendants contend that their opinions were based on wholly unbelievable information given to them by plaintiff. The record is replete with examples that support defendants' argument. As previously pointed out, the deputy commissioner specifically found plaintiff to lack credibility. Dr. William Anixter too testified that plaintiff had not always been truthful to him in his treatment of her. (Anixter Dep. at 24.) Additionally, Dr. Jones testified that he could not necessarily believe all the information plaintiff told him in light of her psychiatric condition. (Jones Dep. at 35.) And finally, plaintiff admitted that her psychiatric condition affected her ability to remember. (T. at 53-54.)

As stated earlier, however, our task on appeal is not to weigh the respective evidence but to assess the *competency* of the evidence in support of the Full Commission's conclusions. A physician's opinion testimony with respect to causation is not rendered incompetent unless his opinion is based on mere speculation. *Ballenger v. Burris Industries*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984). Although plaintiff herself

might have been unbelievable and her physicians might have acknowledged this lack of credibility, this does not transform their opinion into one based upon sheer speculation. Accordingly, the Full Commission could consider the opinion testimony of Dr. Anixter and Dr. Jones and assign their testimony whatever weight it deemed appropriate.

We have reviewed defendants' remaining assignments of error. In light of our limited standard of review as announced in *Adams v. AVX Corp.*, we find them also to be without merit.

It is not difficult to produce "some credible evidence" by lay witnesses or even expert witnesses for a very great and diverse number of positions. Indeed, practically any position can gain "credence" by finding an expert who agrees. But in every other legal configuration, the finder of fact who *observes* the witnesses is given authority to determine credibility—not a reviewing body such as the Full Commission. Although there are those rare cases where the Full Commission does hear evidence and confront the witnesses, this was not such a case. In fact, those cases are few and far between.

Affirmed.

Judges JOHN and EDMUNDS concur.

MARGARET S. GROVER, PLAINTIFF v. JOHN W. NORRIS, DEFENDANT

No. COA99-471

(Filed 18 April 2000)

Pleadings— Rule 11 sanctions—sufficiency of allegations

Even though the trial court found plaintiff's claim for child support arrearages based on a consent order was barred by the statute of limitations, the trial court did not err in denying defendant's motion for monetary sanctions under N.C.G.S. § 1A-1, Rule 11 against plaintiff and her trial attorneys because: (1) the trial court's conclusions of law that plaintiff's pleadings were well-grounded in fact, were warranted by the existing law or a good faith argument, and were not interposed for an improper purpose,

are supported by its findings of fact; and (2) there was a legitimate question of whether the consent judgment could be considered a contract or a judgment.

Appeal by defendant from an order entered 4 January 1999 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 13 January 2000.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by Dennis L. Guthrie, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Paul P. Browne, for defendant-appellant.

HUNTER, Judge.

Defendant-appellant, John W. Norris, appeals the trial court's ruling denying his motion for monetary sanctions against plaintiff-appellee, Margaret S. Grover, and her trial attorneys of the firm Guthrie, Davis, Henderson & Staton, P.L.L.C. Finding defendant's argument unpersuasive, we affirm the trial court's ruling.

The record before this Court reveals that the parties divorced in 1971 with plaintiff receiving custody of the couple's only child. On 29 July 1977 the trial court ordered defendant to pay child support in the amount of $85.00 every two weeks, and to establish a savings account for the parties' daughter by depositing a total of $4,000.00 at the rate of $1,000.00 per year for four years, which deposits would satisfy defendant's child support arrearages.

In 1982, plaintiff filed a motion to show cause, requesting the trial court hold defendant in contempt for his willful violation of the court's earlier child support order. However, prior to the hearing, the parties reached an agreement. It is this agreement that became the basis for the trial court's later consent order on 6 January 1983. In the order, the court found, in relevant part:

> 8. That the [prior] Order of this Court remains in force . . . .
>
> 9. That, by stipulation of the parties, the Defendant has failed, without lawful excuse, to make the support payments ordered by this Court . . . the arrearage owed to the Plaintiff is, at this time, no less than $6,100.00; and by stipulation of the parties, said arrearage, being an indebtedness of the Defendant owed to the Plaintiff, shall be reduced to judgment.

10. That, by stipulation of the parties, the Defendant has failed, without lawful excuse, to maintain the minor child's savings account in accordance with the [prior] Order . . . deposit[ing] and withdraw[ing] money at will . . . .

. . .

12. That, by stipulation of the parties, the Defendant has been, and continues to be, gainfully employed and able to make the child support payments and savings account deposits ordered by this Court . . . .

. . .

15. That, by stipulation of the parties, the Defendant and his second wife, Paula [] Norris, presently own certain improved real estate situated at 2021 Arapaho Drive, Mecklenburg County, North Carolina, as Tenants in Common . . . .

The trial court then made its conclusions of law and ordered, in pertinent part:

1. That the $6,100.00 arrearage . . . be reduced to judgment . . . with interest to accrue thereon at the lawful rate of eight percent (8%) per annum from and after November 8, 1982, until fully satisfied.

2. That satisfaction of the judgment, entered with respect to the $6,100.00 arrearage in the Defendant's child support obligations, shall be had by the Plaintiff from funds to be received by the Defendant at such time as [his] interest, as a Tenant in Common, of the [Arapaho] real estate . . . owned jointly by [him] and his second wife, Paula [] Norris, is disposed of either voluntarily or involuntarily.

In April 1982, defendant and his second wife Paula Norris ("Ms. Holt") divorced, still jointly owning the Arapaho property. On 17 May 1993, more than ten years after the consent order was entered, defendant transferred his interest in the Arapaho property to Ms. Holt, who then disposed of the property. Although defendant received his share of the proceeds from the property, he never paid his child support arrearages owed to plaintiff.

On 30 August 1995, plaintiff's attorney learned that defendant may have transferred the property without satisfying his child sup-

port arrearages. After further investigation, on 25 March 1996 plaintiff's attorney filed a complaint based on the 1983 consent order and judgment, seeking damages for breach of contract and fraud, and a motion to show cause asking that defendant be held in civil contempt for failure to pay the $6,100.00 arrearages as set forth in the 1983 judgment. Plaintiff further filed a motion for attachment for ancillary remedies in the underlying actions. The judge allowed plaintiff to attach defendant's automobile.

Defendant responded by filing his answer, a 12(b)(6) motion to dismiss based on the theory that the statute of limitations had run on the 1983 judgment. Defendant also filed a motion to dissolve attachment, motion to transfer to district court, motion for sanctions and counterclaims. Without objection by plaintiff, the case was transferred to district court (the proper venue for civil matters seeking damages of less than $10,000.00). At a hearing on 13 June 1996, the court granted defendant's motion to dismiss with prejudice. The court also granted defendant's motion to dissolve attachment since the attachment granted was based on the original claim which was now barred. However, the court denied defendant's motion for sanctions under Rule 11. Defendant appeals.

Defendant has brought forward only one assignment of error, that the trial court erred in denying his motion for Rule 11 sanctions against plaintiff. Defendant relies heavily on the idea that because the trial court found plaintiff's claim to be barred by the statute of limitations, plaintiff's attorneys should have known that at the time the suit was filed. Thus, the suit was filed frivolously and to harass defendant, in violation of N.C. Gen. Stat. § 1A-1, Rule 11. We disagree and thus overrule defendant's argument.

The pertinent portion of Rule 11(a) states:

> Every pleading, motion, . . . shall be signed by at least one attorney of record . . . . The signature of an attorney . . . 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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative,

> shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990). Made plain, the three things the signer is certifying to be true are that the pleadings are: (1) well grounded in fact, (2) warranted by existing law, "or a good faith argument for the extension, modification, or reversal of existing law," and (3) not interposed for any improper purpose. "A breach of the certification as to any one of these three prongs is a violation of the Rule." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992).

North Carolina law is clear in its holding that the standard for this Court's reviewing the trial court's decision to impose or not to impose sanctions under Rule 11 is reviewable *de novo*.

> *De novo* review by an appellate court involves a determination of: (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 these elements are met, the trial court's decision to impose or deny sanctions is [to be] upheld.* The totality of the circumstances determine whether Rule 11 sanctions are merited. . . .
>
> A violation of any one of these three [determinatives] is sufficient to support sanctions under Rule 11.

Williams v. Hinton, 127 N.C. App. 421, 423, 490 S.E.2d 239, 240-41 (1997) (emphasis added) (citations omitted).

In the case at bar, the trial court found that after plaintiff's attorneys learned that defendant had transferred his interest in the Arapaho property:

> 11. [A] careful review was undertaken concerning the facts of the case. Legal theories of recovery were derived based upon application of the facts to the law. Pleadings and other papers were reviewed by the Plaintiff in order to insure factual accuracy and appropriate Affidavits were obtained. Thereafter, pleadings and other papers were filed on behalf of Margaret Grover.
>
> 12. The sole reason this action was instituted on behalf of the Plaintiff Margaret Grover, was to obtain satisfaction of the child support arrearage of $6,100.00 plus interest. This action was not instituted for any improper purpose. It was not instituted by

[plaintiff's] attorneys . . . to harass, persecute, otherwise vex John Norris or to cause unnecessary cost or delay.

13. Before pleadings and other papers were filed on behalf of Margaret Grover, [her attorney] was satisfied that by signing such pleadings, motions and other papers that he could in good faith certify that (1) he had read the pleading, motion, or other paper (2) that to the best of his knowledge, information, and belief, formed after reasonable inquiry, they were well grounded in fact, and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that none of the documents filed was interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The same has been true throughout each of the various stages of this litigation.

The trial court further found that once defendant filed his response to plaintiff's motion to show cause and motion for sanctions, plaintiff's attorneys conducted further legal research and concluded that "a claim for legal redress could [still] properly be presented on behalf of Ms. Grover." Thus, plaintiff's attorneys proceeded with plaintiff's case.

The trial court further found, in pertinent part, that:

27. At the Court of Appeals level [plaintiff's attorneys] argued in good faith, and for a proper purpose. Those arguments included the well-founded argument that the Consent Judgment and Order was both a valid contract and an order of the court and that [Norris'] breach violated a court order.

28. The arguments presented by the former attorneys for Plaintiff Margaret S. Grover, in this case in all stages, although eventually unsuccessful, were instituted in good faith, after proper research into the facts of the case and applicable law.

29. Cases including dissenting opinions, rules, scholarly literature cited in Plaintiff's Brief in Support of the Appropriateness of Plaintiff's Pleadings and In Opposition to Defendant's Allegations of Rule 11 Misconduct provide support for this position.

30. [Plaintiff's attorneys] took Plaintiff's appeal in this case on a pro bono basis because there was ample reason to believe

the Plaintiff could recover that to which she was entitled under the laws of the State of North Carolina.

31. The Plaintiff and her former attorneys . . . undertook reasonable inquiry into the facts of this case and reasonably concluded that the pleadings, motions, notices, appellate filings and all other documents filed on behalf of the Plaintiff . . . were well grounded in fact.

32. At the time of filing each of the Plaintiff's pleadings, each such pleading was facially plausible.

33. At the time of filing each of the Plaintiff's pleadings, [and as the case progressed,] Plaintiff and her former attorneys had made reasonable inquiry concerning the legal sufficiency of the pleadings and reasonably concluded that each pleading was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

. . .

35. The purpose of the Plaintiff's pleadings was not to harass the Defendant, persecute the Defendant, vex the Defendant, cause unnecessary costs to the Defendant or to cause delay.

36. The Defendant has not shown that the Plaintiff's pleadings were filed for an improper purpose.

37. The Plaintiff's purpose in bringing and pursuing this action was not improper.

38. The Plaintiff's former attorneys' purpose in bringing and pursuing this action was proper.

Following its very detailed findings of fact, the trial court then concluded as a matter of law that: (1) plaintiff's pleadings were well-grounded in fact, thus meeting the factual sufficiency prong of Rule 11; (2) plaintiff's pleadings were warranted by the existing law or a good faith argument for the extension, modification, or reversal of existing law, thus meeting the legal sufficiency prong of Rule 11; (3) plaintiff's pleadings were not interposed for an improper purpose, meeting the improper purpose prong of Rule 11; and (4) neither plaintiff nor her attorneys violated Rule 11, thus defendant's motion for Rule 11 sanctions should be denied. We agree.

Applying the *de novo* standard in reviewing the trial court's denial of defendant's motion for sanctions, we approve the trial court's find-

ings in their entirety, finding not only that its conclusions of law are supported by its findings of fact, but also finding that the record is replete with evidence to support those findings. *See Williams v. Hinton*. Therefore, we hold that the trial court's final determination not to impose sanctions on plaintiff is also well supported by its conclusions of law. *See id.*

Further, defendant's contention that plaintiff's complaint was legally insufficient because it was "long since" barred by the statute of limitations is unpersuasive.

Plaintiff argued before the trial court that the consent order was a contract which defendant breached. As such, the statute of limitations would not have begun to run until defendant's breach. Thus, plaintiff argued that the statute of limitations did not begin to run until 17 May 1993, when defendant transferred his interest in the Arapaho property. Nevertheless, the trial court found the consent order to be a judgment, adopted by the court.

In *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), our Supreme Court reviewed the law of consent decrees and held that

> whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case. . . . This new rule applies *only to* this case and all such *judgments entered after this decision.*

Walters, 307 N.C. at 386, 298 S.E.2d at 342 (emphasis added) (citations omitted).

Defendant argues that because the order was adopted by the court, the plaintiff had no reason to believe it was not a judgment instead of a contract. However, the case law cited by defendant, particularly *Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983), is no more helpful to defendant than *Walters*, *supra*. Both holdings apply prospectively, not retrospectively, and the consent judgment in the case at bar was entered five days before the *Walters* decision was filed (the *Walters* decision being filed before *Henderson*). Thus, the prior law controlled, that being that there

were two types of consent judgments: one, "which is nothing more than a contract . . . [and which] require[s] the parties to seek enforcement and modification through traditional contract channels;" and one that " 'the Court adopts' " thus making it "no longer enforc[able] or modifi[able] solely under contract law principles." *Walters*, 307 N.C. at 384-85, 298 S.E.3d at 341 (quoting *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964)). Therefore, there was a legitimate question of whether the consent judgment could be considered a contract or a judgment.

We agree with plaintiff's attorneys that Rule 11 was instituted to prevent abuse of the legal system, our General Assembly never intending to constrain or discourage counsel from the appropriate, well-reasoned pursuit of a just result for their client. Case law clearly supports the fact that just because a plaintiff is eventually unsuccessful in her claim, does not mean the claim was inappropriate or unreasonable. An otherwise reading of the law would compromise every attorney's ability to pursue a claim where the status of the law is subject to dispute and force litigants to refrain from arguing all but the most clear-cut of issues. We do not believe this is what our Legislature intended.

Having found no violation of Rule 11 by plaintiff or her attorneys, the trial court's order denying sanctions against them is,

Affirmed.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. ELISHA LEE MONTFORD

No. COA99-530

(Filed 18 April 2000)

1. Criminal Law— joinder—sale and delivery of cocaine—transactional connection

The trial court did not err in consolidating for trial the two sale and delivery of cocaine offenses under N.C.G.S. § 15A-926(a) because: (1) the two offenses have a transactional connection since the offenses are identical, both involved selling cocaine to the same person, both involved the same place of sale, both

involved the same quantity of cocaine sold, and only three weeks elapsed between the commission of each offense; and (2) joinder of the offenses did not impede defendant's ability to receive a fair trial and to put on his defense since the State used the same witnesses for both offenses, the same evidence would have been introduced had the trials been separate, and the evidence of the other offense would have been admissible at each trial under N.C.G.S. § 8C-1, Rule 404(b) to show intent and/or knowledge.

2. Indictment and Information— amendment—habitual felon—harmless error

Although defendant contends the trial court improperly permitted the State to amend its habitual felon indictment by inserting "in North Carolina" after each listed felony when the original indictment listed that defendant's three prior felony convictions occurred in Carteret County, any perceived error was harmless because the original indictment itself was not flawed since the association of Carteret County with North Carolina at the top of the indictment, coupled with the subsequent listing of Carteret County as the locale of the prior felony convictions, is sufficient to indicate the state against whom the prior felonies were committed as required by N.C.G.S. § 14-7.3.

3. Evidence— prior crime or act—drug sales—intent—common plan or purpose—identity

The trial court did not err in a case involving two sale and delivery of cocaine offenses by denying defendant's motion for a mistrial based on the admission of testimony from a detective that the informant had previously been arrested for buying cocaine from defendant and agreed to help the police catch defendant, because the evidence of defendant's prior drug sales was admissible under N.C.G.S. § 8C-1, Rule 404(b) to prove intent, to show a common plan or purpose, and to identify defendant as the one selling the cocaine.

4. Constitutional Law— effective assistance of counsel—failure to request jury instruction on defendant's silence

Defendant was not denied effective assistance of counsel in a case involving two sale and delivery of cocaine offenses by his counsel's failure to request that the jury be instructed on defendant's failure to testify at trial because: (1) the absence of this instruction did not arise to the level of plain error since the trial court is not required to instruct on a defendant's silence unless a

specific request has been made; and (2) counsel may choose no instruction in order not to emphasize defendant's silence.

5. Constitutional Law— effective assistance of counsel—sentencing hearing—failure to call witnesses

Defendant was not denied effective assistance of counsel in a case involving two sale and delivery of cocaine offenses by his counsel's failure to call any witnesses at defendant's sentencing hearing because counsel made a short argument advocating lenient sentencing, and the Court of Appeals has previously held that total silence by defense counsel at a sentencing hearing cannot be grounds for ineffective assistance.

6. Constitutional Law— effective assistance of counsel—failure to cross-examine a witness—strategic and tactical decision

Defendant was not denied effective assistance of counsel in a case involving two sale and delivery of cocaine offenses by his counsel's failure to cross-examine a detective about a wire that was placed on an informant during one of the drug sales, which apparently malfunctioned, because strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

Appeal by defendant from judgments entered 4 September 1997 by Judge Jerry R. Tillett in Carteret County Superior Court. Heard in the Court of Appeals 23 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General K.D. Sturgis, for the State.

James Q. Wallace, III for defendant-appellant.

LEWIS, Judge.

Defendant was indicted on two counts of sale and delivery of cocaine, in violation of N.C. Gen. Stat. § 90-95(a)(1). The first count was based upon a cocaine sale to Larry Godwin, a police informant, that occurred on 23 January 1997. The second count was based upon a cocaine sale to Mr. Godwin that occurred on 14 February 1997. On 5 May 1997, the grand jury also returned an habitual felon indictment against defendant. The two sale and delivery counts were thereafter consolidated for trial, and defendant made no motion to sever the two offenses. Defendant was then tried at the 3 September 1997 Session

of Carteret County Superior Court, where a jury convicted him of both sale and delivery offenses. Defendant now appeals, bringing forth four arguments.

[1] In his first assignment of error, defendant contests the consolidation of the two sale and delivery offenses for trial. Specifically, he contends that the trial court had no authority to join the offenses because there was no transactional connection between the two cocaine sales. We disagree.

Unfortunately, our case law with respect to joinder of offenses has been rather muddled. Our Legislature has implemented the following rule regarding joinder of offenses:

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

N.C. Gen. Stat. § 15A-926(a) (1999). Pursuant to this rule, a two-step analysis is required for all joinder inquiries. First, the two offenses must have some sort of transactional connection. *State v. Corbett*, 309 N.C. 382, 387, 307 S.E.2d 139, 143 (1983). Whether such a connection exists is a question of law, fully reviewable on appeal. *State v. Holmes*, 120 N.C. App. 54, 61, 465 S.E.2d 915, 920, *disc. review denied*, 342 N.C. 416, 465 S.E.2d 545 (1995). If such a connection exists, consideration then must be given as to "whether the accused can receive a fair hearing on more than one charge at the same trial," i.e., whether consolidation "hinders or deprives the accused of his ability to present his defense." *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). This second part is addressed to the sound discretion of the trial judge and is not reviewable on appeal absent a manifest abuse of that discretion. *Holmes*, 120 N.C. App. at 62, 460 S.E.2d at 920. We hold that joinder satisfies both parts here.

With respect to the transactional connection inquiry, we point out that, under prior law, such a connection could be established merely if the two offenses were similar in character. N.C. Gen. Stat. § 15A-926, Official Commentary. Under present law, however, similarity of crimes alone is insufficient to create the requisite transactional connection. *State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 393 (1981). Rather, consideration must be given to several factors, no one of which is dispositive. These factors include: (1) the nature of the

offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case. *State v. Herring*, 74 N.C. App. 269, 273, 328 S.E.2d 23, 26 (1985), *aff'd per curiam*, 316 N.C. 188, 340 S.E.2d 105 (1986).

Here, the offenses for which defendant was being tried are identical, sale and delivery of cocaine. Furthermore, the facts involved in each offense are nearly identical. Both involved selling cocaine to the same person, Mr. Godwin. Both involved the same place of sale, defendant's mobile home. And both involved the same quantity of cocaine sold, i.e., fifty dollar's worth. Finally, only three weeks elapsed between the commission of each offense.

In this regard, we find *State v. Styles*, 116 N.C. App. 479, 448 S.E.2d 385 (1994), *disc. review denied*, 339 N.C. 620, 454 S.E.2d 265 (1995), particularly illustrative. In that case, the trial judge consolidated two drug offenses for trial, possession of marijuana with intent to sell and sale of marijuana to a minor, even though the two offenses occurred more than a month apart. *Id.* at 480, 448 S.E.2d at 386. We held that the requisite transactional connection existed because both offenses shared a common thread of facts and a common motive. *Id.* at 482, 448 S.E.2d at 387. Specifically, we reasoned, "The 'common thread' is the selling and distribution of marijuana. The 'scheme' was to sell the illegal substance for profit." *Id.* Similarly, this case involves a common thread of selling cocaine and a common scheme of doing so for a profit. Accordingly, the requisite transactional connection exists. *See also State v. Bracey*, 303 N.C. at 118, 277 S.E.2d at 394 (holding that three robberies over a ten-day span shared a transactional connection); *State v. Breeze*, 130 N.C. App. 344, 355, 503 S.E.2d 141, 148 (holding that ten different robberies over a two-month span shared a transactional connection), *disc. review denied*, 349 N.C. 532, 526 S.E.2d 471 (1998).

Having concluded that the two drug offenses shared a transactional connection, we next ascertain whether joinder of the offenses impeded defendant's ability to receive a fair trial and put on his defense. *Silva*, 304 N.C. at 126, 282 S.E.2d at 452. We conclude that it did not. First of all, the State used the same witnesses to present the evidence as to both offenses. Furthermore, the same evidence would have been introduced had the trials been separated. Specifically, evidence of the January drug sale still would have been admissible at a trial on just the February drug charge (and vice versa), because such

evidence would have been admissible under Rule 404(b) to show intent and/or knowledge. *See State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E.2d 918, 919 (1978) ("In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found."). Accordingly, the trial court did not abuse its discretion in concluding that defendant's ability to receive a fair trial was not hindered by consolidation.

[2] In his second assignment of error, defendant argues that the trial court improperly permitted the State to amend his habitual felon indictment. The original indictment listed three previous felonies for which defendant had been convicted, but did not specifically state that such felonies had been committed against the State of North Carolina. Instead, the indictment simply listed that the convictions had occurred in Carteret County. The prosecutor thereafter sought to amend the indictment by inserting "in North Carolina" after each listed felony. The trial court allowed the amendment. However, we need not even address the amendment issue, as we conclude that the original indictment itself was not flawed and thus any attempt to correct that perceived flaw was harmless.

N.C. Gen. Stat. § 14-7.3 sets forth the pleading requirements for an habitual felon indictment. Specifically, that statute states:

> An indictment which charges a person with being an habitual felon must set forth . . . the name of the state or other sovereign against whom said felony offenses were committed . . . .

N.C. Gen. Stat. § 14-7.3 (1999). However, our courts have not required rigid adherence to this rule. In fact, "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed." *State v. Mason*, 126 N.C. App. 318, 323, 484 S.E.2d 818, 821 (1997). This is so because the main purpose of the felony indictment is simply to provide notice to the defendant that he will be tried as a recidivist. *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990).

Here, the original indictment sufficiently indicated the state against whom the prior felonies were committed. "State of North Carolina" explicitly appears at the top of the indictment, followed by "Carteret County." Thus, Carteret County is clearly linked with the state name. Although "State of North Carolina" does not again appear

when the prior felonies are set out, "Carteret County" does—as the locale of the prior felony convictions. The association of Carteret County with North Carolina at the top of the indictment, coupled with the subsequent listing of Carteret County as the locale of the prior felony convictions, is sufficient to indicate the state against whom the prior felonies were committed. Because the original indictment itself was not flawed, any issue with respect to amending that indictment is essentially moot, for the amendment could not have in any way prejudiced defendant.

[3] Next, defendant contests the trial court's denial of his motion for mistrial based upon an alleged improper admission of evidence in violation of Rule 404(b). During the State's case-in-chief, the prosecutor questioned Detective M.L. Arter as to how Mr. Godwin came to be an informant for the police. Detective Arter testified that Mr. Godwin had previously been arrested for buying cocaine and that he agreed to help the police catch the individual who sold him the cocaine, namely defendant. Defendant argues that this testimony was inadmissible as evidence of a prior cocaine sale between defendant and Mr. Godwin for which defendant was not on trial. We conclude that admission of this evidence was proper and therefore uphold the trial court's ruling on defendant's motion for mistrial.

Under our Rules of Evidence, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.R. Evid. 404(b). As previously pointed out, in drug cases, evidence of other drug violations is often admissible to prove many of these purposes. *Richardson*, 36 N.C. App. at 375, 243 S.E.2d at 919. The evidence here was admissible for at least three such purposes. First, it was admissible to prove intent. *See State v. Johnson*, 13 N.C. App. 323, 325, 185 S.E.2d 423, 425 (1971) (allowing evidence of a prior transaction between defendant and an informant to prove intent), *appeal dismissed*, 281 N.C. 761, 191 S.E.2d 364 (1972). Second, such evidence could be used to prove a common plan or scheme. *See State v. Trueblood*, 46 N.C. App. 545, 547, 265 S.E.2d 664, 666 (1980) (allowing evidence of prior cocaine purchases between defendant, his coconspirators, and an undercover officer because such evidence "was but a part of a series of transactions . . . in pursuance of their plan and design to sell and deliver cocaine"). And finally, evidence of the prior

drug sale here was admissible to identify defendant as the one selling the cocaine. *See State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983) (allowing evidence of a prior marijuana sale between defendant and an undercover officer to prove identity). Accordingly, we reject defendant's argument.

In his final assignment of error, defendant claims he was denied effective assistance of counsel in violation of the Sixth Amendment. In order to substantiate a claim for ineffective assistance, a defendant must demonstrate two things: (1) his counsel's performance was deficient such that his counsel was basically not functioning as legal "counsel" at all; and (2) he was prejudiced by his counsel's ineffectiveness in such a way that he was deprived of a fair trial—"a trial whose result is reliable." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). A stringent standard of proof is required to substantiate ineffective assistance claims. *State v. Sneed*, 284 N.C. 606, 613, 201 S.E.2d 867, 871 (1974). In fact, our Supreme Court has cautioned that relief based upon such claims should be granted only when counsel's assistance is "so lacking that the trial becomes a farce and mockery of justice." *State v. Pennell*, 54 N.C. App. 252, 261, 283 S.E.2d 397, 403 (1981), *disc. review denied*, 304 N.C. 732, 288 S.E.2d 804 (1982). With these principles in mind, we now consider defendant's claim for ineffective assistance here.

[4] First, defendant claims his counsel was ineffective in failing to request that the jury be instructed on his decision not to testify at trial. We disagree. "[I]n order to show ineffective assistance of counsel because of the failure to request jury instructions, the defendant must show that without the requested instructions there was plain error in the charge." *State v. Swann*, 322 N.C. 666, 688, 370 S.E.2d 533, 545 (1988). Here, absence of an instruction as to defendant's silence cannot be said to have created plain error in the charge because a trial judge is not required to instruct on a defendant's silence unless a specific request has been made. *See State v. Cawthorne*, 290 N.C. 639, 649, 227 S.E.2d 528, 534 (1976). Counsel may well choose no instruction so as not to emphasize the defendant's silence. Defendant's first ground for ineffective assistance is without merit.

[5] Second, defendant claims ineffective assistance based upon his counsel's failure to call any witnesses at his sentencing hearing. We have previously rejected this as a ground in a case where the defense counsel was completely silent at the sentencing hearing. *See State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861, *disc. review*

denied, 317 N.C. 340, 346 S.E.2d 146 (1986). Here, although no witnesses were called, counsel did make a short argument advocating lenient sentencing. If total silence cannot be grounds for ineffective assistance, then this situation surely clears the hurdle.

[6] Last, defendant asserts he was denied effective assistance because his counsel did not cross-examine Detective Arter about a wire that was placed on Mr. Godwin during one of the drug sales, which apparently malfunctioned. " 'The decisions on what witnesses to call, whether and *how to conduct cross-examination*, . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.' Trial counsel are necessarily given wide latitude in these matters." *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979) (emphasis added) (citation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). Given this wide latitude in matters regarding cross-examination, we conclude that the failure to cross-examine Detective Arter about the wire did not render defense counsel's assistance constitutionally defective. *See State v. Swindler*, 129 N.C. App. 1, 10, 497 S.E.2d 318, 323-24 (holding no ineffective assistance when defense counsel did not cross-examine certain witnesses regarding matters that might have exposed inconsistencies in the State's case), *aff'd per curiam*, 349 N.C. 347, 507 S.E.2d 284 (1998); *State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985) (holding no ineffective assistance when defense counsel did not cross-examine a prison guard regarding his prior inconsistent statements), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 905 (1986).

In sum, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges JOHN and EDMUNDS concur.

IN THE MATTER OF: APRIL COGDILL, MARK COGDILL, MINOR CHILDREN

No. COA99-1051

(Filed 18 April 2000)

1. **Child Abuse and Neglect— adjudication order—authority over parent**

The trial court in a juvenile neglect proceeding did not have the authority to order respondent to "secure and maintain safe, stable housing and employment" or to contact the Child Support Enforcement Department. N.C.G.S. § 7A-650 is the trial court's only source of authority over the parent of a juvenile adjudicated abused or neglected and the trial court may not order a parent to undergo any course of conduct not provided for in the statute.

2. **Child Abuse and Neglect— dispositional order—parent to undergo psychological testing**

The trial court properly ordered respondent-mother to undergo psychological evaluation and possible treatment in a child abuse and neglect dispositional order where the father's abuse led to the adjudications, the court found that respondent was aware of the abuse and did not tell the truth in court, and the evaluation and possible treatment were directed toward remediating or remedying behaviors or conditions which led to the adjudications.

3. **Child Abuse and Neglect— sufficiency of evidence—sufficiency of findings**

The trial court's findings of fact in a juvenile abuse adjudication were supported by clear and convincing evidence and the findings supported the conclusion that she was abused in that her father took and attempted to take indecent liberties with her and acted for the purpose of arousing or gratifying sexual desire.

Appeal by respondent mother from adjudication and dispositional order filed 16 December 1998 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 4 April 2000.

John C. Adams for petitioner-appellee Buncombe County Department of Social Services.

Hunton & Williams, by Jason S. Thomas, Guardian Ad Litem.

Michael E. Casterline for respondent mother-appellant.

Joel Trilling for respondent father-appellee.

GREENE, Judge.

Linda Cogdill (Respondent) appeals an order filed 16 December 1998 adjudicating April Cogdill (April) an abused and neglected child, and adjudicating Mark Cogdill (Mark) a neglected child.

The evidence shows that on 23 February 1998, petitions were filed by Buncombe County Department of Social Services (DSS) alleging April, the twelve-year-old daughter of Respondent, was an abused and neglected juvenile, and Mark, the nine-year-old son of Respondent, was a neglected juvenile.

At a 31 July 1998 hearing on the petitions, Cynthia Brown, M.D. (Dr. Brown) testified she was employed as the medical director of the Child Advocacy Center (the Center), and in January of 1998 she saw April and Mark at the Center for the purpose of conducting child medical examinations on them. Dr. Brown testified a child medical examination includes an interview with the child and the family, and a complete examination of the child. She stated the examinations were initiated because "April had disclosed to [Kay McCauley (McCauley), a social worker with DSS] that her father had . . . asked her to touch his penis." During Dr. Brown's interview of April, April told Dr. Brown her father had " 'said stuff to [her] and [her] cousin, . . . [Ashley],' " and Ashley had told April that April's father had asked Ashley " 'to touch his privates' " and she had told him " ' "no." ' " April also told Dr. Brown that her father had " 'asked [her] to look at a book' " and the book was a "dirty book." When asked by Dr. Brown whether she had ever been asked by her father to touch his "private parts," April responded " 'no.' " Dr. Brown testified that her examination of April revealed "no abnormal findings," and she stated that if a child is sexually abused by being fondled there is often no physical evidence of abuse.

McCauley testified that on 13 September 1997, DSS received a report regarding April and Mark. The report indicated the Asheville Police Department had been contacted and told there were some problems at the children's residence, and when an officer arrived at the residence he found April's father chasing April down the road. April told the officer she would not return home with her father. McCauley was then assigned to investigate the incident, and April

told McCauley she refused to return home with her father because he "was asking her to look at and touch at his thing." April stated her father "would ask her to come into the basement to help him clean the basement, and then he would show her his thing and ask her to touch it." April told McCauley that her cousin, Ashley, was also in the basement when this incident occurred.

McCauley testified that as a result of her investigation, April was taken to Respondent's home, and Respondent told McCauley "that April had told her that her father would come in and put his hand under the blanket when she was asleep on the couch, and up under her crotch." When April told her father " 'no,' " he responded, " 'You must be a lesbian.' " McCauley testified regarding her conversations with Respondent that "[Respondent] initially believed April and stated that April had told her things, and actually that April had told her more than she had told [DSS]. And she was initially very supportive of April and protecting her from her father." Later, however, Respondent told McCauley that April told her she had been lying regarding her father's conduct. Additionally, Mark told McCauley he had seen his father "play with himself."

Respondent testified April had never told her April's father had abused her, and April told the social worker her father had abused her because she was afraid of the social worker. Additionally, April testified her father did not abuse her; however, she stated her father had shown her a picture of a woman who was wearing a "white, see-through dress," and the picture showed a woman's "butt."

Subsequent to the 31 July 1998 hearing, the trial court held another hearing, and Ashley was subpoenaed to testify at the hearing. Although Ashley was unable to verbally communicate the events which took place in the basement with April's father, she did, at the trial court's request, draw a picture of what happened in the basement with April's father. The picture depicted a man exposing his penis.

On 16 December 1998, the trial court entered an order containing findings of fact consistent with the above stated facts, including the following findings of fact:

> 4. . . . April . . . told the social worker that her father . . . asked her to touch his penis, and . . . April also told Dr. Cynthia Brown . . . that April's father asked April to look at magazines with him that had pictures of naked people in them. . . . April was

called as a witness and testified that she was shown a picture of a girl in a white see-through dress by her father.

. . . .

6. . . . [Respondent] stated . . . [to a social worker at DSS] that April had told her that [April's father] would put his hand under the child's bed blankets and then place his hand on her crotch and when she would tell him to stop, he called [her] a lesbian. April's sibling, Mark, stated his father would play with himself.

7. . . . April stated her father approached April and her cousin Ashley in the basement of the home where he lived . . . and that he asked April to look at "his thing", [sic] but that she never touched it.

8. . . . Ashley . . . was present in court on August 25, 1998 and although she was found competent to be a witness, she had difficulty making a verbal testimony. Ashley made a drawing of [April's father] showing his penis exposed and said that this happened in the basement.

9. . . . [Respondent] denied under oath making any statement to [DSS] concerning the sexual abuse of April. . . .

. . . .

13. . . . [Respondent] has failed to provide safe, stable housing for herself and [April and Mark] . . . . [April and Mark] have been unable to maintain attendance in the same school and their academic performance now suffers for it. . . . [DSS] has assisted the family in registering for housing and . . . they have been approved for Section 8 housing, but the family has not been able to locate a house.

14. . . . [Respondent] has failed to maintain stable employment.

The trial court then concluded as a matter of law that April was an abused and neglected child pursuant to N.C. Gen. Stat. § 7A-517(1), (21),[1] and Mark was a neglected child pursuant to N.C. Gen. Stat. § 7A-517(21). The trial court ordered Respondent, as part of its dispositional order, to "obtain a psychological evaluation and . . . follow all recommendations of the assessment"; "secure and maintain safe,

1. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-101 (1999).

stable housing and employment"; and "contact the Child Support Enforcement Department and . . . file the necessary paperwork to begin paying child support for the benefit of [April and Mark]." The order stated that, as a prerequisite to reunification, Respondent was required to comply with the order.

The issues are whether: (I) the trial court had the authority, in its dispositional order, to order Respondent to "secure and maintain safe, stable housing and employment"; (II) the trial court's findings of fact support its conclusion of law Respondent should undergo a psychological evaluation; and (III) the trial court's findings of fact regarding whether April was abused are supported by clear and convincing evidence, and whether those findings of fact support a conclusion of law that April was an abused juvenile.

I

[1] Respondent argues the trial court did not have authority, pursuant to N.C. Gen. Stat. § 7A-650,[2] to order Respondent to "secure and maintain safe, stable housing and employment." We agree.

Section 7A-650 provides authority for the trial court to order the parent of a juvenile who has been adjudicated, in pertinent part, as abused or neglected to "undergo psychiatric, psychological, or other treatment or counseling." N.C.G.S. § 7A-650(b2) (repealed 1999). Section 7A-650 is the trial court's only source of authority over the parent of a juvenile adjudicated abused or neglected, and the trial court may not order a parent to undergo any course of conduct not provided for in the statute. *See In re Badzinski*, 79 N.C. App. 250, 256, 339 S.E.2d 80, 83, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 35 (1986).

In this case, the trial court ordered Respondent, in its dispositional order, to "secure and maintain safe, stable housing and employment." Because section 7A-650 does not provide the trial court with authority to order a parent to obtain housing or employment, we modify the trial court's order to exclude this portion of the order.[3]

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2. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-904 (1999).

3. The trial court also ordered Respondent to "contact the Child Support Enforcement Department and . . . file the necessary paperwork to begin paying child support." Although section 7A-650 provides that a trial court may order a parent to "pay a reasonable sum that will cover in whole or in part the support of the juvenile," the statute does not provide the trial court with authority to order a parent to contact a child support enforcement department. N.C.G.S. § 7A-650(c). Accordingly, we modify the trial court's order to exclude this portion of the order.

II

[2] Respondent argues the trial court's findings of fact do not support the conclusion of law that Respondent should undergo a psychological evaluation because the order was not "directed toward remediating or remedying behaviors or conditions" which led to the trial court's adjudications. We disagree.

North Carolina General Statute § 7A-650(b2) provides a trial court may order a parent "to undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions" that led to the trial court's adjudication of the juvenile as neglected or abused. N.C.G.S. § 7A-650(b2).

In this case, McCauley testified Respondent had admitted to her that April had told Respondent April's father was abusing her, and Respondent was "initially very supportive of April and protecting her from her father." Respondent, however, testified that she never told McCauley that April had discussed her father's abuse with Respondent. The trial court found McCauley's testimony more credible, and found as fact Respondent had told McCauley that April had discussed her father's abuse with Respondent. This finding of fact shows Respondent was aware April was being abused and Respondent did not tell the truth in court about the abuse. Respondent's knowledge of the abuse raises concerns regarding her reasons for denying the abuse. Moreover, because it was the father's abuse of April which led to the trial court's adjudications, the trial court's order that Respondent undergo a psychological evaluation and possible treatment was "directed toward remediating or remedying behaviors or conditions" which led to the trial court's adjudications. The trial court, therefore, properly ordered Respondent to undergo a psychological evaluation and possible treatment.

III

[3] Respondent contends the trial court's findings of fact regarding April's status as an abused juvenile are not supported by the evidence, and these findings of fact do not support the trial court's conclusion of law that April is an abused juvenile. We disagree.

The allegations in a petition alleging abuse must be proved by clear and convincing evidence, N.C.G.S. § 7A-635 (repealed 1999),[4] and the trial court's findings of fact, if supported by clear and con-

4. Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999. See now § 7B-805 (1999).

vincing evidence, are conclusive on appeal "even where some evidence supports contrary findings," *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

In this case, the trial court found as fact April told McCauley her father had "asked her to touch his penis," April told Dr. Brown her father had asked her to look at magazines containing pictures of naked people, and April testified her father had shown her a picture of a woman wearing a see-through dress. These findings of fact are supported by the testimony of McCauley, Dr. Brown, and April. The trial court also found as fact Respondent told DSS that April "had told [Respondent] that [April's father] would put his hand under [April's] bed blankets and then place his hand on her crotch and when she would tell him to stop, he called [her] a lesbian." Although Respondent testified she did not make these statements to DSS, this finding of fact is supported by McCauley's testimony that these statements were made. The trial court's finding of fact that Mark told McCauley his father "play[ed] with himself" is also supported by McCauley's testimony. Additionally, the trial court found as fact "April stated her father approached April and . . . Ashley in the basement of the home where he lived . . . and that he asked April to look at 'his thing.' " This finding of fact is supported by McCauley's testimony that April made this statement to her. This finding is also supported by Ashley's drawing, made at the trial court's request, of what Ashley saw when she was in the basement with April's father. The drawing depicted a man exposing his penis. Finally, the trial court's finding of fact that Respondent "denied under oath making any statement to [DSS] concerning the sexual abuse of April" is supported by Respondent's testimony. The trial court's findings of fact regarding April's status as an abused juvenile are therefore supported by clear and convincing evidence.

Respondent also contends these findings of fact do not support the trial court's conclusion of law that April is an abused juvenile.

An abused juvenile is defined, in pertinent part, as a juvenile whose parent "[c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: . . . taking indecent liberties with the juvenile, as provided in G.S. 14-202.1, regardless of the age of the parties." N.C.G.S. § 7A-517(1)(c). North Carolina General Statute § 14-202.1 provides:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . :

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C.G.S. § 14-202.1 (1999). Whether a person acts "for the purpose of arousing or gratifying sexual desire[] may be inferred from the evidence of [his] actions." *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987).

In this case, the findings of fact, as stated above, support a conclusion April's father took and attempted to take indecent liberties with April when he exposed his penis to April and when he asked April to touch his penis while they were in the basement, when he "place[d] his hand on [April's] crotch," and when he showed April a picture of a woman wearing a see-through dress. Moreover, that April's father acted "for the purpose of arousing or gratifying sexual desire" can be inferred from these findings. The trial court's findings of fact, therefore, support its conclusion of law that April is an abused juvenile.

Affirmed as modified.

Judges EDMUNDS and SMITH concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. CURTIS D. MAHAFFEY AND WIFE, MARGARET W. MAHAFFEY, DEFENDANTS

No. COA99-567

(Filed 18 April 2000)

1. Appeal and Error— condemnation by DOT—issues other than title or area taken—immediate appeal not required

Defendants in a condemnation action filed by DOT were not barred from raising on appeal the granting of DOT's 12(b)(6) motion and the denial of defendants' constitutional challenge to N.C.G.S. § 136-112 where the court held a hearing to resolve all

issues other than damages, granted DOT's motion and denied defendant's due process claim, and defendants did not appeal. An order resolving questions concerning title and area taken in a DOT condemnation hearing must be appealed immediately, but the issues in this case did not involve title or area taken.

2. Eminent Domain— inverse condemnation—existing DOT action

The trial court did not err by granting DOT's Rule 12(b)(6) motion to dismiss defendants' inverse condemnation claim. DOT had already filed a formal condemnation action and defendants' averment was unnecessary and redundant because the issue of compensation was to be decided in accordance with N.C.G.S. § 136-112.

3. Eminent Domain— statutory measure of damages—constitutional

N.C.G.S. § 136-112 does not violate the federal Due Process Clause and therefore does not violate our state law of the land clause.

4. Evidence— condemnation—sale price of another property—excluded

The trial court did not abuse its discretion in an action to determine damages for a DOT taking by refusing to allow testimony concerning the sales price of another property which was developed into a shopping center. The property in this case was zoned residential at the time of the taking and at the time of the trial while the shopping center was zoned agricultural or residential prior to the sale and is currently zoned residential, and the court decided that the properties were too dissimilar to allow testimony of the sale price of the shopping center property.

5. Evidence— condemnation—offer on property by developer—not competent on value when taken

The trial court did not err in a condemnation action by excluding the property owner's testimony about an offer he received on the property from a shopping center developer. The testimony was incompetent on the issue of the value of the property when it was condemned.

Appeal by defendants from judgment dated 9 June 1998 and from order filed 21 September 1998 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 22 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General David R. Minges, for plaintiff-appellee.

Max D. Ballinger for defendant-appellants.

GREENE, Judge.

Curtis D. Mahaffey (Mr. Mahaffey) and Margaret W. Mahaffey (collectively, Defendants) appeal the entry of an order denying Defendants' motion for a judgment notwithstanding the verdict and in the alternative a new trial and the entry of a jury verdict and judgment in the amount of $20,000.00 in compensation for Defendants in this condemnation action instituted by the North Carolina Department of Transportation (DOT).

Defendants are the owners of an 11.32 acre tract of land (the Property) located at the intersection of Fleming Road and Country Woods Lane in Guilford County. The Property is improved with two single family dwellings and other buildings. The Property was zoned R-12 and R-40, which permit residential development.

On 5 November 1991, DOT took approximately one acre of the Property along Fleming Road, in order to widen Fleming Road in conjunction with construction of Bryan Boulevard, a four-lane controlled access expressway. The underlying action was filed on 5 November 1991, and the sum of $15,850.00 was deposited as just compensation. Defendants timely filed an answer, asserting a counterclaim for inverse condemnation and a defense that N.C. Gen. Stat. ch. 136, art. 9 is unconstitutional. Defendants also moved to continue the action until after Bryan Boulevard was built.

Defendants' inverse condemnation claim alleges they had "not been offered just compensation for the alleged taking of their property" and prayed the trial court to empanel a jury to try the issue of just compensation. Defendants' constitutional defense alleges N.C. Gen. Stat. ch. 136, art. 9 "is violative of the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States and the provisions of Article 1, Section 19, of the North Carolina Constitution." Defendants also aver "[t]he measure of damages authorized by [section] 136-112 is inadequate, it ignores realistic

and customary marketing practices, and the statutes are unconstitutional in that they amount to a deprivation of property without due process of law."

In June of 1997, the matter came up for hearing pursuant to N.C. Gen. Stat. § 136-108 to resolve all issues other than damages. At the hearing, the trial court granted DOT's Rule 12(b)(6) motion, dismissed Defendants' inverse condemnation claim, and held the measure of damages set forth in N.C. Gen. Stat. § 136-112 was constitutional. Defendants did not appeal that order.

The record reveals Defendants purchased the Property in 1976 with knowledge that Bryan Boulevard was to be built in the vicinity. Mr. Mahaffey testified he believed that after Bryan Boulevard was built, Defendants could get the Property re-zoned to commercial. All of the immediate properties surrounding the Property are residential.

The parties in this action have differing opinions of the value and the highest and best use of the Property. Mr. Mahaffey and Defendants' real estate experts opined the highest and best use of the Property is as commercial property, and the Property's fair market value was $1,800,000.00 before the taking and $1,500,000.00 after the taking. Mr. Mahaffey testified he had been approached by the developers of the Cardinal Crossing Shopping Center (the Cardinal) who wanted to buy the Property. The trial court sustained DOT's objection and struck Mr. Mahaffey's statement. Thereafter, on several occasions, Mr. Mahaffey attempted to relay what the developers of the Cardinal had told and offered him. The trial court sustained DOT's objections to these statements and allowed DOT's motions to strike the statements.

Max Ballinger, Jr. (Ballinger), one of Defendants' real estate experts, testified the land upon which the Cardinal is located is a comparable piece of property to the Property. The Cardinal property is zoned for commercial use and is located on the corner of Inman Road and Fleming Road near the Property. The trial court sustained DOT's objections to Defendants' questions to Ballinger concerning the price per acre the Cardinal property sold for in 1988, and the sales price of the Cardinal property.

On *voir dire*, Ballinger testified the Cardinal property, which is 6.85 acres, sold for $163,467.00 per acre for a total price of $1,144,275.00. The Cardinal property, however, was zoned for a shop-

ping center. It had been zoned agricultural or residential and was re-zoned to commercial use. Thereafter, a shopping center was built on the land.

DOT's experts opined the highest and best use of the Property is for residential development. J. Thomas Taylor (Taylor), a licensed general appraiser, testified for the DOT. As he customarily does in the process of appraising a piece of property, Taylor interviewed people with the Greensboro Planning Department and determined the Property would not likely be re-zoned from residential to commercial. Taylor testified the fair market value of the Property before the taking was $363,400.00. The land being valued at $193,700.00 or $17,000.00 per acre and the improvements (the buildings) being valued at $169,700.00. As bases for his appraisal, Taylor cited the Property was zoned residential at the time of the taking and at the time of the trial and cited comparable land sales of property zoned residential located near the Property. In his appraisal, the properties Taylor used to compare to the Property in arriving at his determination ranged from $16,759.00 per acre to $18,158.00 per acre, after adjustments.

The issues are whether: (I) Defendants have timely appealed the granting of the State's Rule 12(b)(6) motion and the denial of Defendants' due process motion; (II) Defendants have adequately stated a claim for relief; (III) N.C. Gen. Stat. ch. 136, art.9 is violative of due process; (IV) Ballinger was properly denied an opportunity to testify about the sales price of the Cardinal property; and (V) Mr. Mahaffey's testimony about the interest of the Cardinal developers was admissible.

I

[1] DOT argues Defendants' appeal from the granting of DOT's Rule 12(b)(6) and the denial of Defendants' constitutional challenge to section 136-112 is not timely and, therefore, must be dismissed. We disagree.

The entry of an order resolving questions "concerning title and area taken" in a DOT condemnation proceeding must be immediately appealed. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999). In this case, the issues raised by Defendants and addressed by the trial court in the section 136-108 hearing did not relate to title or area taken. Defendants, thus, are not barred from raising these issues in this appeal.

II

[2] Defendants argue the trial court erred in granting DOT's Rule 12(b)(6) motion to dismiss their inverse condemnation claim. We disagree.

In this case, DOT had already instituted a formal condemnation action prior to Defendants' answer. Although Defendants' inverse condemnation claim alleges they had "not been offered just compensation for the alleged taking of their property" and prayed the trial court to empanel a jury to try the issue of just compensation, Defendants' averment was unnecessary and redundant, because the issue of compensation was to be decided in accordance with the provisions of N.C. Gen. Stat. § 136-112. Defendants' answer failed to state a claim for which relief could be granted under inverse condemnation, because DOT had exercised its formal taking power and the provisions of section 136-112 would guide the determination of the proper amount of just compensation for the DOT's taking from the Property. *Midgett v. Highway Commission*, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963) (where statute provides complete remedy, that remedy is exclusive), *overruled on other grounds, Lea Co. v. North Carolina Bd. of Transp.*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983). The trial court, thus, correctly granted DOT's Rule 12(b)(6) motion. *See Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

III

[3] Defendants argue section 136-112 is violative of their federal and state due process rights because the "statutory limitation on the measure of damages effectively denies one whose property has been taken for road purposes by the [DOT] the 'just compensation' to which he is guaranteed."

Section 136-112 of the North Carolina General Statutes provides in pertinent part:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages [in a DOT taking]:
>
> (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.G.S. § 136-112 (1999).

The United States Supreme Court, when addressing a constitutional challenge to a federal condemnation statute[1] similar to section 136-112, held the statute did not deny the owner just compensation within the meaning of the federal Due Process Clause. *Bauman v. Ross*, 167 U.S. 548, 574, 42 L. Ed. 2d 270, 283 (1897). As we are unable to discern any material difference between the statute before the *Bauman* court and section 136-112, we hold section 136-112 does not violate the federal Due Process Clause. It, therefore, follows our state constitution "law of the land" clause is not violated. *See Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (construing "law of the land" consistent with federal due process of law). The measure of compensation provided by section 136-112, thus, provides "just compensation" within the scope of both the federal and state constitutions. Consequently, we leave undisturbed the trial court's determination that section 136-112 is constitutional.[2]

IV

[4] Defendants argue the trial court erred in refusing to allow Ballinger to testify about the sales price of the Cardinal property. We disagree.

Sales prices of voluntary sales of property similar in nature, location, and condition to property being condemned is admissible as evidence of the value of the condemned land, so long as the other sales are not too remote in time. *City of Winston-Salem v. Cooper*, 315 N.C. 702, 711, 340 S.E.2d 366, 372 (1986). "Whether the properties are sufficiently similar to admit such evidence is a question to be deter-

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1. The federal statute provided in pertinent part: "where the use of a part only of any parcel or tract of land shall be condemned . . . the jury, in assessing the damages therefor, shall take into consideration the benefit [that] the purpose for which it is taken may be to the owner . . . of such tract or parcel by enhancing the value of the remainder of the same." *Bauman v. Ross*, 167 U.S. 548, 557, 42 L. Ed. 2d 270, 277 (1897).

2. Defendants, in their brief to this Court, also contend there was no rational basis for the difference in the measures of compensation provided to landowners whose property is condemned under sections 136-112 and 40A-64. This is an equal protection argument not raised below, and thus, we will not address it for the first time on appeal. *See State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988).

mined by the trial judge in his sound discretion," usually upon *voir dire*, *id.*, and such decisions will not be disturbed on appeal absent an abuse of that discretion, *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The market value of the condemned property is to be determined on the basis of the conditions existing at the time of the taking. *Charlotte v. Recreation Comm.*, 278 N.C. 26, 33, 178 S.E.2d 601, 606 (1971). The exclusion of evidence of the voluntary sales price of an adjacent property is proper where the lands are markedly dissimilar in nature, condition, and zoning classification. *Barnes v. Highway Commission*, 250 N.C. 378, 394, 109 S.E.2d 219, 232 (1959). When property is unavailable for a particular use because of a zoning ordinance, the possibility the property may be re-zoned may be taken into consideration if there is a "reasonable probability of a change in the near future." *Id.* at 391-92, 109 S.E.2d at 230. If the possibility that the property may be re-zoned is "purely speculative," however, such possibility should not be considered. *Id.* at 392, 109 S.E.2d at 230.

In this case, the Property was zoned for residential use at the time of the taking and at the time of the trial. Although it had been zoned for agricultural or residential use prior to its sale, the Cardinal property is currently zoned for commercial use.[3] The trial court, in its discretion, decided the Cardinal property and the Property were too dissimilar to allow Ballinger to testify concerning the sale price of the Cardinal property, and Defendants have not demonstrated an abuse of that discretion. The trial court, thus, did not err in refusing to allow Ballinger to testify concerning the sales price of the Cardinal property.

V

[5] Defendants argue the trial court erred in sustaining DOT's objection to Mr. Mahaffey's testimony about what the developers of the Cardinal property told Mr. Mahaffey when the developers offered to purchase the Property. We disagree.

"A mere offer to buy or sell property is incompetent to prove its market value. The figure named is only the opinion of one who is not

3. There is no evidence in the record providing when the Cardinal property was re-zoned for commercial use. Defendants' expert speculated, without objection, that getting the Cardinal property re-zoned for commercial use was likely a condition of the sale.

bound by his statement and it is too unreliable to be accepted as a correct test of value." *Highway Comm. v. Helderman*, 285 N.C. 645, 655, 207 S.E.2d 720, 727 (1974); *see also Canton v. Harriss*, 177 N.C.11, 14, 97 S.E. 748, 749-50 (1919) (evidence of unaccepted offer to purchase condemned property held incompetent).

In this case, Mr. Mahaffey was allowed to offer testimony of what he thought the market value of the Property was on the date of the taking. He also was allowed to testify concerning his thoughts of the highest and best use of the Property. He was not, however, allowed to testify concerning the offer he received on the Property. This testimony was incompetent on the issue of the value of the Property when it was condemned, and thus, the trial court did not err in excluding it.

We note Defendants have made six additional arguments relating to seven assignments of error in the record. Defendants, however, failed to cite to any authorities in support of these arguments in violation of Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, and thus, these assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(5); *see also Byrne v. Bourdeaux*, 85 N.C. App. 262, 265, 354 S.E.2d 277, 279 (1987). Defendants also provided six additional assignments of error in the record that they did not argue in their brief to this Court. These assignments of error are likewise deemed abandoned. N.C.R. App. P. 28(b)(5) (assignments of error not set out in appellant's brief will be deemed abandoned); *see also State v. Davis*, 68 N.C. App. 238, 245, 314 S.E.2d 828, 833 (1984).

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

DERRICK MILLER, JR., BY HIS GUARDIAN AD LITEM, ALLEN BAILEY; CHARMA MILLER; AND DERRICK MILLER, SR., PLAINTIFFS V. PIEDMONT STEAM COMPANY, INC., D/B/A STANLEY STEEMER; STANLEY STEEMER INTERNATIONAL, INC.; AND JOHN STEVEN SPERO, DEFENDANTS

No. COA99-440

(Filed 18 April 2000)

Agency— automobile accident—personal injury action—franchise agreement—no evidence of control

In an action to recover damages for personal injuries sustained by a six-year-old pedestrian struck by a van owned by defendant-franchisee Piedmont Steam Company, Inc., the trial court did not err in granting summary judgment in favor of defendant-franchisor Stanley Steemer International, Inc., on the issue of the franchisor not being liable for the torts of its franchisee on an actual agency theory, because: (1) the franchise agreement only provided general standards regarding the attire and appearance of the franchisee's employees and the condition of its equipment, and a general duty to maintain the premises in a "clean, attractive, safe and orderly manner"; (2) the franchisor did not retain or exercise detailed control over the daily operations since its involvement in the franchisee's operations functioned largely to ensure uniform service and public good will toward the corporation; (3) the franchisor did not retain control over the hiring, firing, or supervision of the franchisee's personnel; (4) the franchisor's remedies in the event of a breach of the franchise agreement were limited; (5) the franchisor could obtain adequate insurance if the franchisee failed to do so, and no agency relationship arises when one party requires another to maintain liability insurance; (6) the franchisor did not maintain control over the operators of the franchisee's vehicles or the manner in which they operated vehicles owned by the franchisee and registered in its name; and (7) the fact that the parties formally agreed that the franchisee was an independent contractor and not an agent of the franchisor is an indicia of the parties' intent that no agency relationship be formed.

Appeal by plaintiffs from judgment entered 14 January 1999 by Judge L. Oliver Noble in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 January 2000.

Twiggs, Abrams, Strickland, & Trehy, P.A., by Donald R. Strickland and Karen M. Rabenau, for plaintiffs-appellants.

Cranfill, Sumner, & Hartzog, L.L.P., by Stephanie Hutchins Autry and Samuel H. Poole, Jr., for defendant-appellee.

TIMMONS-GOODSON, Judge.

D.J. Miller ("D.J."), a six year-old pedestrian, suffered severe brain injury when struck by a van as he attempted to cross Archdale Drive in Charlotte, North Carolina. The van was owned by Piedmont Steam Company, Inc., d/b/a Stanley Steemer ("Piedmont"), and was driven by John Steven Spero ("Spero"), an employee of Piedmont.

Piedmont became a franchisee of Stanley Steemer International, Inc. ("Steemer") in 1977. The twenty-one page Franchise Agreement ("the Agreement") between Piedmont and Steemer "[set] forth the contract terms and conditions for [Piedmont's] ownership and right to operate a [Steemer] carpet and upholstery cleaning business." Under the terms of the Agreement, Piedmont was required to purchase one carpet cleaner from Steemer, use Steemer approved replacement parts and cleaning products, and obtain Steemer approval of the appearance of the trucks used in the business and of all advertising. Additionally, the Agreement required Piedmont to keep its books and records according to Steemer guidelines, and make monthly sales reports to Steemer on Steemer supplied forms. The Agreement allowed record and tax return inspection by Steemer, and Steemer inspection of machines and equipment. Furthermore, Piedmont was obligated to carry a specified level of liability insurance coverage with a carrier approved by Steemer under the Agreement. If Piedmont failed to carry adequate insurance, Steemer reserved the right to obtain such insurance.

Article XIV of the Agreement stated:

> Franchisee [Piedmont] acknowledges that he is an independent contractor and as such may not act as an agent, employee or representative of [Steemer], or attempt to bind or obligate [Steemer] in any manner. [Steemer] similarly agrees that it may not bind or act for Franchisee.

Under the Agreement, if Piedmont failed to comply with substantial provisions, Steemer had the option to terminate the Agreement or to terminate Piedmont's exclusivity.

In addition to the Agreement, the Franchise Operations Manual ("the Manual"), which was referred to in the Agreement, set forth "Prescribed Standards for Franchise Operations." The Manual contained detailed standards regarding hours of operation, uniforms, equipment and supplies, prescribing even the length and color of hair of Piedmont employees.

D.J., through his guardian ad litem and his parents (collectively "plaintiffs"), brought a motor vehicular negligence action against Spero, Piedmont, and Steemer (collectively, "defendants") to recover damages for the personal injuries D.J. sustained. The complaint alleged that Spero was negligent in his operation of the van and that Spero's negligence was imputed to Piedmont and Steemer based on principles of *respondeat superior* and agency.

Defendants answered, denying the material allegations contained in the complaint. Following discovery, Steemer filed a motion for summary judgment. Plaintiffs filed a partial summary judgment motion on the issue of Steemer's vicarious liability for the alleged negligence of Steemer and Spero. During oral argument on the summary judgment motions, plaintiffs withdrew their motion for partial summary judgment on the grounds the affidavits offered by Steemer created genuine issues of material fact.

At the hearing on its motion for summary judgment, Steemer attempted to establish that it did not exercise the necessary degree of control over Piedmont so as to establish an actual agency relationship. In support of the motion, Steemer submitted a host of documents including the affidavits and depositions of Philip R. Ryser, Executive Vice-President, Secretary and General Counsel of Steemer, and Steven W. Rohletter, President of Piedmont, to show that Steemer did not control the management, operation, or day-to-day business activity of Piedmont. While Steemer conceded that it issued many directives regarding Piedmont's business operation which amounted to a measure of control, Steemer argued that this control did not reach the bar set by the North Carolina courts. Steemer also argued that the plain language of the Agreement clearly defined its relationship with Piedmont as one of non-agency.

In opposition to Steemer's summary judgment motion, plaintiffs submitted that genuine issues of material fact were presented by the Agreement, the manuals, the mandatory prescribed standards, and the deposition testimony of Ryser and Rohletter. Plaintiffs argued that on the issue of the degree of Steemer's control over Piedmont's

operations, the Ryser and Rohletter affidavits were in direct conflict with the deposition testimony offered by the two officers.

In their identical affidavits, Ryser and Rohletter stated that Steemer "had no control over, or authority to direct, the upkeep, maintenance, use or operation of the 1994 ford van." In his deposition, Rohletter conceded that Steemer had a right of control over the trucks used in its business. Ryser and Rohletter stated in their affidavits that "[Piedmont] alone maintains complete control over all personnel decisions involving its employees[.]" In his deposition, Rohletter agreed that Steemer had a right of control over the uniforms and general appearance of Piedmont employees. Ryser and Rohletter asserted in their affidavits that "[Steemer] has no control over the management, operation or the day-to-day activities of [Piedmont]." In his deposition, Ryser testified:

> Q: . . . Has it been your experience that [Piedmont] follows the directives or the requirements set forth in the franchise agreement between [Piedmont] and [Steemer]?
>
> A: To my knowledge, yes.
>
> Q: . . . [H]as it been your experience that [Piedmont] does what it is asked to do or required to do by [Steemer]?
>
> A: To the best of my knowledge, yes.

The trial court entered an order granting Steemer's motion for summary judgment. Plaintiffs appeal.

Plaintiffs' sole argument on appeal is that the trial court erred in granting Steemer's motion for summary judgment where material questions of fact existed as to whether there was an actual agency relationship between Steemer and Piedmont. We cannot agree.

Summary judgment is proper where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). In determining whether summary judgment is proper, the trial court must view the evidence in the light most favorable to the non-moving party, giving the non-moving party the benefit of all reasonable inferences. *Coats v. Jones*, 63 N.C. App. 151, 303 S.E.2d 655, *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). The burden to establish the nonexistence of any triable issue of fact rests on the moving party. *Oliver v. Roberts*, 49 N.C.

App. 311, 271 S.E.2d 399 (1980), *cert. denied*, — N.C. —, 276 S.E.2d 283 (1981).

A franchisor is vicariously liable for the tortious acts of its franchisee when an agency relationship exists and the acts are committed within the scope of the agent's authority. *Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979). Agency arises when parties manifest consent that one shall act on behalf of the other and subject to his control. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 357 S.E.2d 394, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987).

> [A] principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal over the details of the work as it is being performed. The controlling principle is that vicarious liability arises from the right of supervision and control.

Vaughn, 296 N.C. at 686, 252 S.E.2d at 795.

Both parties rely on *Hayman*, and we agree that *Hayman* is controlling in the case at bar as it addresses the issue of whether a franchisor may be held liable for the torts of its franchisee on an actual agency theory. In *Hayman*, a patron of the Ramada Inn was assaulted while staying at the hotel and brought suit against Ramada Inn, Inc. This Court affirmed summary judgment in favor of Ramada Inn, Inc., holding that no actual agency relationship existed between Ramada Inn, Inc., the franchisor, and Turnpike Properties, the franchisee. Noting that the general purpose of the franchise agreement was "the maintenance of uniform service within, and public good will toward, the Ramada Inn System[,]" this Court found no evidence that the franchisor exercised detailed control over day-to-day operations of the hotel. *Hayman*, 86 N.C. App. at 278, 357 S.E.2d at 397.

The franchise agreement in *Hayman* was a twenty-page document which required the franchisee to comply with certain standards in constructing, furnishing, and advertising the hotel. The franchisee was also required to maintain the premises in a "clean, attractive, safe and orderly manner," *id.*, and the franchisor retained the right to make inspections of the hotel to ensure compliance with the parties' agreement.

However, the franchisor in *Hayman* retained no authority over the hiring, firing, supervision, or discipline of personnel. Moreover, the franchisor's remedy for any breach was limited to termination of

the franchise agreement. The *Hayman* court noted that while the plaintiff alleged that Ramada Inn, Inc. was negligent in failing to provide adequate security for hotel patrons, the franchisor maintained no control over the security of the premises.

In the present case, the parties entered into a twenty-one page franchise agreement. Under the Agreement, Steemer, like the *Hayman* franchisor, was authorized to make periodic inspections of Piedmont and its records. Steemer prescribed standards regarding the attire and appearance of Piedmont's employees and the condition of its equipment. Although Steemer's standards were detailed, prescribing even the length and hair color of Piedmont employees, they served the same purpose as the *Hayman* provision requiring the franchisee to maintain the premises in a "clean, attractive, safe and orderly manner."

While Steemer required Piedmont to purchase one carpet cleaning machine from it and to use spare parts that met Steemer specifications for quality, we hold that these provisions did not rise to the level of daily control over Piedmont operations. As in *Hayman*, Steemer's involvement in the operations of Piedmont functioned largely to ensure uniform service and public good will toward the corporation, and did not, therefore, give rise to an agency relationship.

Like the *Hayman* franchisor, Steemer retained no control over the hiring, firing, or supervision of Piedmont personnel. Steemer's remedies in the event of a breach of the Agreement were limited. Steemer could either terminate the Agreement or terminate Piedmont's exclusivity in the event that Piedmont failed to comply with "any of the substantial provisions." The remedies available to Steemer did not allow it to interfere in the day-to-day operations of Piedmont with the minor exception that Steemer could obtain adequate insurance if Piedmont failed to do so. We note that no agency relationship arises when one party requires another to maintain liability insurance. *Id.* at 279-80, 357 S.E.2d at 398.

Just as the plaintiff in *Hayman* alleged that her injuries arose from a lack of adequate security, plaintiffs in the present case allege that D.J.'s injuries arose from negligent operation of a motor vehicle. However, Steemer did not train or test the drivers employed by Piedmont, nor did it require that the drivers have a good driving record or meet any other standards. We conclude that Steemer did not maintain control over the operators of the Piedmont vehicles or

the manner in which they operated vehicles owned by Piedmont and registered in its name.

We hold that plaintiffs failed to establish any material fact tending to prove the existence of an agency relationship between Steemer and Piedmont. While Steemer conceded and the depositions of Ryser and Rohletter establish that Steemer had a measure of control over Piedmont operations, this control was not sufficient to establish an agency relationship as a matter of law. We are aware of precedent stating that the power to hire and fire employees is only one factor to consider in determining whether an agency relationship exists. *Vaughn*, 296 N.C. at 691, 252 S.E.2d at 798. As such, we have examined the circumstances in their entirety for material facts which support a finding of control and therefore agency. Similarly, we note that the language of the contract is not necessarily controlling. Nonetheless, the fact that the parties formally agreed that Piedmont was an independent contractor and not an agent of Steemer is an indicia of the parties' intent that no agency relationship be formed.

For the reasons stated herein, we conclude that there are no genuine issues of material fact regarding Steemer's liability for the alleged negligence of Spero based on principles of agency. As such, the judgment of the trial court granting summary judgment for Steemer is affirmed.

Affirm.

Judges MARTIN and HORTON concur.

ASSOCIATES FINANCIAL SERVICES OF AMERICA, INC., PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA99-765

(Filed 18 April 2000)

1. Insurance— homeowners—failure to renew—notice

The trial court did not err by granting summary judgment for defendant-insurer where a homeowner's policy did not remain in effect subsequent to its expiration date because the homeowner failed to pay the premium. Although plaintiff-mortgagee argued that defendant failed to give proper notice of

nonrenewal under N.C.G.S. § 58-41-20, the statutory notice requirements apply when the insurer "refuses to renew," which occurs when the insurer indicates an unwillingness to renew. In this case, the undisputed facts show that defendant mailed two renewal declarations to the homeowner that indicated a willingness to renew the policy.

2. Insurance— homeowners—expiration—not renewed due to nonpayment of premium—not a cancellation

The trial court did not err by granting summary judgment for defendant insurance company in an action arising from the destruction of a homeowner's property after the policy expired. Although plaintiff-mortgagee argued that defendant's attempted cancellation of the policy did not comply with N.C.G.S. § 58-41-15 and was ineffective, the policy expiration resulted from not renewing the policy due to nonpayment of premium rather than a cancellation within the statutory meaning.

3. Insurance— homeowners—expiration—notice to mortgagee

The trial court did not err by granting summary judgment for defendant-insurer in an action arising from the destruction of a home where plaintiff-mortgagee contended that the terms of the policy required defendant to notify plaintiff of the expiration of the policy. The policy contained a clause which required notification if defendant unilaterally determined that it would cancel or not renew the policy, but defendant extended an offer to renew to the homeowners and the policy lapsed when they unilaterally determined that they would not accept the offer to renew. Although the policy does give the impression that plaintiff would have the opportunity to pay the premium, the court must construe the contract by its terms.

Appeal by plaintiff from order filed 29 March 1999 by Judge Claude S. Sitton in Rutherford County Superior Court. Heard in the Court of Appeals 14 March 2000.

J. Thomas Davis, for plaintiff-appellant.

Cloninger, Lindsay, Hensley, Searson & Arcuri, P.L.L.C., by Patricia L. Arcuri, for defendant-appellee.

GREENE, Judge.

Associates Financial Services of America, Inc. (Plaintiff) appeals a 29 March 1999 order granting summary judgment in favor of North Carolina Farm Bureau Mutual Insurance Company (Defendant) and denying Plaintiff's motion for summary judgment.

The undisputed facts show that on 22 March 1995, Jerry D. Moore and Ann A. Moore (collectively, the Moores) received a loan from Plaintiff for $29,496.75 pursuant to the terms of a promissory note signed by the parties. Under the terms of the promissory note, the loan was secured by a deed of trust for a house and property (the property) located in Rutherford County, North Carolina.

In 1996, Defendant insured the property under a homeowners policy numbered HP5187512 (the policy), and the policy coverage began on 28 August 1996 and expired on 28 August 1997. Under the terms of the policy, Defendant would bill the Moores for premiums due. Plaintiff was designated as a mortgagee of the property in the policy; however, premium payments were paid directly from the Moores to Defendant and were not included in the Moores' payments to Plaintiff under the promissory note. The policy contained, in pertinent part, the following clause:

Mortgage Clause.

. . . .

If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

a. Notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. Pays any premium due under this policy on demand if you have neglected to pay the premium; and

c. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. . . .

If we decide to cancel or not to renew this policy, the mortgagee will be notified at least 10 days before the date cancellation or nonrenewal takes effect.

On 26 July 1997, Defendant mailed to Plaintiff and the Moores a policy renewal declaration. The declaration stated: "COVERAGE

WILL EXPIRE ON 08/28/97 IF PREMIUM IS NOT PAID BY THE DUE DATE SHOWN ON THE STUB BELOW," and the due date provided was 28 August 1997. Wilma Robertson (Robertson), an employee of Plaintiff, conceded in an affidavit filed 25 February 1999 that Plaintiff received this declaration.

On 4 August 1997, Defendant mailed to Plaintiff and the Moores a corrected renewal declaration. The corrected declaration stated: "COVERAGE WILL EXPIRE ON 08/28/97 IF PREMIUM IS NOT PAID BY THE DUE DATE SHOWN ON THE STUB BELOW. REASON FOR AMENDMENT CHANGE CLASS." The due date provided was 5 September 1997, and Bob Adams, an agent of Defendant, stated in an affidavit filed on 22 March 1999 that the "change in protection class did not in any way change the material terms of the policy." Robertson conceded in her affidavit Plaintiff received this corrected declaration.

Defendant did not receive payment of the premium due under the policy, and Defendant contends that on 20 September 1997 it mailed to Plaintiff and the Moores a notice of expiration of the policy. The notice stated:

> Our records indicate that by failing to pay [the] renewal premium, you have allowed this important policy to expire.
>
> The "PREMIUM DUE" shown above is the amount required to reinstate the policy. . . .
>
> . . . .
>
> We hereby cancel the mortgagee agreement/loss payee clause/additional insured endorsement which is made part of the above mentioned policy and also the above mentioned policy issued to the insured named above on [28 August 1997].
>
> . . . .
>
> YOU WILL, THEREFORE, PLEASE TAKE NOTICE THAT AT AND FROM THE HOUR AND DATE MENTIONED ABOVE, THE SAID AGREEMENT AND THE SAID POLICY IS TERMINATED AND CEASES TO BE IN FORCE. HOWEVER, IF THE EXPIRATION DATE SHOWN ABOVE HAS PASSED, YOUR INTEREST, AS MORTGAGEE/LOSS PAYEE/ADDITIONAL INSURED, IS PROTECTED FOR TEN (10) DAYS FROM THE DATE THIS NOTICE IS MAILED.

Robertson stated in her affidavit Plaintiff did not receive the 20 September 1997 notice of expiration.

On 3 November 1997, the property was destroyed by fire, and Plaintiff subsequently filed a claim with Defendant based on the policy. The claim was denied on the ground coverage of the property had lapsed prior to the date of the fire, and on 18 June 1998 Plaintiff filed suit against Defendant for funds due under the policy. Plaintiff's complaint alleged "[D]efendant failed to notify . . . [P]laintiff of any cancellation of its policy of insurance prior to cancellation as required by its policy and North Carolina law." On 29 March 1999, the trial court granted summary judgment in favor of Defendant on the ground the pleadings and affidavits did not raise a genuine issue of material fact and denied Plaintiff's motion for summary judgment.

The issues are whether: (I) Defendant's failure to renew the policy for nonpayment of the premium was a "refus[al] to renew" the policy pursuant to N.C. Gen. Stat. § 58-41-20; (II) Defendant's failure to renew the policy for nonpayment of the premium was a "cancellation" of the policy pursuant to N.C. Gen. Stat. § 58-41-15; and (III) the terms of the policy required Defendant to notify Plaintiff of the Moores' failure to renew the policy prior to the expiration of the policy.

I

[1] Plaintiff argues Defendant failed to give proper notice of nonrenewal of the policy pursuant to N.C. Gen. Stat. § 58-41-20, and the policy, therefore, remained in effect subsequent to the 28 August 1997 expiration date. We disagree.

North Carolina General Statute section 58-41-20 provides:

> (a) No insurer may *refuse to renew* an insurance policy except in accordance with the provisions of this section, and any nonrenewal attempted or made that is not in compliance with this section is not effective. . . .
>
> (b) An insurer may *refuse to renew* a policy that has been written for a term of one year or less at the policy's expiration date by giving or mailing written notice of nonrenewal to the insured not less than 45 days prior to the expiration date of the policy.
>
> . . . .

> (e) The notice required by this section must be given or mailed to the insured and any designated mortgagee or loss payee at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. . . . Failure to send this notice to any designated mortgagee or loss payee invalidates the nonrenewal only as to the mortgagee's or loss payee's interest.

N.C.G.S. § 58-41-20 (1999) (emphasis added).

Because this statute does not define the phrase "refuse to renew," we must construe this phrase in accordance with its plain meaning to determine the intent of the legislature. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The plain meaning of "refuse" is "[t]o indicate unwillingness to do." *The American Heritage College Dictionary* 1148 (3rd ed. 1993). An insurer, therefore, "refuse[s] to renew" a policy when the insurer indicates an unwillingness to renew the policy. *Cf. Faizan v. Insurance Co.*, 254 N.C. 47, 59, 118 S.E.2d 303, 311-12 (1961) (insurer did not "fail[] to renew" automobile insurance policy pursuant to N.C. Gen. Stat. § 20-310[1] when insurer offered to renew policy and insured party rejected offer by failing to pay premium due under policy); *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 268, 337 S.E.2d 569, 573 (1985) ("expiration of a policy for nonpayment of premium is not a cancellation or refusal to renew under [section 20-310]").

In this case, the undisputed facts show Defendant mailed two renewal declarations to the Moores, and these renewal declarations offered to renew the policy upon payment of the premium due. Defendant, therefore, indicated a willingness to renew the policy, and the failure of the Moores to pay the premium was a rejection of Defendant's offer to renew the policy. Accordingly, the notice requirements of section 58-41-20 do not apply, and Defendant was not required to provide Plaintiff with notification of the policy's expiration.

II

[2] Plaintiff argues Defendant canceled the policy and, because the cancellation did not comply with N.C. Gen. Stat. § 58-41-15, the cancellation was ineffective. We disagree.

Section 58-41-15, which applies to cancellations of insurance policies by the insurer, provides:

1. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 29, effective February 1, 1995. See now § 58-36-85 (1999).

> (a) No insurance policy or renewal thereof may be canceled by the insurer *prior to the expiration of the term or anniversary date stated in the policy* and without the prior written consent of the insured, except for any one of the following reasons:
>
> (1) Nonpayment of premium in accordance with the policy terms.
>
> . . . .
>
> (b) Any cancellation permitted by subsection (a) of this section is not effective unless written notice of cancellation has been delivered or mailed to the insured, not less than 15 days before the proposed effective date of cancellation. The notice must be given or mailed to the insured, and any designated mortgagee or loss payee at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. The notice must state the precise reason for cancellation. Proof of mailing is sufficient proof of notice. Failure to send this notice to any designated mortgagee or loss payee invalidates the cancellation only as to the mortgagee's or loss payee's interest.

N.C.G.S. § 58-41-15 (1999) (emphasis added). Under this statute, an insurer may not cancel a policy *prior to the expiration of the term* of the policy. *Id.*; *Scott v. Allstate Insurance Co.*, 57 N.C. App. 357, 359, 291 S.E.2d 277, 278 (1982) (policy is canceled within meaning of section 58-41-15 "when the insurer unilaterally terminates a policy then in effect *before* the end of the stated term"). Because we have held Defendant's nonrenewal of the policy due to nonpayment of the premium resulted in an expiration of the policy at the end of the policy's term, Defendant did not cancel the policy within the meaning of section 58-41-15. Plaintiff, therefore, was not entitled to notice pursuant to section 58-41-15.

III

[3] Plaintiff finally argues the terms of the policy required Defendant to notify Plaintiff of the expiration of the policy. We disagree.

Generally, when an insurance policy contains an expiration date, the insurer is not required to give the insured party notice of expiration as "[t]he insured is charged with knowledge of the terms of his policy." *Scott*, 57 N.C. App. at 359, 291 S.E.2d at 278. A duty of notification to the insured or some third party, including a mortgagee,

however, may arise due to agreement between the parties. *Id.; see also C. D. Spangler Constr. Co. v. Industrial Crankshaft & Eng. Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 562 (1990) ("insurance policy is a contract and its provisions govern the rights and duties of the parties").

In this case, the policy contained a mortgagee clause which stated: "If *[Defendant] decide[s] to cancel or not to renew this policy*, the mortgagee will be notified at least 10 days before the date cancellation or nonrenewal takes effect." (emphasis added). The term "decide" means to "determine." *The American Heritage College Dictionary* 359 (3rd ed. 1993). Under the terms of this notification clause, therefore, Defendant was required to notify Plaintiff of a cancellation or nonrenewal of the policy if *Defendant* unilaterally determined it would cancel or not renew the policy. Because an offer to renew the policy was extended to the Moores, Defendant did not unilaterally determine it would not renew the policy; rather, the policy lapsed when the Moores unilaterally determined they would not accept Defendant's offer to renew the policy by failing to pay the premium. Thus, the notice provision was not applicable, and Defendant had no obligation under the terms of the policy to notify Plaintiff of the expiration of the policy.

Plaintiff also argues in its brief to this Court:

> The language of the mortgage clause seems to give the impression to [Plaintiff] that it will have the opportunity to pay the premium if the insured neglects to pay it . . . [and] denial [of the claim] should not apply to [Plaintiff] if, upon demand by [Defendant], [Plaintiff] pays the premium which the [Moores] neglected to pay.

Although at first glance the policy does give the impression Plaintiff will have an opportunity to pay the premium, this Court cannot be guided by impressions and must construe the contract according to its terms. *See C. D. Spangler Const. Co.*, 326 N.C. at 142, 388 S.E.2d at 562. Although the policy allows Plaintiff to pay the premium due under the policy in order to protect its interest in the property, the mortgage clause does not require Defendant to give Plaintiff notice of the Moores' failure to pay the premium unless failure to pay the premium results in Defendant canceling or unilaterally deciding not to renew the policy. As noted above, Defendant did not cancel or unilaterally decide not to renew the policy, and, therefore, Plaintiff was not entitled to notice of the policy's expiration.

The pleadings and affidavits do not raise any genuine issue of material fact regarding whether Plaintiff was entitled to notice of expiration of the policy, and Defendant is entitled to judgment as a matter of law. Accordingly, the trial court properly granted Defendant's motion for summary judgment and denied Plaintiff's motion for summary judgment. *See* N.C.G.S. § 1A-1, Rule 56(c) (1999).

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

STEPHANIE S. JOHNSON AND DEBORAH S. GILBERT, PLAINTIFFS V. SANDRA V. SCOTT, DEFENDANT

No. COA99-71

(Filed 18 April 2000)

Emotional Distress— loss of sleep—loss of appetite—not sufficiently severe

The trial court did not err by granting summary judgment for defendant on a claim for negligent infliction of emotional distress arising from the shooting of plaintiff's father by defendant, their step-mother. Although the parties' contentions involved the effect of a settlement agreement limiting any recovery to homeowner's insurance proceeds and a prior ruling discharging the insurance company, alternative grounds for upholding the summary judgment exist in that the loss of sleep and loss of appetite described by plaintiffs do not meet the requisite level of severe emotional distress.

Appeal by plaintiffs from judgment entered 13 February 1998 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 20 October 1999.

Hunter Law Firm, by Robert R. Seidel and R. Christopher Hunter, for plaintiffs-appellants.

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

JOHN, Judge.

Plaintiffs Stephanie S. Johnson (Johnson) and Deborah S. Gilbert (Gilbert) appeal the trial court's grant of defendant Sandra V. Scott's motion for summary judgment. We affirm.

Plaintiffs are sisters and the daughters of Duke Tyler Scott (Mr. Scott), now deceased. Defendant Scott is the step-mother of plaintiffs, having married Mr. Scott in 1982. Mr. Scott died 19 March 1993 as a result of a gunshot wound inflicted by defendant.

Plaintiffs thereafter filed suit against defendant, asserting, *inter alia*, claims of wrongful death, negligence, and for the return of personal property. Plaintiffs' initial action was settled 6 April 1994 upon execution by the parties of a "Stipulation of Settlement" agreement (the settlement agreement). Defendant therein agreed to a monetary and property settlement with plaintiffs in exchange for the latters' promise "to remain silent" during the plea bargaining and sentencing phases of defendant's impending criminal trial.

The settlement agreement further provided, however, that any claim of plaintiffs for negligent infliction of emotional distress against defendant would survive

> insofar as the same may exist against Defendant and Defendant's carrier of the homeowners insurance (believed to be USF&G) on the premises and home of Defendant at which the incident occurred . . . . Plaintiff understands that Defendant may be obliged under her insurance contract with USF&G or said carrier to assist the carrier in the defense of the surviving claim(s) herein described. . . .
>
> . . . In the event that Plaintiff is unable to make or prove a case or succeed against Defendant such that Defendant's insurance policy carrier is liable, then Plaintiff shall have no other or further recourse against Defendant except as otherwise agreed upon in this Settlement Agreement. In the event that any judgment shall be entered against Defendant in this surviving issue, then Defendant's real or personal belongings shall not be subject to execution, it being the understanding and agreement by and between the parties that the sole source of collection shall be the Defendant's insurance policy and/or carrier . . . . Defendant shall exercise all reasonable steps and measures to assist Plaintiff in the collection of any such judgment . . . which shall not be in breach of Defendant's contract with the insurance carrier.

Plaintiffs filed the instant suit 21 March 1994 alleging negligent infliction of emotional distress. Defendant's 10 August 1995 motion for summary judgment was continued by the trial court pending resolution of a separate suit filed by United States Fidelity & Guaranty Company (USF&G) against defendant, seeking a declaratory judgment (the declaratory judgment action) as to USF&G's obligation to defend or afford coverage to defendant in the case *sub judice.*

The trial court allowed USF&G's motion for summary judgment in the declaratory judgment action on 28 July 1995 and "relieved [USF&G] of any obligation to defend or afford coverage to the defendant Scott." Defendant filed timely notice of appeal of the court's 28 July 1995 ruling, but failed to file a supporting brief. USF&G thereupon moved to dismiss defendant's appeal pursuant to N.C.R. App. P. 13(c) ("[i]f an appellant fails to file and serve his brief . . . the appeal may be dismissed"), which motion was allowed 29 February 1996.

In the declaratory judgment action, plaintiffs likewise attempted to appeal the grant of summary judgment in favor of USF&G. This Court held plaintiffs were not real parties in interest and also dismissed their appeal. *See U.S. Fidelity and Guaranty Co. v. Scott*, 124 N.C. App. 224, 226, 476 S.E.2d 404, 406 (1996), *disc. review denied*, 346 N.C. 185, 486 S.E.2d 220 (1997) (hereinafter *USF&G*). In the course of the opinion, however, we observed

> that even if Johnson and Gilbert had the right to appeal, we would affirm the trial court's decision to grant summary judgment in USF&G's favor on the ground that the insurer had no obligation to Johnson and Gilbert where Scott, the insured, was protected by a covenant not to execute.

Id. at 227, 476 S.E.2d at 406.

The trial court in the case *sub judice* thereafter reconsidered defendant's motion for summary judgment, and granted her motion 13 February 1998. Plaintiffs timely appealed.

Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits on file show no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1999); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). A summary judgment movant bears the burden of showing that

> (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim.

Lyles v. City of Charlotte, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996).

A court ruling upon a motion for summary judgment must view the evidence in the light most favorable to the non-movant, accepting all its asserted facts as true and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994).

> However, once the moving party presents an adequately supported motion, the opposing party must come forward with specific facts (not mere allegations or speculation) that controvert the facts set forth in the movant's evidentiary forecast.

Id. As stated in G.S. § 1A-1, Rule 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In short, "plaintiffs must . . . forecast sufficient evidence of all essential elements of their claims." *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992).

The parties disagree as to the effect on the instant action of this Court's earlier ruling dismissing plaintiffs' appeal and thereby discharging USF&G from any obligation to afford coverage to defendant. *See USF&G*, 124 N.C. App. at 227, 476 S.E.2d at 406. In essence, defendant maintains she was entitled to summary judgment because (1) the parties' settlement agreement limited plaintiffs' recovery on their negligent infliction of emotional distress claim to the amount recoverable from defendant's homeowner's insurance carrier; and, (2) defendant's carrier, USF&G, was absolved from liability in the *USF&G* decision, thereby precluding any recovery by plaintiffs from USF&G.

Plaintiffs counter that defendant materially breached the settlement agreement by failing to file a brief in the previous appeal. As a consequence, plaintiffs continue, they

> are no longer obligated to the bilateral agreement that the sole source of collection of any . . . judgment shall be [defendant's] insurance policy and/or carrier.

It is unnecessary to resolve the parties' dispute on this issue, however, in that an alternative ground sustains the trial court's grant of summary judgment. *See Nifong v. C. C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 ("[i]f the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision"), *aff'd*, 344 N.C. 730, 477 S.E.2d 150 (1996). Specifically, we conclude plaintiffs failed to "produce evidence to support an essential element of [their] claim." *Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350.

The elements of a claim for negligent infliction of emotional distress are that

> (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress.

Johnson v. Ruark Obstetrics, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

Our Supreme Court has defined severe emotional distress as

> any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Id. The distress must indeed be severe; "mere temporary fright, disappointment or regret will not suffice." *Id.* Further,

> "[i]t is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed."

Waddle, 331 N.C. at 84, 414 S.E.2d at 28 (quoting Restatement (Second) of Torts § 46 cmt. j (1965)).

In the case *sub judice*, assuming *arguendo* plaintiffs produced adequate evidence of the first two prongs of negligent infliction of emotional distress, their forecast of evidence was deficient, *see Waddle*, 331 N.C. at 82, 414 S.E.2d at 27, on the remaining prong requiring a showing that plaintiffs indeed suffered "severe emotional distress," *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97, in consequence of the conduct of defendant.

The sole evidence relative to characterization of the nature of their alleged emotional distress was located in plaintiffs' responses to defendant's interrogatories, attached to defendant's summary judgment motion. Taken in the light most favorable to plaintiffs, *Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, plaintiffs' verified answers indicated Johnson had experienced "difficulty sleeping" since her father's death and suffered from nightmares and periodic loss of appetite, diagnosed as "stress related gastinitis" by a physician who recommended counseling. Plaintiffs' responses reflected that Gilbert similarly encountered trouble sleeping and had "become fearful of the dark." Both in discovery and in their appellate brief, plaintiffs concede neither was ever "diagnosed by any doctor as suffering from neurosis, psychosis, chronic depression, phobia or any other type of severe mental condition."

We first note Gilbert's assertion she had "become fearful of the dark" was unaccompanied by any details reflecting that such fear might properly be labeled a phobia. A phobia is defined as "an exaggerated and often disabling fear." *Webster's Third New International Dictionary* 1699 (1966). Moreover, neither of the plaintiffs alleged her difficulty with sleeping resulted either in visits to a physician, required use of any medication, even "over-the-counter" sleep aids, or had in any manner disrupted that plaintiff's life. Although Johnson claimed to suffer from "stress related gastinitis," this was qualified by the statement that her loss of appetite was periodic. Similarly, Gilbert claimed that the "stress of dealing with her father's death" contributed to Gilbert's "*temporarily* separating from her husband." (emphasis added).

Based upon the evidence adduced below, we cannot say the alleged emotional distress of plaintiffs as described in their responses to defendant's interrogatories met the requisite level of "severe" emotional distress. *See Waddle*, 331 N.C. at 84, 414 S.E.2d at 27-28 (" '[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the

duration of the distress are factors to be considered in determining its severity.' ") (quoting Restatement (Second) of Torts § 46 cmt. j). The *Johnson* definition of "severe emotional distress" mandates that plaintiffs forecast evidence they suffered from a "neurosis, psychosis, chronic depression, [or] phobia" or from

> 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, 327 N.C. at 304, 395 S.E.2d at 97. Neither condition described by plaintiffs, loss of sleep nor loss of appetite, qualified under the showing *sub judice* as "severe and disabling." *Id.*

Accordingly, defendant met her summary judgment burden of demonstrating the absence of an essential element of plaintiffs' claim, *i.e.*, *severe* emotional distress. *See Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 159, 468 S.E.2d 260, 262 ("defendant moving for summary judgment may prevail by affirmatively showing by affidavits or depositions offered by any party, or other devices permitted by Rule 56, [such as answers to interrogatories,] that an essential element of a plaintiff's claim is lacking"), *disc. review denied*, 344 N.C. 444, 476 S.E.2d 134 (1996).

> Since [defendant thereby] successfully shifted the burden to plaintiffs, they were required to "produce a forecast of evidence demonstrating that [they] will be able to make out at least a *prima facie* case at trial."

Id. at 162, 468 S.E.2d at 263 (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). Plaintiffs having presented no evidence *aliunde* their responses to defendant's interrogatories tendered to the trial court by defendant, the court did not err in granting defendant's motion for summary judgment. *See* G.S. § 1A-1, Rule 56(e).

Affirmed.

Judges LEWIS and McGEE concur.

STATE OF NORTH CAROLINA v. DAVID CHARLES DIEHL

No. COA98-1626

(Filed 18 April 2000)

Criminal Law— prosecutor's closing argument—references to race—mistrial

The trial court abused its discretion in a first-degree murder case by denying defendant's motion for a mistrial under N.C.G.S. § 15A-1061, after the State's closing argument in which the prosecutor referred to the race of the jurors, because the prosecutor abdicated his duty to uphold defendant's right to a fair trial, the prosecutor's conduct was so undignified as to degrade the tribunal, and the trial court's comment that "we're not going to have that thing going on" did nothing to prevent the prosecutor's statements from influencing the jurors.

Judge WALKER dissenting.

Appeal by defendant from judgment entered 10 March 1998 by Judge W. Douglas Albright in the Superior Court, Randolph County. Heard in the Court of Appeals 16 November 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Buren R. Shields III, for the State.

Mary March Exum for defendant-appellant.

TIMMONS-GOODSON, Judge.

David Charles Diehl ("defendant") appeals a jury verdict finding him guilty of first degree murder and sentencing him to imprisonment for life without parole.

The facts pertinent to this appeal are as follows. In Asheboro, North Carolina, police officers found the dead body of Jake Spinks ("the victim") in his home. The victim had been stabbed sixty-four times. Deoxyribonucleic acid ("DNA") analysis of blood stains found in the home led police investigators to identify defendant as the perpetrator. Defendant was subsequently indicted and the case was called for trial.

During the course of closing arguments by the State at trial, the prosecutor made the following argument:

> [Defendant] doesn't like Anise. He doesn't like Tonya . . . All these people, I don't know their names, they're just Black people. I don't know their names. I don't—I don't—I don't mess with them . . . We're trying a brutal, vicious, sadistic killing. And one thing you got to face, why? Because he was embarrassed and he thinks he's doing y'all a favor by killing the drug dealer, a Black drug dealer.

No objection was lodged by defendant to these statements and the trial court did not intervene *ex mero motu* to the line or tenor of the prosecutor's argument. At a later point in his closing argument, the prosecutor again made a reference to race:

> Well if his story is sufficient to confuse you or to whatever, or if it's just another reason. If, and I hope that is the answer, if twelve people good and true, twelve White jurors in Randolph County, just doesn't think—

Defense counsel objected, stating, "Your Honor, please, I object to the racism." The trial court responded: "Well, let's just—We're not going to have that thing going on." The prosecutor completed his closing argument and court was adjourned for the day.

On the following morning, counsel for defendant asked the court to "amplify" his objection to the remark the prosecution had made the previous day. The trial court refused, stating:

> Well, I sustained the objection on the spot, right where he stood. Before the words were hardly silent, I sustained the objection to any line of argument that attempted to inject racial division in the argument, and I sustained the objection to [the] type of argument that the D.A. was about to make which would have constituted a feel for a race-based decision, and I don't know—I ruled for you.

Defense counsel moved for a mistrial. The trial court denied the motion, called for the jury to return, and resumed the proceeding with no further reference to the prosecutor's remarks. Defendant appeals.

The dispositive issue on appeal is whether the trial court abused its discretion in denying defendant's motion for a mistrial after the State's closing argument in which the prosecutor referred to the race of the jurors.

"Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment." *State v. Britt*, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975). "This right exists 'regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.' " *State v. Sanderson*, 336 N.C. 1, 7-8, 442 S.E.2d 33, 38 (1994) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L. Ed. 2d 751, 755 (1961)).

A mistrial is "[a] trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings." Black's Law Dictionary 1018 (7th ed. 1999). The trial court is required to declare a mistrial where prejudicial error takes place: "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (1999). The defendant has the burden to show prejudicial error. N.C. Gen. Stat. § 15A-1443(a) (1999).

The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse of discretion. *State v. Upchurch*, 332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992). Abuse of discretion occurs where the trial court's decision is "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations omitted).

Control of counsel's remarks during closing argument is left largely to the discretion of the trial court. *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). "Counsel have wide latitude in making their arguments to the jury." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967). Ordinarily, appellate courts will not review the exercise of the trial judge's discretion regarding jury arguments except where "the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761.

However, limits exist to jury arguments. *State v. Sanderson*, 336 N.C. at 15, 442 S.E.2d at 42. Counsel shall not engage in undignified or discourteous conduct that is degrading to a tribunal. *State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (1994), *cert. denied*, 522 U.S.

1096, 139 L. Ed. 2d 878 (1998). Furthermore, counsel must refrain from "abusive, vituperative, and opprobrious language, or from indulging in invectives." *State v. Rivera*, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999) (citations omitted).

Therefore, the discretion of the trial court regarding jury arguments is not unbridled. "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury." *Britt*, 288 N.C. at 712, 220 S.E.2d at 291. Moreover, where counsel's arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial, it is proper for the trial court to intervene *ex mero motu*. *Id.*

The prosecutor also has a duty to safeguard the defendant's right to a fair trial. *Sanderson*, 336 N.C. at 8, 442 S.E.2d at 38.

> The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. (quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 1321 (1935)).

Following an improper argument of counsel, the trial court must give prompt and explicit instructions to disregard the unwarranted language. *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). "Ordinarily, when incompetent or objectionable evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in the admission of the evidence is cured." *Upchurch*, 332 N.C. at 450, 421 S.E.2d at 584 (citations omitted). The following is an example of a proper curative instruction:

> Members of the jury, you are to disregard the defense counsel's statement that he believes the defendant is innocent. It is

> improper for counsel to argue his own personal opinion. You are to disregard this improper statement and not to allow it to affect your decision. [Do you understand my instructions? Can you follow them?]

(North Carolina Trial Judges' Bench Book, Superior Court Volume 1, Sec. III, Ch. 36, p. 4, 1999.) We note, however, that "some forms of misconduct are so inherently prejudicial that they may not be considered 'cured' even though the trial court has given a strong corrective instruction." *Sanderson*, 336 N.C. at 18, 442 S.E.2d at 43.

In the case at bar, the prosecutor gratuitously injected race into the proceeding during closing argument by referring to the jury as "twelve people good and true, twelve White jurors in Randolph County." In so doing, the prosecutor abdicated his duty to uphold defendant's right to a fair trial. We find the conduct of the prosecutor was so undignified as to degrade the tribunal.

Furthermore, the comment by the trial court that "We're not going to have that thing going on," did nothing to prevent the prosecutor's statements from influencing the jury. In fact, the trial court's comment was not directed to the jury, but to the prosecution and defendant. The overly brief and vague comment did not admonish the jury to disregard the objectionable remarks. We hold that direct and decisive action by the trial court was required in the form of an instruction directed to the jurors notifying them that the prosecutor's appeal to race was improper and that they should disregard it. As such, the statement of the trial court failed to cure the prosecutor's opprobrious language. In the trial court's own words, the remarks of the prosecutor constituted an appeal for a "race-based decision." We hold that the trial court did not fulfill its duty to censor remarks calculated to prejudice the jury.

Because the trial court allowed the prosecutor's statements to go uncorrected, we cannot be sure what effect the statements had on the jury. While we note that the judge, prosecutor and defendant were White, and the victim was Black, we are no less offended by the prosecutor's appeal to "twelve people good and true, twelve White jurors." The fact that all of the parties are of the same race does not authorize the use of the "race card." There is no place in our system of justice for any of its officers to appeal to race rather than the legal evidence. To insure that the system works as it was intended, trials and jury arguments must be free from the taint of insidious, extraneous influences such as race. As this Court stated in *Johnson v. Amethyst*

Corp., 120 N.C. App. 529, 537, 463 S.E.2d 397, 402 (1995), "[t]his court will neither condone nor permit practicing attorneys to take leave of their responsibilities to uphold the respectability of the judicial system."

In light of the prejudicial legal defect in the proceedings, the trial judge was required to grant defendant's motion for mistrial pursuant to North Carolina General Statutes section 15A-1061. Therefore, the trial court erred in denying defendant's motion for mistrial and defendant is entitled to a new trial. Having determined that a new trial is required, we need not address defendant's remaining assignments of error.

For the foregoing reasons, we vacate defendant's conviction and order a new trial.

Vacated and remanded for a new trial.

Judge GREENE concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I agree with the majority opinion that neither the State nor the defendant in a criminal trial is authorized to use the "race card." However, in this case, defendant objected to the prosecutor's argument as soon as he referred to the race of the jurors and before the prosecutor could finish his sentence. The trial judge's admonition to the prosecutor and to the jury was evident in his comment, "We're not going to have that thing going on."

I believe the jury clearly understood that the prosecutor was not permitted to use the "race card" in his argument. I conclude there was no prejudicial error committed in the trial of this case.

CONDELLONE v. CONDELLONE

[137 N.C. App. 547 (2000)]

CARROLL H. CONDELLONE, PLAINTIFF v. PETER C. CONDELLONE AND MARKET MASTER SALES CO., INC., DEFENDANTS

No. COA99-483

(Filed 18 April 2000)

1. Civil Procedure— Rule 60 order—changed circumstances

The trial court did not err by granting a defendant's Rule 60 motion for relief from a portion of a judgment requiring prospective alimony payments without a showing of changed circumstances. N.C.G.S. § 1A-1, Rule 60 allows a court to rely upon changed circumstances as grounds for granting a motion for relief from a judgment or order, but there is no requirement of such a showing.

2. Civil Procedure— Rule 60 order—findings of fact—not required

An order granting a motion under N.C.G.S. § 1A-1, Rule 60(b) without findings of fact was not in error.

3. Appeal and Error— law of the case—issue undecided in prior case

A prior appeal of an alimony action was not the law of the case as to prospective alimony payments where that issue was left undecided.

Appeal by plaintiff from order entered 12 February 1999 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 25 January 2000.

Craige, Brawley, Liipfert & Walker, L.L.P., by William W. Walker, for plaintiff-appellant.

Wyatt, Early, Harris & Wheeler, L.L.P., by A. Doyle Early, Jr., for defendant-appellees.

EDMUNDS, Judge.

Plaintiff wife and defendant husband were married in March 1969, separated in August 1985, and divorced in November 1986. In August 1987, they entered into a Separation Agreement, which reads in pertinent part:

> 18. ALIMONY. Husband shall pay to Wife as permanent alimony the following:

> $1,500.00 per month until Wife remarries or cohabits with an adult male to whom she is neither related nor married or until the death of either Husband or Wife.

Pursuant to this provision, defendant made monthly payments of $1,500.00 to plaintiff from August 1987 to April 1992, partial or no payments from May to August 1992, and no payments thereafter.

In February 1993, plaintiff brought an action for breach of contract against defendant seeking as damages the alimony arrears then due under the Separation Agreement. The trial court entered a default judgment against defendant in the amount of $13,450.00. This judgment remained unsatisfied and arrearages continued to accrue. As a result, plaintiff later filed against defendant three additional actions, which were consolidated for trial. The consolidated actions alleged breach of contract and sought a judgment for arrearages and an order of specific performance.

In October 1996, the consolidated actions were heard without a jury. Two days before the trial commenced, defendant provided plaintiff a draft affidavit from a private investigator who averred that plaintiff was cohabiting with an adult male to whom she was neither related nor married. However, because defendant had not raised the affirmative defense of cohabitation in his answer, the trial court granted plaintiff's motion *in limine* to exclude evidence of plaintiff's cohabitation. Consequently, defendant presented no evidence that he was excused from performing under the contract due to plaintiff's alleged cohabitation.

The court filed its judgment on 4 December 1996, ordering defendant to pay $66,000.00 in alimony arrearages that had accrued since entry of the 1993 judgment. The order required defendant to continue paying monthly alimony of $1,500.00 plus $1,000.00 per month on the arrearages (due under both the 1996 judgment and the 1993 judgment) until paid in full.

On 20 December 1996, defendant filed a Motion for New Trial and Relief from Judgment under N.C. Gen. Stat. § 1A-1, Rules 59 and 60 (1999). Three days later, on 23 December 1996, defendant filed a Motion in the Cause to modify the judgment because of a material change in circumstances, in that plaintiff was cohabiting with another. In an order filed 1 May 1997, the trial court denied defendant's motion for new trial and relief from judgment, but granted

defendant's motion in the cause, finding that "[p]laintiff cohabited with an adult male to whom she is neither related nor married during the period June 1, 1996, to October 22, 1996." Accordingly, the court ordered that plaintiff's right to receive future alimony payments pursuant to the Separation Agreement be terminated "effective as of the trial of this action on October 25, 1996."

Both parties appealed. This Court, in an opinion filed 16 June 1998, affirmed the trial court's December judgment except as to the trial court's order of specific performance of the 1993 judgment and reversed the trial court's May order granting defendant's motion in the cause. *See Condellone v. Condellone*, 129 N.C. App. 675, 501 S.E.2d 690 (hereinafter *Condellone I*), *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998).

After defendant unsuccessfully sought rehearing by this Court and discretionary review by our Supreme Court, he filed a motion in the trial court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) and (b)(6). The amended motion sought relief from "the Judgment of Specific Performance as to prospective alimony effective June 1996," relief from "the denial of defendant's Rule 59 and Rule 60 Motion and Order dated 1 May 1997," and "such other and further relief as the Court, in law or in equity, may grant." A hearing was held before the trial court on 3 December 1998. Defendant presented no evidence. After considering oral arguments of counsel, the trial court, in an order filed 12 February 1999, granted defendant's motion and relieved defendant "of that portion of the Judgment dated 4 December 1996 ordering specific performance of prospective alimony payments of $1,500.00 per month, and that the prospective alimony payments of $1,500.00 per month are terminated as of October 25, 1996." Plaintiff appeals.

I.

[1] Plaintiff first contends the trial court erred in granting defendant's motion because defendant presented no evidence showing any material change in circumstances since entry of judgment on 4 December 1996. Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b). Rule 60(b)(5) allows a court to rely upon changed circumstances as grounds for granting a motion for relief from a judgment or order, *see, e.g., Poston v. Morgan*, 83 N.C. App. 295, 350 S.E.2d 108 (1986), but there is no *requirement* of such a showing, *see Buie v. Johnston*, 313 N.C. 586, 589, 330 S.E.2d 197, 199 (1985) ("[A] court may relieve a party from a judgment if, among other reasons, it is no longer equitable that the judgment have prospective application."). Similarly, under Rule 60(b)(6), although the moving party must satisfy a two-prong test before the trial court may grant relief, *see Partridge v. Associated Cleaning Consultants*, 108 N.C. App. 625, 632, 424 S.E.2d 664, 668 (1993) ("A judgment should be set aside under Rule 60(b)(6) only if the movant can show (1) that extraordinary circumstances exist and (2) justice demands that the judgment be set aside."), neither prong of the test requires a showing of changed circumstances, *see City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457 (affirming trial court's decision to set aside default judgment pursuant to Rule 60(b)(6) "on the basis of fundamental unfairness"), *cert. denied*, 348 N.C. 496, 510 S.E.2d 380 (1998); *Windley v. Dockery*, 95 N.C. App. 771, 383 S.E.2d 682 (1989) (remanding for grant of relief under Rule 60(b)(6) where movant had no notice that case had been calendared). Accordingly, defendant's failure to present evidence of changed circumstances does not render the trial court's order invalid. This assignment of error is overruled.

II.

[2] Plaintiff contends the trial court's order was in error because it contained no findings of fact. However, this Court consistently has held: "Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party." *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (1999); *McLean v. Mechanic*, 116 N.C. App. 271, 447 S.E.2d 459 (1994); *Grant v. Cox*, 106 N.C. App. 122, 415 S.E.2d 378 (1992). This assignment of error is overruled.

III.

[3] Finally, plaintiff contends the trial court erred in granting defendant's motion because this Court's opinion in *Condellone I* established the "law of the case." Plaintiff argues that the appeal established as the law of the case that plaintiff was entitled to an order requiring defendant to specifically perform his promise to pay alimony pursuant to the Separation Agreement.

"The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *Metts v. Piver*, 102 N.C. App. 98, 100, 401 S.E.2d 407, 408 (1991) (citation omitted). However, the general rule only applies to issues actually decided by the appellate court. *See id.* "The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case." *Waters v. Phosphate Corp.*, 61 N.C. App. 79, 84, 300 S.E.2d 415, 418 (1983) (citation omitted), *modified and aff'd*, 310 N.C. 438, 312 S.E.2d 428 (1984).

This Court was presented four issues for review in *Condellone I*: (1) whether a motion *in limine* was appealable, (2) whether defendant was able to pay alimony arrears, (3) whether the trial court may order specific performance of a previously-entered judgment, and (4) whether the trial court had the authority to grant defendant's post-trial motion pursuant to Chapter 50 of the North Carolina General Statutes. *See Condellone I*, 129 N.C. App. at 681, 501 S.E.2d at 694-95. Contrary to plaintiff's contention in her brief, this Court did not hold that "[p]laintiff was entitled to an order that defendant specifically perform his promise to pay alimony pursuant to the parties' Separation Agreement and pay arrearages." Rather, with regard to the 4 December 1996 judgment, which required defendant to pay alimony due as of October 1996, the only law of the case established was that the trial court could not order specific performance of the 1993 judgment and could not modify the 4 December 1996 order pursuant to Chapter 50. Plaintiff's entitlement to *prospective* alimony payments due after October 1996 was left undecided by this Court. *See id.* at 686 n.2, 501 S.E.2d at 697-98 n. 2 (The "ultimate finding by the trial court that Plaintiff has breached a condition of her entitlement to alimony . . . is not presented in this appeal.").

This conclusion is supported by other cases decided by our courts. In *Southland Assoc. Realtors v. Miner*, we stated:

> The sole question before this court upon the prior appeal was whether the pleadings, admissions and affidavits contained in the

> record proper affirmatively showed that there were no genuine issues of material fact so that plaintiff would be entitled, on the facts established, to judgment in its favor as a matter of law. This court held that the plaintiff had not adequately carried its summary judgment burden, stating that "there was an unresolved issue of material fact" as to the assumability of the defendants' mortgage and, consequently, as to the financial ability of the prospective purchasers to consummate the transaction. The case was not before the court for a decision on the merits; the statement upon which the defendants rely was based upon limited evidence within the record on appeal, was not necessary to the holding that an unresolved issue of fact existed, and was not binding on the subsequent proceedings in the trial court. The prior appeal establishes only that plaintiff was not entitled to summary judgment; it did not establish that plaintiff was not entitled to present its evidence with regard to the disputed issues. The "law of the case" doctrine does not apply.

73 N.C. App. 319, 321, 326 S.E.2d 107, 108 (1985) (internal citations omitted). A similar result was reached in *Edwards v. Northwestern Bank*, where we stated:

> Plaintiff contends that a prior reversal of a grant of summary judgment for the bank on this claim renders directed verdict for the bank improper under the "law of the case" doctrine . . . . The prior appeal here was from the grant of a *pre-trial* summary judgment motion. This appeal is from the grant of a *post-plaintiff's evidence* motion for directed verdict. The stage of the trial is different. The evidence before the court is different. The "law of the case" doctrine thus does not apply.

53 N.C. App. 492, 495, 281 S.E.2d 86, 88 (1981) (internal citations and footnote omitted).

Because the trial court's action was not precluded by the law of this case, this assignment of error is overruled.

Affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. RANDALL SALTERS

No. COA99-243

(Filed 18 April 2000)

1. Larceny— indictment—variance—owner of stolen property

The trial court committed reversible error by failing to dismiss the charge of larceny when there was a fatal variance between the indictment and the evidence as to who was the actual owner of the stolen suitcase because: (1) the indictment did not name the proper owner of the blue suitcase allegedly stolen by defendant since it named the grandmother, and the evidence reveals the suitcase belonged to her grandchild; and (2) the grandmother did not have a "special property interest" in the child's belongings because the grandmother was not standing in loco parentis since the child's mother also lived in the home.

2. Burglary and Unlawful Breaking or Entering— breaking or entering—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the felonious breaking or entering charge because viewed in the light most favorable to the State, circumstantial evidence reveals: (1) defendant committed the entering since he was in the vicinity of the house around the time of the break-in, he gave a false alibi, and he lied about where he had gotten the suitcase; (2) defendant committed the breaking since there was a broken lock, splinters, and wood chips on the floor; and (3) defendant entered the home without consent since neither of the two persons authorized to give consent to entry in the house were ever asked directly whether they had given defendant permission to enter, one of those persons called the police upon realizing that someone broke into the home, and the front door revealed a forced entry.

Appeal by defendant from judgments entered 20 May 1998 by Judge Claude S. Sitton in Buncombe County Superior Court. Heard in the Court of Appeals 13 January 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner, for the State.

Office of the Appellate Defender, by Appellate Defender Malcolm Ray Hunter, Jr. for defendant-appellant.

HUNTER, Judge.

On 20 May 1998, defendant Randall Salters was convicted of felony breaking or entering and felony larceny. In a later proceeding, he was also found to be an habitual felon. Defendant appeals his convictions. Having preserved four assignments of error, he argues only two: (1) that the trial court committed reversible error in not dismissing the larceny charge due to the fatal variance between the indictment and the evidence as to who was the actual owner of the stolen suitcase, and (2) that the trial court committed reversible error in denying defendant's motion to dismiss the charge of felonious breaking or entering because the State failed to produce evidence of every element of the offense. Having reviewed the record before us, we agree with defendant that the larceny indictment should have been dismissed; however, we find defendant's second argument unpersuasive. Therefore, we reverse in part and affirm in part.

The State's evidence presented at trial tended to show that on Saturday, 8 November 1997, while driving in his neighborhood, Mr. Robert Maddox, chairman of his neighborhood community watch, saw a stranger running wildly down the street with a blue suitcase in hand. Maddox pulled along side of the individual and the man stopped running and laughed saying, "I thought you were the police." Because Maddox was suspicious, he got out of his car and confronted the man, eyeing the suitcase. In response, the man said "I didn't steal it. I got it from Michael." This incident occurred at approximately 3:30 p.m. Except for the time of day, defendant does not dispute these facts.

After watching the man leave, Maddox went into his home and got his cell phone, returned to his car, called the police, and began to follow the man. He remained on line with the police as he followed the man through the neighborhood. When the man realized he was being followed, he ducked into the "Quick as a Wink Cleaners" with the suitcase. When he emerged again from the cleaners, the man no longer had the suitcase in hand. Maddox continued following the man until he lost him when the man ran behind a nightclub. Maddox returned to the cleaners, found the suitcase and waited there until the police arrived. He, together with the police, looked in the suitcase and found it to be empty. The police left the suitcase with Maddox.

No one was home when Maddox arrived at the Justice home, but he was joined by Police Officer Johnston. The two men looked but saw no obvious signs of forced entry. Later that day, Maddox returned

to the Justice home and recounted what happened to Deborah Justice, who immediately stated the suitcase belonged to her eight-year old son, Kedrick. Deborah further stated that the man Maddox described was Randall Salters and that she and her mother, Frances, had seen him at the bus stop just up from their house when they left home earlier that day. Frances, Debbie and Kedrick all live together in the rental house.

The following Monday morning, defendant and his wife were waiting in the Justices' driveway when Frances returned from walking Kedrick to the bus stop for school. Defendant's wife said they had come over to explain that defendant had nothing to do with the break-in and theft. Frances invited them into her home and then called Maddox. Defendant stated to Frances that on the day in question, he had been visiting with Mr. Tucker, the Justices' neighbor, and then caught the bus to Mission Hospital. When Maddox arrived, he identified defendant as the man he had seen running through the neighborhood with the blue suitcase. The police later arrested defendant.

At trial, Frances Justice testified that when they arrived home on Saturday, 8 November 1997, the light was on in the living room, the front door latch appeared to have been forced open, and the door would no longer close properly. There were splinters, sawdust and small pieces of wood on the floor. The wreath that had been on the door, was now on the floor and the airline tag which had been on Kedrick's suitcase was now on the floor of his room.

[1] Defendant's first assignment of error is that the trial court committed reversible error by failing to dismiss the charge of larceny when there was a fatal variance between the indictment and the evidence as to who was the actual owner of the stolen suitcase. We agree.

In North Carolina our courts have been clear that:

> [T]he general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest. If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.

State v. Greene, 289 N.C. 578, 584-85, 223 S.E.2d 365, 369-70 (1976) (citations omitted). Furthermore, although the law acknowledges

that a parent has a special custodial interest in the property of his minor child kept in the parent's residence, *State v. Robinette*, 33 N.C. App. 42, 45-46, 234 S.E.2d 28, 30 (1977), that special interest does not extend to a caretaker of the property even where the caretaker had actual possession. *Greene*, 289 N.C. at 584, 223 S.E.2d at 369.

In the case at bar, the indictment charged defendant with stealing property owned by Frances Justice, but the evidence at trial showed the property belonged to Kedrick (Frances' eight-year old grandson). The State argues that Frances Justice was in lawful custody and control of her grandson's suitcase because it was in his room, in the house rented by her. Thus, the State maintains that she had a "special property interest" in the suitcase. However, we disagree.

> The purpose of the requirement that [proper] ownership be alleged is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense.

Id. at 586, 223 S.E.2d at 370. Therefore, it was necessary that defendant's indictment name the proper owner of the blue suitcase he was alleged to have stolen.

Had Frances Justice been raising Kedrick alone and his mother been living elsewhere, there would be no doubt that Frances would have been in lawful possession of the suitcase or had a special custodial interest in the suitcase. In such a case it would be easy to extend that custodial interest where Frances was acting *in loco parentis*. *See* 3 Robert E. Lee, *North Carolina Family Law* § 238 at 190 (4th ed. 1981) (one who stands *in loco parentis* to a child assumes, in general, the rights and obligations of a natural parent); *State v. Robinette*, 33 N.C. App. 42, 234 S.E.2d 28 (1977) (parent has a special custodial interest in the property of his minor child kept in the parent's residence); *cf. Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983) (where natural father never had any significant custodial, personal or financial relationship with child, court held that the rights of parents are a counterpart of the responsibilities they have assumed); *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (1998) (where child lived with companion after father and companion separated and companion was responsible parent in rearing and caring for child, companion had standing to sue father for custody). However, Frances Justice had not been raising Kedrick alone. Instead, the child's mother, Deborah,

also lived in the home, raising her son. Therefore, Frances was not standing *in loco parentis* and thus, had no special interest in the child's belongings. To be effective, the indictment must necessarily have named either the child as general owner, or Deborah his mother, as special owner. *Greene*, 289 N.C. 578, 223 S.E.2d 365. Consequently, defendant's conviction for larceny must be vacated.

[2] Defendant next argues the trial court committed reversible error in denying his motion to dismiss the felonious breaking or entering charge where the State failed to prove every element of the offense. Specifically, defendant argues the State failed to prove that he broke or entered the Justice home, and that if there was an entry, it was without the consent of Deborah or Frances Justice. From his brief to this Court, defendant seems to argue that circumstantial evidence of his breaking or entering is insufficient to prove the State's *prima facie* case. However, we find defendant's argument unpersuasive since

> [n]either . . . statute nor [case law] requires that the evidence be direct; rather, the evidence must be substantial. It is well-established in the appellate courts of this State that jurors may rely on circumstantial evidence to the same degree as they rely on direct evidence. *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). The law makes no distinction between the weight to be given to either direct or circumstantial evidence. *Id.* Rather, "the law requires only that the jury shall be fully satisfied of the truth of the charge." *Id.* at 29, 310 S.E.2d at 603 (quoting *State v. Adams*, 138 N.C. 688, 695, 50 S.E. 765, 767 (1905)).

State v. Sluka, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992).

The evidence at bar tended to show the defendant was in the vicinity of the Justices' house around the time of the break-in (3:00 p.m.); that he gave a false alibi as to why he was there (he stated he was visiting with Mr. Tucker, but Mr. Tucker testified he and his family had been out of town all weekend); and, that he lied about where he had gotten the suitcase (he stated Michael had given it to him that day, but Michael, Deborah's old boyfriend, had moved out of town seven to eight months prior). We find this evidence substantial enough to fully satisfy a jury that defendant had, in fact, committed the entering. Additionally, from the evidence of the broken lock and splinters and wood chips on the floor, the jury could also have concluded defendant committed the breaking.

Defendant further argues that the State failed to present proof that if he did break or enter, he did it without the permission of Frances or Deborah Justice. Our Supreme Court has ruled that evidence is sufficient to prove lack of consent if it can support a reasonable inference by the jury that the dwelling was entered without the permission of the occupants. *State v. Sweezy*, 291 N.C. 366, 384, 230 S.E.2d 524, 535 (1976).

In the case at bar, defendant concedes that only "Frances and Deborah Justice were persons who were authorized to consent to the entry . . . into the house." The record before us shows that neither Frances nor Deborah was ever asked directly whether they had given defendant permission to enter their home. However, upon realizing that someone had broken into their home, Frances called the police to report the incident. Furthermore, from the evidence of the front door latch's being forced open so that the door would no longer close properly, and splinters and wood chips on the floor and along with Frances' decorative wreath which she had hanging on the door, we hold it was reasonable for the jury to infer that entry was not that of an invited guest. *Id.* at 383-84, 230 S.E.2d at 535. Viewed in the light most favorable to the State, we hold this evidence is sufficient to support an inference and the jury's finding that defendant entered the Justice home without consent. *See State v. Mandina*, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Based on the foregoing, the judgment of the trial court is vacated as to the larceny conviction; however, we find no error in the trial court's judgment regarding the breaking and entering conviction.

Larceny conviction vacated; no error in breaking and entering conviction.

Judges JOHN and McGEE concur.

IN THE MATTER OF: THRIFT, MINOR CHILD TERISA SNOW THRIFT, RESPONDENT v. BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER AND GUARDIAN AD LITEM

No. COA99-291

(Filed 18 April 2000)

1. **Child Abuse and Neglect— adjudication on verified petition—not sufficient**

The trial court erred in a neglected child proceeding by finding that the allegations in the petition had been proved by clear and convincing evidence where respondent was not present, defense counsel objected to entry of an adjudicatory order without hearing evidence, and the court adjudicated the child neglected based upon the verified petition. The trial court incorrectly assumed that it could accept the verified petition and enter judgment on the petition on its own motion, judgment on the pleadings was implicitly precluded by Chapter 7A, and respondent's counsel was denied the opportunity to cross-examine witnesses.

2. **Child Abuse and Neglect— mother not present—father's stipulation—not sufficient**

An adjudication that a child was neglected was not supported by the father's stipulation where the mother was not present. Under N.C.G.S. § 7A-641, all parties must be present in order for the trial court to enter a consent judgment.

Appeal by respondent from judgment entered 24 November 1998 by Judge Shirley H. Brown in District Court, Buncombe County. Heard in the Court of Appeals 7 December 1999.

Buncombe County Department of Social Services, by Charlotte A. Wade, for petitioner-appellee.

Michael E. Casterline for respondent-appellant.

Kyle W. King as Guardian ad Litem.

TIMMONS-GOODSON, Judge.

Terisa Snow Thrift ("respondent") appeals from an order adjudicating her minor child, Brandon Thrift ("Brandon" or "the child"), a neglected child pursuant to North Carolina General Statutes section 7A-517(21).

The facts pertinent to the case on appeal are as follows. On 19 June 1998, the Buncombe County Department of Social Services ("petitioner") filed a verified juvenile petition alleging that Brandon was a neglected child in that he lived in an environment injurious to his welfare. The Buncombe County District Court entered a non-secure custody order for the child and he was taken into petitioner's custody. On 6 July 1998, a non-secure hearing was conducted by the court to determine whether the child should remain in the custody of petitioner. Although respondent had been properly served with the petition and summons, she did not appear at the non-secure hearing. An adjudicatory and dispositional hearing was held on 11 September 1998. Respondent was not present at the hearing. However, respondent was represented at the hearing by counsel, Michael E. Casterline ("counsel").

Counsel stated that he had not had contact with respondent for three weeks and that he was not authorized to consent to an adjudication of neglect. When the case came on for hearing, neither respondent nor petitioner offered evidence. Edward Thrift, the father of the child, was present at the hearing and consented to a finding of neglect. The trial court adjudicated the child neglected on the basis of the verified petition, as demonstrated by the following exchange:

> COURT: All right. We'll just make those findings without [respondent's] consent and note that she was well aware of today's court date.
>
> [COUNSEL FOR RESPONDENT]: Well, your Honor, I would object to us doing it without evidence.
>
> COURT: Well, we have a sworn petition. Is that not enough for you?

Although counsel objected to an entry by the trial court of an adjudicatory order without hearing evidence, the trial court adjudicated Brandon to be a neglected child as alleged in the petition and proceeded to disposition. The trial court ordered that the child remain in petitioner's custody with placement in the discretion of petitioner. Respondent appeals from the adjudicatory and dispositional order.

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[1] The dispositive issue on appeal is whether the trial court erred by finding that the allegations of neglect contained in the petition had been proved by clear and convincing evidence.

Respondent argues that her failure to be present at the adjudicatory hearing did not relieve the trial court of its duty to find based on competent evidence that the allegations of neglect contained in the petition were supported by clear and convincing evidence. We agree.

A neglected juvenile is one who "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who . . . lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7A-517(21), repealed effective 1 July 1999, S.L. 1998-202, s.5. When a child is alleged to be neglected, the trial court must conduct an adjudicatory hearing designed to determine the existence or nonexistence of any of the conditions alleged in the petition. N.C. Gen. Stat. § 7A-631, repealed effective 1 July 1999, S.L. 1998-202, s.5. The allegations contained in a petition may be admitted or denied. *See* N.C. Gen. Stat. § 7A-633, repealed effective 1 July 1999, S.L. 1998-202, s.5. At the hearing, the trial court must protect the due process rights not only of the child, but also of the parent.

> The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the judge shall protect the following rights of the juvenile and his parent to assure due process of law: the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, the right of discovery and all rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

N.C.G.S. § 7A-631. "Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7A-634(b), repealed effective 1 July 1999, S.L. 1998-202, s.5. The allegations of a petition alleging neglect must be proved by clear and convincing evidence. N.C. Gen. Stat. § 7A-635, repealed effective 1 July 1999, S.L. 1998-202, s.5.

North Carolina General Statutes section 7A-641 authorizes consent orders in limited instances:

> Nothing in this Article precludes the judge from entering a consent order or judgment on a petition for abuse, neglect or dependency when all parties are present, the juvenile is represented by counsel and all other parties are either represented by counsel or

have waived counsel, and sufficient findings of fact are made by the judge.

N.C. Gen. Stat. § 7A-641, repealed effective 1 July 1999, S.L. 1998-202, s.5. "A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court[,]" *McRary v. McRary*, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948), and operates as a judgment on the merits, *id.* at 719-20, 47 S.E.2d at 31.

Petitioner argues that the trial court was authorized to enter in essence a default judgment based on the allegations contained in the verified petition, the stipulations of the father, the absence of respondent, and the failure of her counsel to present any evidence. For the reasons that follow, we are compelled to disagree.

According to Rule 12(c) of the North Carolina Rules of Civil Procedure, the trial court may, upon motion of any party, enter judgment solely on the pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(c) (1999). The Rules of Civil Procedure apply "in the district court division of the General Court of Justice," unless otherwise provided in a pertinent provision of Chapter 7A. N.C. Gen. Stat. § 7A-193, repealed effective 1 July 1999, S.L. 1998-202, s.5. Therefore, unless the provisions of Chapter 7A, Hearing Procedures, explicitly or implicitly provide otherwise, Rule 12(c) applies in the case at bar.

In the present case, the trial court incorrectly assumed that it could, on its own motion, accept the verified petition and enter judgment on the petition. The trial court was not authorized to enter judgment on the pleadings pursuant to Rule 12(c) because neither party moved for judgment on the pleadings. N.C.G.S. § 1A-1, Rule 12(c). Furthermore, we believe that judgment on the pleadings was implicitly precluded by the provisions of Chapter 7A, Hearing Procedures. As stated above, the trial court must conduct a hearing to adjudicate the existence or nonexistence of the conditions of neglect alleged in the petition. N.C.G.S. § 7A-631. The quantum of evidence at the hearing is clear and convincing evidence. N.C.G.S. § 7A-635.

This Court has adopted a similar line of reasoning in cases pertaining to termination of parental rights. In *In re Tyner*, 106 N.C. App. 480, 483, 417 S.E.2d 260, 261 (1992), this Court held that the respondent's failure to file an answer did not authorize the trial court to enter a "default type" order terminating the respondent's parental rights. *See also In re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158 (1992) (Greene, J., concurring).

Just as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect. We note that an adjudication of neglect constitutes grounds for terminating parental rights and is frequently the basis for a termination proceeding. N.C. Gen. Stat. § 7A-289.32(2), repealed effective 1 July 1999, S.L. 1998-202, s.5. As the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, *In re Baby Girl Dockery*, 128 N.C. App. 631, 495 S.E.2d 417 (1998), the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence.

Finally, our decision in the present case is consistent with this Court's holding in *In re Murphy*, 105 N.C. App. 651, 414 S.E.2d 236, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992). In *Murphy*, the respondent was incarcerated at the time his parental rights were terminated. At issue on appeal was whether he had a right to be present at the hearing. This Court stated:

> When, as here, a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal.

Id. at 658, 414 S.E.2d at 400. While *Murphy* indicates that the trial court must allow counsel for the absent parent to cross-examine witnesses, respondent's counsel in the present case was denied the opportunity to cross-examine witnesses, compromising the "adversarial nature of the proceeding." *Id.*

[2] Petitioner argues that the father's stipulation supported an adjudication of neglect. While North Carolina General Statutes section 7A-641 authorizes judgments on a petition, consent judgments are appropriate only in limited instances. According to the mandates of section 7A-641, all parties must be present in order for the trial court to enter a consent judgment. In the case at bar, respondent was not present and, as such, no valid consent judgment could be entered. *See also Brundage v. Foye*, 118 N.C. App. 138, 454 S.E.2d 669 (1995) (holding that where a consent judgment is entered against two parties with the consent of only one, the trial court must set the consent judgment aside as to both parties). We conclude that

the father's purported consent was not sufficient to support a finding of neglect.

For the reasons stated herein, we hold that the trial court erred in finding the allegations of neglect contained in the petition had been proved by clear and convincing evidence. The judgment of the trial court is therefore reversed and the matter is remanded for a trial.

Reversed and remanded.

Judges GREENE and WALKER concur.

IN THE MATTER OF THE ESTATE OF MICHAEL ALLEN MONTGOMERY

No. COA99-681

(Filed 18 April 2000)

1. **Estate Administration— letters of administration—petition to revoke—living in adultery—definition**

   The phrase "living in adultery" in N.C.G.S. § 31A-1(a)(2) is construed to mean that a spouse engages in repeated acts of adultery within a reasonable period of time preceding decedent's death.

2. **Estate Administration— letters of administration—petition to revoke—living in adultery—insufficient evidence**

   The trial court did not err by granting summary judgment for respondent on a petition to revoke her letters of administration for her husband's estate on allegations that she was living in adultery under N.C.G.S. § 31A-1(a)(2), but the evidence at best merely shows that respondent kissed a man in a bar, kissed that same man in a house, lay "all over" him on a couch with other people present, and talked with him several times on the telephone.

Appeal by petitioners from order filed 17 February 1999 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 14 March 2000.

Peebles & Schramm, by John J. Schramm, Jr. and Erin L. Williams, for petitioner-appellants.

Kenneth Clayton Dawson, for respondent-appellee.

GREENE, Judge.

Charles Allen Montgomery and Janice S. Montgomery (collectively, Petitioners) appeal an order filed 17 February 1999 granting a motion by Karen Montgomery (Respondent) for summary judgment.

The record shows that Michael Allen Montgomery (Decedent) and Respondent were married on 2 November 1995, and one child was born to the marriage. The parties separated sometime prior to 20 June 1998. Decedent died on 20 June 1998, and on 30 June 1998 the Clerk of the Superior Court of Forsyth County issued Respondent Letters of Administration to administer Decedent's estate pursuant to N.C. Gen. Stat. § 28A-6-1.

On 25 August 1998, Petitioners filed a Petition for Revocation of Letters of Administration Issued to Respondent (the Petition) pursuant to N.C. Gen. Stat. § 28A-9-1(a)(1). The Petition alleged that in February of 1998 Respondent "willfully and without just cause abandoned [Decedent] and refused to live with him, and was not living with him at the time of his death." The Petition also alleged that at the time of Decedent's death Respondent was "living in adultery not condoned by [Decedent]."

On 4 December 1998, Respondent filed a Response to Petition for Revocation of Letters of Administration Issued to Respondent (the Response). Respondent admitted in the Response that she and Decedent "were living separate and apart at the time of [Decedent's] death," and denied Petitioners' allegation she was "living in adultery" at the time of Decedent's death. The Response contained a motion to dismiss the Petition on the ground Petitioners lacked standing to bring an action for revocation of Letters of Administration, and a motion for summary judgment on the ground no genuine issue of material fact existed.

On 4 December 1998, Respondent filed an affidavit with the trial court stating she "did not abandon [her] husband, commit adultery, or live in adultery." In an affidavit filed with the trial court on 4 December 1998, Respondent's landlord stated the terms of Respondent's lease restricted occupancy of Respondent's mobile

home, and Respondent was not permitted to occupy the mobile home with "a man to whom she was not married." The affidavit also stated the landlord "received no complaints from any neighbors of any improper occupancy of [Respondent's mobile home, and the landlord] frequently travel[ed] by the property and never saw any vehicles which did not belong there." Finally, in a 4 December 1998 affidavit, Cynthia Diane Martin, a "close friend[]" of Respondent, stated Respondent "had no other romantic interests, and . . . was not involved in any sexual relationships with anyone else."

The record also contains affidavits in support of the Petition, submitted to the trial court by Brian Amen (Amen), Ben Blevins (Blevins), and Mandy Stewart (Stewart). Amen's affidavit, executed on 16 December 1998, stated he "was a close personal friend to [Decedent]," and he had "personal knowledge the [Respondent] was having an affair . . . during the course of her marriage." Amen made the following statements in his affidavit: "I have observed [Respondent] kissing, hugging, and dancing with Matthew Davis at the Country Corral Dance Club and Bar in February of 1998 when she was married to [Decedent]"; and "I have observed [Respondent] and Matthew Davis kissing, hugging and laying all over each other on a couch in February of 1998 at my home where they stayed until approximately 4:30 to 5:00 a.m." Blevins' affidavit, executed 16 December 1998, stated Blevins is an acquaintance of Respondent, and Respondent had, on several occasions, called Blevins' house and asked Blevins and his wife to "cover for her and call her in the event [Decedent] called [Blevins'] house looking for her . . . [because] she had told [Decedent] she was staying with [Blevins] when in fact she was going to see Matthew Davis." Blevins' affidavit also stated that "[i]n approximately February of 1998 [Blevins] spoke with [Respondent] several times in which she asked [Blevins] to call her back at her house . . . so that if [Decedent] tried to dial *69 it would trace back to [Blevins'] phone and not to the phone of Matthew Davis." Finally, Stewart's affidavit, executed on 15 December 1998, stated that "[f]rom November of 1997 through February of 1998 on approximately 8 occasions [Respondent] has called me asking me to call her back . . . [and] it is clear to me that her reasons for asking me to call her back were to avoid [Decedent's] attempts to conduct a *69 call search."

In an order filed 17 February 1999, the trial court granted Respondent's motion for summary judgment on the ground "there is no genuine issue as to any material fact and . . . Respondent is en-

titled to a judgment as a matter of law." The record does not contain the trial court's ruling on Respondent's motion to dismiss.[1]

[1] The dispositive issue is whether the record raises a genuine issue of material fact regarding whether Respondent was "liv[ing] in adultery" at the time of Decedent's death.

Letters of Administration which have been issued to the spouse of a decedent may be revoked on the ground the spouse has lost her right to administer the estate pursuant to N.C. Gen. Stat. § 31A-1(a)(2). N.C.G.S. § 28A-9-1(a)(1) (1999); N.C.G.S. § 28A-4-2(7) (1999). A spouse loses her right to administer her spouse's estate under section 31A-1(a)(2) when she "voluntarily separates from the other spouse and lives in adultery and such has not been condoned." N.C.G.S. § 31A-1(a)(2) (1999).

Respondent argues the phrase "lives in adultery" requires a showing the adulterous spouse was residing with the party with whom she was committing adultery.[2] Petitioners argue a single act of adultery can constitute "liv[ing] in adultery."

Because the word "liv[ing]" is ambiguous,[3] we are unable to look to the plain meaning of "liv[ing]" to determine its meaning. *See State v. Bates*, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998). When language in a statute is ambiguous, this Court may look to the purpose of the statute to ascertain legislative intent. *State v. Tew*, 326 N.C. 732, 738-39, 392 S.E.2d 603, 607 (1990). The purpose of Chapter 31A is

1. Although a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is treated as a motion for summary judgment when "matters outside the pleading are presented to and not excluded by the court," N.C.G.S. § 1A-1, Rule 12(b) (1999), the record in this case does not contain any matters outside the parties' pleadings regarding Respondent's motion to dismiss for lack of standing. Respondent's motion to dismiss, therefore, was not treated as a motion for summary judgment and, because the record contains no ruling on the motion, we do not address the issue of whether Petitioners had standing to bring the Petition. *See* N.C.R. App. P. 10(b)(1).

2. Respondent admitted in her affidavit she and Decedent "were living separate and apart at the time of [Decedent's] death," and, therefore, we do not address this issue.

3. A term is ambiguous if it has more than one meaning, and a layman would be unable to determine which meaning is intended. 73 Am. Jur. 2d *Statutes*, § 195, at 392 (1974). Because the term "live" may be defined as "reside; dwell," or may be defined as "conduct[ing] one's life in a particular manner," *The American Heritage College Dictionary* 793 (3rd ed. 1993), and a layman would be unable to determine which definition was intended by the legislature, the term is ambiguous.

to prevent a person from "profit[ing] by his own wrong," and the legislature has stated Chapter 31 "shall be construed broadly" in order to achieve that purpose. N.C.G.S. § 31A-15 (1999). The broadest construction of section 31A-1(a)(2), the construction requiring the least showing to disqualify a spouse, would disqualify a spouse upon a showing of a single act of adultery. We reject this construction based on our legislature's previous distinction between "committing adultery" and "liv[ing] in adultery." *See Pendergast v. Pendergast*, 146 N.C. 225, 226, 59 S.E. 692, 692 (1907) (causes for absolute divorce include: " '(1) If either party shall separate from the other and live in adultery' "; and " '(2) If the wife shall commit adultery' ") (quoting N.C.G.S. § 1285 (1883)); *Setzer v. Setzer*, 128 N.C. 170, 172, 38 S.E. 731, 732 (1901) (statute requires a showing husband was " 'liv[ing] in adultery,' " and showing of "adultery *alone*" is insufficient) (quoting N.C.G.S. § 1285 (1883)). "Committ[ing] adultery" can consist of a single act of adultery. Robert E. Lee, 1 *North Carolina Family Law* § 65, at 319 (4th ed. 1979). It thus follows that "liv[ing] in adultery" requires a showing of something more than "committ[ing] adultery," or a single act of adultery.

We also reject Respondent's argument that "liv[ing] in adultery" should be limited to those "residing" in adultery. This construction is not consistent with the stated legislative directive that the statute be construed "broadly."[4] This is so because such a construction would permit spouses to engage in habitual adultery with those with whom they do not reside and nevertheless be qualified to administer their decedent spouse's estate under section 28A-6-1.

Considering the legislative history and the purpose of section 31A-1(a)(2), we construe "liv[ing] in adultery" to mean a spouse engages in repeated acts of adultery within a reasonable period of time preceding the death of her spouse.[5] Whether the evidence estab-

4. Respondent cites *In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991), for the proposition section 31A-1(a)(2) requires a showing a spouse is residing with the person with whom she has committed adultery. In *Trogdon*, however, the only issue before the court was whether the spouse was having an adulterous relationship with the person with whom she was residing and, although the parties in *Trogdon* were residing together, the *Trogdon* court did not hold section 31A-1(a)(2) *requires* a showing the parties were residing together. *Trogdon*, 330 N.C. at 144, 152, 409 S.E.2d at 898, 902-03.

5. We note our holding in this case is consistent with the case law of other states which have decided this issue. *See, e.g. Goodwin v. Owen, et. al*, 55 Ind. 243, 255 (1876) ("[l]iving in adultery means living in the practice of adultery"); *see also Goss, &C v. Froman, &C*, 89 Ky. 318, 329, 12 S.W. 387, 390 (1889) (statute requiring spouse "live[]

lishes a spouse is "liv[ing] in adultery" is a question of fact to be determined by the trier of fact. *See Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) (determination is finding of fact if it requires "logical reasoning from the evidentiary facts").

[2] In this case, the trial court correctly entered summary judgment for Respondent because the evidence, considered in the light most favorable to Petitioners, does not reveal a genuine issue of material fact with respect to whether Respondent was "liv[ing] in adultery." *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (genuine issue of material fact is "one which can be maintained by substantial evidence"); *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990) ("[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). At best the evidence merely shows that some four months prior to Decedent's death, Respondent kissed a man in a bar, kissed that same man in a house and lay "all over" him while she was on a couch with other people around, and talked with him several times on the telephone. Indeed, the evidence fails to raise a genuine issue of material fact regarding whether Respondent committed *any* acts of adultery. *See In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) (adultery can be shown by circumstantial evidence of opportunity and inclination to commit adultery).

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

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in adultery" "does not mean that [spouse] shall constantly live with one man in adultery . . . [,] but if she admits any man or men to her periodically . . . such conduct constitutes . . . living in adultery within the meaning of the statute").

STATE OF NORTH CAROLINA v. MICHAEL TARVIS JACKSON

No. COA99-608

(Filed 18 April 2000)

1. **Drugs— trafficking in cocaine—constructive possession—sufficiency of evidence**

The trial court did not err in a trafficking in cocaine and possession of drug paraphernalia case by denying defendant's motion to dismiss based on insufficient evidence to show defendant constructively possessed the cocaine found in the bathroom because even though defendant had nonexclusive possession of the motel room, other incriminating circumstances exist to show defendant had the power and intent to control the substance, including evidence that police officers found $800 cash and 2.22 grams of cocaine in defendant's pants pocket.

2. **Criminal Law— requested instruction—flight—applies only to defendant**

The trial court did not err in a trafficking in cocaine and possession of drug paraphernalia case by denying defendant's request for a jury instruction that another person's flight may be considered to show consciousness of guilt because an instruction on flight applies to the flight of defendant and does not apply to any alleged flight of a witness.

3. **Appeal and Error— preservation of issues—constitutional issue—no authority to preserve claim**

Although defendant contends his claim of ineffective assistance of counsel should be preserved for a hearing in superior court, the issue of whether defendant received ineffective assistance of counsel is not properly before the Court under N.C. R. App. P. 28(a), and the Court of Appeals has no authority to preserve this claim for a hearing in superior court.

Appeal by defendant from judgment dated 2 December 1998 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Clinton C. Hicks, for the State.

Haakon Thorsen for defendant-appellant.

GREENE, Judge.

Michael Tarvis Jackson (Defendant) appeals jury verdicts finding him guilty of trafficking in cocaine and possession of drug paraphernalia.

The State presented evidence at trial that on 12 December 1997 at 4:30 p.m., David W. Powell (Powell), an officer with the Charlotte Police Department, went to a motel room in Charlotte, North Carolina to execute a search warrant for drugs and weapons. Powell was accompanied by several other officers, and when the officers arrived at the motel they saw a man later identified as Antonio Gaskins (Gaskins) standing in front of the motel room. After Gaskins looked in the direction of the officers, he ran into the motel room. The officers then executed the warrant by announcing themselves and breaking in the door of the motel room. The officers discovered Defendant, Gaskins, and Jemina Bryant (Bryant) in the room. After securing these three occupants, the officers searched the room. They found a clear plastic baggy and digital scales on a night stand beside the bed. They also found two bags in the tank of the toilet in the bathroom, and the Charlotte-Mecklenburg Crime Lab later determined one of these bags contained 28.96 grams of cocaine and the other contained 178.56 grams of cocaine. Finally, the officers found $800.00 cash and a small bag in Defendant's front pants' pocket, and the Charlotte-Mecklenburg Crime Lab later determined the bag contained 2.22 grams of cocaine.

At the close of the State's evidence, Defendant made a motion to dismiss the charges of trafficking in cocaine and possession of drug paraphernalia for insufficiency of evidence and the trial court denied the motion.

Bryant then testified on behalf of Defendant that Defendant was her boyfriend and she was staying with him in a motel room on 12 December 1997. She testified Gaskins allowed her and Defendant to stay in the room, and Gaskins would occasionally "checkup on the room." Gaskins came to the room at 4:30 p.m. on 12 December 1997 and he brought digital scales with him, which he placed on a dresser. Bryant stated the parties then ate pizza in the motel room and, after a few minutes, Gaskins began to walk out the door of the motel room. Gaskins was halfway out the door when he said " 'Oh, there go the police,' " and "ran back into the bathroom." Approximately thirty seconds later the police entered the motel room. Bryant then heard the lid being lifted off of the toilet tank in the bathroom.

Defendant testified that on 12 December 1997 Gaskins entered the motel room where Defendant and Bryant had been staying for approximately one and one-half days, and Gaskins had a set of scales in his possession. Gaskins later began to leave the room; however, after he had walked approximately two feet outside of the room he said " 'Police' " and "marched back into the door." Gaskins then "ran to the bathroom, and [Defendant] watched him, and he unzipped his top jacket pocket." Defendant observed Gaskins "lift the back lid of the toilet up and sit it right there on the round part that you have a seat on, and . . . drop [a bag containing a white substance] down in the water." Gaskins then placed the lid back onto the toilet.

Following Defendant's testimony, the State called Gaskins as a rebuttal witness. Gaskins testified he went to a motel room on 12 December 1997 because Defendant had invited him there to watch a basketball game on television, and he had not been to the motel room prior to that day. Gaskins stated he did not bring scales with him to the motel room, and he did not enter the bathroom while in the motel room.

At the close of evidence, Defendant renewed his motion to dismiss the charges of trafficking in cocaine and possession of drug paraphernalia for insufficiency of evidence, and the trial court denied the motion.

During the charge conference, Defendant requested a jury instruction stating:

> "Defendant contends . . . Gaskins fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt."

The trial court denied Defendant's request for this instruction.

The issues are whether: (I) the record contains substantial evidence Defendant constructively possessed the cocaine found in the bathroom; (II) Defendant was entitled to a jury instruction stating Gaskins' alleged flight may be considered by the jury as evidence of consciousness of guilt; and (III) this Court has authority to "preserve[] for a hearing in Superior Court" Defendant's claim of ineffective assistance of counsel.

I

[1] Defendant argues the record does not contain substantial evidence Defendant constructively possessed the cocaine found in the bathroom, and his motion to dismiss for insufficiency of evidence, therefore, should have been granted. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

To obtain a conviction for trafficking in cocaine, the State must prove: "1) possession of cocaine and 2) that the amount possessed was 28 grams or more." *State v. Mebane*, 101 N.C. App. 119, 123, 398 S.E.2d 672, 675 (1990), *overruled on other grounds, State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994); N.C.G.S. § 90-95(h)(3) (1999). Possession may be actual or constructive, and a defendant constructively possesses a substance when " 'he has both the power and intent to control its disposition or use.' " *State v. Leonard*, 87 N.C. App. 448, 455, 361 S.E.2d 397, 401 (1987) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)), *appeal dismissed and disc. review denied*, 321 N.C. 746, 366 S.E.2d 867 (1988). Constructive possession may be inferred when a defendant has exclusive control over the premises where a substance is found. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989). When a defendant has nonexclusive control over a premises, however, constructive possession may only be inferred when other incriminating circumstances exist to show Defendant had the power and intent to control the substance. *Id.*

In this case, the evidence shows Defendant, Gaskins, and Bryant were in the motel room when law enforcement officers entered the room and found cocaine. Defendant, therefore, had nonexclusive possession of the motel room. Law enforcement officers, however, found $800.00 cash and 2.22 grams of cocaine in the pocket of Defendant's pants. Based on these other incriminating circumstances, a reason-

able person could infer Defendant had the power and intent to control the cocaine found in the bathroom, and, therefore, constructively possessed the cocaine. Accordingly, the trial court properly denied Defendant's motion to dismiss for insufficiency of evidence.

II

[2] Defendant argues he was entitled to a jury instruction stating Gaskins' alleged flight may be considered to show consciousness of guilt. We disagree.

"[W]hen a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). An instruction on flight is properly given to show consciousness of guilt when the record contains evidence "reasonably supporting the theory that *defendant* fled after commission of the crime charged." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977) (emphasis added); N.C.P.I., Crim. 104.35. The sole rationale for instructing a jury on flight is that a defendant's flight from the scene of a crime for which he has been charged may be some evidence the defendant committed the crime. *See State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972) ("accused's flight from a crime shortly after its commission is admissible as evidence of guilt"). An instruction on flight is therefore *sui generis* to the flight of a *defendant*, and does not apply to any alleged flight of a witness. Accordingly, Defendant was not entitled to a jury instruction regarding Gaskins' alleged flight.

III

[3] Defendant does not argue in his brief to this Court that he received ineffective assistance of counsel; rather, he argues his claim of ineffective assistance of counsel "should be preserved for a hearing in Superior Court." The issue of whether Defendant received ineffective assistance of counsel, therefore, is not properly before this Court. N.C.R. App. P. 28(a). Additionally, this Court has no authority to "preserve[] for a hearing in Superior Court" Defendant's ineffective assistance of counsel claim.

Defendant did not argue in his brief to this Court his additional assignments of error, and, therefore, they are deemed abandoned. N.C.R. App. P. 28(b)(5).

No error.

Judges WALKER and TIMMONS-GOODSON concur.

SHANNON N. JORDAN, APPELLANT v. CIVIL SERVICE BOARD FOR THE CITY OF CHARLOTTE, AND CITY OF CHARLOTTE, RESPONDENTS

No. COA99-453

(Filed 18 April 2000)

Public Officers and Employees— firing of police officer—superior court order—characterization of issues and standard of review

The trial court's order affirming the Civil Service Board's decision to dismiss plaintiff from his employment with the city's police department is reversed and remanded for entry of a new order characterizing the issues before the court and setting forth the standard of review applied by the court in resolving each separate issue.

Appeal by petitioner from an order entered 7 January 1999 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2000.

Lesesne & Connette, by Louis L. Lesesne, Jr. and Richard L. Hattendorf, for petitioner-appellant.

Dozier, Miller, Pollard & Murphy, by W. Joseph Dozier, Jr., for respondent-appellees.

HUNTER, Judge.

Petitioner-appellant Shannon N. Jordan ("Jordan") appeals the superior court's order affirming the decision of respondent-appellee, Civil Service Board for the City of Charlotte's ("Board") decision dismissing him from his employment with the Charlotte-Mecklenburg Police Department ("Police Department"). Unable to determine what standard of review the trial court applied, we reverse and remand to that court for entry of a new order in accordance with this opinion.

In view of our disposition of this matter, we recite only a brief history of this case: On 8 April 1997, Jordan was discharged from his employment with the Police Department following an incident in which Jordan fired his gun at a moving automobile, striking and killing the passenger therein. On 2 August 1997, Jordan was cited by the Chief of Police D. E. Nowicki for alleged violations of Rule of Conduct #28(A) and General Order #2, which essentially cover when and how a police officer is authorized to use deadly force. Chief Nowicki suspended Jordan without pay and memoed the Board with the recommendation that his employment with the Police Department be terminated for those violations. Jordan's case was heard by the Board on 13-17 October 1997, and the Board concluded that Jordan had, in fact, violated both of the cited procedures. Thus, the Board terminated Jordan's employment with the Police Department, effective immediately.

Acting upon his appeal, the trial court affirmed the Board's decision to terminate Jordan, the body of its order reading in its entirety:

> This matter was heard before the undersigned Judge Presiding over the July 16, 1998, Session of Superior Court for Mecklenburg County on appellant's request for judicial review of a decision by the Civil Service Board for the City of Charlotte, North Carolina (Board), entered on December 3, 1997, dismissing appellant Shannon N. Jordan (Jordan) as an employee of the Charlotte-Mecklenburg Police Department (the department) for violating departmental rules and orders resulting in the death of Ms. Carolyn Sue Boetticher.
>
> The Court having considered the arguments and briefs of counsel and having reviewed the entire record herein, FINDS that the findings, conclusions, and decision of the Board are supported by competent, material, and substantial evidence in view of the entire record as submitted. The Court further finds that the parties have agreed that this ORDER may be signed out of Term, Session, County, and District.
>
> IT IS NOW, THEREFORE, ORDERED that the decision of the Board terminating Jordan's employment as an officer of the Charlotte-Mecklenburg Police Department is hereby AFFIRMED.

We begin by noting that in his brief to this Court, "Jordan does not challenge [any of] the Board's findings of fact." Thus, it is not at issue

whether the Board's findings of facts are supported by competent evidence. Instead, Jordan challenges the Board's legal conclusions based on its findings of fact.

Recent case law has clearly set out the standard of review by the trial court in these kinds of administrative board decisions:

> The proper *standard of review* under [N.C. Gen. Stat. § 150B-51(b)] depends upon the issues presented on appeal. If appellant argues the agency's decision was based on an error of law, then *"de novo"* review is required. If however, appellant questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

In Re Appeal by McCrary, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citations omitted) (emphasis in original). Because " '[*d*]*e novo*' review requires a court to consider a question anew, as if not considered or decided by the agency" previously (*Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)), the trial court must make its own findings of fact and conclusions of law and cannot defer to the agency its duty to do so. Contrarily, the "whole record" test requires the trial court ". . . 'to examine all competent evidence (the "whole record") in order to determine whether the agency decision is supported by "substantial evidence." ' " *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). Then, once the trial court has entered its order, should one of the parties appeal to this Court,

> [o]ur task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999).

In the case at bar, Jordan concedes the Board's findings of fact are correct. However, he assigns reversible error to its interpretation of law—that is, the rules and regulations allegedly violated. Thus, Jordan argues that interpretation does not support his dismissal. As stated earlier, in a case such as this in which the petitioner argues the Board's decision was based on an error of law, the trial court was

required to review that decision *de novo*. *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. Contrarily, with regard to Jordan's assignments of error that do not argue error of law, the trial court was required to apply the "whole record" test in its review. *In Re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359.

In order for this Court to properly conduct its review, the trial court must first have properly reviewed the case. From the language of the trial court's order before us, we are able to determine only that it employed the "whole record" test in reaching its decision. However, the issue the trial court must necessarily have addressed first was whether the Board correctly applied the law—an issue which could *only* be resolved by the trial court's application of the *"de novo"* standard of review. It was, therefore, inappropriate for the trial court to apply the "whole record" test in resolving that issue. Thus, we must remand this case to the trial court.

This Court recently held that

> while the court's order in effect set out [one of] the applicable standards of review, it failed to delineate [the proper standard for review of the issues at bar]. Moreover, while the court may have disagreed with the parties' characterization of the issues, it failed to specify its own "determin[ation of] the actual nature of the contended error" before proceeding with its review. *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118.

In Re Appeal of Willis, 129 N.C. App. 499, 503, 500 S.E.2d 723, 726 (1998). Therefore, we agree with the *Willis* court that:

> As a result of these omissions, this Court is unable to make the requisite threshold determination that the trial court "exercised the appropriate scope of review," *[Amanini]* at 675, 443 S.E.2d at 118-19, and we decline to speculate in that regard. It follows that we likewise are unable to determine whether the court properly conducted its review. *See Act-Up*, 345 N.C. at 706, 483 S.E.2d at 392.

Id.

We, therefore, reverse the order of the trial court and remand this matter for a new order in accordance with our opinion herein. Specifically, the trial court must: (1) make its own characterization of the issues before it, and (2) clearly set out the standard(s) for its

review, delineating which standard it used to resolve each separate issue raised by the parties.

Reversed and remanded.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. DEBORAH FAYE BROGDEN

No. COA99-627

(Filed 18 April 2000)

1. **Criminal Law— verdict—amended by court—greater offense created**

It was plain error for the trial court to amend a jury verdict for misdemeanor assault on a government official to a felony conviction for assault with a deadly weapon upon a government official where defendant was indicted for the felony, the trial court instructed on the misdemeanor, the verdict sheet listed the misdemeanor, the jury returned verdicts of guilty of assault on a government official and assault with a deadly weapon, and the State moved to amend the judgment after the jury returned the verdict. Reading the two verdicts together, the jury found all of the elements of assault with a deadly weapon upon a government official, but a verdict can only be attacked under the limited circumstances provided by N.C.G.S. § 15A-1240. It is plain error for a judge to amend a verdict to create a greater offense when the jury returned a verdict of a lessor offense.

2. **Criminal Law— erroneously arrested judgment—remand—no impediment to reinstatement**

There is no legal impediment on remand to ordering entry of an arrested judgment for assault with a deadly weapon where the court mistakenly submitted to the jury assault with a deadly weapon and misdemeanor assault on a government official rather than the felony of assault with a deadly weapon on a government official, increased the misdemeanor verdict to the felony and arrested judgment on the assault with a deadly weapon, and the case was remanded on appeal. There was no error in the verdict of guilty of assault with a deadly weapon and the trial judge

arrested judgment on that charge only after erroneously amending the verdict of guilty of assault on a government official.

Appeal by defendant from judgment entered 19 August 1998 by Judge W. Erwin Spainhour in Superior Court, Rowan County. Heard in the Court of Appeals 14 March 2000.

Michael F. Easley, Attorney General, by Jeffrey C. Sugg, Associate Attorney General, for the State.

Thomas M. King for the defendant-appellant.

WYNN, Judge.

Since the resolution of the issues in this appeal turn upon matters of law, a detailed recitation of the facts of this case is unnecessary. Essential to understanding the outcome of this appeal is that the defendant, Deborah Faye Brogden, a former government employee, pointed and fired a gun at one of her former supervisors.

In one indictment (97 CrS 16059), the State charged Ms. Brogden with assault with a deadly weapon with intent to kill. In its second indictment (98 CrS 8327), the State charged her with assault with a deadly weapon on a government official. At trial, Ms. Brogden appeared without a lawyer.

At the close of all evidence, the trial judge instructed the jury on the following charges: (1) assault with a deadly weapon with intent to kill, (2) assault with a deadly weapon, and (3) assault on a government official. The trial judge did not instruct the jury on the charge of assault *with a deadly weapon* on a government official. Indeed, the jury verdict sheet listed, *inter alia*, assault on a government official; it did *not* include the option "guilty of assault with a deadly weapon on a government official."

The jury returned the following verdicts:

(1) NOT GUILTY—assault with a deadly weapon with intent to kill

(2) GUILTY—assault with a deadly weapon

(3) GUILTY—assault on a government official

Upon recognizing that the jury returned a verdict on the misdemeanor offense of assault on a government official, rather than the felony offense of assault with a deadly weapon on a government offi-

cial, the State moved to amend the jury verdict to read: "assault *with a deadly weapon* on a government official." In response, the trial judge asked the jury to clarify its verdict—were they finding Ms. Brogden guilty of assault with a deadly weapon on a government official? The jury responded yes. The trial judge next asked if anyone on the jury disagreed with the altered verdict; no one disagreed. The trial judge granted the State's motion and amended the jury's verdict by adding the words "with a deadly weapon."

Thereafter, the trial judge arrested the judgment for the assault with a deadly weapon charge and sentenced the defendant to 20 to 24 months of imprisonment on the amended charge of assault with a deadly weapon on a government official. The defendant appealed.

[1] The sole issue on appeal is whether the trial court erred by amending the jury verdict to enhance the defendant's conviction to the felony of assault with a deadly weapon upon a government official. Finding error, we remand this matter for resentencing.

Since the defendant did not object to the amendment of the verdict at trial, under N.C.R. App. P 10(b)(2) and *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), we review the record for plain error only.

A trial court has wide discretion as to how a jury is charged. *See State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965). However, the trial court must explain each essential element of the offense charged. *See State v. Gooch*, 307 N.C. 253, 256, 297 S.E.2d 599, 601 (1982). Under N.C. Gen. Stat. § 14-34.2 (1993), an essential element of the offense of assault with a deadly weapon on a government official is the use of a firearm or other deadly weapon to commit the assault.

In the present case, the trial court did not properly instruct the jury on the charge of assault with a deadly weapon on a government official; rather, the trial court instructed on the charge of assault on a government official. After the jury returned a verdict upon the offense of assault on a government official, the trial court amended that verdict to enhance the conviction to a felony. But a verdict in a criminal case can only be reached after jury deliberations. N.C. Gen. Stat. § 15A-1236 (1997). And once the verdict is returned in open court, it can only be attacked under the limited circumstances provided by N.C. Gen. Stat. § 15A-1240 (1997). The State's motion to amend the verdict did not comport with any of the challenges allow-

able under § 15A-1240, and we cannot find any legal precedent supporting the State's motion to amend a verdict rendered after deliberation.

The State points out that the record contains substantial evidence that the defendant used a deadly weapon to commit an assault against a government official. In fact, the jury found the defendant guilty of assault with a deadly weapon, and therefore must have determined that the defendant did in fact assault her supervisor with a deadly weapon. The State argues that because the jury found the defendant guilty of assault with a deadly weapon, it *would have* found the defendant guilty of assault with a deadly weapon on a government official, had the trial court properly instructed the jury. The State concludes, therefore, that the instructional error and subsequent amendment to the verdict did not alter the jury's finding of guilt. *See State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

The State's argument is persuasive but not controlling. Indeed, reading the two guilty verdicts together, the jury did find all of the elements of assault with a deadly weapon upon a government official. But it is plain error for a judge to amend a verdict to create a greater offense when the jury returned a verdict of guilty of a lessor offense. To hold otherwise would effectively allow the trial court to eviscerate the role of the jury by changing the jury's verdict to create an offense greater than the one found by the jury. Such an encroachment upon the function of the jury would unfairly violate a defendant's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. *See State v. Tolley*, 290 N.C. 349, 373, 226 S.E.2d 353, 371 (1976) (holding that due process of law "requires all courts to insure that elementary fairness toward one charged with an offense is not infringed").

But we disagree with the defendant's contention that because of this error all charges against her must be dismissed. The jury properly found the defendant guilty of two charges—assault with a deadly weapon and assault on a government official. There were no errors in the trial itself, only after the jury returned its verdict. Accordingly, we first vacate the judgment and remand this case for re-sentencing on the misdemeanor charge of assault on a government official. *See Gooch, supra.*

[2] Secondly, we consider whether the arrested judgment on the charge of assault with a deadly weapon may be entered upon remand. When the order for an arrest of judgment is based on a fatal flaw appearing on the face of the record, such as a substantive error in the indictment, the arrest of judgment operates to vacate the verdict. *See State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990); *State v. Davis*, 123 N.C. App. 240, 244, 472 S.E.2d 392, 394 (1996). However, where the judgment was arrested because of a mistake on the part of the trial judge, and there is no impediment to the entry of a lawful judgment, an arrested judgment may be entered upon remand. *See Davis*, 123 N.C. App. at 244, 472 S.E.2d at 394.

In this case, there was no error in the verdict of guilty of assault with a deadly weapon. Since the trial court arrested judgment on this charge only after erroneously amending the verdict of guilty of assault on a government official, we hold that there is no legal impediment in ordering the entry of the arrested judgment.

Judgment in 98 CrS 8327 vacated and remanded for re-sentencing on the conviction of assault on a government official.

Arrested judgment in 97 CrS 16059 set aside and remanded for sentencing on the conviction of assault with a deadly weapon.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. MICHAEL GERMAINE STANBACK

No. COA99-1176

(Filed 18 April 2000)

Constitutional Law— right to counsel—pro se representation—inadequate inquiry

The trial court committed plain error by allowing defendant to proceed pro se in an armed robbery and kidnapping case because: (1) the trial court did not inquire as to whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments as required by N.C.G.S. § 15A-1242(3); and (2) neither the statutory responsibilities of standby counsel nor the actual participation of standby counsel

is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.

On writ of certiorari to review judgments dated 16 January 1997 by Judge William Z. Wood, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 4 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Marc D. Bernstein, for the State.

North Carolina Prisoner Legal Services, by J. Phillip Griffin, for defendant-appellant.

GREENE, Judge.

Michael Germaine Stanback (Defendant) failed to perfect his appeal from three judgments reflecting jury verdicts finding him guilty of two counts of second-degree kidnaping and robbery with a dangerous weapon. On 22 December 1997, this Court allowed Defendant's petition for writ of certiorari to review these judgments.

The record shows that on 16 September 1996, Defendant was charged with two counts of first-degree kidnaping and robbery with a dangerous weapon. Because of Defendant's indigency, the trial court appointed an attorney to represent him. On 21 October 1996, Defendant filed a letter with the trial court requesting his court appointed counsel "be taken off [his] case" because his family wanted to retain an attorney for him.

Defendant's case was called for trial on 14 January 1997. At that time, Defendant told the trial court, "I'd like to represent myself and go ahead with the trial." After the trial court cautioned Defendant about the hazards of representing himself, the trial court took a recess to allow Defendant to consult with his appointed counsel. After the recess, Defendant's counsel informed the trial court Defendant was adamant about wanting to represent himself. When the trial court asked Defendant if he wanted to represent himself, Defendant responded, "Yes, I do." The trial court then appointed Defendant's appointed counsel as Defendant's standby counsel, and, without further inquiry, brought Defendant's case to trial.

The State's evidence shows that on 12 August 1996, Defendant and two other men entered a business named Carl Scrap Metal, they taped the hands and mouths of two workers, and they demanded money. One of the three men who entered the business exhibited a

handgun. After Defendant and the two other men had taken money from a billfold, from a cash box, and from a cash register, they left the scene.

Defendant testified on his own behalf, and denied having any involvement in the robbery.

The jury found Defendant guilty of armed robbery and two counts of second-degree kidnaping.

The dispositive issue is whether the trial court committed plain error by allowing Defendant to proceed *pro se* without first inquiring as to whether Defendant "[c]omprehend[ed] the nature of the charges and proceedings and the range of permissible punishments," pursuant to N.C. Gen. Stat. § 15A-1242(3).

Defendant contends, and the State agrees, the trial court committed plain error by not complying with the statutory mandate of N.C. Gen. Stat. § 15A-1242 before allowing Defendant to proceed *pro se*.

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Section 15-1242 provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1999). Compliance with section 15A-1242 serves to insure the defendant "voluntarily made a knowing and intelligent waiver of his constitutional right to counsel in order to exercise his constitutional right to represent himself." *State v. Dunlap*, 318 N.C.

384, 388, 348 S.E.2d 801, 804 (1986) (citation omitted). The record must reflect that the trial court is satisfied regarding each of the three inquiries listed in the statute. *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987).

In this case, the record indicates the trial court discussed with Defendant the consequences of his decision to represent himself. Additionally, Defendant had been advised of his right to assigned counsel since "he had exercised the right and counsel had been appointed to represent him." *Dunlap*, 318 N.C. at 389, 348 S.E.2d at 804. The record, however, does not indicate the trial court made any inquiry to satisfy itself Defendant comprehended "the nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242. Furthermore, "neither the statutory responsibilities of standby counsel . . . nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver." *Dunlop*, 318 N.C. at 389, 348 S.E.2d at 805. Accordingly, the trial court's failure to comply with section 15A-1242 is plain error. Furthermore, because it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by section 15A-1242, Defendant must be granted a new trial. *State v. Hyatt*, 132 N.C. App. 697, 704, 513 S.E.2d 90, 95 (1999).

New trial.

Judges EDMUNDS and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 APRIL 2000

ALTMAN v. MOORE No. 99-933	Harnett (98CVS01377)	Affirmed
ASSOCIATES FIN. SERVS. OF AM., INC. v. STATE FARM GEN. INS. CO. No. 99-672	Rutherford (98CVS692)	Affirmed
BURNS v. PHIPPS No. 99-565	Ashe (97CVD340)	Reversed
FORD v. MATTINGLY No. 99-659	Richmond (96CVS960)	Affirmed
FOREMAN v. CITY OF ELIZABETH CITY No. 99-1017	Ind. Comm. (662586)	Affirmed
IN RE HAYNES No. 99-590	Cleveland (97J194) (97J195) (97J196) (97J197)	Affirmed
IN RE JOHNSON No. 99-1194	Catawba (98J358)	Dismissed
IN RE LYONS No. 99-758	Mecklenburg (98J1025)	No Error
IN RE DEAL No. 99-818	Catawba (97J111)	Affirmed
IN RE PRICE No. 99-953	Pasquotank (93CRS3036) (93CRS3037)	Affirmed
KILLIAN v. THOMPSON No. 99-840	Haywood (98CVS484)	Affirmed
MIESEN v. BUCKMAN No. 99-1033	Mecklenburg (97CVS6277)	Vacated and Remanded
OSTROWSKI v. EMPLOYMENT SEC. COMM'N OF N.C. No. 99-653	Wake (99CVS287)	Affirmed
RICKS v. WHITE CONSTR., INC. No. 99-330	Wake (98CVS11103)	Affirmed

ROGERS v. CITY OF WILMINGTON No. 99-674	New Hanover (98CVS2388)	Affirmed
STATE v. ARRINGTON No. 99-968	Nash (96CRS13778) (97CRS5310) (97CRS5312) (97CRS9156) (97CRS9157)	No Error
STATE v. AVILA No. 99-1013	Wilson (97CRS17551) (97CRS17554)	No Error
STATE v. CALLAHAN No. 99-336	Robeson (95CRS9161) (95CRS9162) (95CRS12408)	No Error
STATE v. CANSLER No. 99-563	Cleveland (98CRS115)	No Error
STATE v. CLONTZ No. 99-312	Guilford (98CRS62527) (98CRS62528) (98CRS62529)	Affirmed
STATE v. CONRAD No. 99-1040	Forsyth (98CRS46695) (98CRS37342)	No Error
STATE v. GILLIAM No. 99-819	Northampton (97CRS839) (97CRS956)	No Error
STATE v. INGRAM No. 99-250	Forsyth (96CRS39938)	No Error
STATE v. JACOBS No. 99-1068	Scotland (95CRS9363) (95CRS9364)	No Error
STATE v. McSWAIN No. 99-922	Cumberland (95CRS25662)	No Error
STATE v. MURRAY No. 99-1015	Robeson (94CRS4001)	Remanded
STATE v. PICKETT No. 98-1443	Greene (96CRS402) (96CRS403) (96CRS415) (96CRS400) (96CRS401) (96CRS414)	New Trial

STATE v. SLADE No. 99-1285	Guilford (98CRS73983) (98CRS63984) (98CRS63985) (98CRS63986)	Dismissed
STATE v. VERDICANNO No. 99-1086	Durham (96CRS17847)	No Error
STATE v. WHITE No. 99-1226	Lenoir (98CRS2232)	No Error
STEPHENS v. REYNOLDS No. 99-649	Harnett (96CVS1738)	New Trial
VAN EVERY v. REID No. 99-374	Mecklenburg (88CVD9201)	Affirmed
WELLS v. OCEAN BROAD., LLC No. 99-749	New Hanover (99CVM2085)	Affirmed
WINTERS v. WINTERS No. 99-784	Wake (98CVS13482)	Dismissed

STATE OF NORTH CAROLINA v. IMANI KABRON PARKER, DEFENDANT

No. COA98-1557

(Filed 2 May 2000)

1. Search and Seizure— investigatory stop—reasonable articulable suspicion

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to suppress items seized during the search of her automobile, because the detectives had a reasonable articulable suspicion to conduct an investigatory stop of defendant's vehicle since: (1) the cumulation of information received by the detectives throughout their investigation led them to believe a "stash house" for drugs was located at 206 Wind Road; (2) within minutes of setting up surveillance of that location, at approximately 1:00 a.m., the detectives observed two men and defendant exit the complex and walk hurriedly to a parked vehicle in the parking lot; (3) the detectives noticed the men placing what appeared to be a rifle wrapped in a blanket and a black tote bag, possibly containing controlled substances, in the trunk of the automobile; and (4) the time of day, the detectives' experience, and the detectives' prior knowledge of the propensity of the area for criminal conduct revealed that it was not unreasonable to infer that the occupant of the vehicle engaged in some sort of criminal activity.

2. Sentencing— consecutive terms—not cruel and unusual

The trial court did not err by imposing consecutive sentences in a trafficking in cocaine by transportation and conspiracy to traffick in cocaine case because: (1) although defendant cites the Eighth Amendment prohibition against cruel and unusual punishment in her appellate brief, it was not a basis of defendant's assignment of error challenging the sentence imposed, N.C. R. App. P. 10(a); (2) defendant has cited no authority or court decision requiring a trial court to apportion strict degrees of culpability among codefendants when imposing a sentence, N.C. R. App. P. 28(b)(5); (3) the Eighth Amendment does not require strict proportionality between the crime and the sentence; (4) the sentences imposed upon defendant were within the presumptive statutory range authorized for her drug trafficking offenses under the Structured Sentencing Act, N.C.G.S. § 90-95(h)(3)(b); (5) the Eighth Amendment is not offended by variance in sen-

tence terms among codefendants where some have pleaded guilty and others were convicted by a jury; and (6) the statements of one trial judge, indicating it would be a perversion of justice for this defendant to get a larger sentence than her more culpable codefendants, were made prior to the plea arrangements of her codefendants.

Appeal by defendant from orders entered 11 March 1997 by Judge Howard R. Greeson, Jr., and 9 December 1996 by Judge W. Douglas Albright, and from judgments entered 8 January 1997 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 22 September 1999.

Attorney General Michael F. Easley, by Assistant Attorney General Marc D. Bernstein, for the State.

Smith, James, Rowlett and Cohen, L.L.P., by Seth R. Cohen, for defendant-appellant.

JOHN, Judge.

Defendant appeals judgments entered upon convictions by a jury of trafficking in cocaine by transportation and conspiracy to traffick in cocaine. Defendant contends the trial court erred by denying her motions to suppress and sentencing her to consecutive terms. We conclude the trial court did not err.

The State's evidence at trial tended to show the following: During August 1995, the Greensboro Police Department (the Department), learned through two confidential sources that Murad Weaver (Weaver), a suspected drug dealer, was distributing large amounts of cocaine in the Greensboro area and that he maintained an apartment on Wind Road. In February 1996, Marcus Dalton (Dalton), who had been charged with a drug trafficking offense, agreed to assist the Department in their on-going investigation of Weaver.

On 1 February 1996, Dalton telephoned Weaver to arrange a purchase of cocaine and was told to meet Weaver near Wind Road. However, because of police difficulty in monitoring the area specified by Weaver, Dalton suggested and Weaver agreed to another location. Within hours of the conversation, Weaver, accompanied by Tommie Blaylock (Blaylock), met Dalton at the arranged site and directed Dalton to follow him to another location. As the group began to depart, Detectives W.J. Graves (Graves), A.S. Wallace (Wallace), Mike

Wall (Wall) (jointly, the detectives), and several other law enforcement officers positioned nearby, intervened and stopped Weaver's automobile. A subsequent search of the vehicle revealed no contraband; nonetheless, Weaver and Blaylock were arrested and charged with conspiracy to traffick cocaine.

While in custody, Weaver indicated he lived with his sister at 2107 Windsor Street and insisted that police search the residence for controlled substances. Shortly thereafter, the detectives drove to the Windsor Street location and were greeted by Sheldon Boyce (Boyce). Boyce claimed to be a resident at the premises and consented to a search of the dwelling and of his person. Although no drugs were located, the detectives recovered a Western Union money transfer receipt from Boyce's wallet bearing the previous day's date and designating Boyce as the sender who resided at 206 Wind Road. Also discovered was an identification card displaying Blaylock's photograph, but bearing the name Markus Watlington. When asked if he knew Blaylock or Weaver, Boyce denied knowing Weaver but indicated Blaylock had a girlfriend who resided at 206 Wind Road and that Blaylock had lived with her at one time. As the detectives proceeded to leave, they acquiesced in Boyce's request to provide him with transportation to Market Street so that he could make a telephone call.

After considering the inconsistencies concerning Boyce's residence, the fictitious ID card, the receipt listing a 206 Wind Road address, and other connections linking Wind Road to possible drug activity, the detectives believed a "stash" house containing controlled substances was located on Wind Road. They further suspected Boyce intended to call his "cohorts" at 206 Wind Road to warn them of possible police surveillance in light of the detectives' interest in the money receipt containing that address.

Upon delivering Boyce to Market Street and following a brief stop at the Department, the detectives traveled to 206 Wind Road where they anticipated observing drug related activity. The detectives concealed themselves in front of the 206 Wind Road apartment complex at approximately 1:00 a.m. Within minutes, three individuals, later identified as defendant, Mark Ammonds (Ammonds) and Ronald Gooden (Gooden), exited the complex bearing various items. In defendant's hand was a brown paper shopping bag, a second individual carried what appeared to be a rifle wrapped in a blanket, and the third had a black tote bag. The group "hurried" across the parking lot to a parked automobile. The two men placed their items in the trunk

of the vehicle while defendant set the brown bag behind the driver's seat and then drove away alone. As the men returned to the apartment building, Detective Wallace observed Ammonds bend down and appear to put something behind a bush. Upon investigation, the detectives found nothing in the area and believed they had been sighted by the two men who then began "acting up" to "distract" the detectives' attention from the departing vehicle. The detectives thereupon decided to pursue defendant.

Upon stopping defendant's automobile, Wallace approached the passenger side with a flashlight. Illuminating the interior of the vehicle, he observed the shopping bag behind the driver's seat. It contained what appeared to be cocaine wrapped in clear plastic bags. Defendant was arrested and the substance, later identified as 351.4 grams of cocaine and 39.4 grams of cocaine base, was seized. Retrieved from the trunk of the automobile was the black tote bag and a SKS assault rifle wrapped in a sheet. The detectives subsequently learned defendant, Ammonds and Gooden had made arrangements to exchange the cocaine and weapon for $1,500.00 in cash to bail Weaver out of jail.

Prior to trial, defendant moved to suppress the evidence seized as a result of the vehicle stop. The motion was denied by Judge Howard R. Greeson, Jr. (Judge Greeson), and the case came on for trial during the 28 October 1996 Mixed Session of Guilford County Superior Court. A deadlocked jury resulted in a mistrial being declared 1 November 1996 and re-trial was scheduled before Judge W. Douglas Albright (Judge Albright) during the 9 December 1996 Criminal Session of Superior Court. Judge Albright denied defendant's renewed motion to suppress prior to trial. On 13 December 1996, the jury returned verdicts of guilty on charges of trafficking in more than 200 and less than 400 grams of cocaine, and conspiracy to traffick in more than 200 and less than 400 grams of cocaine. Judge Albright continued sentencing to allow for disposition of the cases against the co-defendants.

On 8 January 1997, Judge James M. Webb (Judge Webb) conducted sentencing hearings for defendant, Gooden, Ammonds and Weaver. Pursuant to a plea arrangement, Gooden and Ammonds pleaded guilty to Class G drug felonies involving less than 200 grams of cocaine and were each sentenced to a minimum of 35 and a maximum of 42 months imprisonment. Weaver also plea-bargained and pleaded guilty to Class F felonies of trafficking and conspiracy to traffick 200 to 400 grams of cocaine. He was sentenced to a minimum

of 70 and a maximum of 84 months imprisonment on each offense, the sentences to run consecutively. Defendant, who had pleaded not guilty and entered into no plea arrangement, was sentenced to two consecutive terms of 70 months to 84 months imprisonment, identical to the sentences imposed upon Weaver. Defendant appeals.

[1] Defendant first contends her motions to suppress were erroneously denied. She argues the investigatory stop of her automobile was "based on a mere hunch rather than reasonable articulable suspicion." We disagree.

In reviewing denial of a motion to suppress, this Court must determine:

> whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal. *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995).

Defendant's 1 October 1996 motion to suppress evidence asserted the search of her automobile and subsequent seizure of certain items contained therein was invalid because the detectives had no "reasonable grounds" or "particularized or objective basis" to suspect defendant had committed a crime. However, in his 3 October 1996 ruling upon the motion, Judge Greeson designated numerous specific, articulable facts he determined sufficient to justify the investigatory stop, including:

> 4. [Weaver] told the officers that he lived at 2107 Windsor Street and provided the officers with consent to search that premises.
>
> 5. [The detectives] knew based upon a continuing investigation that Murad Weaver frequented an unknown address in the vicinity of Wind Road.
>
> . . . .
>
> 7. The detectives made contact at the Windsor Street address with who was later identified as [Boyce] who claimed that he resided there but did not know [Weaver].

8. [Boyce] granted consent to the officers to search the residence and his person and the officers located in his wallet a Western Union money transfer receipt listing [Boyce's] address as 206 Wind Road and a North Carolina identification card with [Blaylock's] photograph but an alias name of Marcus [sic] Watlington.

9. [Boyce] told the officers that [Blaylock's] girlfriend lived at the Wind Road address and he himself had been there recently.

. . . .

11. The officers agreed at his request to transport [Boyce] to another location so that he could make a telephone call.

12. The officers then responded immediately to the Wind Road address believing that they may locate and identify further co-conspirators to the previously arranged drug transaction and further locate any contraband connected to the drug transaction.

13. The officers believed that [Boyce] may contact possible co-conspirators at the Wind Road address and alert them of the officers' continuing investigation.

14. The officers arrived at the Wind Road apartment complex at or about 1:00 a.m. and positioned themselves for surveillance activities in the parking lot adjacent to 206 Wind Road.

15. 206 Wind Road is a multiple-unit dwelling.

16. Within minutes of their arrival, the officers observed three persons . . . exit building 206.

17. The three individuals were walking in a hurried fashion toward the parking lot and each was carrying separate items.

18. [Defendant] was carrying a large brown shopping-type bag and [another] . . . was carrying a hand or tote bag and the third individual was carrying what appeared to be a rifle wrapped tightly in a sheet and carried in a manner consistent with a firearm.

19. The items were placed in an automobile and [defendant] got in and began to drive away.

20. Detective Wallace had begun to follow one of the two males who walked back to the building but returned to the other offi-

cers after believing that the individual was merely attempting to distract the officers away from the vehicle.

21. The officers then followed the vehicle operated by [defendant], believing that it contained items of contraband, including a concealed rifle.

22. The officers effected a vehicle stop and . . . approached the car.

. . . .

26. Detective Wallace could observe . . . what appeared to be a large amount of compressed powder cocaine in a clear plastic packaging in the open shopping bag.

Judge Greeson's order also contained the following pertinent conclusions of law:

1. The officers were reasonable in their belief that they may further their initial investigation by responding to 206 Wind Road based upon their prior familiarity with Wind Road, the discoveries made during the course of their contact, search and interview of [Boyce], and the combined training and experience of the detectives who believed the Wind Road address represented a possible stash or storage location for the cocaine.

2. The officers were reasonable in their belief that criminal activity may have occurred or was occurring when they observed the three persons exit 206 Wind Road at 1:00 a.m. in a hurried fashion, carrying items that included what they reasonably believed to be a concealed weapon.

3. The officers had reasonable and articulable suspicion that criminal activity was afoot and were justified in stopping the vehicle operated by [defendant] for limited investigative purposes. . . .

Judge Albright denied defendant's renewal of her motion at retrial, stating

a Superior Court Judge has heretofore heard in an evidentiary hearing the motion to suppress and has entered a ruling thereon based upon findings of fact and conclusions of law. That ruling is the law of the case. There's an insufficient showing . . . that would compel a re-litigating of that entire issue.

The Fourth Amendment to the Constitution of the United States and Section 20 of Article I of the North Carolina Constitution prohibit unreasonable searches and seizures. *State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992). Nonetheless, it is well established that police officers may conduct a brief investigatory stop of a vehicle without probable cause 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)); *see State v. Hendrickson*, 124 N.C. App. 150, 155, 476 S.E.2d 389, 392 (1996) (brief investigatory stop constitutes Fourth Amendment seizure that must be supported by "a reasonable and articulable suspicion that the person seized is engaged in criminal activity") (citation omitted). A minimal level of objective justification, although something more than an "unparticularized suspicion or hunch," is the sole requirement for such a stop. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (citation omitted).

To constitute a valid and constitutional investigative stop, a police officer's actions must be both

> justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.

State v. Thompson, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979) (citation omitted). In determining on appeal whether the standard of a "reasonable" and "articulable" suspicion, *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10, has been met, a reviewing court must

> examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of the [suspects] . . . and the rational inferences which the officers were entitled to draw from those facts.

Thompson, 296 N.C. at 706, 252 S.E.2d at 779. The foregoing circumstances are to be viewed as a whole "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *Id.* (citation omitted).

Initially, we note that review of the record reveals Judge Greeson's findings of fact to be supported by competent evidence and thus binding on appeal. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. Applying the principles set forth above in conducting a *de novo* determination, *see Mahaley*, 332 N.C. at 592-93, 423 S.E.2d at 64, of whether Judge Greeson's conclusions of law are sustained by his findings of fact, we must give "due weight to inferences drawn from th[e] facts by resident judges and local law enforcement officers," *Ornelas v. United States*, 517 U.S. 690, 699, 134 L. Ed. 2d 911, 920 (1996), and view the facts "through the eyes of a reasonable, cautious officer, guided by his experience and training," *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994), in light of the totality of the circumstances, *id.*

Judge Greeson concluded as a matter of law that the

> officers had reasonable and articulable suspicion that criminal activity was afoot and were justified in stopping the vehicle operated by [defendant].

See Ornelas, 517 U.S. at 699, 134 L. Ed. 2d at 920-21. We therefore examine both the articulable facts as found by Judge Greeson, *see Cooke*, 306 N.C. at 134, 291 S.E.2d at 619, to be known to the detectives at the time they determined to stop defendant's vehicle, as well as the rational inferences the detectives were entitled to draw from these facts. *See Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (police officers may draw inferences based upon personal experiences).

Detectives Graves and Wallace, both employed by the Department for over seven years and with at least three years experience as detectives in the Vice and Narcotics Division, testified at the suppression hearing as to the facts and circumstances giving rise to the investigatory stop of defendant's automobile. They reported that several months prior to Weaver's arrest, two confidential informants close to Weaver had informed the Department that Weaver "had an apartment or frequented an apartment out on Winn [sic] Road," but were unable to give a specific address. When Dalton telephoned Weaver seeking to arrange a cocaine purchase, the detectives connected the earlier information with Weaver's request that Dalton meet him near Wind Road, and concluded that drugs distributed by Weaver were kept somewhere on Wind Road.

Following his arrest, Weaver stated he lived with his sister at 2107 Windsor Street and "was pretty insistent" the detectives search

it for contraband. When the latter arrived at the Windsor address, Boyce, who was present and claimed to be a resident, consented to a search of the house and his person. The detectives found no contraband, but retrieved a $350.00 Western Union money transfer receipt from Boyce's wallet that listed Boyce as the sender and 206 Wind Road as his address. The detectives noted the receipt designated an address inconsistent with Boyce's claim he resided at Windsor Street, but located in the area where they had concluded Weaver stored drugs for distribution.

In addition, the identification card recovered from Boyce's wallet displayed a photo of Blaylock bearing the name Markus Watlington. The detectives had arrested Blaylock and Weaver the night before and thus knew Blaylock was falsely depicted on the card. Additionally, Boyce had revealed to the detectives that Blaylock had a girlfriend on Wind Road and that Blaylock had lived with her at one time.

In the words of Graves, the detectives

> responded to 206 Winn [sic] Road based on inconsistencies that [Boyce] had given us, Tommie Blaylock['s connections], the fictitious ID card, a[nd] . . . the receipt.

Graves added that "drug dealers directly [sic] have a stash house somewhere else besides where they reside," and that the cumulation of information received by the detectives throughout their investigation, and particularly during the preceding two days, led them to believe Weaver's "stash house" was located at 206 Wind Road.

In addition, the detectives considered Boyce's reaction when they discovered the Western Union money transfer receipt and identification card, as well as his subsequent request for transportation to Market Street so as to place a telephone call. According to Wallace, Boyce "became very interested as to why we were interested in [the receipt]." As a result of Boyce's reaction the detectives surmised he

> was going to call persons out at [206] Winn [sic] Road and advise them that we had found paperwork leading us to that address.

In view of all the foregoing factors, each contained in Judge Greeson's findings of fact, *see Cooke*, 306 N.C. at 134, 291 S.E.2d at 619, the detectives elected to set up surveillance at 206 Wind Road. Accordingly, after leaving Boyce on Market Street and making a brief

stop at the Department, they proceeded directly to that location, arriving around 1:00 a.m.

The detectives concealed themselves in front of the twelve unit apartment complex at 206 Wind Road. According to Graves, within minutes they observed two men, later identified as Ammonds and Gooden, and a woman, later identified as defendant, exit the complex and "walk[] hurriedly or kind of trot[]" to a parked vehicle in the parking lot. The detectives noticed one of the men carried what appeared to be a rifle wrapped in a blanket while the other had a black tote bag; the men placed these items in the trunk of the automobile. Defendant carried a brown paper shopping bag with handles which she set behind the driver's seat of the vehicle before driving off. Graves related that as defendant left and the two men returned to the apartment complex, one "apparently observed us and walk[ed] around on the back side of the building," prompting Wallace to investigate. After finding nothing in the area, the detectives concluded the man had been "acting up" and "possibly trying to discourage [them] from following [defendant]." They then decided to pursue and stop the vehicle operated by defendant.

Graves explained this latter decision was based upon the detectives' "reasonable suspicion that the[] subjects were carrying illegal contraband based on the activities of—that we observed them carrying that late at night, at 1:00 in the morning." Wallace added that the detectives also considered the following: 1) Weaver was known to keep an apartment near 206 Wind Road, 2) Weaver initially wanted to meet Dalton in the Wind Road area for a drug transaction, 3) Weaver and Blaylock had direct connections with Wind Road, 4) Boyce was linked to the 206 Wind Road address and was expected to warn his "cohorts" that the detectives had discovered the receipt listing that address, 5) they observed the three individuals rush from the apartment complex at 1:00 in the morning, 6) they expected to observe suspicious activity at 206 Wind Road on that particular night, and 7) they believed the three people were involved in drug activity upon seeing one of the men place a rifle in the trunk based upon their experience that "oftentimes guns . . . are associated with narcotics and drug dealers."

While a single one of the above factors relied upon by the detectives might not in itself have been sufficient to sustain a reasonable suspicion that criminal conduct was underway, and may well have been consistent with innocent behavior, we conclude that the composite of the factors as detailed in Judge Greeson's findings of fact,

see Cooke, 306 N.C. at 134, 291 S.E.2d at 619, adequately sustained a reasonable and articulable suspicion that criminal activity was afoot, *see Sokolow*, 490 U.S. at 9-10, 104 L. Ed. 2d at 12 (in determining existence of reasonable suspicion for investigative stop, relevant inquiry is not whether particular conduct is innocent or guilty, but degree of suspicion which attaches to particular types of noncriminal acts), and *see generally Reid v. Georgia*, 448 U.S. 438, 441, 65 L. Ed. 2d 890, 894 (1980) (there may be "circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot"), and thus supported Judge Greeson's conclusion of law to that effect.

We note, for example, that courts have recognized factors such as activity at an "unusual hour," *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (citation omitted), and " 'an area's disposition toward criminal activity' " as articulable circumstances which may be considered along with more particularized factors to support a reasonable suspicion, *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (quoting *United States v. Moore*, 817 F.2d 1105, 1107 (4th Cir. 1987), *cert. denied*, 484 U.S. 965, 98 L. Ed. 2d 396 (1987)); *see United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) (observation of defendant at nearly 1:00 a.m. in area known to have propensity for criminal drug activity may raise requisite level of suspicion; lateness of hour a factor which may raise reasonable suspicion to conduct an investigative stop). In the instant case, from the perspective of the detectives drawn from years of experience in drug investigations, presence of the three individuals in the early morning at an address connected to drug involvement through numerous sources bolstered the suspicion that the three hurrying from the complex were involved in criminal activity and that defendant was likely transporting controlled substances in her vehicle.

In *State v. Tillet* and *State v. Smith*, 50 N.C. App. 520, 274 S.E.2d 361 (1981), moreover, this Court upheld the investigatory stop of a vehicle on facts less compelling than those *sub judice*. In *Tillet*, a law enforcement officer observed an automobile at about 9:40 p.m. entering a heavily wooded dirt road leading "to a number of seasonal residences, only one of which was occupied at that time of the year." *Id.* at 524, 274 S.E.2d at 364. The officer, aware of "firelighting" deer reports near the site, stopped the vehicle when it emerged from the area. We concluded that, based upon the officer's experience, it was not unreasonable "[t]o infer from the[] facts that the occupants of the vehicle were engaged in some sort of criminal activity," *id.*, in view of the time of day and the officer's prior knowledge of the propensity of

the area for criminal conduct, *id.*; *see State v. Fox*, 58 N.C. App. 692, 695, 294 S.E.2d 410, 412-13 (1982) (reasonable suspicion existed for investigatory stop when: 1) defendant driving slowly down dead-end street where businesses had previously been robbed, 2) defendant dressed shabbily but vehicle was a "real nice" car, 3) defendant did not communicate with officer but appeared to avoid his gaze in passing, and 4) the stop occurred in the early morning hours), *aff'd*, 307 N.C. 460, 298 S.E.2d 388 (1983).

In the case *sub judice*, the culmination of facts and circumstances arising during the detectives' on-going investigation provided objective justification beyond a mere hunch to support a "common sense conclusion[]," *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981) (evidence considered to determine whether reasonable suspicion exists "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement . . . [for a] common sense conclusion[]"), "that criminal activity may [have] be[en] afoot," *Battle*, 109 N.C. App. at 370, 427 S.E.2d at 158 (citation omitted). The detectives' prior knowledge of various connections between the Wind Road address and drug activity, coupled with their 1:00 a.m. observations at the address on a night they expected to observe suspicious drug-related conduct as well as the circumstances surrounding defendant's actions on 2 February 1996, provided a sufficient basis for those experienced law enforcement officers to draw a reasonable inference "that criminal activity was afoot," *id.*, thus warranting the investigative stop. Accordingly, Judge Greeson's findings of fact sustained his conclusion of law upholding the search, *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619, and neither Judge Greeson nor Judge Albright erred in denying defendant's motions to suppress.

[2] Defendant next contends the imposition of consecutive sentences by Judge Webb violated the United States and North Carolina constitutional prohibitions against cruel and unusual punishment. Specifically, defendant argues her sentence was disproportionate to the crimes because her more culpable co-conspirators received lesser or equivalent sentences. Defendant points to the comments of Judge Albright who continued defendant's sentencing so all co-defendants would be sentenced during the same proceeding.

Judge Albright indicated it would be an "absolute perversion of justice" should the "bigger fry" receive a more lenient sentence than defendant:

> You don't want one sentence getting out of line with the rest of them if everybody understands what I'm trying to say. It would be a miscarriage of justice for her to get the heavy sentence and the others get the light sentence. That's what I'm trying to say. It ought to be the other way around.

While advertent to defendant's arguments and the comments of the able and experienced trial judge, we conclude that this assignment of error fails.

We note first that defendant in her appellate brief relies solely upon the Eighth Amendment to the United States Constitution (the Eighth Amendment) and federal and state decisions applying that amendment. However, the Eighth Amendment is not cited as the basis of defendant's assignment of error challenging the sentence imposed. *See* N.C.R. App. P. 10(a) ("scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"), and *State v. Frye*, 341 N.C. 470, 495-96, 461 S.E.2d 664, 676-77 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996) (defendant who objected to introduction of "evidence on only one ground" failed to preserve for review additional grounds raised on appeal).

In addition, save for her generalized reliance upon the Eighth Amendment, defendant has cited no authority or court decision requiring a trial court to apportion strict degrees of culpability among co-defendants when imposing sentence. *See* N.C.R. App. P. 28 (b)(5) ("[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

Finally, assuming *arguendo* defendant's argument is properly before us, it is unfounded. *See State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983) ("[o]nly in exceedingly unusual non-capital cases will . . . sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment").

We first note our Supreme Court has held that

> [t]he [Eighth Amendment's] prohibition against cruel and unusual punishment "does not require strict proportionality between the crime and sentence . . . [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime."

State v. Green, 348 N.C. 588, 609, 502 S.E.2d 819, 832 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999) (citations omitted); *see Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998) (citation omitted) (Court of Appeals "required to follow decisions of our Supreme Court"). Indeed, the sentences imposed upon defendant, albeit consecutive, were within the presumptive statutory range authorized for her drug trafficking offenses under the Structured Sentencing Act. *See* N.C.G.S. § 90-95(h)(3)(b) (1999) (trafficking in cocaine in amount of "200 grams or more, but less than 400 grams," punishable by "a minimum term of 70 months and a maximum term of 84 months"), *State v. Collins*, 81 N.C. App. 346, 354, 344 S.E.2d 310, 316 (1986) (no constitutionally disproportionate sentence where "defendant received the statutory minimum sentence mandated by the legislature for *all persons* convicted of this class of crime") (emphasis in original), and *State v. Barts*, 316 N.C. 666, 697, 343 S.E.2d 828, 848 (1986) (citations omitted) (consecutive sentences upon several serious felony counts "does not violate any constitutional proportionality requirement" in that all sentences imposed "were within the limits prescribed by the General Assembly" and "imposition of consecutive sentences, standing alone, does not constitute cruel and unusual punishment").

Further, the Eighth Amendment is not offended by variance in sentence terms among co-defendants where some have pleaded guilty and others were convicted by a jury. *See State v. Shane*, 309 N.C. 438, 446, 306 S.E.2d 765, 770 (1983), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134 (1984) (sentences imposed for defendants who committed similar sex crimes not disproportionate under Eight Amendment where one defendant pleaded guilty to lesser charges and received two consecutive ten year terms and other was convicted by jury and sentenced to life imprisonment).

Lastly, the comments of Judge Albright upon which defendant heavily relies were rendered prior to the plea arrangements of defendant's co-defendants.

No error.

Judges LEWIS and McGEE concur.

D. MICHAEL HYDE AND WIFE, DINA M. HYDE, PLAINTIFFS v. CHESNEY GLEN HOMEOWNERS ASSOCIATION, INC., DEFENDANT

No. COA99-152

(Filed 2 May 2000)

1. Trial— pretrial order—admission of evidence not contained in

The trial court did not abuse its discretion in an action involving an above-ground pool and homeowner's covenants by permitting amendment of the pretrial order to allow into evidence a previously undisclosed document delineating the architectural committee's reasons for not approving plaintiffs' application. The record reflects that it was plaintiffs who offered the exhibit at trial and, by offering no objection at trial, plaintiffs failed to preserve the question for appellate review. Moreover, admission of evidence not delineated in the original pretrial order is in the discretion of the trial court.

2. Deeds— restrictive covenants—above-ground pool—disapproval not unresonable

The trial court did not err by concluding that a subdivision architectural committee had not unreasonably withheld approval of plaintiffs' application for an above-ground pool where unchallenged findings reflect that plaintiffs' next-door neighbor recused himself from proceedings, the three remaining committee members independently reviewed plaintiffs' application, and the general consensus was that more information was required and that the plans as submitted failed to conform to the general plan and scheme of the subdivision. A letter from the property management company referring to a policy prohibiting above-ground pools, which failed to garner the required votes of association members, does not bear upon whether approval was unreasonably withheld because the covenants contain no requirement that approval or disapproval be reasonably communicated, only that approval not be unreasonably withheld, and the failed attempt to ban above-ground pools is unrelated to the issue of reasonableness.

3. Deeds— restrictive covenants—above-ground pool—denial letter

The trial court did not err in an action arising from the denial of an above-ground pool application by a subdivision architec-

tural committee in its treatment of the rejection letter. Whether the author's inaccurate recitation of the reasons for the denial exceeded her authority is unrelated to whether the architectural committee unreasonably withheld approval. Plaintiffs' contention that their application was deemed approved under the covenants because the letter was void and therefore no specific reasons for the denial were given within the required time period is untenable because the denial itself was specifically communicated to plaintiffs; nothing more was required under the covenants.

4. Deeds— restrictive covenants—requirements for denial of application—specific to covenants at issue

A decision that subdivision restrictive covenants required only that approval of an application not be unreasonably withheld, that a denial must be specific, and that no reasons for the denial were required, was based only on the covenants at issue.

Judge HUNTER concurring in part and dissenting in part.

Appeal by plaintiffs from judgment filed 15 September 1998 and orders entered 15 January 1999 by Judge Michael R. Morgan in Wake County District Court. Originally heard in the Court of Appeals 25 October 1999. An opinion was filed by this Court 16 November 1999. Defendant's Petition for Rehearing, filed 20 December 1999, was granted 23 December 1999 and heard without additional briefs or oral argument. The present opinion supersedes the 16 November 1999 opinion.

Levine & Stewart, by Michael D. Levine, for plaintiffs-appellants.

Jordan, Price, Wall, Gray, Jones & Carlton, by Henry W. Jones, Jr., and Hope Derby Carmichael, for defendant-appellee.

JOHN, Judge.

Plaintiffs D. Michael Hyde and Dina M. Hyde appeal the trial court's 15 September 1998 judgment in favor of defendant Chesney Glen Homeowners Association, as well as the court's 15 January 1999 grant of defendant's motion for attorney's fees and denial of plaintiffs' motions for new trial, *see* N.C.G.S. § 1A-1, Rule 59 (1999) and for relief from judgment, *see* N.C.G.S. § 1A-1, Rule 60 (1999). We affirm the rulings of the trial court.

Plaintiffs are residents of Chesney Glen Subdivision, located in Wake County and governed by a "Declaration of Covenants, Conditions and Restrictions for Chesney Glen" (the covenants) administered by defendant. On 25 April 1998, plaintiffs submitted to defendant's Architectural Control Committee (ACC) hand-drawn plans for an above-ground swimming pool and backyard fence (the application). Plaintiffs thereby sought approval for the project pursuant to that section of the covenants providing:

> [n]o building, sign, fence, . . . or other structure or planting shall be constructed, erected or planted until the plans and specifications showing the nature, kind, shape, height, materials, floor plans, color scheme, and located (sic) with respect to topography and finished ground elevation shall have been submitted to and approved in writing by the [ACC]. *The [ACC] shall have the right to refuse to approve any plans and specifications which are not suitable or desirable, in its sole discretion, for aesthetic or any other reasons, provided such approval is not unreasonably withheld.*

(emphasis added). The covenants also state that:

> [n]o exposed above-ground tanks except for *approved* recreational swimming pools will be permitted . . . .

(emphasis added).

Plaintiffs' application was denied by the ACC, although the grounds for its action are disputed by the parties. Cindy Hunter (Hunter), an employee of the property management company engaged by defendant, informed plaintiffs of the denial by letter dated 15 May 1995 (the Hunter letter).

Plaintiffs thereupon filed the instant action 5 July 1995 seeking a declaratory judgment regarding interpretation of the covenants and an injunction restraining defendant from "interfering with [plaintiffs'] plans to construct their pool." Following defendant's original answer, plaintiffs proceeded with construction of both the pool and fence. Defendant thereafter filed a supplemental answer and counterclaim requesting the court (1) to order removal of the pool and fence by plaintiffs; (2) to award costs as well as reasonable counsel fees pursuant to the covenants; and, (3) to assess "fines for [plaintiffs'] continuing violation" of the covenants.

The case proceeded to trial 3 June 1996. At the close of plaintiffs' evidence, the trial court granted defendant's motion for directed ver-

dict. The court further ordered plaintiffs to remove the pool and fence, to pay fines accruing until such removal was effected, and to reimburse defendant's "reasonable attorney fees."

Although plaintiffs failed to file written notice of appeal to this Court, *see* N.C.R. App. p. 3(a), plaintiffs' subsequent petition for writ of certiorari was granted, *see* N.C.R. App. P. 21(a)(1), allowing the appeal to proceed. In an unpublished opinion, *see Hyde v. Chesney Glen Homeowners Assn.*, 126 N.C. App. 437, 486 S.E.2d 491 (1997) [hereinafter *Hyde I*], this Court reversed the judgment of the trial court.

It appears the initial trial court interpreted *Raintree Homeowners Assn. v. Bleimann*, 342 N.C. 159, 463 S.E.2d 72 (1995), as requiring "evidence of arbitrariness or bad faith on the part of the defendant" homeowners association in order to overturn its decision denying plaintiffs' application. Perceiving no such evidence, the court allowed defendant's directed verdict motion.

On appeal, this Court first observed defendant's directed verdict motion was improper in a non-jury trial. However, we treated the motion

> as having been a motion for involuntary dismissal under Rule 41(b) [N.C.G.S. § 1A-1, Rule 41(b) (1999)] in order to pass on the merits of plaintiffs' appeal.

Hyde I, 126 N.C. App. 437, 486 S.E.2d 491.

This Court then highlighted a significant factual difference between the covenants at issue in *Raintree* and those herein, *i.e.*, the presence in the latter of a "standard by which the [ACC's] authority is judged." *Id.*

> Thus, where there is no standard within the restrictive covenant itself, as was the case in *Raintree*, courts apply "the general rule that a restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith." [*Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 196, 218 S.E.2d 476, 479 (1975).] In this case [*Hyde I*], the standard by which the [ACC's] authority is judged *is* within the restrictive covenant itself, i.e, whether or not the [ACC's] approval of plaintiffs' plans was "unreasonably withheld." . . . Since the covenant in this case provided a standard, the trial court erred by failing to

> determine whether or not the [ACC] "unreasonably withheld" its approval.

Id. (citation omitted). Accordingly, *Hyde I* reversed the trial court and remanded the case for further proceedings.

On remand, plaintiffs were allowed to supplement their evidence so as to address the issue of unreasonableness and defendants proceeded with presentation of their case. The trial court entered judgment 11 September 1998, concluding as a matter of law that the ACC "did not unreasonably withhold approval of the [p]laintiffs' application for approval of an above-ground pool and fence." Plaintiffs were ordered to remove the pool and fence and to pay fines totaling $6,950.00 for past violations of the covenants plus an additional $100.00 per week for any continuing violations.

On 24 September 1998, plaintiffs moved for new trial, for relief from judgment, and to stay proceedings to enforce the judgment. The latter motion was allowed 14 January 1999, and the remaining motions were denied 15 January 1999. Defendant's motion seeking counsel fees was granted 15 January 1999. Plaintiffs timely appealed both the 11 September 1998 judgment and the 15 January 1999 orders. Although plaintiffs assigned error to the award of counsel fees, this issue is not discussed in their appellate brief and the assignment of error relating thereto is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error . . . in support of which no reason or argument is stated . . . will be taken as abandoned").

[1] Plaintiffs first argue the trial court on remand erroneously permitted amendment of "the original pre-trial order to allow . . . a previously undisclosed document" to be entered into evidence. Plaintiffs' contention borders on the frivolous.

At the commencement of trial upon remand following *Hyde I*, the court heard from the parties regarding witnesses and evidence not specified in the original pre-trial order. Defendant sought to add "one additional document," a worksheet prepared by the ACC delineating the committee's reasons for disapproval of plaintiffs' application (the worksheet), and plaintiffs objected generally. The trial court ruled that both plaintiffs and defendant might introduce "additional evidence on [the] issue of reasonableness," noting this Court had directed resolution of that issue in *Hyde I*.

Although plaintiffs now challenge introduction of the worksheet into evidence, the record reflects that it was *plaintiffs* who offered

the exhibit into evidence at trial. By offering no objection at trial, plaintiffs have failed to preserve this question for appellate review. *See* N.C.R. App. R. 10(b) (to preserve question for appellate review, "a party must have presented to the trial court a timely . . . objection"). Moreover, assuming *arguendo* proper preservation of this issue for appellate review, we note that

> admission of evidence not delineated in the [original] pretrial order is within the sound discretion of the trial court.

Alston v. Monk, 92 N.C. App. 59, 64, 373 S.E.2d 463, 467 (1988), *disc. review denied*, 324 N.C. 246, 378 S.E.2d 420 (1989). Given the unique procedural posture of the instant case, the trial court cannot be said to have abused its discretion by allowing each of the parties to present additional evidence and witnesses not contemplated in the original pre-trial order.

[2] Plaintiffs next contend

> the trial court erred in finding as a conclusion of law that the [ACC] did not unreasonably withhold approval [of plaintiffs' application] as such conclusion is unsupported by the findings of fact.

We do not agree.

> If the trial court's conclusions of law are supported by findings of fact . . . , and the conclusions of law support the order or judgment of the trial court, then the decision from which appeal was taken should be affirmed.

In re Everette, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999).

In the case *sub judice*, the following pertinent findings of fact, unchallenged by plaintiffs and therefore conclusive on appeal, *see Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 768, 253 S.E.2d 494, 495 (1979) ("[w]here exceptions are not taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal"), were rendered by the trial court:

> 9. Mr. Scott Gannon was at [the time of plaintiffs' application] a member of [defendant's] Board of Directors and also served as Chairman of the [ACC]. Mr. Gannon was also the [p]laintiffs' next-door neighbor. . . . Mr. Gannon recused himself from consideration of the [p]laintiffs' [application], as he was their next-door neighbor. . . .

10. Between April 25, 1995 and May 15, 1995, the three remaining members of the [ACC] independently reviewed the [p]laintiffs' application . . . .

11. The three members of the [ACC] cited various reasons for the disapproval of the [p]laintiffs' application, including the reasons that a 24-foot pool was too large for the lot size and that the [p]laintiffs had not included enough information with their application for the [ACC] to make a fully-informed decision. Two members of the [ACC] specifically reported that they should see the actual pool plans or a photograph from the pool manufacturer showing the style of the pool. In addition, one member of the [ACC] felt that he needed to see landscaping plans for screening the pool before he could approve it, and another [ACC] member felt that the pool might be too close to the side lot line as it appeared on the [p]laintiffs' application. The [ACC] also reported that they might consider the matter again based upon a proper and complete application.

. . . .

16. Based upon the testimony and documentary evidence presented by the [d]efendant (which was not presented at the first hearing of this case), the [c]ourt finds as a fact that the [ACC] based its decision to disapprove the [p]laintiffs' application on the fact that the above-ground pool and fence requested did not meet the general scheme and plan of development for the Chesney Glen community . . . .

The foregoing findings reflect that plaintiffs' next-door neighbor recused himself from the proceedings and the three remaining ACC members independently reviewed plaintiffs' application. Further, the general consensus among the latter was that more information was required before the application could be acted upon and that the plans as submitted failed to conform to the general plan and scheme of the subdivision. These findings amply support the trial court's conclusion that the ACC "did not unreasonably withhold approval of the [p]laintiffs' application," and the court's ruling therefore must be affirmed. *See Everette*, 133 N.C. App. at 85, 514 S.E.2d at 525.

Notwithstanding, plaintiffs insist certain actions of defendant and Hunter were unreasonable and that denial of plaintiffs' application must accordingly be characterized as unreasonable. Plaintiffs' contention misses the mark.

Plaintiffs reference the Hunter letter, prepared at the direction of Tom Coleman (Coleman), acting chair of the ACC. The Hunter letter stated:

> The [ACC] has reviewed your request submitted April 25, 1995 to install an above ground pool and fence. . . .
>
> The [ACC] has denied your request based on the following: The [ACC] and the Board of Directors have established architectural guidelines for the subdivision which will be published to all homeowners in the near future. After careful consideration, the Board of Directors made the decision that above ground pools will not be allowed in Chesney Glen. . . .

In its judgment, the trial court found as a fact that:

> 13. [Coleman] did not authorize [Hunter] to tell the [p]laintiffs that their application had been denied because the Association would not allow above-ground pools. . . .
>
> . . . .
>
> 15. . . . [Hunter] acted beyond the scope of her authority in citing those reasons for disapproval of the [p]laintiff's application and . . . [Hunter's] letter does not correctly reflect the [ACC's] reasons for disapproval of the [p]laintiff's application.

The court's findings also recited the Board's attempted adoption of a policy prohibiting all above-ground pools which failed to garner the required two-thirds vote of association members needed to effectuate amendment of the covenants.

Plaintiffs seize upon the foregoing findings, maintaining in their brief that:

> It was unreasonable for [Hunter] to send a denial letter to [plaintiffs] which cited as the reason for denial of the application that above ground pools would no longer be allowed . . . .
>
> . . . .
>
> It was unreasonable for the Board of Directors to attempt to prohibit above ground pools when such pools are specifically allowed under the covenants . . . .

Plaintiffs' assertions to the contrary notwithstanding, the contents of the Hunter letter under the circumstances *sub judice* do not

bear on whether "approval [was] . . . unreasonably withheld" by the ACC. The covenants contain no requirement that approval or disapproval be "reasonably communicated," but only that approval not be "unreasonably withheld." In this context, we again note this Court's emphasis in *Hyde I* on deference to the specific provisions of the instant restrictive covenants. *See Hyde I*, 126 N.C. App. 437, 486 S.E.2d 491. As noted herein, the covenants accord to the ACC

> the right to refuse to approve any plans and specifications which are not suitable or desirable, *in its sole discretion*, for aesthetic or *any other reasons* . . . .

(emphasis added).

Further, the failed attempt of the Chesney Glen Homeowners Association Board of Directors (the Board) to ban above-ground pools is unrelated to the issue of reasonableness. The Board and the ACC comprise different entities. Indeed, the trial court's finding of fact 17, also uncontested by plaintiffs and therefore conclusive on appeal, *Ply-Marts*, 40 N.C. App. at 768, 253 S.E.2d at 495, stated:

> the [ACC] deliberated and considered the [p]laintiffs' application independent of any action by, and without any influence or interference of, the Board of Directors relative to prohibition of above-ground pools.

Plaintiffs counter that this Court in *Hyde I* commented that the Hunter letter and the Board's attempt to ban above-ground pools comprised evidence "the [ACC] acted at least arbitrarily in denying plaintiffs' request." *Hyde I*, 126 N.C. App. 437, 486 S.E.2d 491. However, in *Hyde I* we reviewed the trial court's grant of defendant's Rule 41(b) motion for involuntary dismissal, *see* G.S. § 1A-1, Rule 41(b), and noted that a trial court "should defer judgment" on such rulings "until the close of all the evidence 'except in the clearest cases,' " *Hyde I*, 126 N.C. App. 437, 486 S.E.2d 491 (quoting Phillips, 1970 Supplement to 1 McIntosh, *North Carolina Practice and Procedure* § 1375). The statement cited by plaintiffs simply identifies evidence which removed the instant case from the "clearest cases" category such that the trial court should have deferred judgment "until the close of all the evidence." *Id.*

Following remand, the trial court received "all the evidence," *id.*, weighed that evidence and determined the credibility thereof, and

thereafter rendered judgment. We note also that the worksheet listing the ACC's reasons for denying plaintiffs' application had not been introduced into evidence at the time of *Hyde I* and was thus not available either to the initial trial court or to this Court on appeal. Given the new evidence presented at the trial upon remand and the trial court's uncontested factual findings, we cannot say the court incorrectly concluded as a matter of law that defendant did not "unreasonably with[hold]" approval of plaintiffs' application. *See Smith v. Butler Mtn. Estates Property Owners Assn.*, 90 N.C. App. 40, 43, 367 S.E.2d 401, 405 (1988) (if judgment is supported by findings of fact, it will be affirmed notwithstanding fact that contrary evidence may have been offered), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989).

[3] Lastly, plaintiffs find fault with the trial court's treatment of the Hunter letter. Plaintiffs first maintain the trial court's finding of fact 15, set out above, was not supported by competent evidence in the record and in any event is actually a conclusion of law on the issue of Hunter's "scope of authority."

The classification of finding of fact 15 has no bearing on the outcome of this case. Whether Hunter's inaccurate recitation of the reasons for denial of plaintiffs' application exceeded her authority is unrelated to whether the *ACC* "unreasonably withheld" approval of the application. Accordingly, any error of the trial court in categorizing finding of fact 15 is harmless. *See Shepard, Inc. v. Kim, Inc.*, 52 N.C. App. 700, 711, 279 S.E.2d 858, 865 (judgment will not be disturbed if one finding is unsupported by the evidence or immaterial to the case as long as other findings supported by competent evidence are sufficient to support the judgment), *disc. review denied*, 304 N.C. 392, 285 S.E.2d 831 (1981). Further, we note the trial court pointedly determined Hunter exceeded her authority *only* by "citing those [incorrect] reasons for disapproval," not in writing the denial letter nor in informing plaintiffs their application had been denied.

Nonetheless, plaintiffs interject, the covenants provide that

> [i]n the event the [ACC] shall fail to *specifically approve or disapprove* the plans and specification[s] submitted in final and complete form, within thirty (30) days after written request for final approval or disapproval such plans and specifications shall be deemed approved.

(emphasis added). Therefore, plaintiffs continue,

> [i]f [Hunter] exceeded her authority . . . then the denial letter was null and void, and as a result, no specific reasons for the denial were conveyed from the [ACC] to [plaintiffs]

as required under plaintiffs' interpretation of the covenants. In short, plaintiffs assert that no specific *reasons* for denial were given within thirty days of their application and that their application was therefore "deemed approved."

Plaintiffs' argument is untenable. Although the reasons assigned to denial of plaintiffs' application may have been inaccurate, the denial itself was "specifically" communicated to plaintiffs. When courts interpret the language of restrictive covenants such as those at issue herein,

> the covenant must be given effect according to the natural meaning of the words. . . .

Hobby & Son v. Family Homes, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981).

> A dictionary is an appropriate place to gather the natural meaning of words.

Agnoff Family Revocable Trust v. Landfall Assoc., 127 N.C. App. 743, 744, 493 S.E.2d 308, 309 (1997), *disc. review denied*, 347 N.C. 572, 498 S.E.2d 375 (1998).

"Specifically" is defined as "with exactness and precision . . . in a definite manner," *Webster's Third New International Dictionary* 2187 (1966), and as "explicitly, particularly, definitely," *Black's Law Dictionary* 1398 (6th ed. 1990). The Hunter letter stated the ACC "has denied your request," thus "explicitly" and "definitely" conveying that plaintiffs' application had been disapproved. Nothing more was required under the covenants, which set the standards by which the ACC's conduct must be judged, *see Hyde I*, 126 N.C. App. 437, 486 S.E.2d 491 (actions of ACC must be judged by standards in the covenants), which provide that the ACC may "refuse to approve" any plan "in its sole discretion" based upon aesthetics "or any other reason[]." Plaintiffs' attempt to read into the covenants a requirement that the ACC provide "specific" reasons for disapproval of an application is therefore unavailing.

[4] Prior to concluding, we address the assertion raised by the dissent that the majority decision herein would operate to allow an architectural review committee to give a property owner

any reason it wished, no matter how ridiculous, or no reason at all for denying an application, so long as valid reasons existed that could be presented to a judge in a later court hearing.

We disagree.

First, the instant decision applies only to the covenants at issue in the case *sub judice*. Decisions of architectural control committees governed by covenants containing no standard by which to judge that committee's authority must be reviewed under the standard promulgated in *Boiling Spring Lakes*, 27 N.C. App. at 196, 218 S.E.2d at 479, and we do not speculate as to whether "reasonable communication" might be required thereunder. Thus, both *Raintree*, 342 N.C. 159, 463 S.E.2d 72, and *Smith*, 90 N.C. App. 40, 367 S.E.2d 401, cited by the dissent for the proposition that homeowners must be given valid reasons for denial of construction applications, were governed by a different standard than that at issue herein and are inapposite.

In the instant case, the covenants require only that (1) the ACC may not "unreasonably with[hold]" approval of an application; and, (2) that if an application is denied, such denial must be specific. The covenants contain no requirement that *any* reasons for denial be communicated to the homeowner.

Accordingly, although plaintiffs may have received inaccurate reasons for denial, the denial itself was specifically communicated and the trial court's uncontested findings, *see Ply-Marts*, 40 N.C. App. at 768, 253 S.E.2d at 495, reflect the ACC possessed valid reasons for denial. Therefore, we are not confronted with the dissent's hypothetical circumstance wherein a homeowners' association has attempted to justify its decision *post hoc* at trial. We reiterate that the worksheet prepared by ACC members contemporaneously with denial of the application was introduced into evidence by plaintiffs themselves.

As noted by the dissent, it appears plaintiffs wrote defendants a letter of protest following denial by the ACC, which communication was not responded to in writing. Nonetheless, while the covenants contain no procedure to protest denial of an application, defendant presented the testimony of both Hunter and Coleman that plaintiffs had been invited to a Board meeting to discuss denial of their application, but failed to attend.

In sum, although plaintiffs' vigorous arguments have proved persuasive to the dissent, we decline to second guess the ruling of the

trial court. After a full trial, hearing evidence at length from both sides, the court determined the ACC

> did not unreasonably withhold [its] approval, . . . [and] acted deliberately, reasonably and in good faith in considering and ultimately disapproving the [p]laintiffs' application . . .
>
> . . . [Further,] the [ACC's] disapproval of the [application] was neither arbitrary nor capricious.

As plaintiffs have not challenged the findings of fact upon which the trial court based the foregoing conclusions, *see Ply-Marts*, 40 N.C. App. at 768, 253 S.E.2d at 495, and as those conclusions of law are supported by the court's findings of fact, *see Everette*, 133 N.C. App. at 85, 514 S.E.2d at 525, we affirm the trial court's decision, *id.*

Affirmed.

Chief Judge EAGLES concurs.

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

Judge HUNTER concurring in part and dissenting in part.

I respectfully dissent from the majority opinion on the issue of whether the Architectural Control Committee ("ACC") unreasonably withheld approval of plaintiffs' application for construction of an above-ground swimming pool and backyard fence.

The record reveals that on 25 April 1995, plaintiffs submitted hand-drawn plans to the ACC for an above-ground swimming pool and backyard fence. Plaintiffs thereby sought approval for the project pursuant to the Chesney Glen Subdivision Declaration of Covenants, Conditions, and Restrictions ("Covenants"), which provide in pertinent part:

> No building, sign, fence, . . . or other structure or planting shall be constructed, erected or planted until the plans and specifications showing the nature, kind, shape, height, materials, floor plans, color scheme, and located (sic) with respect to topography and finished ground elevation shall have been submitted to and approved in writing by the [ACC]. The [ACC] shall have the right to refuse to approve any plans and specifications which are not suitable or desirable, in its sole discretion for aesthetic or

> any other reasons, provided such approval is not *unreasonably withheld.*

(Emphasis added.) The covenants also provide:

> No exposed above-ground tanks except for approved recreational swimming pools will be permitted . . . .

This section of the covenants clearly indicates that above-ground pools, similar to the one plaintiffs sought approval for, are allowed in the Chesney Glen Subdivision. This is supported by the sixth finding of fact by the trial court, which provides:

> 6. During the period in which the builder/developer was in control of the Association, the builder/developer approved an above-ground swimming pool for Mr. Joe Smith, a resident of Chesney Glen and a member of the Association. The builder/developer also approved another above-ground swimming pool and a hot tub for other lot owners within Chesney Glen during the time of the builder/developer's control of the Association.

Therefore, it is obvious that above-ground pools existed in the Chesney Glen Subdivision at the time plaintiffs submitted their application.

After receiving plaintiffs' application, the ACC did not request any additional information from the plaintiffs concerning their application. By letter dated 15 May 1995, plaintiffs were informed by Cindy Hunter ("Hunter"), an employee of the property management company engaged by defendant, that their application had been denied. The record reveals that this letter was written at the direction of Tom Coleman ("Coleman"), acting chair of the ACC, after Coleman and Hunter had a conversation about the denial and decided that the actual reasons for the denial did not need to be conveyed to the plaintiffs. The letter stated in pertinent part:

> The [ACC] has reviewed your request submitted April 25, 1995 to install an above ground pool and fence. . . .
>
> The [ACC] has denied your request based on the following: The [ACC] and the Board of Directors have established architectural guidelines for the subdivision which will be published to all homeowners in the near future. After careful consideration, the Board of Directors made the decision that above ground pools will not be allowed in Chesney Glen. . . .

Plaintiffs were given no other reasons for the denial of their application, and the denial letter did not address or comment on any of the characteristics or features of the pool the plaintiffs had proposed to build. On 25 May 1995, plaintiffs wrote a letter of protest in response to the denial letter, asserting that the Board did not have the authority to prohibit all above-ground pools. There is no evidence in the record that plaintiffs received a response to this letter. In fact, the record contains no evidence of any correspondence between plaintiffs and the ACC in regards to what additions or changes plaintiffs could make to their application to make it acceptable to the ACC.

On 3 July 1995, plaintiffs filed an action for a declaratory judgment as to whether their application had been unreasonably denied under the Covenants. During the pendency of this action, plaintiffs proceeded with construction of both the pool and the fence. Plaintiffs did so pursuant to that section of the Covenants which provides:

> In the event the [ACC] shall fail to *specifically approve or disapprove* the plans and specifications submitted in final and complete form, within thirty (30) days after written request for final approval or disapproval such plans and specifications shall be deemed approved.

(Emphasis added.)

On 17 October 1995, at the annual meeting of the Chesney Glen Homeowners' Association, a proposed amendment to the Covenants which would have prohibited all above-ground pools was considered, but failed to receive the required two-thirds approval of the membership. The ACC subsequently published to all Chesney Glen homeowners its "Revised Architectural Control Guidelines," which were to become effective 1 March 1996. These guidelines include a section that sets forth specific design guidelines for above-ground pools, indicating that future above-ground pools would be allowed, completely contradicting the 15 May 1995 denial letter sent to the plaintiffs.

The North Carolina Supreme Court has addressed the rules of construction which are to be applied when interpreting restrictive covenants, and has stated:

> "Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. . . . Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capa-

> ble of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.["]

Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (quoting 20 Am. Jur. 2d *Covenants, Conditions and Restrictions* § 187 (1965). The construction against limitations upon the beneficial use of land must be reasonable and cannot defeat the plain and obvious purposes of a restriction. *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 195, 218 S.E.2d 476, 478 (1975). This Court has held that the exercise of authority with respect to covenants requiring the submission of plans and prior consent to construction, even if vesting the approving authority with broad discretionary power, is valid and enforceable so long as the authority to consent is exercised reasonably and in good faith. *Smith v. Butler Mtn. Estates Property Owners Assoc.*, 90 N.C. App. 40, 48, 367 S.E.2d 401, 407 (1988). With regard to the exercise of authority given architectural review committees, the Supreme Court has stated: " '[A] restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith.' " *Raintree Homeowners Assn. v. Bleimann*, 342 N.C. 159, 163, 463 S.E.2d 72, 74 (1995) (quoting *Boiling Spring Lakes*, 27 N.C. App. at 195-96, 218 S.E.2d at 478-79).

In *Raintree*, the defendant homeowners wanted to replace wood siding with vinyl siding. Pursuant to a restrictive covenant, the defendants applied to the Architectural Review Committee ("ARC") for approval of their plans. This restrictive covenant made the ARC the sole arbiter of such plans, with the authority to withhold approval for any reason, similar to the restrictive covenant at issue *sub judice*. Defendants attended an ARC meeting on the evening of 26 March 1990 and presented evidence in support of their application. The ARC denied defendants' application because it found that the use of vinyl siding was not harmonious with the general theme of the subdivision. The ARC informed defendants that their application for approval had been denied by letter dated 6 April 1990. Defendants replied with a letter requesting that the ARC reconsider their application. The ARC did so at its next meeting and unanimously reaffirmed its prior denial. Defendants attended another ARC meeting a month later and again presented evidence in support of their application and suggested a compromise by which their home would be deemed a "test case" for vinyl siding. The ARC once again denied the application. The

Supreme Court found the defendants had failed to produce any evidence that the ARC acted unreasonably or in bad faith—the ARC had considered defendants' application for vinyl siding on three separate occasions, despite the fact that it had previously found the material unacceptable, and the ARC had consistently denied other applications for vinyl siding. *Id.* at 165, 463 S.E.2d at 75.

In *Smith*, the plaintiffs submitted a set of plans for a proposed dwelling to the architectural review committee for approval. Plaintiffs' plans were rejected because they failed to meet the restrictive covenant's square footage requirement. Plaintiffs then submitted a second set of plans which were rejected by the architectural review committee based on the roofline and geodesic design of the house. The plaintiffs were sent a letter from the president of the property owners association indicating that the proposed house reflected a marked departure from the home-building styles in the area and that the plaintiffs might consider a design closer to those in existence. The plaintiffs were given a definite and legitimate reason why their application had been denied, as well as suggestions on what changes were needed for possible reconsideration and approval. Therefore, this Court held that the architectural review committee had acted reasonably in denying plaintiffs' application. *Smith*, 90 N.C. App. at 48, 367 S.E.2d at 407.

In both *Raintree* and *Smith*, the respective architectural review committees involved the landowners in the application process. Once the application was initially denied, the architectural review committees made concrete suggestions to the landowners about what was needed for approval. The committees also clearly communicated to the landowners legitimate reasons why their applications had been denied. None of this occurred in the case *sub judice*. Here, plaintiffs' original application was denied for an invalid reason, the plaintiffs' letter protesting this decision was disregarded, and plaintiffs were given no specific reason why their application had been denied prior to proceeding with construction, aside from the Board's invalid attempt to prohibit all above-ground pools in the subdivision.

The majority opinion claims to find ample support for its conclusion in the following findings of fact by the trial court:

> 11. The three members of the [ACC] cited various reasons for the disapproval of the Plaintiffs' application, including the reasons that a 24-foot pool was too large for the lot size and that the Plaintiffs had not included enough information with their

> application for the [ACC] to make a fully-informed decision. Two members of the [ACC] specifically reported that they should see the actual pool plans or a photograph from the pool manufacturer showing the style of the pool. In addition, one member of the [ACC] felt that he needed to see landscaping plans for screening the pool before he could approve it, and another [ACC] member felt that the pool might be too close to the side lot line as it appeared on the Plaintiffs' application. The [ACC] also reported that they might consider the matter again based upon a proper and complete application.
>
> . . .
>
> 16. Based upon the testimony and documentary evidence presented by the Defendant (which was not presented at the first hearing of this case), the Court finds as a fact that the [ACC] based its decision to disapprove the Plaintiffs' application on the fact that the above-ground pool and fence requested did not meet the general scheme and plan of development for the Chesney Glen community . . . .

I believe the majority's ruling would be correct on this issue if it was simply concluding that valid reasons existed for the ACC to deny plaintiffs' application. However, the majority is using these findings to support its conclusion that the ACC did not act unreasonably in withholding approval of plaintiffs' application. In my opinion, the record lacks any showing, and the trial court made no findings of fact, that these legitimate reasons for denial were ever communicated to the plaintiffs prior to the second hearing in front of the trial court on 4 March 1998. The majority states that: "The covenants contain no requirement that approval or disapproval be 'reasonably communicated,' but only that approval not be 'unreasonably withheld.' " Following this line of reasoning, an architectural review committee could give a landowner any reason it wished, no matter how ridiculous, or no reason at all for denying an application, so long as valid reasons existed that could be presented to a judge in a later court hearing. I believe that the majority's construction of "unreasonably withheld" and "specifically approve or disapprove" in the present case is not a strict construction against limitations on the beneficial use of plaintiffs' property as required by *Boiling Spring Lakes*, 27 N.C. App. at 195, 218 S.E.2d at 478. I believe a reasonable construction against limitations on the beneficial use of property is one which requires the ACC to give notice to the applicant of valid reasons why the application was denied. As in *Rainwater* and *Smith*, plaintiffs

should have been given valid reasons for denial so that they could have worked with the ACC to remedy the problems with their application, if possible. Accordingly, I would reverse the judgment of the trial court on this issue.

STEPHEN TIMOTHY BYRD AND SANDRA SAIN BYRD, PETITIONERS FOR THE ADOPTION OF RACHEL LEIGH BYRD

No. COA99-887

(Filed 2 May 2000)

1. Adoption— consent—alleged father—acknowledgment requirement

Respondent natural father's consent to the adoption of his child was not required in a case where respondent conditioned his acceptance of responsibility for the child on a determination that he was the child's biological father, because: (1) N.C.G.S. § 48-3-601 requires an alleged father to have acknowledged his paternity of the minor before the earlier of the filing of the adoption petition or the date of the hearing; (2) respondent's offer to provide the biological mother with a place to live during her pregnancy, along with his obtaining various jobs during the biological mother's pregnancy, fall short of the requirements to show he acknowledged the paternity of the unborn child; and (3) N.C.G.S. § 48-3-601 does not allow a potential father's acknowledgment of his paternity to be conditioned on establishing a biological link with the child.

2. Adoption— consent—alleged father—support requirement

The evidence was sufficient to support the trial court's findings that respondent natural father failed to provide the support required under N.C.G.S. § 48-3-601, thus negating the requirement of his consent prior to the adoption of his child, because: (1) testimonial evidence in the record showed that respondent earned money above his living expenses during the biological mother's pregnancy, and respondent did not give any money to the biological mother; (2) there are no exceptions for the consistent and reasonable support requirement, meaning respondent's obligation is not conditioned on either the biological mother's acceptance of a place to live as support, or sufficient time between the

child's birth and the filing of the petition to allow the man time to provide support for the child; and (3) the potential father's support obligation cannot be conditioned on establishing a biological link with the child.

Judge HUNTER dissenting.

Appeal by Respondent Michael Thomas Gilmartin from order entered 10 February 1999 by Judge Fred M. Morelock in District Court, Wake County. Heard in the Court of Appeals 24 February 2000.

Manning, Fulton & Skinner, P.A., by Howard E. Manning and Michael S. Harrell, for the petitioners-appellees.

H. Spencer Barrow and George B. Currin for the respondent Michael Thomas Gilmartin.

WYNN, Judge.

Under N.C. Gen. Stat. § 48-3-601, the consent of a man who may or may not be the father of a child must be obtained in an adoption proceeding except where the potential father failed to acknowledge his paternity or provide support for the biological mother and the child. N.C.G.S. § 48-3-601(2)(b)(4)(II) (1999). In this case, the potential father contends that his level of acknowledgment and support provided for an unborn child should be considered in light of the biological mother's uncertainty of his paternity. Because the potential father neither adequately acknowledged paternity nor provided the financial support required under N.C.G.S. § 48-3-601(2)(b)(4)(II), we must affirm the trial court's holding that his consent was not required in the adoption proceeding of the child.

The facts of this case culminate in an emotional confrontation of families regarding the status of a minor child. In September 1997 eighteen-year-old Shelly Dawn O'Donnell informed seventeen-year-old Michael Thomas Gilmartin[1] of her pregnancy and revealed that the date of birth derived from an ultrasound indicated that he fathered her child. But a later ultrasound indicated a different due date which in turn indicated that Michael may not have fathered her child.

Shelly decided to give her child up for adoption. Working through an adoption network, she developed a relationship with Steve Byrd

1. Michael currently serves in the United States Coast Guard.

and his wife Sandra who desired to adopt her child. Shelly contacted Michael to request his consent to the private placement adoption; however, he refused stating that he wanted his baby.

To resolve this difference, Shelly petitioned the District Court in Chowan County to make a "Prebirth Determination of Right" stating that there "is more than one possible biological father" and requesting the court to determine whether "the consent of Respondent Michael Gilmartin [was] required for the adoption of . . . the child." Shelly served that petition upon Michael along with a notice stating:

> You have been identified as one of the possible biological fathers. It is the intention of the biological mother to place the child up for adoption. It is her belief that your consent to the adoption is not required. If you believe your consent to the adoption of this child is required pursuant to G.S. 48-3-601, you must notify the court in writing no later than 15 days from the date you received this notice that you believe your consent is required.

Indeed, Michael responded stating:

> 5. . . . the respondent contends that his consent to adopt is required and believes that he possibly is the biological father of the child. That the petitioner repeatedly told the respondent that he was the biological father of the said child. That the respondent is desirous of having custody of the said child placed with him if it is determined that he is the biological father.
>
> . . .
>
> 8. That the [respondent] is desirous of assisting with the medical expenses incurred regarding the birth of the child, as well as being interested in paying child support for the care and maintenance of the child, should he be determined to be the child's father.

In short, Michael requested that "no adoption of the said child be approved by the [c]ourt until it is determined that [he] is not the biological father of the said child."

About a month later, on 4 March 1998, Shelly gave birth to a baby girl. The next day, unbeknownst to Michael, the Byrds filed a Petition for Adoption in the District Court in Wake County. On the same day, unbeknownst to the Byrds, Michael filed a complaint and petition in the District Court in Chowan County. In his complaint, Michael

requested: (1) the court to order a blood test to determine parentage of the baby, (2) all other proceedings in the cause be stayed until the test results were available and (3) custody should be granted in his favor or in the alternative, visitation rights be granted if he was determined to be the father of the child. The District Court in Chowan County, however, denied his motion for a blood test in April 1998.

In the interim, Michael received service of the Byrds' adoption petition and responded by requesting custody or visitation with the child "should it be determined by blood test, that he is the natural father of said minor child." On 28 July 1998, Michael moved for a blood test under N.C. Gen. Stat. § 8-50.1 in the District Court in Wake County. The trial court granted his motion; and, the resulting test showed a probability of 99.99% that Michael fathered the child.

Notwithstanding the results of the blood test, at an adoption hearing in October 1998, the trial court concluded that Michael's consent was not required under N.C. Gen. Stat. § 48-3-601 because before filing the adoption petition Michael failed to: (1) acknowledge the child and (2) provide "in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor or both."

From this order, the respondent—Michael Thomas Gilmartin—appeals.

I.

[1] The respondent first contends that his consent to the adoption was required under N.C.G.S. § 48-3-601 because he adequately complied with the statute's acknowledgment requirement. We must disagree.

Under N.C.G.S. § 48-3-601, a petition to adopt may be granted only if consent to the adoption has been executed by:

> b. Any man who may or may not be the biological father of the minor. . . .

N.C.G.S. § 48-3-601(2)(b).

But that statute also requires that before "the earlier of the filing of the petition or the date of the hearing," the man must have "acknowledged his paternity of the minor." N.C.G.S. § 48-3-601(2)(b)(4).

In construing statutes, such as N.C.G.S. § 48-3-601, our primary task is to determine the legislative intent. *See Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 396 (1988). To ascertain this legislative intent "resort must first be had to the language used." *Nance v. Southern Ry. Co.*, 149 N.C. 366, 371, 63 S.E. 116, 118 (1908). "In other words, the statute must, if possible, be made to speak for itself." *Id.* Therefore, where "the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980).

Under the plain language of N.C.G.S. § 48-3-601, to assert the right to consent to an adoption, an alleged father must first acknowledge his paternity of the child before the earlier of the filing of the adoption petition or the date of the hearing. *See* N.C.G.S. § 48-3-601(2)(b)(4). The term "acknowledgment" for purposes of paternity actions means "the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted." *Carpenter v. Tony E. Hawley, Contractors*, 53 N.C. App. 715, 720, 281 S.E.2d. 783, 786 (1981).

In this case, the biological mother revealed that during her child's conception period, she engaged in sexual relations with more than one man including the respondent. She revealed her uncertainty of the paternity of her child to the respondent. Nonetheless, to preserve his consent rights for adoption, N.C.G.S. § 48-3-601(2)(b)(4) required the respondent to "acknowledge" the unborn child as his own.

The respondent asserts that the following actions were sufficient to constitute acknowledgment of his paternity: (1) offering to provide the biological mother with a place to live during her pregnancy, (2) obtaining various jobs to provide support for the child, and (3) filing several court documents requesting custody of the child upon a determination that he was the child's biological father.

Indeed, the record on appeal shows that the respondent offered the biological mother a place to live during her pregnancy. The record also shows that the respondent attempted various jobs during the biological mother's pregnancy. But those actions fall short of the requirements under our case law to show that he acknowledged the paternity of the unborn child.

In essence, the respondent argues that it was reasonable for him to condition his acknowledgment or acceptance of responsibility for the child on a determination that he was the child's biological father. Yet, N.C.G.S. § 48-3-601 does not allow a potential father's acknowledgment of his paternity to be conditioned on establishing a biological link with the child. In fact, that statute removes any requirement of a biological link by stating that "any man who *may or may not* be the biological father of the minor." N.C.G.S. § 48-3-601 (emphasis supplied).

We recognize that under a plain reading of the statute, the respondent faced a difficult dilemma—to acknowledge paternity of a child that he may not have fathered, or face the possibility that the child would be adopted by third parties without his consent. However, his equitable challenge must yield to our judicial stricture to follow the statutory law, not make it. When the constitutionally affirmed laws of the General Assembly provide unambiguous language, we must follow it even though the facts of a particular case may cry out for fairness, or a different result. And in instances where the General Assembly plainly speaks, we must infer that under its policy-making authority it understood the consequences of its enactment. Thus, where an unambiguous law of the legislature presents a situation that appeals for a different result, our restrained role as jurists empowers us only to point out this anomaly. So, that in light of that circumstance, the legislature may be moved to further reflect on its words to determine if in fact they intended such a result.[2]

The statute in this case, N.C.G.S. § 48-3-601, plainly and unambiguously requires a man who "may or may not" be the biological father, to acknowledge paternity to preserve the right to consent to an adoption of that child. Because the evidence in the record supports a finding that the respondent did not acknowledge his paternity

2. The dissenting opinion states: "To require a man, who has been informed by the biological mother that he 'may or may not be' the biological father, to acknowledge that he *is* the father, not only goes against the plain reading of N.C. Gen. Stat. § 48-3-601, but also against logic." While we can agree that such an outcome appears illogical, our role as jurists is not to challenge with our own logic the plain words of the legislature under N.C. Gen. Stat. § 48-3-601 which explicitly states that it applies to any man who *may or may not be the biological father of the minor.* The dissent also suggests that any man who has been so informed, need only acknowledge that he may or may not be the father. Nonetheless, the unambiguous language of N.C. Gen. Stat. § 48-3-601 requires the man to have "acknowledged his paternity of the minor." To read in an amendment that the father be allowed to acknowledge that he may or may not be the father of the child would be to rewrite N.C. Gen. Stat. § 48-3-601. That's a legislative function, not a judicial function.

of the child, we must conclude that the trial court properly determined that his consent to the child's adoption was not required.

II.

[2] A second reason supporting the trial court's determination that the respondent's consent was not required for the adoption is that he failed to provide the support required under N.C.G.S. § 48-3-601. The respondent contends that he (1) provided support in accordance with his financial means, and (2) was not required to comply with the statute's support requirement.

N.C.G.S. § 48-3-601 provides that to preserve consent rights for adoption, a man who may or may not be the father of the child, must have provided in accordance with his financial means,

> reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor or both. . . ."

N.C.G.S. § 48-3-601(2)(b)(4)(II).

In this case, the trial court made the following findings of fact regarding the respondent's compliance with N.C.G.S. § 48-3-601's support requirement:

> 14. At no time during September-October, 1997 time period did the respondent provide any financial support to O'Donnell. On one occasion in mid-October, 1997, the respondent and his mother, Patricia Gilmartin took O'Donnell to a local restaurant in Edenton where Patricia Gilmartin offered O'Donnell a free room in Patricia Gilmartin's resident during the term of O'Donnell's pregnancy so that O'Donnell could mitigate certain expenses. O'Donnell refused this offer. O'Donnell afterwards took the respondent and Ms. Gilmartin to the William's home, where respondent and Ms. Gilmartin looked at ultrasound pictures of the baby on the porch of the William's house.
>
> 15. Around the 1st of November, 1997, the respondent went to Nags Head to secure full-time employment in order to save money for the child. O'Donnell acknowledged that the respondent was working to save money for the child. The respondent worked two different full time jobs (one for several weeks, the other for approximately six weeks) until he returned to his grandparent's residence just before the holidays in December, 1997. The respondent rented an apartment with two other individuals

where he paid $75.00 a week in order to have a bedroom the total rent on the apartment was $650.00 a month. (The respondent could have slept on a sofa and paid rent of $30.00 per week, but he did not) The respondent had $50.00 a week left over after paying all of his expenses for living in Nags Head. During this time period, the respondent did not provide any financial support to O'Donnell.

. . .

19. Upon respondent's return to his grandparents residence in Pea Ridge in late December, 1997, he again began working around his grandparents' residence earning approximately $90.00 per week. He did this through the date of [the child's] birth, March 4, 1998. He was not charged any expense for room, board, or other items during any time when he resided with his grandparents. He did not provide any financial support to O'Donnell from late December 1997 through the date of [the child's] birth, March 4, 1998. The respondent claimed that he did not have much money to send O'Donnell, particularly in light of the fact that "She told me on and off that I was the father."

. . .

25. On the date of [the child's] birth, the respondent purchased a $100.00 money order and some baby clothing and gave the same to his mother to forward to O'Donnell. The money order was not mailed to O'Donnell until March 9, 1998.

Based on these findings of fact, the trial court concluded that the respondent failed to comply with the statute's support requirement.

The respondent argues that the trial court's finding of fact number 15 that he "had $50.00 a week left over after paying all of his expenses for living in Nags Head" was unsupported by the evidence in the record. And he argues that the evidence supports a finding that he did not have the financial means to provide monetary support to the biological mother during her pregnancy.

However, testimonial evidence in the record showed that he had over $50 left over when he worked in Nags Head. In fact, during the adoption hearing the respondent stated that:

Q. Okay Now you've testified that you made—you really saved, at the end of each week, $50 a week—

A. Around.

Q. —after you had paid your expenses. And you had a checking account and you could have sent it couldn't you? Isn't that right.

A. Yes, but there was a chance—

. . . .

A. Yes, I could have sent it, but there was a chance that would ruin my chances of staying at the beach to work because some weeks it would rain and we wouldn't get a full week in. So I'd have to take that $50 I saved and put toward rent.

While the evidence showing that the respondent earned money above his living expenses appears equivocal, we are bound to uphold the trial court's findings in the face of competence evidence that support those findings. *See Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (holding that if the trial court's findings of fact are supported by the evidence, they are binding on appeal even though there may be evidence to the contrary). Since the record contains evidence to support the trial court's findings, we must uphold the trial court's determination that the respondent failed to comply with the statute's support requirement.

Still, the respondent argues that he was not required to comply with the statute's support requirement because the circumstances present in this case made it impossible for him to do so. He contends that (1) the biological mother made it "clear that she did not want, nor would she accept, any financial support" from him, and (2) the filing of the adoption petition just one day after the birth of the child prevented him from providing support to the child.

As stated, in construing N.C.G.S. § 48-3-601, we must apply its plain meaning. Under the statute's plain meaning, a man must before the earlier of the filing of the adoption petition or the date of the hearing provide reasonable and consistent payments for the support of (1) the biological mother during her pregnancy, (2) the minor, or (3) both the biological mother and the minor. N.C.G.S. § 48-3-601(b)(4)(II). Reasonable is defined as "[f]air, proper, or moderate under the circumstances . . . ." BLACK'S LAW DICTIONARY 1272 (7th ed. 1999). Consistent means to be "reliable [or] steady." AMERICAN HERITAGE COLLEGE DICTIONARY 297 (3rd ed. 1997).

Significantly, N.C.G.S. § 48-3-601 does not—as the respondent suggests—condition the requirement of consistent and reason-

able support on either (1) the biological mother's acceptance of a place to live as support, or (2) sufficient time between the child's birth and the filing of the petition to allow the man to provide support for the child.

Again, we are mindful of the respondent's dilemma since there is evidence in the record that the mother, in fact, did refuse the offer to stay with his mother during her pregnancy, and the adoption petition was filed just one day after the child's birth. Nonetheless, the statute makes no exceptions for the support requirement, and we will read no such requirements into the General Assembly's clear language.

We are also mindful that the unanswered question of the child's parentage may have fueled the respondent's reluctance to take more affirmative steps to comply with the statute's support requirement. But N.C.G.S. § 48-3-601 does not allow a potential father's support obligation to be conditioned on establishing a biological link with the child. As with the acknowledgment requirement, the respondent was given the choice under the statute to provide support for a biological mother who was uncertain as to whether he fathered the child, or face the possibility that the child could be adopted by third parties without his consent. Because the evidence in the record supports a finding that the respondent chose not to provide reasonable and consistent support in accordance with his means, we must conclude that the trial court properly determined that his consent to the child's adoption was not required.

The trial court's order is,

Affirmed.

Judge MARTIN concurs.

Judge HUNTER dissents in a separate opinion.

Judge HUNTER dissenting.

I respectfully dissent. As applied to the present case, N.C. Gen. Stat. § 48-3-601 provides in pertinent part that:

> [A] petition to adopt a minor may be granted only if consent to the adoption has been executed by:
>
> . . .

b. Any man who *may or may not be the biological father* of the minor but who:

. . .

4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has *acknowledged* his paternity of the minor and

I. Is obligated to support the minor under written agreement or by court order;

II. *Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy*, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, *and* has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48-3-601 (1999) (emphasis added). The two issues before this Court are respondent's acknowledgment and support under this statute.

According to *Carpenter v. Tony E. Hawley Contractors*, 53 N.C. App. 715, 281 S.E.2d 783, *disc. review denied*, 304 N.C. 587, 289 S.E.2d 564 (1981),

> the word "acknowledged" is not a term of art meaning requiring a formal declaration before an authorized official. In regard to paternity actions, the term "acknowledgment" generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted.

Id. at 720, 281 S.E.2d at 786. I believe that the respondent's actions in the present case indicate that he acknowledged the unborn child as required by the statute. It is undisputed that from the time O'Donnell learned she was pregnant in September 1997 until the phone call in November 1997, respondent acknowledged that he was the father of

the unborn child. The trial court found that respondent met with O'Donnell to discuss issues surrounding the pregnancy during this time, and, in October 1997, respondent and his mother met with O'Donnell and offered her housing during her pregnancy, which was refused. Therefore, respondent unquestionably met the acknowledgment requirement up until November 1997. Additionally, after the November 1997 phone call, respondent never denied parentage. Rather, he continued to offer support to O'Donnell and the child, and he acknowledged in court documents that the child may or may not be his and requested custody and offered support of the child if he were found to be the biological father. The trial court made the following findings of fact pertinent to this issue:

> 16. On or around November 14, 1997, O'Donnell was given a different due date for her child which was approximately two weeks earlier than the due date originally given. This new due date could have meant that O'Donnell's former boyfriend and not the respondent was the biological father of O'Donnell's child. In a telephone conversation on November 14, 1997, O'Donnell informed the respondent about the changed due date. The parties' evidence on this specific phone call differed in that the respondent claimed that O'Donnell told him that he was "not" the father of O'Donnell's baby while petitioners' evidence indicates that O'Donnell told the respondent that he "may not" be the father of her baby. The evidence is insufficient for either side for the court to make a specific finding of fact concerning the exact content of this telephone call.
>
> . . .
>
> 22. On January 21, 1998, O'Donnell filed a petition for prebirth determination of right of consent in Chowan County and served the same upon the respondent. The respondent was also served with a notice of petition which included in part:
>
> > You have been identified as one of the possible biological fathers. It is the intention of the biological mother to place the child up for adoption. It is her belief that your consent to the adoption is not required. If you believe your consent to the adoption of this child is required pursuant to G.S. 48-3-601, you must notify the court in writing no later than fifteen (15) days from the date you received this notice that you believe your consent is required.

The respondent was served with a copy of this petition and notice, and on February 2, 1998, he timely filed a response which stated in part:

> . . . [T]he respondent contends that his consent to adopt is required and believes that he possibly is the biological father of the child. That the petitioner repeatedly told the respondent that he was the biological father of the said child. That the respondent is desirous of having custody of the said child placed with him if it is determined that he is the biological father.

The respondent's response went on to state:

> That the defendant is desirous of assisting with the medical expenses incurred regarding the birth of the child, as well as being interested in paying child support for the care and maintenance of the child, should he be determined to be the father.
>
> . . .
>
> 23. In February, 1998, the respondent telephoned O'Donnell three times . . . . Each time, the respondent inquired as to the progress of O'Donnell's pregnancy and O'Donnell's well-being. Each time, O'Donnell requested that the respondent sign the papers to allow the adoption to go forward, which the respondent refused to do. O'Donnell told the respondent that she would not notify him when the child was born, as she would be "busy."

On the same day petitioners filed the request for adoption of the child, respondent filed a complaint asking that parentage be determined, and if he was the biological father, that he be granted custody and that the support obligations of O'Donnell and respondent be determined by the court.

The majority holds that respondent did not acknowledge that he was the child's father, and makes no differentiation as to his actions before and after November 1997. As I have stated, it is undisputed that respondent acknowledged the child as his until the 14 November 1997 phone call by O'Donnell that questioned his parentage. To require a man, who has been informed by the biological mother that he "may or may not be" the biological father, to acknowledge that he *is* the father, not only goes against a plain reading of N.C. Gen. Stat.

§ 48-3-601, but also goes against logic. Therefore, I believe that when the biological mother has informed a putative father that he may or may not be the father of her child, he is only required under N.C. Gen. Stat. § 48-3-601 to acknowledge just that, *i.e.*, that he may or may not be the father. Competent evidence indicates that the respondent in the present case did so. Accordingly, I believe that respondent met the acknowledgment requirement of this statute both before and after November 1997.

As to the issue of having provided support of the biological mother and/or child during or after the term of pregnancy, I believe the following findings of fact by the trial court, which were not cited by the majority, are instructive:

> 10. After O'Donnell and respondent's relationship ceased in early June, the respondent had no employment until early November, 1997 as noted below, other than continuing to work around his grandparents' house approximately three days a week and making $80-$90 per week. The respondent was involved in an automobile accident in August, 1997 which incapacitated him approximately one month. . . .
>
> . . .
>
> 13. In September and October, 1997 O'Donnell went to see the respondent approximately once a week at the respondent's grandparents' home in Pea Ridge to discuss various issues with him, including issues concerning O'Donnell's pregnancy. On one occasion, O'Donnell spent the night at respondent's grandparents' residence. . . .
>
> . . .
>
> 17. In late November—early December 1997 . . . O'Donnell contacted respondent and requested that he consent to the private placement adoption. Respondent refused to consent to the adoption and advised O'Donnell that he still wanted to raise the child.
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> . . .
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> 24. On March 4, 1998, O'Donnell gave birth to Rachel. The respondent through his mother found out about the birth, and he went to Chowan County Hospital once on March 4 and once on March 5 while O'Donnell was in the hospital to see O'Donnell and/or Rachel, but he was informed by the

hospital administrators that he was not on O'Donnell's approved list for visitors . . . .

25. On the date of Rachel's birth, the respondent purchased a $100.00 money order and some baby clothing and gave the same to his mother to forward to O'Donnell. This money order and clothing was not mailed to O'Donnell until March 9, 1998.

Based on these findings, and those cited by the majority, I believe that competent evidence indicates that the respondent provided support to O'Donnell in accordance with his financial means. O'Donnell stayed at respondent's grandparents' home on at least one occasion. As the majority recognizes, respondent and his mother offered the biological mother housing throughout her pregnancy, and she refused. The majority points out that respondent had $50.00 left over after covering his living expenses from November to December 1997 and infers that this money should have been paid to O'Donnell; however, the trial court found that O'Donnell acknowledged that respondent was working to "save" money for the child. While the court did not specifically find that respondent saved money for the child, I believe that his working to save money for the child qualifies as providing support for the unborn child in light of his financial means. Such action would not be illogical, or in violation of N.C. Gen. Stat. § 48-3-601, when the putative father has been told that he may very well not be the biological father of the unborn child. Apparently, the respondent had saved money for the child's support, as the trial court found that respondent purchased a $100.00 money order for the child on the day of its birth. From December 1997 to the time of the child's birth, respondent only made $90.00 a week doing work around his grandparents' residence. While the court found that he had no room or board expenses, it did not find nor conclude that respondent had extra money with which to support O'Donnell. The trial court found that respondent and O'Donnell had a volatile relationship after O'Donnell asked respondent to give his consent to the unborn child's adoption. O'Donnell barely acknowledged respondent during this period. On the day the child was born, respondent was not even allowed to see the child or O'Donnell. The day after the birth, respondent filed suit requesting that parentage be determined, and asked for custody if he were the father, in which case he also indicated his intent to support the child.

I believe that competent evidence indicates that respondent's support was *provided* in accordance with his financial means.

Respondent offered housing to O'Donnell during the pregnancy, which was refused, worked to save money for the child, and purchased a $100.00 money order for the child on the day of the child's birth. The fact that the mother refused support does not negate the fact that respondent provided it, by the only means within his power, in accordance with the statute. Therefore, I would hold that respondent met the support requirements under N.C. Gen. Stat. § 48-3-601.

Our General Assembly has specifically declared its legislative policy as to the purpose of the adoption statutes. N.C. Gen. Stat. § 48-1-100 states in pertinent part:

> (1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, ...

N.C. Gen. Stat. § 48-1-100(b)(1) (1999). In light of this being the first primary purpose listed in N.C. Gen. Stat. § 48-1-100, our courts should be extremely cautious in determining that the consent of a biological father to the adoption of his child is not required. Accordingly, I believe that respondent's consent to the adoption of the minor child is necessary, and would reverse the order of the trial court.

DIALYSIS CARE OF NORTH CAROLINA, LLC, D/B/A DCNC, LLC, D/B/A DIALYSIS CARE OF ROWAN COUNTY, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE AND BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC. D/B/A BMA OF KANNAPOLIS D/B/A METROLINA KIDNEY CENTER OF KANNAPOLIS (LESSEE) AND METROLINA NEPHROLOGY ASSOCIATES, P.A. (LESSOR), RESPONDENTS-INTERVENORS-APPELLEES

No. COA99-436

(Filed 2 May 2000)

1. Hospitals and Other Medical Facilities— certificate of need—application—financial feasibility—conditional approval

The Department of Health and Human Services' final agency decision that approved the application for a certificate

of need was not defective based on its finding under N.C.G.S. § 131E-183(a)(5) that Bio-Medical Applications' (BMA) application was conditionally conforming to Criterion 5, concerning the financial feasibility of the project, because the whole record test reveals: (1) the availability of funds for the project was set out in BMA's application; and (2) the Certificate of Need Section issued a conditional approval requiring additional documentation, thus ensuring compliance with Criterion 5.

2. Hospitals and Other Medical Facilities— certificate of need—application—no improper amendment

Although the administrative law judge (ALJ) is limited to consideration of evidence which was before the Certificate of Need Section when making its initial decision concerning an application for a certificate of need, a de novo review reveals that the testimony at the contested case hearing, regarding NationsBanks' intent to finance Metrolina Nephrology Associates when the proposed borrower was listed as Kannapolis Nephrology Associates, did not constitute an amendment to Bio-Medical Applications' (BMA) application and was properly considered by the agency because: (1) the NationsBank finance letter was before the Certificate of Need Section when it made its initial decision; and (2) the ALJ is not limited to that part of the evidence that the Certificate of Need Section actually relied upon in making its decision.

3. Hospitals and Other Medical Facilities— certificate of need—final agency decision—no new evidence considered

The Department of Health and Human Services did not use new evidence, that was not before the administrative law judge (ALJ), in its final agency decision concerning an application for a certificate of need, including evidence that Bio-Medical Applications (BMA) has a history of operations in North Carolina, is known to the Certificate of Need Section, and the project analyst had previously reviewed BMA's applications, because: (1) BMA's application, which was before the ALJ, lists 32 facilities that BMA has constructed or acquired in North Carolina and an additional 17 facilities in North Carolina for which a certificate of need application was approved; and (2) the project analyst testified before the ALJ that she had performed reviews for BMA applications.

4. Hospitals and Other Medical Facilities— certificate of need—application—conditional approval—not arbitrary and capricious

The Department of Health and Human Services' final agency decision that conditionally approved the application for a certificate of need for a dialysis facility was not arbitrary and capricious where: (1) the conditions imposed explicitly required documentation of the availability of funds and of a commitment to provide those funds from the funding entity, as required by Criterion 5; and (2) the services were determined to be needed.

5. Hospitals and Other Medical Facilities— certificate of need—application—need for the proposed project

The Department of Health and Human Services' final agency decision that approved the application for a certificate of need for a dialysis facility was not defective based on its finding under N.C.G.S. § 131E-183(a)(3) that Bio-Medical Applications' (BMA) application conformed to Criteria 3, 4, and 6, concerning the need for the proposed project, because the whole record test reveals: (1) BMA identified 34 of its own patients who expressed a willingness to transfer their treatment from Concord to the proposed BMA facility in Kannapolis; (2) the project analyst determined that BMA's Kannapolis facility would meet or exceed the utilization guideline established by the agency; (3) the project analyst determined that BMA's proposal to relocate ten dialysis stations to a new facility in Kannapolis was the most effective alternative; and (4) the project analyst determined that BMA demonstrated a need to relocate dialysis stations to better serve their patients, and that such a relocation would not provide a duplication of services.

Chief Judge EAGLES dissenting.

Appeal by petitioner from the final agency decision entered 8 December 1998 and filed 9 December 1998 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 10 January 2000.

Poyner & Spruill, L.L.P., by William R. Shenton, Thomas R. West, and Eric P. Stevens, for petitioner-appellant.

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

Law Office of Joy H. Thomas, by Joy H. Thomas, for respondents-intervenors-appellees.

WALKER, Judge.

Dialysis Care of North Carolina ("DCNC") appeals from a final agency decision of the North Carolina Department of Health and Human Services (formerly the Department of Human Resources, N.C. Gen. Stat. § 143B-138.1 (1999)) ("Department" or "agency"), awarding a Certificate of Need ("CON") to Bio-Medical Applications of North Carolina, Inc. et al, ("BMA"). DCNC 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 DCNC.

BMA, a subsidiary of Fresenius Medical Care, provides dialysis treatment for kidney disease patients at their dialysis facilities in North Carolina, including Concord. DCNC also operates dialysis facilities in North Carolina, including facilities in Kannapolis and Salisbury. The DCNC Kannapolis facility was the focus of a dispute between these same two parties in this Court's recent decision in *BMA v. N.C. Dept. of Health and Human Services*, 136 N.C. App. 103, 523 S.E.2d 677 (1999). In that case, DCNC applied to transfer ten dialysis stations located at its Salisbury facility to a new location in Kannapolis, which BMA contested. This Court upheld the final agency decision awarding DCNC a CON for the Kannapolis facility. *Id.*

On 16 July 1997, BMA filed an application with the CON Section of the agency to establish a new ten-station dialysis facility in Kannapolis, whereby BMA would relocate ten of its Concord dialysis stations to the proposed Kannapolis facility so that the overall number of dialysis stations operated by BMA would not increase. BMA's application proposed that the new facility would be operated by BMA, but constructed by and leased from Metrolina Nephrology Associates, P.A. ("MNA"). The proposed facility would be approximately 7 miles from BMA's Concord facility and approximately 1.3 miles from DCNC's Kannapolis facility. BMA surveyed its Concord patients and determined that 34 patients expressed a willingness to transfer their dialysis treatment from the BMA Concord facility to the proposed BMA Kannapolis facility.

Initially, the CON Section found BMA's application incomplete because the lessor, MNA, had not submitted a certification page with

the application. In response, George Hart, M.D., Vice-President of MNA, submitted a notarized certification page to the CON Section and listed the applicant as "Kannapolis Nephrology Associates, LLC* (* A limited liability company to be formed by principles of [MNA], upon issuance of CON)." Upon receipt of this certification page, the CON Section deemed BMA's application to be complete.

The project analyst determined that the capital expenditure associated with the project was approximately $1.1 million and that MNA's portion of the costs was proposed to be $900,000. BMA's application contained a financing letter from Beth Blanton, Vice President and Relationship Manager of NationsBank. The financing letter expressed NationsBank's willingness to consider a loan to fund the proposed project up to 80% of the appraised value, which was determined by the project analyst to be $900,000. Accordingly, NationsBank evidenced a commitment of $720,000 (80% of $900,000).

On 7 November 1997, the CON Section issued a Conditional Approval of BMA's application, which required in part that:

> 5. Within 35 days of the date of this decision and prior to issuance of the certificate of need, Metrolina Nephrology Associates, P.A. shall submit documentation that $180,000 is available and committed by Metrolina Nephrology Associates, P.A. for its portion of the total capital cost of the project.
>
> 6. Within 35 days of the date of this decision and prior to issuance of the certificate of need, Bio-Medical Applications of North Carolina, Inc. d/b/a BMA of Kannapolis shall submit documentation from the person who is fiscally responsible for the funds to be used for the lessee's portion of the capital cost and for start-up and initial operating expenses that $539,076 is available and committed to this project.

Further, the Conditional Approval stated that the CON would not be issued "until all applicable conditions of approval that can be satisfied before issuance of the [CON] have been met pursuant to G.S. 131E-187(a)."

On 4 December 1997, DCNC filed a petition challenging the CON Section's decision to issue a Conditional Approval. BMA was permitted to intervene in the contested case on 4 February 1998.

At the contested case hearing before the Administrative Law Judge ("ALJ"), Ms. Blanton testified that the intent of the

NationsBank letter was "to finance for Metrolina or another entity that they would form to construct and for the permanent financing for the Kannapolis center." Further, she testified that:

> Our primary relationship is with Metrolina Nephrology, and with talking to Suzanne Mecum, who is with Metrolina and works with the other centers that they have, it was our intent to service Metrolina. And whether that be funding to Metrolina directly or to another entity that they set up specifically with the Kannapolis location, it was our intent to service either one and to finance that.

Ms. Blanton further testified that Metrolina had access to sufficient funds for the equity contribution of $180,000.

On 31 August 1998, the ALJ found that although the project was needed, BMA's application was incomplete and non-conforming with N.C. Gen. Stat. § 131E-183(a)(5) (1999) ("Criterion 5"), which pertains to the availability of funds for capital and operating needs of the facility.

On 8 December 1998, the Department's final decision concurred with the ALJ that the project was needed, but found BMA's application in compliance with N.C. Gen. Stat. § 131E-183. After making extensive findings, the Department concluded in part that:

> 3. The Agency appropriately determined that BMA was conforming with the applicable criteria regarding need. The Agency did not fail to consider DCNC's existing facility in Kannapolis, Rowan County in making its determination that the BMA facility was conforming with the need criteria.
>
> 4. The conditions imposed on the approval of the BMA application were lawful and appropriate pursuant to the statutory and regulatory authority granted to the Agency. N.C. Gen. Stat. § 131E-186(a) provides in part "[t]he department shall issue a decision to approve, approve with conditions or deny an application. . . ." 10 N.C.A.C. 3R.0313(a) provides in part "If a proposal is not consistent with all applicable standards, plans and criteria, the Agency decision shall be to either not issue the certificate of need or issue one subject to those conditions necessary to ensure that the proposal is consistent with applicable standards, plans and criteria." These conditions were properly imposed and sufficient to ensure conformity of the BMA application with the applicable criteria. The imposition of conditions

in this case did not prejudice any competing applicants, as there were none in this review.

. . .

6. The CON Section can conditionally approve an application with respect to Review Criterion 5 subject to the applicant supplying certain additional information.

7. The Agency acted reasonably in imposing conditions to require further confirmation to ensure availability and commitment for capital and operating needs and for the financial feasibility of the project.

8. The CON Section is authorized pursuant to N.C.G.S. § 131E-186(a) to approve a CON application; in this non-competitive review, it was not arbitrary or capacious [sic] for the Agency to use conditions to obtain statutorily required information.

9. Based upon the findings set forth above, the Agency did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by law or rule in violation of N.C. Gen. Stat. § 150B-23(a) in approving the application of BMA for the relocation of 10 stations to a new Kannapolis, Cabarrus County facility.

The Department determined "that a Certificate of Need shall be awarded to" BMA.

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. N.C. Employment Security Comm.*, 115 N.C. App. 590, 596, 446 S.E.2d 383, 387 (1994). Pursuant to G.S. § 150B-51(a), when reviewing a final decision in a contested case in which an ALJ made a recommended decision, this Court must make two initial determinations:

First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. Second, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recom-

> mended decision. If the court determines that the agency 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 agency to enter specific reasons.

N.C. Gen. Stat. § 150B-51(a) (1999). Although DCNC argues that the agency heard new evidence after receiving the ALJ's recommended decision, we conclude, as discussed *infra*, that the agency did not hear new evidence and that the Department's decision sufficiently states the reasons why the Department did not adopt the recommended decision. Accordingly, we proceed with our review of the Department's final decision.

Under G.S. § 150B-51(b):

> [T]he court reviewing a final agency decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 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(b) (1999). Although this statute "lists the grounds upon which the [reviewing] court may reverse or modify a final agency decision, the proper manner of review depends upon the particular issues presented on appeal." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994); *see also Utilities Comm. v. 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"). More than one standard of review may be utilized if required by the nature of the issues. *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118.

The appropriate standard of review is *de novo* for an assertion that the agency decision is based on an error of law under subsections (1),(2),(3) or (4). *See Hubbard v. State Construction Office*, 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); *Burke Health Investors, L.L.C. v. N.C. Dept. of Human Resources*, 135 N.C. App. 568, 522 S.E.2d 96 (1999).

When it is alleged that a final agency decision was not supported by the evidence or was arbitrary or capricious, this Court must apply the "whole record" test. *See Retirement Villages Inc. v. N.C. Dept. of Human Resources*, 124 N.C. App. 495, 498, 477 S.E.2d 697, 699 (1996); *Burke Health Investors*, 135 N.C. App. at 571, 522 S.E.2d at 99. 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.' " *Meads v. N.C. Dep't. of Agric.*, 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." *Meads*, 349 N.C. at 663, 509 S.E.2d at 170 (*quoting Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)); *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 393 (1997). We should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*. *See Meads*, 349 N.C. at 663, 509 S.E.2d at 170. While the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency. *See Employment Security Comm. v. Peace*, 128 N.C. App. 1, 7, 493 S.E.2d 466, 470 (1997), *affirmed in part and review dismissed in part*, 349 N.C. 315, 507 S.E.2d 272 (1998).

[1] First, DCNC argues the Department's decision finding that BMA's application was conditionally conforming to Criterion 5 was unsupported by substantial evidence. Accordingly, we employ the whole record test and review all competent evidence to determine if the agency's decision is supported by substantial evidence.

Criterion 5 states that "[f]inancial 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) (1999). Where the project is to be funded by an entity other than the applicant, the agency must have "evidence" of a commitment to provide the funds by the funding entity. *See Retirement Villages*, 124 N.C. App. at 499, 477 S.E.2d at 699.

The availability of funds for the project was set out in BMA's application. BMA submitted a letter from the Vice President of Finance for Fresenius Medical Care obligating sufficient funding. The CON Section conditioned its approval upon submission of documentation from the person fiscally responsible for the $539,076 associated with BMA's portion of the project. MNA's certification page agreed to carry out the project which required a combination of a loan and lessor's equity totaling $900,000. The NationsBank financing letter evidenced a commitment of $720,000 to the proposed project. Ms. Blanton testified that the intent of the letter was to service and finance the project for MNA "directly or [for] another entity that [MNA] set up specifically with the Kannapolis location." The certification page provided by George Hart described Kannapolis Nephrology Associates, LLC as "a limited liability company to be formed by the principles of [MNA]." Ms. Blanton also testified that MNA had access to sufficient funds for their equity contribution of $180,000. The CON Section issued a conditional approval requiring additional documentation to satisfy Criterion 5. As discussed *infra*, these conditions ensure compliance with Criterion 5.

Our review of the whole record reveals there was substantial evidence from which the agency could reasonably find that BMA's application conformed with Criterion 5, as conditioned, and thus DCNC's first assignment of error is without merit.

[2] Next, DCNC argues that evidence was submitted at the contested case hearing which constitutes an improper amendment to BMA's application and should not have been considered by the ALJ. Specifically, Ms. Blanton's testimony at the contested case hearing regarding NationsBank's intent to finance MNA when the proposed borrower was listed as Kannapolis Nephrology Associates constituted an amendment to BMA's application. Further, Ms. Blanton's testimony regarding MNA's access to sufficient funding for its equity contribution of $180,000 was also an improper amendment to BMA's application. DCNC's assertions require a *de novo* review.

An applicant may not amend a CON application. *See* 10 N.C.A.C. 3R.0306 (Dec. 1999 Supp.). The hearing officer (ALJ) is properly lim-

ited to consideration of evidence which was before the CON Section when making its initial decision. *See In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791 (1987). However, the ALJ is not limited to that part of the evidence before it that the CON Section actually relied upon in making its decision. *Id.* Information available to the agency at the time of the original decision may be relied upon in its final decision. *Id.*

The NationsBank finance letter was before the CON Section when it made its initial decision. The letter referred to the "more than satisfactory banking relationship[]" NationsBank has with MNA and Ms. Blanton, the letter's author, testified regarding NationsBank's intent to finance MNA and its access to sufficient equity funding. This information was available to the CON Section at the time of the initial decision. Accordingly, Ms. Blanton's testimony did not constitute an amendment to BMA's application and was properly considered by the agency.

[3] Next, DCNC claims the agency used new evidence in its final decision that was not before the ALJ. Specifically, the agency's findings that BMA has a history of operations in North Carolina, is "known to the CON Section," and that the project analyst had previously reviewed BMA applications, are the result of considering evidence not before the ALJ.

BMA's application lists 32 facilities that BMA has constructed or acquired in North Carolina and an additional 17 facilities in North Carolina for which a CON application was approved, but which were not yet in operation. With regard to the project analyst's experience with BMA, she testified before the ALJ that she had performed reviews for "BMA of King's Mountain, [North Carolina]" and "some BMA applications in Mecklenburg County, [North Carolina], for new facilities, or at least for relocation of stations." Thus, DCNC is unable to establish that the agency considered evidence not before the ALJ.

[4] Also, DCNC argues that the agency's attempt to condition BMA's application was beyond its statutory authority, because the agency lacked sufficient information before it to determine if the application was consistent with or in conflict with Criterion 5. Specifically, DCNC argues that "the Agency issued a CON at a time when it could not know whether the applicants would be able to satisfy indispensable statutory requirements." DCNC asserts that the agency acted erroneously, failed to follow proper procedure, exceeded its authority, and acted arbitrarily and capriciously.

Under N.C. Gen. Stat. § 131E-182, an applicant for a CON "shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria." Under N.C. Gen. Stat. § 131E-183(a), the Department "shall determine that an application is either consistent with or not in conflict with these criteria *before a certificate of need . . . shall be issued.*" (Emphasis added). N.C. Gen. Stat. § 131E-186 states in part, "the Department shall issue a decision to 'approve,' 'approve with conditions,' or 'deny,' an application for a new institutional health service." N.C. Gen. Stat. § 131E-186(a) (1999). Furthermore, N.C. Gen. Stat. § 131E-187 states in part:

> The Department shall issue a certificate of need within five days after [. . .] the final agency decision has been made following a contested case hearing, *and all applicable conditions of approval that can be satisfied before issuance of the certificate of need have been met.*

N.C. Gen. Stat. § 131E-187(b) (1999) (emphasis added).

Thus, the Department's rules mandate that the Department either issue a CON *subject* to conditions that ensure the proposal becomes consistent with all criteria or deny a CON to a non-conforming applicant. Specifically, Title 10 N.C.A.C. 3R.0313 states in part:

> If a proposal is not consistent with all applicable standards, plans, and criteria, the agency decision shall be to either not issue the certificate of need *or issue one subject to those conditions* necessary to insure that the proposal is consistent with applicable standards, plans, and criteria. The agency *may only impose conditions which relate directly to applicable standards, plans, and criteria.*

10 N.C.A.C. 3R.0313 (Dec. 1999 Supp.) (emphasis added).

Additionally, this Court has approved the practice of conditioning CON applications. *See In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986) (stating "the law does not require that applications for certificates of need be approved precisely as submitted or not at all, and it would be folly if it did so"); *Burke Health Investors*, 135 N.C. App. at 576, 522 S.E.2d at 101. Further, this Court has held that it was not error for a hearing officer (ALJ) to condition her approval of a CON application upon information to be furnished later, rather than returning the case

to the project analyst for further review, because "N.C. Gen. Stat. § 131E-185 authorizes the Department to issue a CON with or without conditions." *In re Conditional Approval of Certificate of Need*, 88 N.C. App. 563, 566, 364 S.E.2d 150, 152, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 220 (1988).

Here, the CON Section conditioned its approval upon BMA submitting documentation that $180,000 is available and committed by MNA for its equity portion of the total capital cost of the project and documentation "from the person who is fiscally responsible for the funds to be used for the lessee's portion of the capital cost and for start-up and initial operating expenses that $539,076 is available and committed to this project." These two conditions "insure that the proposal is consistent with applicable . . . criteria." 10 N.C.A.C. 3R.0313. The conditions imposed explicitly require documentation of the availability of funds and of a commitment to provide those funds from the funding entity, as required by Criterion 5.

DCNC calls our attention to the agency's decisions to deny two BMA applications for dialysis stations in Johnston County and Robeson County. DCNC argues that the agency found these BMA applications non-conforming with respect to Criterion 5 under similar circumstances to the present case. However, in the Robeson and Johnston decisions, both of which were competitive reviews between these same parties, the agency found BMA's and DCNC's applications non-conforming because of numerous deficiencies. No doubt of particular importance was the agency's determination there was a lack of need for the services proposed by the parties in both Robeson County and Johnston County.

Here, the initial determination by the CON Section, the ALJ's recommended decision, and the final decision all concluded that this project was needed. Additionally, there was substantial evidence from which the agency could reasonably find BMA's application conditionally conforming with Criterion 5. Under these circumstances, the agency's decision to conditionally approve a CON application where the services are determined to be needed does not rise to the level of arbitrary and capricious decision-making.

[5] Finally, DCNC argues that the final decision's findings that BMA's application conformed with N.C. Gen. Stat. § 131E-183(a)(3), (4) and (6) ("Criteria 3, 4, and 6") were not supported by substantial evidence. As previously stated, this Court must apply the whole record test to determine whether the final decision is supported

by substantial evidence. Criteria 3, 4 and 6 relate to the need for the proposed project.

In its application, BMA identified 34 of its own patients who expressed a willingness to transfer their treatment from Concord to the proposed BMA facility in Kannapolis. After consulting with these BMA patients, BMA's Nursing Director confirmed their interest in transferring their dialysis treatment. The project analyst determined that BMA's Kannapolis facility would meet or exceed the utilization guidelines established by the agency. The project analyst also determined that relocation of ten dialysis stations to Kannapolis would create better access for BMA's current patients.

BMA's application presented the alternatives that were considered: (1) relocating stations to develop a new facility at a new site, (2) expansion of the existing facility, and (3) doing nothing. BMA indicated that its most viable and cost effective alternative was a proposal to relocate ten dialysis stations to a new facility in Kannapolis. The project analyst testified that she evaluated the alternatives proposed by BMA "and determined that they had selected the most effective alternative."

With regard to unnecessary duplication of services, the project analyst determined that BMA demonstrated a need to relocate dialysis stations to better serve their patients and that such a relocation would not provide such a duplication of services. Additionally, the project analyst testified that she took into consideration that DCNC operates a dialysis center in Kannapolis, but did not "consider it a factor," because BMA's identification of 34 of its own patients to be served at the proposed Kannapolis facility was "a good indication of [BMA] being able to serve that number of patients one and a half to two and a half years down the line and meet their utilization projections."

In sum, there was substantial evidence from which the Department could reasonably find that BMA's application conformed with Criteria 3, 4, and 6. Accordingly, DCNC's final assignment of error is also without merit.

Affirmed.

Judge WYNN concurs.

Chief Judge EAGLES dissents.

Chief Judge EAGLES dissenting.

I respectfully dissent.

G.S. § 131E-183 mandates compliance in all substantive aspects with its review criteria, including Criterion 5. *See Retirement Villages v. N.C. Dept. of Human Resources*, 124 N.C. App. 495, 477 S.E.2d 697 (1996); *Presbyterian-Orthopedic Hospital v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 470 S.E.2d 831 (1996); *Britthaven v. Dept of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455, *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

In light of this mandate, it is clear that G.S. §§ 131E-185 and 186, when read in conjunction with G.S. § 131E-183, grant DHHS limited power to conditionally approve deficient CON applications only where the additional information sought by the Agency by means of conditions is not essential to an applicant's compliance with the mandatory review criterion in the first place. *See* G.S. § 131E-182 (applicants "shall be required to furnish . . . that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. [§] 131E-183"). Consequently, I would hold that 10 N.C.A.C. 3R.0313, relied upon by DHHS and BMA here, exceeds the Agency's statutory authority to the extent that it purports to grant the Agency the power to conditionally approve CON applications pending receipt of information which is "necessary" for compliance with G.S. § 131E-183.

Despite this Court's specific approval of the Agency's authority to issue conditional approvals, *see Humana*, *Burke*, and *In re Conditional Approval*, we have never held that the Agency has unbridled authority to sidestep G.S. § 131E-183's clear mandate that applicants provide all necessary information in their initial filings. Prior cases upholding conditional approvals have noted that the information omitted by applicants (and sought by means of the imposition of conditions by the CON Section) was not "essential" to a finding of conformity with G.S. § 131E-183. *See Burke*, 135 N.C. App. at 576, 522 S.E.2d at 102 (finding that the conditions placed on nonconforming applications "were not essential to its approval" because additional Criterion 5 documentation sought by the Agency "was not crucial to a finding of financial feasibility"); *In re Conditional Approval of Certificate of Need*, 88 N.C. App. at 566, 364 S.E.2d at 152, citing *Humana* (approval conditioned on the later provision of information which "did not change the proposal in any material or practical sense and was not unauthorized"). Requiring conformity

with G.S. § 131E-183 would not, however, confine the Agency to approving CON applications "precisely as submitted or not at all," see *Burke*, 135 N.C. App. at 576, 522 S.E.2d at 102, citing *Humana*, 81 N.C. App. at 632, 345 S.E.2d at 237, because not all deficiencies would relate to essential prerequisites. For instance, the Agency would be well within its power to condition approval on the provision of additional details clarifying information already contained in *conforming applications*.

In the "Required State Agency Findings" attached to the CON Section's letter conditionally approving BMA's application, CON Section project analyst Mary Edwards found that (1) BMA "did not provide any documentation that [MNA] has $180,000 available and committed [for the owner's equity portion of the capital costs for] . . . this project," and (2) "it is not clear if Fresenius Medical Care . . . is funding [the lessee's $539,076 portion of the capital cost and for start-up and initial operating expenses of] the project." Based on these findings of nonconformity with Criterion 5, I would reverse on grounds that (1) the omitted financial information was essential and "necessary" for the CON section to determine BMA's initial conformity with Criterion 5, (2) the omission could not be cured by the imposition of conditions pursuant to G.S. §§ 131E-185 and 186 or relevant agency rules, and (3) the omission should have precluded the issuance of a CON to the nonconforming applicant under G.S. § 131E-183.

KARL DAVID PATTERSON, BY AND THROUGH HIS ADMINISTRATOR, MILLER JORDAN, PLAINTIFF v. CAROLYN DURDLE PATTERSON, DEFENDANT v. PAULA S. PATTERSON, INTERVENOR AND THIRD-PARTY DEFENDANT, AND TEACHERS INSURANCE ANNUITY ASSOCIATION—COLLEGE RETIREMENT EQUITIES FUND, THIRD-PARTY DEFENDANT

No. COA99-70

(Filed 2 May 2000)

1. Divorce— equitable distribution—retirement account—findings

The trial court did not err in an equitable distribution action involving a retirement account by finding that the parties had advised the court that the claim had been resolved, that the parties had corresponded about the final form of a Qualified

Domestic Relations Order, and that neither party had tendered a QDRO to the court on the date on which plaintiff died.

2. Divorce— equitable distribution—retirement plan—conclusions supported by findings

Findings by the trial court in an equitable distribution action that plaintiff's obligation to divide his retirement account survived his death and that plaintiff's UNCC retirement plan was a "government plan" were conclusions rather than findings, as the third-party defendant contended; however, both conclusions were supported by findings.

3. Divorce— equitable distribution—retirement plan—QDRO—not required

A defendant in an equitable distribution action did not lose all rights she may have had in plaintiff's retirement account where plaintiff and defendant separated, the parties agreed in a consent order to a Qualified Domestic Relations Order granting defendant 20% of plaintiff's retirement account, plaintiff changed the beneficiary on the account to his new wife, and the QDRO was never entered. Plaintiff's UNCC retirement plan is a governmental plan exempt from the anti-assignment provisions of ERISA; while a QDRO constituted an approved method of effectuating a court-ordered equitable distribution of retirement benefits under the state statute, that language is permissive rather than mandatory; and language in the consent order in this case satisfied the statutory requirements. The purpose of the QDRO was to preserve defendant's interest rather than to create it; while entry of a QDRO may have been contemplated, defendant acquired an interest in the retirement plan upon execution of the consent order and that interest existed separate from any prospective QDRO.

4. Divorce— equitable distribution—retirement account—waiver and laches

An equitable distribution defendant's claims to a retirement account were not barred by waiver or laches where plaintiff and defendant separated; they agreed that defendant should have 20% of plaintiff's retirement account; a Qualified Domestic Relations Order to that effect was discussed but never entered; plaintiff remarried and made his new wife (the third-party defendant) the beneficiary of the account; and plaintiff passed away 5 years later. The record is not clear regarding the failure to enter the

QDRO, but the intention to relinquish a right, necessary for waiver, has not been shown, and laches requires prejudice, which is also missing because defendant is entitled to her 20% share even without a QDRO.

Appeal by intervenor from order entered 16 October 1998 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 15 November 1999.

Essex, Richards, Morris, Jordan & Matus, P.A., by G. Miller Jordan, for plaintiff-appellee Karl D. Patterson. No brief filed.

James, McElroy & Diehl, P.A., by Richard A. Elkins and Paul P. Browne, for defendant-appellee Carolyn D. Patterson.

Odom & Groves, P.C., by Thomas L. Odom, Jr., for intervenor and third-party defendant-appellant Paula S. Patterson.

Cansler, Lockhart, Campbell, Evans, Bryant & Garlitz, P.A., by George K. Evans, Jr., for third-party defendant-appellee Teachers Insurance Annuity Association—College Retirement Equities Fund. No brief filed.

JOHN, Judge.

Intervenor and third-party defendant Paula S. Patterson (Paula) appeals the trial court's order denying her motions for judgment on the pleadings and summary judgment and granting defendant's motion for entry of a Qualified Domestic Relations Order (QDRO). We affirm.

Pertinent procedural and generally uncontested background information includes the following: defendant Carolyn D. Patterson (Carolyn) and Karl D. Patterson (Karl) were married 30 August 1963. For many years during the marriage, Karl worked as a professor at the University of North Carolina at Charlotte (UNCC). During his employment at UNCC, Karl participated in a retirement plan offered by the university (the UNCC retirement plan) and administered by Teachers Insurance Annuity Association and College Retirement Equities Fund (TIAA-CREF).

Carolyn and Karl separated 8 July 1986, Karl filed a divorce complaint (the district court case) 22 February 1988, Carolyn counterclaimed therein for equitable distribution, and the divorce was granted 25 April 1988. Carolyn's equitable distribution claim was

subsequently settled by means of a "Consent Order and Judgment" (the Consent Order) filed 18 March 1991.

Relevant provisions of the Consent Order included the following:

> The parties stipulate and agree that in order to effectuate the terms of this Consent Order and Judgment, a [QDRO] will need to be prepared and entered by the Court so as to grant to [Carolyn] a twenty percent (20%) interest in [Karl's] retirement plan with TIAA-CREF, valued as of the date of the separation of the parties. The parties stipulate and agree that the Court shall retain jurisdiction so as to enter such QDRO when prepared.
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> . . . .
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> This Court expressly retains jurisdiction to enter all such [QDRO's] as may be necessary to preserve to [Carolyn] a twenty percent (20%) interest in [Karl's] TIAA-CREF retirement plan, further preserving to [Carolyn] all of her rights to such retirement plan as set forth under the provisions of N.C.G.S. § 50-20[(b)(3)(1987)].

In addition, a Property Settlement Agreement (the Agreement) executed by Carolyn and Karl was incorporated by reference into the Consent Order. The Agreement contained the following pertinent provisions:

> [Karl] is a participant in a retirement plan [the TIAA-CREF plan] . . . . The parties have stipulated and agreed that [Carolyn] shall be granted a twenty percent (20%) share of said retirement plan, valued as of the date of separation of the parties . . . . In order to preserve to [Carolyn] her twenty percent (20%) share of the TIAA-CREF [plan], it will be necessary to have the Court enter a [QDRO] . . . . [Carolyn] shall be responsible for the preparation of said QDRO, and [Karl] shall cooperate with [Carolyn] so that such preparation may be done expeditiously. [Karl] shall execute all such documents as may be necessary to place such QDRO in effect.
>
> . . . .
>
> Except [as] otherwise provided herein, all the provisions of this Agreement shall be binding upon the heirs, next of kin, executors and administrators of each party.

Meanwhile, Karl married Paula 16 February 1990 and named her sole beneficiary of the UNCC retirement plan. Karl died intestate 19 November 1996. No QDRO had been entered pursuant to the Agreement and Consent Order prior to Karl's death.

Paula was named administratix of Karl's estate 31 January 1997. On 26 March 1997, Carolyn filed a motion in the district court case, requesting "entry of a mandatory injunction requiring [Karl's estate] to consent to the entry of the [QDRO]" envisioned earlier. Carolyn thereby sought preservation of her twenty percent interest in the proceeds of the UNCC retirement plan, valued as of the date she and Karl separated, *see* N.C.G.S. § 50-20(b)(3) (1987) (award of pension benefits shall be determined "using the proportion of time the marriage existed . . . up to the date of separation of the parties"); *see also* 1987 N.C. Sess. Laws ch. 663, §§ 1, 2 (amendments to G.S. § 50-20(b)(3) effective 1 October 1987 and applicable to actions for absolute divorce filed on or after that date (Karl's divorce action herein filed 22 February 1988)). Carolyn's interest hereinafter will be denominated simply as "twenty percent" without specifying that such interest must be valued as of the date of separation.

On 21 May 1997, Paula initiated a separate action in superior court (the superior court case) against Carolyn and TIAA-CREF, "requesting a declaratory judgment as to the TIAA-CREF funds in dispute." In a subsequent motion to intervene in the district court case, Paula alleged that, in consequence of Carolyn's March 1997 motion, "TIAA-CREF has not disbursed to [Paula] funds she is entitled to as primary beneficiary" of the UNCC retirement plan.

A stay was entered in the superior court case 6 August 1997 pending resolution of Carolyn's motion in the district court case. By order dated 29 December 1997, the district court (1) substituted Karl's estate, Miller Jordan by that point having been designated administrator, as named plaintiff in lieu of Karl in the underlying district court case; (2) allowed Paula to intervene therein; and, (3) joined both Paula and TIAA-CREF as third-party defendants.

On 16 October 1998, the district court (hereinafter, the trial court), upon rendering extensive factual findings, (1) granted Carolyn's motion for entry of a QDRO and ordered Karl's estate "to authorize TIAA-CREF to transfer to [Carolyn] 20% of the value of the TIAA-CREF account;" (2) "declare[d] Carolyn . . . to be the owner of a 20% share of the TIAA-CREF account;" (3) denied Paula's previously submitted motions for judgment on the pleadings and summary judg-

ment; and, (4) retained jurisdiction over the cause for the purpose of entering the QDRO. Paula timely appealed, citing seven assignments of error.

[1] Preliminarily, we address Paula's contentions relating to certain of the trial court's findings of fact (findings). Paula first challenges the following portions of findings 9 and 13 "because these findings of fact are not supported by competent evidence:"

> 9. Prior to [Carolyn's] claim for equitable distribution being called for trial, [Karl and Carolyn] advised the Court, through counsel, that the claim had been resolved and compromised. The parties' attorneys at that time were Alan P. Krusch for [Karl] and Paul A. Reichs for [Carolyn]. The parties, through counsel, submitted a Consent Order and Judgment to the Court which was entered on March 18, 1991. . . .
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> . . . .
>
> 13. For a number of months following the entry of the Consent Order and Judgment, the parties' attorneys . . . corresponded with one another regarding the final form of the [QDRO] as contemplated by the parties in their settlement. Drafts of a proposed [QDRO] were prepared and exchanged. [Carolyn] remained in contact with her attorney throughout this period, inquiring about the status of the [QDRO]. Nevertheless, as of the date on which [Karl] died . . ., neither party had tendered to the Court a [QDRO] effecting the division of the TIAA-CREF [plan] as agreed and ordered.

With respect to finding 9, Paula asserts

> there is no affidavit from Carolyn, [or either of the named attorneys] to support the alleged conversation with the Court. Neither is there a transcript to support these findings.

Paula's first argument borders on the frivolous.

The Consent Order itself, filed 18 March 1991 and signed by Carolyn, Karl and Judge William G. Jones, the trial judge in the case *sub judice*, expressly stated that the parties

> advised the Court that all matters in controversy between the parties with respect to their claims for equitable distribution of marital property have been settled, compromised and agreed. . . .

This provision alone, attested to by Carolyn and Karl, suffices to sustain the challenged portion of finding 9. *See Brandon v. Brandon*, 132 N.C. App. 646, 652, 513 S.E.2d 589, 593 (1999) (findings of trial court are conclusive on appeal if supported by competent evidence).

Likewise, competent evidence in the record supports finding 13. Carolyn submitted copies of correspondence between original counsel for Karl and Carolyn as part of her response to Paula's request for production of documents (the document response). The letters, dating from 1988 until April 1992, indicated counsel had communicated regarding the QDRO for more than a year following filing of the Consent Order, and that Carolyn had been in contact with her attorney during this period as well. Included among the correspondence was a proposed QDRO, and Carolyn stated in the document response that, upon reviewing her attorney's files, she had "determined that a number of drafts of the [QDRO] were exchanged between the attorneys."

While not necessarily insisting the foregoing fails to support finding 13, Paula instead attacks the competency thereof, arguing (1) Carolyn's document response was unverified and therefore not an affidavit, and that, (2) even if considered an affidavit, Carolyn's assertions in her document response constituted hearsay and the attached documents were unauthenticated. These contentions lack merit.

First, Paula neglected to raise the issues of hearsay or authentication in the trial court, thereby failing to preserve such matters for appellate review. *See* N.C.R. App. P. 10(b)(1) ("[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. . . .").

Moreover, assuming *arguendo* both preservation of the question for our consideration and that an affidavit was indeed required, the record contains an affidavit by Carolyn specifically incorporating by reference her document response as well as the attachments thereto.

> To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein.

Booker v. Everhart, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978). Carolyn's document response therefore must be regarded as part of her later affidavit. *See id.*

[2] Paula next maintains the following portions of findings 11 and 16 "are not findings of fact but conclusions of law [and are] not supported by competent evidence":

> 11. The above provisions, as part of the Court's Consent Order and Judgment dated March 18, 1991, establish that *[Karl's] obligation to divide the TIAA-CREF account survived his death, and that this obligation is binding upon his heirs, including [Paula].*
>
> . . . .
>
> 16. . . . *The UNCC plan* was established by the State of North Carolina for the employees of its university, and therefore *constitutes a "governmental plan" within the meaning of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(32). Since "governmental plans" are expressly excluded from coverage by [ERISA], 29 U.S.C. § 1003(b)(1), the UNCC plan is not subject to the requirements of ERISA.*

(emphasis added).

Paula correctly characterizes the preceding italicized portions as conclusions of law and we therefore treat them as such on appeal. *See Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) ("[a]lthough designated as a finding of fact, the character of this statement is essentially a conclusion of law and will be treated as such on appeal"). However, she further suggests the italicized conclusions are not supported by the trial court's findings. *See Brandon*, 132 N.C. App. at 653, 513 S.E.2d at 594 ("trial court's findings of fact must support its conclusions of law"). We do not agree.

The challenged conclusion in "finding" 11 is amply supported by finding 10, which contains "[t]he above provisions" referred to in finding 11. The reference is to sections of the Consent Order and Agreement previously set out herein, and it appears the trial court was simply interpreting those provisions in reaching its legal conclusion.

The conclusion of law included in "finding" 16 describes the UNCC retirement plan as a government plan and therefore exempt from ERISA. However, this conclusion is supported by the remaining portions of finding 16 reciting that the UNCC retirement plan "was established by the State of North Carolina for the employees of its

university," and by certain other findings unchallenged by Paula. Finding 21, for example, states that

> TIAA-CREF provides funding for a retirement plan established pursuant to Chapter 135 of the North Carolina General Statutes, which covers professors employed at

UNCC, and finding 29 makes reference to Karl's "optional retirement plan adopted by the University of North Carolina," both supporting the court's conclusion that the UNCC retirement plan was governmental.

[3] We turn now to the heart of the instant appeal, Paula's third assignment of error asserting

> Carolyn lost all possible rights she may have had to the TIAA-CREF funds by her failure to have a QDRO entered prior to Karl's death. . . .

According to Paula, she "is entitled to the TIAA-CREF funds by virtue of her status as sole beneficiary" of the UNCC retirement plan, and further this Court should reverse the trial court and remand for entry of judgment "declaring [Paula] as a matter of law the sole owner of and solely entitled to the death benefits payable from the TIAA-CREF annuities." Paula is mistaken.

We first emphasize that the trial court correctly determined that the UNCC retirement plan was a "governmental plan" not subject to federal regulation under provisions of the Employee Retirement Income Security Act, codified at 29 U.S.C. § 1001 *et seq.* (1994) (ERISA). ERISA contains a preemption clause stating that the provisions thereof "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a), unless specifically exempted from coverage.

> Governmental plans are defined in the federal statute as
>
> plan[s] established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

29 U.S.C. § 1002(32). "Governmental plans" are pointedly exempted from ERISA coverage, 29 U.S.C. § 1003(b)(1), and notably from the "anti-assignment" provision allowing benefits to be distributed to the

spouse of a participant only pursuant to a court order meeting certain specified criteria, 29 U.S.C. § 1056(d)(3)(A), *i.e.*, a QDRO.

The trial court's determination in finding 16 that the UNCC retirement "plan was established by the State of North Carolina for the employees of its university" has been discussed above. Significantly, Paula has not maintained this portion of the finding was not supported by competent evidence; it is therefore binding on appeal. *See Steadman v. Pinetops*, 251 N.C. 509, 514-15, 112 S.E.2d 102, 106 (1960) (findings of fact to which no exceptions are made "are presumed to be supported by competent evidence and are binding on appeal").

In addition, Paula concedes in her appellate brief that the UNCC retirement plan was "established pursuant to Chapter 135 of the North Carolina General Statutes." Paula is referring to N.C.G.S. § 135-5.1 (1999), originally enacted in 1971, which provides:

> (a) An Optional Retirement Program provided for in this section is authorized and established and shall be implemented by the Board of Governors of The University of North Carolina . . . for the benefit of administrators and faculty . . . .

In short, the UNCC retirement plan is a governmental plan exempt from the anti-assignment provisions of ERISA. *See* 29 U.S.C. §§ 1002(32), 1003(b)(1); *see also Roy v. Teachers Ins. and Annuity Ass'n*, 878 F.2d 47 (2nd Cir. 1989) (plan established by New York State Legislature for benefit of professional employees of State University of New York, with TIAA-CREF as the designated insurer, was a governmental plan and thus exempt from ERISA); *cf. In re Marriage of Norfleet*, 612 N.E.2d 939 (Ill. App. Ct. 1993) (retirement account subject to ERISA may be "assigned or alienated" only by means of a QDRO, 29 U.S.C. § 1056(d)(3)(A)).

We therefore turn to applicable provisions of state law. N.C.G.S. § 135-9 (1999) provides that

> [*e*]*xcept . . . in connection with a court-ordered equitable distribution under G.S. [§] 50-20*, the right of a person to a pension, or annuity, or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of this Chapter . . . are exempt from levy and sale, garnishment, or any other process whatsoever, and

> shall be unassignable except as in this Chapter specifically otherwise provided.

(emphasis added). Karl's interest in the UNCC retirement plan was therefore assignable "in connection with a court-ordered equitable distribution" pursuant to G.S. § 50-20. *Id.*

Compared with the rigid limitation on assignment in ERISA, *see* 29 U.S.C. § 1056(d)(3)(A), the broad language of G.S. § 135-9, coupled with the relevant provisions of G.S. § 50-20 considered below, indicate that assignment of a state retirement plan under the North Carolina statutory scheme may be effected by court orders other than a QDRO. In this context, we note Congress added the anti-assignment exception for QDROs to ERISA in 1984. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 104, 98 Stat. 1426, 1433-36 (1984) (codified at 29 U.S.C. § 1056(d)(3)(A)). G.S. § 135-9 was amended the next year to incorporate the anti-assignment exception for "court-ordered equitable distribution[s]." *See* 1985 N.C. Sess. Laws ch. 402, § 1. Had the General Assembly wished to limit the exception to QDROs, it could have followed the example presented in ERISA and employed much narrower language. *See Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 316, 233 S.E.2d 895, 898 (1977) (by modifying language from similar federal act, "North Carolina legislature must have intended to alter its meaning").

The version of G.S. § 50-20 applicable to the instant case provides that

> [t]he distributive award of vested pension, retirement, and other deferred compensation benefits may be made payable:
>
> . . . .
>
> c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits. . . .
>
> . . . The award shall be based on the vested accrued benefit . . . calculated as of the date of separation. . . .
>
> . . . .
>
> *The Court may require distribution of the [pension] award by means of a qualified domestic relations order*, as defined in section 414(p) of the Internal Revenue Code of 1986. . . .

G.S. § 50-20(b)(3) (1987) (emphasis added).

Thus the plain meaning of the applicable version of the statute, *see Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (if language of statute is clear, courts must give statute its plain meaning), is that trial courts might utilize QDROs to distribute pension awards, but that QDROs were not the sole mechanism available. As our Supreme Court has stated,

> the use of "may" generally connotes permissive or discretionary action and does not mandate or compel a particular act.

Campbell v. Church, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). To summarize, while QDROs constituted an approved method of effectuating a "court-ordered equitable distribution" of retirement plan benefits under G.S. § 135-9, the governing statutory language was permissive (presumably to allow trial courts to observe the strictures of ERISA) rather than mandatory.[1]

In the case *sub judice*, the Consent Order, once signed and entered by the trial judge, became a "court-ordered equitable distribution" for purposes of G.S. § 135-9. *See White v. White*, 289 N.C. 592, 596, 223 S.E.2d 377, 380 (1976) ("[t]hat the order is based on an agreement of the parties makes it no less an order of the court once it is entered"). Carolyn and Karl therein

> stipulated and agreed that [Carolyn] shall be granted a twenty percent (20%) share of [Karl's] retirement plan, valued as of the date of separation of the parties. . . .

This language alone, incorporated into the Consent Order executed by the trial court pursuant to an equitable distribution claim, satisfied the requirements of G.S. § 135-9 to effectuate a valid assignment of retirement benefits. No QDRO was required.

Although decided under ERISA, *Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856, *disc. review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993), supports this conclusion. Robert and Peggy Evans entered into a property settlement agreement which was incorporated into a consent judgment. *Id.* at 793, 434 S.E.2d at 858. The agreement provided Peggy would "receive as alimony thirty percent (30%) of all income from [Robert's] pension or retirement plan" at his retirement. *Id.* at 794, 434 S.E.2d at 858. Although complying with other alimony

1. In this regard, we note the statute has recently been amended and now reads as follows: "[t]he court may require distribution of the [pension] award by means of a qualified domestic relations order . . . *or by other appropriate order* . . . ." N.C.G.S. § 50-20.1(g) (1999) (emphasis added).

provisions during his employment, Robert failed to make the required payments upon his retirement and Peggy filed motions seeking an order of compliance and that Robert be held in contempt. *Id.*

Robert's private pension plan was subject to ERISA and he argued that any purported assignment thereof was void under the version of the federal statute (not containing the current exemption allowing assignment by means of a QDRO) in effect at the time the parties' agreement was executed. *Id.* at 795, 434 S.E.2d at 858-59. This Court, however, construed the applicable version of ERISA as containing

> an implied exemption to the anti-assignment provision . . . for domestic relation decrees authorizing the transfer of retirement benefits in satisfaction of support obligations. . . .
>
> Since the 1981 [consent] judgment in the case at bar and the implied exception followed by the majority of jurisdictions, Congress has amended the anti-alienation clause of ERISA. Known as the Retirement Equity Act of 1984 . . . Congress amended [29 U.S.C.] § 1056(d) by creating an exception for certain domestic relations orders . . . which were determined to be qualified domestic relations orders. . . . The 1984 amendment, however, has no retroactive effect on the 1981 judgment at issue.

Id. at 796-97, 434 S.E.2d at 859-60.

Thus, under the earlier version of ERISA which did not specifically require a QDRO to assign an interest in pension benefits, the simple language of the parties' agreement incorporated into a court order adequately secured Peggy's interest in Robert's pension. Robert was ordered to pay Peggy one-third of his retirement payout. *Id.* at 797, 434 S.E.2d at 860.

Similarly, in the instant case, because the applicable versions of G.S. §§ 135-9 and 50-20(b)(3) did not mandate entry of a QDRO to assign a retirement plan, the plain language of the Agreement incorporated into the Consent Order served to secure Carolyn's twenty percent interest.

> [S]eparation agreements incorporated into court decrees are construed and interpreted in the same manner as other contracts,

Britt, 49 N.C. App. at 468, 271 S.E.2d at 925, as are assignment clauses, *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990).

> When parties use clear and unambiguous terms, a contract can be interpreted by the court as a matter of law.

Id.

The provisions of the Agreement are indeed "clear and unambiguous," *id.*: Carolyn "shall be granted a twenty percent (20%) share of [Karl's] retirement plan." Further, while entry of a QDRO may have been contemplated, the Consent Order reflects that Carolyn's interest existed separate from any prospective QDRO:

> In order to preserve to [Carolyn] her said twenty percent (20%) share of the TIAA-CREF Retirement Plan, it will be necessary to have the Court enter a [QDRO]. . . .

The purpose of the QDRO was to "preserve" Carolyn's interest, not create it.

Parenthetically, we observe that insertion of the QDRO provision at issue may have been for the purpose of avoiding the circumstance in *Evans*. The pension benefits therein were disbursed to the husband, who in turn was required to disburse a thirty percent share to his former spouse. *Evans*, 111 N.C. App. at 794, 434 S.E.2d at 858. Use of a QDRO permits pension benefits to flow directly from the insurer to both parties in the proportion ordered by the court, thereby "preserving" the rights of the assignee (herein Carolyn) without having to rely upon the assignor to effectuate distribution.

In any event, we conclude it to be immaterial whether a QDRO was entered before Karl's death because Carolyn acquired an interest in the UNCC retirement plan upon execution of the Consent Order. Paula's argument therefore fails. As the trial court properly stated in its 16 October 1998 order,

> by contractually agreeing to transfer 20% of the TIAA-CREF accounts to [Carolyn], and by consenting to the entry of the March 18, 1991 Order, [Karl] transferred at that time all of his right, title and interest in that portion of the accounts to [Carolyn]. Any interest that Paula Patterson had in the accounts as of the date of [Karl's] death was taken subject to the terms of the Court's prior order.

[4] Having determined Carolyn retained an interest in the UNCC retirement plan, we now consider whether the trial court erred in

granting Carolyn's motion for entry of a QDRO to facilitate payment thereof. Addressing this issue, Paula contends in her remaining assignments of error that "Carolyn's claims are barred by the equitable doctrines of waiver and laches," and that the trial court lacked subject matter jurisdiction (1) "to substitute the estate of Karl as a defendant;" (2) "to enter a QDRO;" or, (3) "to require the estate to enter into a QDRO after Karl's death." Paula's concluding arguments are unavailing.

Although more than five years passed between entry of the Consent Order and Karl's death, we cannot agree with Paula that failure to enter the QDRO "was due solely to [Carolyn] or [Carolyn's] then attorneys' negligence and neglect." The trial court rendered no such finding, but, as noted above, simply recited in finding 13 that counsel for Karl and Carolyn had "corresponded with one another" for "a number of months" with no QDRO being entered. Moreover, although the Agreement designated Carolyn and her attorney as "responsible for the preparation of said QDRO," Karl and his attorney were similarly required to "cooperate" so that the QDRO might be prepared "expeditiously."

Frankly, the record is not clear regarding the reasons underlying failure of the QDRO to be entered prior to Karl's death, five years after execution of the Consent Order. Nonetheless, it goes without saying that the present controversy could have been avoided in its entirety had original counsel diligently fulfilled their responsibilities.

In any event, the doctrines of waiver and laches do not serve to block the trial court's belated directive that a QDRO be entered. Waiver

> is always based upon an express or implied agreement. There must always be an *intention* to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been *intentionally* given up.

Klein v. Insurance Co., 289 N.C. 63, 68, 220 S.E.2d 595, 598-99 (1975) (emphasis added). Paula has presented no evidence of an intent on Carolyn's part to waive her right under the Consent Order and Agreement to entry of a QDRO or of any action by Carolyn that would imply such intent, but rather insists that "neglect" by Carolyn caused the failure of the QDRO to be entered. Waiver is thus not present herein.

Regarding laches, this Court has held that

> [t]he defense of laches will bar a claim when the plaintiff's delay in seeking a known remedy or right has resulted in a change of condition which would make it unjust to allow the plaintiff to prosecute the claim. . . .
>
> . . . The doctrine of laches, however, is not based upon mere passage of time; it will not bar a claim unless the delay is (I) unreasonable and (ii) injurious or prejudicial to the party asserting the defense.

Cieszko v. Clark, 92 N.C. App. 290, 297, 374 S.E.2d 456, 460 (1988).

Although the party asserting laches bears the burden of proof thereon, *Harris & Gurganus v. Williams*, 37 N.C. App. 585, 588, 246 S.E.2d 791, 794 (1978), neither Paula's appellate brief nor the record contain any indication of prejudice. Given our holding that Carolyn is entitled to her twenty percent share of the UNCC retirement plan even absent a QDRO, moreover, we cannot envision how the trial court's order requiring a QDRO to be entered would work any prejudice to Paula. With or without a QDRO, Paula would receive only her eighty percent share of the proceeds of the UNCC retirement plan. Absent prejudice, there can be no defense of laches. *Cieszko*, 92 N.C. App. at 297, 374 S.E.2d at 460.

Regarding Paula's challenge to the trial court's subject matter jurisdiction, we note initially that she has failed in her appellate brief to support her argument with relevant citations to authority. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error . . . in support of which no . . . authority [is] cited will be taken as abandoned"); *see also Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 510, 449 S.E.2d 202, 214 (1994) (this Court not required to consider assignments of error unsupported by citation to authority), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995).

In any event, suffice it to point out that the Consent Order expressly provided that the trial court retained jurisdiction to enter a QDRO:

> [this court] retain[s] jurisdiction to enter such Qualified Domestic Relation Order or Orders as may be necessary to effectuate the terms of the agreement of the parties.
>
> . . . .

This cause is retained pending further orders of the Court.

See also Wildcatt v. Smith, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984) (trial court "retains jurisdiction to correct or enforce its judgment").

Further, the Agreement executed by Karl and Carolyn and incorporated by reference into the Consent Order denominated not only the grant of Carolyn's twenty percent interest in the UNCC retirement plan, but also expressly anticipated the court's entry of a QDRO to "preserve" that interest. Significantly, the Agreement also stated that

> all the provisions of this Agreement shall be binding upon the heirs, next of kin, executors and administrators of each party,

thus binding Karl's estate to the terms of the Consent Order.

To conclude, any assignments of error or arguments not addressed are overruled, and the order of the trial court appealed from is affirmed.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

JUDY ANN SIDDEN, PLAINTIFF v. RICHARD BERNARD MAILMAN, DEFENDANT

No. COA99-478

(Filed 2 May 2000)

1. Divorce— separation agreement—mental state—conflicting evidence

The trial court did not err by finding that plaintiff's mental state was not impaired at the time a separation agreement was executed and by refusing to rescind the agreement where the court resolved conflicting evidence in favor of defendant.

2. Divorce— separation agreement—undue influence

The trial court did not err by refusing to rescind a separation agreement on the ground of undue influence where the parties executed an informal agreement two weeks after their separation

and the formal agreement two weeks later; plaintiff was told at the execution of the formal agreement by defendant's attorney that she could have her attorney review the agreement and she was given time to review it in private; and plaintiff chose to sign the agreement without the advice of an attorney even though she had a business attorney and an accountant who regularly represented her in her psychotherapy practice.

3. Fraud— pleadings—separation agreement—failure to disclose asset

The trial court erred by ruling that plaintiff did not plead breach of fiduciary duty in her complaint where plaintiff alleged that she executed a separation agreement at a time when she and defendant were husband and wife, thus sufficiently alleging the existence of a fiduciary duty; and defendant's admission at trial that he did not disclose to plaintiff the existence of his State retirement account is tantamount to an amendment to the complaint that defendant failed to disclose a material asset.

4. Fraud— separation agreement—failure to disclose retirement account

The trial court erred by finding that plaintiff had not presented any evidence of a breach of a fiduciary relationship where there was some evidence that defendant failed to disclose the existence of a retirement account before the parties agreed to and executed a separation agreement.

5. Divorce— separation agreement—not unconscionable

The trial court did not err by rejecting a claim that a separation agreement was unconscionable where plaintiff abandoned on appeal her argument that the agreement was substantively unfair. Both substantive and procedural unfairness must be shown to support the claim that the agreement is unconscionable.

Appeal by plaintiff from order and judgment filed 29 January 1999 by Judge Alonzo Brown Coleman, Jr. in Orange County District Court. Heard in the Court of Appeals 25 January 2000.

Sheridan & Steffan, P.C., by Mark T. Sheridan, for plaintiff-appellant.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellee.

GREENE, Judge.

Judy Ann Sidden (Plaintiff) appeals from an order and judgment upholding the validity of a "Contract of Separation and Property Settlement" (the Agreement) between Plaintiff and Richard Bernard Mailman (Defendant) (collectively, the parties).

The evidence shows the parties were married on 21 April 1979. Plaintiff is a psychotherapist and holds a master's degree in Child Development and Family Relations. Defendant is a Professor of Psychiatry at the University of North Carolina (UNC) School of Medicine.

The parties separated on or about 15 August 1996, at which time Defendant moved out of the marital home. At that time Plaintiff told Defendant she was "tired of fighting," he could "have it all," and to "draw up what [he thought was] fair" and she would sign it. Defendant prepared a listing of the parties' assets and liabilities, which did not include Defendant's North Carolina State Employees' Retirement Account (State Retirement Account), worth $158,100.00. Defendant testified this was an inadvertent omission.

On 1 September 1996, the parties met, reviewed, and discussed the listing, and then signed a one-page informal document which outlined the terms of a separation agreement. On 9 September 1996, Defendant retained attorney Wayne Hadler (Hadler) to prepare a final separation agreement, the Agreement at issue in this case. The Agreement formalized the terms of the one-page informal agreement the parties had previously signed, and the Agreement was executed and acknowledged before a notary by the parties on 10 September 1996 at Hadler's office.

At trial, Hadler who holds a Master's degree in Social Work and previously worked for twelve years as a social worker for the Alamance County Mental Health Department, testified he did not see anything about Plaintiff's appearance, demeanor, or behavior that would indicate she was confused or lacked the capacity to enter into the Agreement. Hadler informed Plaintiff he was representing Defendant and could not give her any legal advice, and he encouraged her to have the Agreement reviewed by separate counsel. Hadler explained to Plaintiff she could take as much time as she needed to review the Agreement, and he left her in the conference room of his office to allow her time to review the Agreement in privacy. Although Plaintiff was in regular consultation with her business attorneys and

an accountant from July 1996 to October 1996, she chose not to have an attorney review the Agreement.

After the parties executed the Agreement, Plaintiff directed Defendant to immediately take her to a bank so she could receive the funds due her under the terms of the Agreement. Defendant followed Plaintiff's directions, and the parties have fully performed and complied with the terms of the Agreement.

Defendant testified at trial that several months after the Agreement's execution he came across a statement of his State Retirement Account. Realizing he had inadvertently omitted the State Retirement Account from his listing of assets and from the Agreement, Defendant telephoned Plaintiff to inquire whether she wanted to discuss the State Retirement Account and whether any adjustment should be made to the Agreement. Defendant testified Plaintiff responded she was "going to get more out of [him] than that," and their conversation ended.

Plaintiff testified at trial that she was suffering from hypo-mania and was psychotic and out of touch with reality from the spring of 1996 throughout the events surrounding the execution of the Agreement until her 20 January 1997 admittance into the UNC Memorial Hospital, where she was placed under a suicide watch. In April of 1995, Plaintiff was seeing a psychiatrist, Thomas N. Stephenson, M.D. (Dr. Stephenson), as an individual patient. Dr. Stephenson diagnosed Plaintiff as suffering from depression and anxiety and prescribed an anti-depressant, Zoloft, for Plaintiff. In May of 1996, before the execution of the Agreement, Dr. Stephenson saw Plaintiff for the last time. Dr. Stephenson found Plaintiff was "continuing to do well," but the problems with her husband were continuing.

Dr. Stephenson testified Zoloft can induce hypo-mania. Plaintiff's expert in psychiatry, Jeffrey J. Fahs, M.D. (Dr. Fahs), defined hypomania as a psychiatric condition that is a milder form of mania which is marked by grandiosity, a decreased need for sleep, loquaciousness, and involvement in activities that have a high potential for painful consequences like foolish business investments or buying sprees. Dr. Stephenson saw Plaintiff again on 13 September 1996, and at that time, he thought her judgement was impaired but she was not manic.

Dr. Fahs testified he examined Plaintiff on 10 March 1997 and reviewed her records and summary of treatment. Dr. Fahs opined Plaintiff had exhibited symptoms of a mood disorder that included

depression, mania, and hypo-mania. Dr. Fahs testified Plaintiff "may have had a cognitive understanding" she was signing the Agreement, but she could not truly appreciate the consequences of signing it. Dr. Fahs also stated Zoloft can cause mania or hypo-mania, and mania impairs judgement.

Defendant, who studies the effects of drugs on the brain, testified an over dosage of Zoloft can cause hypo-mania in a few people. Defendant felt Plaintiff was probably suffering from hypo-mania in November of 1996, but he did not notice anything to indicate Plaintiff suffered from mental illness at the time of the execution of the Agreement. If Defendant had observed Plaintiff to be mentally impaired, he would have had her involuntarily committed.

Karen Dawkins, M.D. (Dr. Dawkins), an Assistant Professor of Psychiatry at UNC, testified she observed Plaintiff in connection with a presentation Plaintiff gave before thirty-to-forty mental health professionals at UNC in late October of 1996. Plaintiff's presentation was "well-received," and Dr. Dawkins felt Plaintiff did not exhibit any signs of being impaired by any mental condition at that time.

In its order and judgment in favor of Defendant, the trial court entered the following pertinent findings of fact and conclusions of law:

> 33. . . . Plaintiff was not out of touch with reality and was not psychotic during such period of time, nor was she at any time prior to the signing of [the Agreement] on September 10, 1996, and for some significant period of time thereafter. . . .
>
> 34. . . . Plaintiff's mental state during the spring and summer and early fall of 1996 was not a state of diminished or impaired mental capacity and was not in any way out of the ordinary for her. . . .
>
> 35. . . . Plaintiff did not lack the capacity to enter into [the Agreement] on September 10, 1996. She knew what she was doing and understood the consequences of signing the Agreement. She had adequate time and opportunity prior to the signing of the Agreement on September 10th to reconsider the terms she had initially agreed to on August 15th, and to which she again agreed on September 1st. She signed the [A]greement of her own free and voluntary will and accord, without any coercion or duress or manipulation, and she was legally competent to do so. She freely chose not to consult an attorney.

36. . . . Defendant acted in good faith toward . . . Plaintiff and intended to divide their marital property and debts in a fair and equitable manner, and his efforts to do so were not intentionally one-sided or unfair. He took no steps to manipulate . . . Plaintiff and used no coercive tactics in dealing with her.

37. . . . [Plaintiff] did not plead mistake or breach of fiduciary duty in her Complaint nor did she offer any evidence of same . . . .

38. . . .

(a). . . Viewed as a percentage allocation, the Plaintiff received 38% of the total economic benefits distributed and the [Defendant] received 62% of such total economic benefits. . . .

. . . .

Based on the foregoing Findings of Fact, the Court CONCLUDES AS A MATTER OF LAW the following:

. . . .

4. The Agreement is . . . not unconscionable. The Agreement divided the marital property and debts unequally in the amount of $34,443.56 in Defendant's favor (the percentage allocation was 62%-38% in . . . Defendant's favor), but the amount of this inequality is not unconscionable in that it was not grossly disproportionate in favor of . . . Defendant. The Court has considered all of the facts and circumstances surrounding the Agreement in reaching its conclusion that the same was not unconscionable, and finds that any inequality of the bargain is not so manifest as to shock the judgment of a person of common sense, and finds that the terms are not so oppressive that no reasonable person would make them and no honest and fair person would accept them, and finds that the provisions are not so one-sided that . . . Plaintiff was denied any opportunity for a meaningful choice. Instead, the bargain was one that a reasonable person of sound judgment might well accept because of the factors justifying an unequal division as above described.

The issues are whether: (I) the evidence supports the trial court's finding that Plaintiff's "mental state . . . was not . . . impaired" at the time the Agreement was executed; (II) the evidence supports the trial court's findings that Plaintiff signed the Agreement "of her own free

and voluntary will . . . without . . . coercion"; (III) Plaintiff alleged and offered evidence of fraud as a basis to set aside the Agreement; and (IV) the Agreement is unconscionable.

Separation and/or property settlement agreements are contracts and as such are subject to recission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence. 17B C.J.S. *Contracts* §§ 460-464, at 77-83 (1999); *Knight v. Knight* 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985). Furthermore, these contracts are not enforceable if their terms are unconscionable. *Id.*; *King v. King*, 114 N.C. App. 454, 457, 442 S.E.2d 154, 157 (1994).

A claim for fraud may be based "on an affirmative misrepresentation of a material fact or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (citation omitted), *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). A duty to disclose arises where: (1) "a fiduciary relationship exists between the parties to the transaction"; (2) there is no fiduciary relationship and "a party has taken affirmative steps to conceal material facts from the other"; and (3) there is no fiduciary relationship and "one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Id.* at 297-98, 344 S.E.2d at 119. A husband and wife, unless they have separated and become adversaries negotiating over the terms of a separation and/or property settlement agreement, are in a fiduciary relationship. *Id.* at 297, 344 S.E.2d at 119; *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971).

A claim that an agreement is unconscionable "requires a determination that the agreement is both substantively and procedurally unconscionable." *King*, 114 N.C. App. at 458, 442 S.E.2d at 157. Procedural deficiencies involve "bargaining naughtiness," *id.*, "such as deception or a refusal to bargain over contract terms," 8 Samuel Williston, *A Treatise on the Law of Contracts* § 18:10, at 57 (Richard A. Lord ed., 4th ed. 1998). The failure of a husband and/or a wife to accurately disclose his or her assets and debts in negotiating a separation and/or a property agreement can constitute procedural unconscionability, even if the failure to disclose does not constitute fraud. *Daughtry v. Daughtry*, 128 N.C. App. 737, 740-41, 497 S.E.2d 105, 107 (1998). Substantive unconscionability involves the "inequality of the bargain." *King*, 114 N.C. App. at 458, 442 S.E.2d at 157.

CONTRACT CLAIMS

I

Mental Capacity

[1] Plaintiff first argues she was mentally incompetent at the time she signed the Agreement, and the trial court thus erred in refusing to rescind the Agreement on this basis. We disagree.

The trial court found as a fact that Plaintiff's "mental state . . . was not . . . impaired" at the time the Agreement was executed and there is competent evidence in the record to support this finding. This Court is accordingly bound by this finding of fact. *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987).

The record to this Court reveals conflicting evidence regarding Plaintiff's mental state at the time she executed the Agreement: there is evidence Plaintiff did not have the capacity to enter into a contract because she was under a drug induced mania that impaired her judgment; there is also evidence Plaintiff had the capacity to contract; Hadler did not see anything about Plaintiff's behavior or appearance which would indicate she lacked the capacity to contract at the Agreement's execution; and Dr. Dawkins did not notice any signs that Plaintiff was mentally impaired shortly after the Agreement was executed. Furthermore, Plaintiff directed Defendant take her to a bank so she could receive the money due her under the Agreement, thus, demonstrating she understood the nature of the act she was engaged in and its consequences.

The trial court resolved this conflict of evidence in favor of Defendant, and thus, did not err in refusing to rescind the Agreement on the ground of Plaintiff's lack of capacity to contract.

II

Undue Influence

[2] Plaintiff argues the Agreement must be rescinded because Defendant exercised undue influence over her decision to sign the Agreement. We disagree.

The trial court found as a fact Plaintiff signed the Agreement "of her own free and voluntary will . . . without . . . coercion" and there is competent evidence in the record to support this finding. This Court is accordingly bound by this finding of fact. *Bridges*, 85 N.C. App. at 526, 355 S.E.2d at 231.

The parties executed an informal agreement two weeks after their separation and the formal Agreement was executed two weeks later. At the time of the formal execution, Plaintiff was told by Defendant's attorney she could have an attorney review the Agreement before she signed it and she was given time to review the Agreement, in private, in Hadler's office. Plaintiff chose to sign the Agreement without the advice of an attorney, even though she had a business attorney and an accountant who regularly represented her in her psychotherapy practice. The trial court, thus, did not err in refusing to rescind the Agreement on the ground of undue influence.

III

Fraud

The trial court found Plaintiff "did not plead . . . breach of fiduciary duty in her Complaint nor did she offer any evidence of same."

Pleading

[3] Plaintiff contends her pleadings are sufficient to allege the Agreement was procured by fraud, in that she alleged she and Defendant were married at the time the Agreement was executed and there was evidence presented, without objection, that Defendant failed to disclose the existence of his State Retirement Account. We agree.

As a general proposition, fraud must be alleged in the complaint with particularity. N.C.G.S. § 1A-1, Rule 9(b) (1999). Constructive fraud, however, requires "less particularity," *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981), and can be based on a breach of a "confidential relationship rather than a specific misrepresentation," *id.* at 85, 273 S.E.2d at 678-79. A claim based on constructive fraud is sufficient if it alleges "facts and circumstances '(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust.' " *Id.* at 85, 273 S.E.2d at 679 (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). The pleading must contain an allegation of the particular representation made, *Rhodes*, 232 N.C. at 549, 61 S.E.2d at 726-27, and there is no requirement there be allegations of dishonesty or intent to deceive, as fraud is presumed from the nature of the relationship, 37 Am. Jur. 2d *Fraud and Deceit* § 4 (1968); *Watts v.*

Cumberland County Hosp. System, Inc., 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986).

In this case, Plaintiff alleges she executed the Agreement at a time when she and Defendant were husband and wife, thus sufficiently alleging the existence of a fiduciary duty.[1] *See Link*, 278 N.C. at 192-93, 179 S.E.2d at 704 (relationship between a husband and a wife creates a relationship of trust and confidence and can give rise to a fiduciary duty). There are, however, no allegations of "facts and circumstances" where Defendant is "alleged to have taken advantage of his position of trust."[2] At trial, however, Defendant admitted he did not disclose to Plaintiff the existence of his State Retirement Account, and the admission of this evidence is tantamount to an amendment to the complaint that Defendant failed to disclose a material asset. N.C.G.S. § 1A-1, Rule 15(b) (1999). With this amendment, the complaint sufficiently alleges Defendant breached his fiduciary duty to Plaintiff when he failed to disclose the existence of his State Retirement Account. The trial court, thus, erred in ruling Plaintiff "did not plead . . . breach of fiduciary duty in her Complaint."[3]

Evidence

[4] Plaintiff offered evidence that she and her husband, the Defendant, soon after separating and before their divorce, informally agreed to the distribution of their marital assets and debts. This informal agreement was reduced to writing by Defendant's attorney and was signed by both parties. At some point after the execution of the Agreement, Plaintiff learned Defendant had failed to disclose the existence of his State Retirement Account, having a value of $158,100.00.

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1. The Complaint does allege Defendant secured legal advice and Defendant's attorney prepared the Agreement. These allegations, however, read in the light most favorable to Plaintiff, do not necessarily reveal the parties were negotiating as adversaries. Representation by an attorney does not automatically end the confidential relationship of the spouses if the attorney's role was merely to record the agreement the spouses agreed to while living in the confidential relationship. *Harroff v. Harroff*, 100 N.C. App. 686, 691, 398 S.E.2d 340, 343 (1990), *disc. review denied*, 328 N.C. 330, 402 S.E.2d 833 (1991).

2. Plaintiff does allege "Defendant . . . manipulated [her] and took advantage of [her] then irrational desire to please [him]." The allegation, however, is in the context of her claim she was "incompetent" because she was "emotionally, physically and psychologically debilitated." We, thus, do not read these allegations as any attempt to assert a breach of a fiduciary duty.

3. The complaint does not contain any alternative pleading asserting fraud on some basis other than breach of fiduciary duty, and thus, the only fraud issue before the trial court related to the breach of fiduciary duty.

This evidence is some evidence Defendant failed to disclose a material fact to Plaintiff at a time when the parties were in a fiduciary relationship. The trial court, thus, erred in finding Plaintiff had not presented "any evidence" of a breach of a fiduciary relationship.

Because the trial court found Plaintiff had not alleged breach of fiduciary duty and had not offered any evidence on this issue, that court made no findings or conclusions on this issue. This was error and remand must be had to the trial court. On remand, the trial court must enter findings and conclusions, based on the evidence in this record, on the breach of fiduciary duty issue.

UNCONSCIONABILITY

IV

[5] Plaintiff argues the Agreement is unconscionable. We disagree.

In this case, Defendant testified he inadvertently failed to disclose the value of his State Retirement Account. Assuming without deciding this omission amounted to procedural unfairness, an issue we need not address, the Agreement is not substantively unfair and therefore not unconscionable.

The trial court found the Agreement divided the martial property and debts, with a 62% allocation to Defendant and a 38% allocation to Plaintiff. The trial court then concluded the Agreement was not unconscionable because this allocation "was one that a reasonable person of sound judgment might well accept because of [certain] factors justifying an unequal division" of the marital property. Although Plaintiff assigns error to this finding and conclusion, she failed to argue them in her brief to this Court and, therefore, has abandoned them. N.C.R. App. P. 28(b)(5). Accordingly, we do not address the substantive unfairness of the Agreement and sustain the conclusion of the trial court that the Agreement is substantively fair. As Plaintiff must show both procedural and substantive unfairness to support her unconscionable claim, the trial court correctly rejected this claim. *King*, 114 N.C. App. at 458, 442 S.E.2d at 157.

Plaintiff made other numerous assignments of error which were not argued in her brief to this Court, and thus, are likewise deemed abandoned. N.C.R. App. P. 28(b)(5).

Affirmed in part and remanded.

Judges LEWIS and EDMUNDS concur.

LORYN HERRING, A MINOR BY RAYMOND M. MARSHALL HER GUARDIAN AD LITEM AND BESSIE HERRING, PLAINTIFFS v. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION AND RONALD LINER, DEFENDANTS

No. COA99-777

(Filed 2 May 2000)

1. Immunity— governmental—transporting students to school—governmental function—negligent supervision—constructive fraud

The trial court erred in denying defendants' motion for summary judgment based on the doctrine of sovereign immunity in a case where a minor was struck by a vehicle while she was crossing a street to get to the new location of her bus stop, which was changed by the assistant principal of her school in response to a complaint that the minor had been assaulted by several boys while on a school bus instead of imposing discipline upon the boys who allegedly attacked the minor, because: (1) the school official's duty of disciplining students is a governmental function, rather than a ministerial or proprietary function, since it was within the school's performance of its statutory duty of transporting students to school; (2) the amended complaint's allegation of a claim for negligent supervision does not preclude a sovereign immunity defense; and (3) the amended complaint's allegation of a claim for constructive fraud does not preclude a sovereign immunity defense.

2. Immunity— governmental—liability insurance—no waiver

The trial court erred in denying defendants' motion for summary judgment based on the doctrine of sovereign immunity in a case where plaintiffs sought recovery for the minor plaintiff's bodily injuries allegedly resulting from a negligent change of her bus stop location, because the "comparison test" between the provisions of defendant Board of Education's three liability insurance policies and the allegations in plaintiffs' pleadings reveal that defendants did not waive their sovereign immunity defense

by purchasing insurance since the policies did not provide coverage for the minor plaintiff's injuries.

Appeal by plaintiffs and defendants from judgment entered 15 March 1999 by Judge Clarence W. Carter in Superior Court, Forsyth County. Heard in the Court of Appeals 30 March 2000.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy for the plaintiffs.

Young, Moore, and Henderson, P.A., by Brian O. Beverly, for the defendants.

WYNN, Judge.

Sovereign immunity is a common law theory or defense established by the courts to protect a sovereign or state and its agents from suit.[1] The defendants in this case contend that the trial court erred in denying their summary judgment motion based on the doctrine of sovereign immunity. Because we hold that (1) the doctrine of sovereign immunity applies in this case and (2) the defendants did not waive their immunity through the purchase of liability insurance under N.C. Gen. Stat. § 115C-42, we reverse the trial court's judgment denying the defendants' summary judgment motion.

In January 1995, Ronald Liner, the assistant principal of Lewisville Elementary School in Winston-Salem, North Carolina, changed nine-year-old Loryn Herring's bus stop in response to a complaint that she had been assaulted by several boys while on a school bus. Approximately five months later, a vehicle struck Loryn as she crossed East Fifth Street in route to that bus stop. Loryn suffered serious, painful and permanent bodily injuries, including permanent and severe brain damage.

Through her guardian ad litem, Loryn, along with her mother on her own behalf, brought actions against the Winston-Salem/Forsyth County Board of Education and Ronald Liner. Their complaint alleged that the defendants were negligent, breached fiduciary duties

1. Our Supreme Court abolished sovereign immunity in contract actions in 1976. *See Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976) (Lake, J. *dissenting*—observing that since the Supreme Court had undertaken to abolish sovereign immunity in contract actions, it was error to limit it to contract actions only); *see also Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245 (1995) (Wynn, J. *concurring in the result only*), *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995).

and committed constructive fraud by changing the location of Loryn's bus stop.

The defendants responded by asserting sovereign immunity and moving to dismiss the action under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) stating that:

> . . . all conduct by these defendants, or any other employees or agents of the Winston-Salem/Forsyth County Board of Education, which relates in any way to the allegations of injury or damage in the Amended Complaint, was performed by such persons in their official capacity as employees and/or agents of the Winston-Salem/Forsyth County Board of Education and pursuant to its governmental authority. . . . and . . . [the] defendants are immune from any liability or damages resulting from their conduct in pursuit of governmental functions.

The defendants' motion to dismiss was converted into a motion for summary judgment by the subsequent filing of an affidavit and supporting documents.

Additionally, the plaintiffs motioned the trial court to compel arbitration on the grounds that:

> 1. Insurance policies purchased for Defendant, Winston-Salem/Forsyth County Board of Education, which cover the allegations in Plaintiff's Amended Complaint allow Defendants to have the controversy submitted to arbitration.
>
> 2. As a third party beneficiary of those contracts, Plaintiffs are entitled to have this case submitted to arbitration.

Following a hearing, the trial court denied: (1) the defendants' motion for summary judgment based on the doctrine of sovereign immunity and (2) the plaintiffs' motion to compel arbitration. From this order, both the plaintiffs and defendants appeal; but, because we find that sovereign immunity bars the plaintiffs' claims, we do not reach the issue of whether this matter should have been submitted to arbitration.

I. EXCEPTIONS TO THE DOCTRINE OF SOVEREIGN IMMUNITY

The defendants contend that because sovereign immunity applies in this case, the trial court erred in denying their summary judgment motion. The plaintiffs, on the other hand, contend that the doctrine of sovereign immunity does not apply because the facts show three

exceptions or exclusions to applying the doctrine of sovereign immunity: (1) the duty breached in this case was a ministerial or proprietary function; (2) the plaintiffs' claim for negligent supervision; and (3) the plaintiffs' claim for constructive fraud. We address each of the plaintiffs' contentions separately.

[1] First, the plaintiffs argue that a school official's duty of disciplining students is a ministerial or proprietary duty. They contend that Ronald Liner's failure to impose the appropriate discipline upon the boys who allegedly attacked the minor plaintiff constituted a failure of this ministerial duty, thereby precluding the sovereign immunity defense.

"As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993). The doctrine applies when the entity is being sued for the performance of a governmental function. *See id.* But it does not apply when the entity is performing a ministerial or proprietary function. *See id*; *see also Broome v. City of Charlotte*, 208 N.C. 729, 182 S.E.2d 325 (1935).

Governmental functions are those which are " 'discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State.' " *Hickman v. Fuqua*, 108 N.C. App. 80, 83, 422 S.E.2d 449, 451 (1992) (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952)). "By contrast, the proprietary activities undertaken by a municipality are those which are 'commercial or chiefly for the private advantage of the compact community.' " *Id.* (quoting *Britt*, 236 N.C. at 450, 73 S.E.2d at 293). The test for distinguishing between governmental and proprietary functions is as follows:

> If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing. . . .

Britt, 236 N.C. at 451, 73 S.E.2d at 293.

The context of the imposition of discipline by the school official in this case was within the school's performance of its statutory duty of transporting students to school. This statutory duty, as our courts have previously determined, is an accepted governmental function. *See Benton v. Board of Education*, 201 N.C. 653, 657, 161 S.E. 96, 97

(1931) (holding that in performing the statutory duty of transporting students to school, the county school board is exercising a governmental function); *see also Rowan County Board of Education v. United States Gypsum Co.*, 332 N.C. 1, 11, 418 S.E.2d 648, 655 (1992) (stating that "[e]ducation is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' "). Therefore, the instant case does not fall within the ministerial duty exception to the doctrine of sovereign immunity.

Next, the plaintiffs argue that because the amended complaint contained a claim for negligent supervision, the defendants were precluded from using the sovereign immunity defense. We disagree.

In *Vester v. Nash/Rocky Mount Board of Education*, 124 N.C. App. 400, 477 S.E.2d 246 (1996), the plaintiff-student brought a personal injury action against the board of education after he was struck by a fellow student while on the school bus. *Id.* Before that incident, the student who struck the plaintiff-student had other disciplinary problems and in many of those instances, no disciplinary action was taken against the student. *Id.* Under those facts, our Court held that the board of education did not waive sovereign immunity by purchasing liability insurance. *Id.* Thus, the facts in *Vester* did not present an exception to the doctrine of sovereign immunity.

Nonetheless, the plaintiffs in this case asserted during oral argument that *Vester* does not control under these facts because this case involves a matter of first impression since the issue presently before this Court—whether a claim for negligent supervision constitutes an exception to the sovereign immunity defense—was not raised in *Vester*.

Even if the present issue was not raised in *Vester*, we cannot agree with the plaintiffs' assertions that the doctrine of sovereign immunity would not apply to a claim for negligent supervision. *See Collins v. North Carolina Parole Commission*, 344 N.C. 179, 473 S.E.2d 1 (1996) (holding that the waiver of sovereign immunity under the Tort Claims Act was not limited to ordinary negligence, but applied for other degrees of negligence, including willful, wanton, and reckless conduct that does not rise to the level of intent). Rather, we find negligent supervision to be a viable tort claim subject to the doctrine of sovereign immunity.

Finally, the plaintiffs argue that because the amended complaint contained a claim for constructive fraud the defendants were precluded from using the sovereign immunity defense. Again, we dis-

agree finding constructive fraud to be a viable tort claim subject to the doctrine of sovereign immunity.

Accordingly, we conclude that the instant case does not constitute an exception to the doctrine of sovereign immunity.

II. WAIVER OF SOVEREIGN IMMUNITY

[2] Next, the plaintiffs argue that the trial court properly denied the defendants' motion for summary judgment because the Winston-Salem/Forsyth County Board of Education waived its sovereign immunity by purchasing liability insurance policies. The defendants, on the other hand, contend that those insurance policies precluded coverage for the minor plaintiff's injuries.

As a governmental agency, a county or city board of education is not liable in a tort or negligence action except to the extent that it has waived its governmental or sovereign immunity pursuant to statutory authority. *See Overcash v. Statesville City Board of Education*, 83 N.C. App. 21, 348 S.E.2d 524 (1986); *see also Beatty v. Charlotte-Mecklenburg Board of Education*, 99 N.C. App. 753, 394 S.E.2d 242 (1990). However, the " '[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the right to sovereign immunity, must be strictly construed.' " *Overcash*, 83 N.C. App. at 25, 348 S.E.2d at 527 (quoting *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983)).

In North Carolina, a local board of education can waive immunity through the purchase of liability insurance under N.C. Gen. Stat. § 115C-42 which provides that:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. . . .

N.C.G.S. § 115C-42 (1999).

Therefore, immunity is deemed to have been waived by the act of obtaining insurance; however, the waiver is "only to the extent that [the] board of education is indemnified by insurance for such negligence or tort. . . ." *Id*; *see also Betty*, 99 N.C. App. at 755, 394 S.E.2d

at 244 (stating that N.C.G.S. § 115C-42 "makes clear that unless the negligence or tort is covered by the insurance policy, sovereign immunity has not been waived by the Board or its agents").

In determining whether the provisions of a liability insurance policy provide coverage for a tort action, our courts apply the "comparison test," thereby requiring the policy provisions to be analyzed and compared with the allegations in the pleadings. *See Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378 (1986) (stating that under the comparison test, "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded"). "Any doubt as to coverage is to be resolved in favor of the insured." *Id.*

In this case, the plaintiffs alleged in their amended complaint that:

> X.
>
> That the Defendants were negligent in that:
>
> 1. They changed Defendant, Loryn Herring's bus stop, requiring her to cross East Fifth Street each school day when they knew that hundreds of vehicles would be traveling into downtown Winston-Salem in the morning on East Fifth Street.
>
> 2. They knew that changing Plaintiff's bus stop and requiring Plaintiff to cross East Fifth Street to get to a new bus stop would be unsafe.
>
> 3. They knew that they were creating a dangerous situation by requiring Plaintiff to cross a very busy street with hundreds of vehicles traveling into downtown Winton-Salem each school day, knowing that many of the vehicles would be traveling at high rates of speed.
>
> 4. They put the victim, Plaintiff, Loryn Herring in harm's way instead of taking appropriate security measures and disciplinary actions to protect said Plaintiff from the three male students that they knew were dangerous and violent.
>
> XI.
>
> That said accident was caused solely and proximately by reason of the negligence of the Defendants without any negligence on the part of Plaintiff, Loryn Herring contributing thereto.

XII.

That by reason of the negligence of the Defendants, as aforesaid, the Plaintiff Loryn Herring received serious, painful and permanent bodily injuries. That as a result of said injuries, the minor Plaintiff has suffered permanent brain damage, loss of enjoyment of life, past and future pain and suffering, future loss of earning capacity, and future medical expenses, all to her damage in a sum in excess of Ten Thousand ($10,000.00) Dollars.

. . . .

XVI.

That subsequent to the establishment of a relationship of confidence and trust between Defendants and Plaintiff, Loryn Herring, Defendants breached the relationship of trust and confidence to the Plaintiff, Loryn Herring by changing her bus stop such that she would have to cross East Fifth Street each school day to get to her bus stop when the Defendants knew that this was unsafe and dangerous.

XVII.

That such conduct was a breach of fiduciary duty on the part of Defendants. That the conduct of Defendants in breaching their fiduciary duty constituted constructive fraud, resulting in detriment, harm and injury to the minor Plaintiff.

XVII.

That by reason of Defendants' breach of fiduciary duty and constructive fraud, the Plaintiff, Loryn Herring, has suffered actual damages, including serious, painful and permanent bodily injuries. That as a result of said injuries, the minor Plaintiff has suffered permanent brain damage, loss of enjoyment of life, past and future pain and suffering, future loss of earning capacity and future medical expenses, all to her damage in a sum in excess of Ten Thousand ($10,000.00) Dollars.

In essence, the plaintiffs sought recovery for the minor plaintiff's bodily injuries allegedly resulting from a negligent change of her bus stop location.

To determine whether the defendants waived their sovereign immunity as to the minor plaintiff's injuries, we must compare the aforementioned allegations with the provisions of the Winston-

Salem/Forsyth County Board of Education's liability insurance policies existing at the time of the minor plaintiff's accident. At that time, the Winston-Salem/Forsyth County Board of Education had three insurance polices in place.

The first policy was a commercial account policy with American Employer's Insurance Company containing the following exclusionary clause:

> The insurance does not apply to:
>
> g. 'Bodily injury' or 'property damage' arising out of the ownership, maintenance, operation, use, 'loading or unloading' or entrustment to others of any aircraft, 'auto' or watercraft that is owned, operated or hired by any insured. For the purpose of this exclusion, the word hired includes any contract to furnish transportation of your students to and from schools.

Our Court considered this issue in *Beatty*, 99 N.C. App. at 753, 394 S.E.2d at 242. In that case, a student who was injured when he was struck by a truck while attempting to reach his assigned school bus stop appealed the trial court's grant of summary judgment on the basis of sovereign immunity in favor of the board of education and the principal of his elementary school. *Id.* The school board's liability insurance policy in *Beatty* contained an exclusionary clause almost identical to the one present in the instant case. *Id.* Based on this exclusionary clause, we affirmed the trial court's holding concluding that the school board's purchase of a liability policy did not waive the defendants' sovereign immunity. *Id; see also* Vester, 124 N.C. App. at 400, 477 S.E.2d at 246.

Following *Beatty*, we must conclude that the Winston-Salem/Forsyth County Board of Education's commercial account policy with American Employer's Insurance Company did not provide coverage for the minor plaintiff's injuries.[2] Therefore, the school

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2. The commercial account policy also contained the following clause supporting the policy's exclusion of injuries such as those suffered by the minor plaintiff:

> Schedule
>
> **Description of Professional Services:** All Professional Services Rendered By the Schools
>
> . . . .
>
> With respect to any professional services shown in the Schedule, this insurance does not apply to 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' due to the rendering or failure to render any professional service.

board's purchase of the commercial insurance policy did not constitute a waiver of the defendants' sovereign immunity.

The second policy that the Winston-Salem/Forsyth County Board of Education had at the time of the minor plaintiff's accident was a commercial umbrella policy with Commercial Union Midwest Insurance Company. That policy contained an endorsement entitled "Autos-Limitation of Coverage" similar to the exclusionary clause in the school board's commercial account policy and the one present in *Beatty*. Specifically, the endorsement provided that:

> Except insofar as coverage is available to the 'insured' for the full limits of insurance as shown for policies of 'underlying insurance' in the Declarations, this insurance does not apply to 'bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any 'auto'. Use includes operation and 'loading or unloading'.

Moreover, the commercial umbrella policy contained two additional endorsements relevant to the determination of whether the umbrella policy covered the minor plaintiff's injuries. One endorsement provided that:

> THIS INSURANCE DOES NOT APPLY TO 'BODILY INJURY,' 'PROPERTY DAMAGE,' 'PERSONAL INJURY' OR 'ADVERTISING INJURY' ARISING OUT OF THE OPERATIONS OF:
>
> YELLOW SCHOOL BUS

The other endorsement provided that:

> This insurance does not apply to any claim for any actual or alleged errors, misstatements or misleading statements, acts or omissions or neglect or breach of duty by the 'insured', or any other person for whose acts the 'insured' is legally responsible, arising out of the discharge of the duties as a school board or board of education, school district, or as elected or appointed members, directors or trustees thereof.

Strictly construing the aforementioned endorsements, we must conclude that the Winston-Salem/Forsyth County Board of Education's commercial umbrella policy with Commercial Union Midwest Insurance Company did not provide coverage for the minor plaintiff's injuries. Therefore, the school board's purchase of the commercial umbrella policy did not constitute a waiver of the defendants' sovereign immunity.

The third policy that the Winston-Salem/Forsyth County Board of Education had at the time of the minor plaintiff's accident was a business auto policy with Harleysville Mutual Insurance Company. But this policy did not provide coverage for the minor plaintiff's injuries since she was neither struck by a vehicle operated by an employee or agent of the Winston-Salem/Forsyth County School Board, nor covered by the business auto policy. Consequently, the school board's purchase of the auto policy did not constitute a waiver of the defendants' sovereign immunity.

In summation, we hold that the defendants did not waive their immunity from liability for the claims asserted by the plaintiffs in this case. Since we hold that the doctrine of sovereign immunity bars the claims presented by the plaintiffs in this case, we conclude that the trial court erred in denying the defendants' summary judgment motion based on the sovereign immunity defense. Accordingly, we remand this matter to the trial court for entry of summary judgment for the defendants.

Reversed and remanded.

Judges HORTON and SMITH concur.

MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, PLAINTIFF v. GARY EUGENE MAULDIN, M.D., AND SYLVA ANESTHESIOLOGY, P.A., DEFENDANTS

No. COA99-33

(Filed 2 May 2000)

1. Collateral Estoppel and Res Judicata— collateral estoppel—no issue preclusion—parties not identical nor in privity—dissimilar issue

The doctrine of collateral estoppel does not apply to preclude plaintiff from pursuing its contribution claim in this medical negligence action against defendants Dr. Mauldin and Sylva Anesthesiology, who entered into a settlement agreement with the Houston estate while an appeal was pending following a jury finding that Houston's death resulted from the negligence of both Dr. Erdman and Dr. Mauldin, because: (1) the parties to the 3 August 1994 proceeding for approval of the settlement, Dr.

Mauldin, Sylva Anesthesiology, and the Houston Estate, were neither identical to nor in privity with the parties to the current action; (2) a party is not in privity with another simply because both parties have an interest in the outcome of a proceeding; (3) the only parties whose interests were protected by the order approving the settlement were the Houston Estate and the present defendants, and the record reveals that neither the present plaintiff nor Dr. Erdman received notice of the hearing; and (4) the issue resolved by the order approving the settlement between the estate and the present defendants, whether the settlement was made in good faith and was in the best interest of the heirs of the estate, is dissimilar to the issue presented in the current action concerning the effect the order has on the contribution rights of the parties.

2. Collateral Estoppel and Res Judicata— res judicata—no claim preclusion—initial liability action—contribution action separate

The doctrine of res judicata does not apply to preclude plaintiff from pursuing its contribution claim in this medical negligence action against defendants Dr. Mauldin and Sylva Anesthesiology, who entered into a settlement agreement with the Houston estate while an appeal was pending following a jury finding that Houston's death resulted from the negligence of both Dr. Erdman and Dr. Mauldin, because: (1) the effect of a post-judgment settlement on the contribution rights of the parties was not before the trial court when the settlement was entered into, and was not relevant to the question of whether the settlement was in the best interests of the heirs to the Houston Estate; (2) no judgment was entered in the proceeding to approve the settlement which decided the merits of the issue presented in the present action; and (3) N.C.G.S. § 1B-1(b) makes clear that a contribution action is separate from the initial liability action, and the right to seek contribution arises only when one joint tortfeasor has paid more than its share of the judgment.

3. Contribution— joint and several liability—settlement and release—after entry of judgment—non-settling tortfeasor entitled to contribution

The trial court's grant of summary judgment in favor of defendants is reversed and the case is remanded since a settlement and release given after entry of a judgment establishing joint and several liability on the part of multiple tortfeasors does

not extinguish the non-settling tortfeasor's claim for contribution against the tortfeasors who settled after the judgment, because entry of judgment against two or more joint tortfeasors fixes a defendant's right to contribution for the amount paid in excess of his equitable share and extinguishes any right to settle and thereby discharge liability for contribution. N.C.G.S. §§ 1B-3(f) and 1B-4.

Appeal by plaintiff from order entered 30 September 1998 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 20 September 1999.

Roberts & Stevens, P.A., by James W. Williams, for plaintiff-appellant.

Wade E. Byrd and Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Stephen B. Williamson and Michelle Rippon, for defendant-appellees.

MARTIN, Judge.

Plaintiff, Medical Mutual Insurance Company of North Carolina (Medical Mutual), appeals from the trial court's order granting summary judgment in favor of defendants Gary Eugene Mauldin, M.D., and Sylva Anesthesiology, P.A. The present action arises out of a suit instituted by Mary E. Houston, Administratrix of the Estate of Donald Gordon Houston, alleging Mr. Houston's wrongful death as a result of negligence on the part of John P. Erdman, M.D.; Dr. Mauldin; and Sylva Anesthesiology, P.A., Dr. Mauldin's employer. On 30 June 1994, following a jury finding that Houston's death resulted from negligence on the part of both Erdman and Mauldin, judgment was entered in Macon County Superior Court against Dr. Erdman, Dr. Mauldin, and Sylva Anesthesiology, P.A., in the amount of $725,000.00 plus interest. Defendants appealed.

In August 1994, while the appeal was pending, St. Paul Insurance Company (St. Paul), the professional liability insurance carrier for Dr. Mauldin and Sylva Anesthesiology, P.A., entered into a settlement agreement with the Houston Estate. Pursuant to the terms of the settlement agreement, St. Paul agreed to pay the sum of $225,000.00 in settlement of the Houston Estate's claims against Dr. Mauldin and Sylva Anesthesiology, P.A., and the Estate entered into a covenant not to enforce the Macon County judgment against Dr. Mauldin and Sylva Anesthesiology, P.A., and agreed that "payment

constitutes a full release and discharge of all monies owing or which might be owing . . ." by reason of the judgment. The settlement agreement was approved by the trial court on 3 August 1994, apparently outside the district and without notice to Dr. Erdman or Medical Mutual. In the order approving the settlement, the trial court found the settlement had been entered in good faith and that it was consistent with the provisions of G.S. § 1B-4. Dr. Mauldin and Sylva Anesthesiology withdrew their appeal on 11 August 1994.

On 15 October 1996, this Court rendered its decision finding no error in the trial, and remanded the matter on the issue of costs. *Houston v. Douglas*, 124 N.C. App. 230, 477 S.E.2d 97 (unpublished 95-307, 1996). Dr. Erdman's petition for discretionary review to the North Carolina Supreme Court was denied on 12 February 1997. *Houston v. Douglas*, 345 N.C. 342, 483 S.E.2d 167 (1997).

On 30 April 1997, plaintiff Medical Mutual Insurance Company paid on behalf of its insured, Dr. Erdman, the sum of the $692, 168.80 in full payment of the principal amount of the judgment and accrued interest less the amount previously paid by St. Paul. Having become subrogated to Dr. Erdman's rights to contribution, if any, plaintiff Medical Mutual brought this action for contribution against Dr. Mauldin and Sylva Anesthesiology, P.A. Defendants answered, denying that any right to contribution exists.

Plaintiff and defendants moved for summary judgment. The trial court denied plaintiff's motion for summary judgment and granted summary judgment in favor of defendants. Plaintiff appeals.

Citing N.C.R. App. P. 3 and 26, defendants have moved to dismiss the appeal by reason of plaintiff's failure to include in the record on appeal a copy of the certificate of service of the notice of appeal. We treat the appeal as a petition for certiorari, allow it, and address the issues on their merits.

I.

[1] Initially, defendants assert the principles of *res judicata* and collateral estoppel preclude plaintiff from pursuing its contribution claim in this action because plaintiff did not appeal from the 3 August 1994 order approving the settlement and/or assign it as error in its appeal from the judgment holding Drs. Mauldin and Erdman jointly liable for the wrongful death of Mr. Houston. The doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating

an issue where it has been previously determined and the parties to the prior action are identical to, or in privity with, the parties in the current action. *State v. Summers*, 132 N.C. App. 636, 513 S.E.2d 575 (1999). *Res judicata*, or claim preclusion, bars a party, or those in privity with that party, from relitigating the same action where a final judgment has already been entered on its merits. *Id.* We conclude neither doctrine precludes plaintiff's claim.

Collateral estoppel cannot apply for two reasons. First, the parties to the 3 August 1994 proceeding for approval of the settlement were neither identical to nor in privity with the parties to the current action; the parties to the proceeding for approval of the settlement were Dr. Mauldin, Sylva Anesthesiology, and the Houston Estate. Neither Dr. Erdman nor plaintiff, as his insurer, were involved in the settlement or the proceeding to approve it. A party is not in privity with another simply because both parties have an interest in the outcome of a proceeding; "a party should be estopped from contesting an issue only where that party was fully protected in the earlier proceeding." *Summers* at 639, 513 S.E.2d at 578. The only parties whose interests were protected by the order approving the settlement were the Houston Estate and the present defendants; from the record it appears that neither the present plaintiff nor Dr. Erdman received notice of the hearing.

Moreover, the issue resolved by the order approving the settlement between the Estate and the present defendants is dissimilar to the issue presented in the current action. The issue resolved by the 3 August 1994 order was the narrow one of whether the settlement between the Houston Estate and the present defendants was made in good faith and was in the best interests of the heirs of the Estate. Medical Mutual, the present plaintiff, does not challenge the validity of the order approving the settlement by this action; the issue presented in the present case concerns the effect of the order on the contribution rights of the parties.

[2] Likewise, the doctrine of *res judicata* cannot bar plaintiff's claim in this action. The effect of a post-judgment settlement on the contribution rights of the parties was not before the court when the settlement was entered into, and was not relevant to the question of whether the settlement was in the best interests of the heirs to the Houston Estate. No judgment was entered in the proceeding to approve the settlement which decided the merits of the issue presented in the present action.

Defendants argue that plaintiff could have challenged the 3 August 1994 order in its appeal from the judgment, imposing joint and several liability for Houston's death, entered in the negligence action. However, the Uniform Contribution Among Tortfeasors Act, G.S. § 1B, Article 1, ("the Act"), which governs the law of contribution in North Carolina, makes clear that a contribution action is separate from the initial liability action, and the right to seek contribution arises only when one joint tortfeasor has paid more than its share of the judgment. N.C. Gen. Stat. § 1B-1(b). Therefore, the issue of the effect of the 3 August 1994 order approving the settlement on the respective rights of the joint tortfeasors to contribution was not ripe for determination until plaintiff, as insurer for one of the joint tortfeasors, paid more than its share of the judgment.

II.

Finding no procedural bar to plaintiff's claim, we proceed to the primary issue presented by this appeal; i.e., the effect of a post-judgment settlement between a claimant and one of multiple tortfeasors on the contribution rights of a non-settling tortfeasor upon his payment of more than his pro rata share of the judgment. This question is one of first impression in North Carolina, arising upon an apparent conflict between two provisions of the North Carolina Uniform Contribution Among Tortfeasors Act. The Act essentially provides that where two or more persons become jointly and severally liable for the same injury, the injured party may recover his or her entire damages against any one of the joint tortfeasors, but any of the joint tortfeasors who pays more than his or her pro rata share of the damages has a right to contribution from the others for any amount paid in excess of the pro rata share. N.C. Gen. Stat. § 1B-1(b). The pro rata share is usually computed by dividing the total damage award by the number of jointly and severally liable tortfeasors, without considering a tortfeasor's relative degree of fault. See N.C. Gen. Stat. § 1B-2; David A. Logan and Wayne A. Logan, *North Carolina Torts*, § 8.20[7]; Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 22.62 (1999). "The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution." N.C. Gen. Stat. § 1B-3(f).

However, a tortfeasor may avoid liability for contribution to other tortfeasors by obtaining a release, covenant not to sue, or covenant not to enforce judgment from the injured party. G.S. § 1B-4 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and,
>
> (2) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

No question arises when such settlements are reached between a plaintiff and one of multiple joint tortfeasors before a judgment has been entered. In such case, the final damage award is reduced by the amount of the settlement and the nonsettling tortfeasors owe the plaintiff the remainder of the award. See N.C. Gen. Stat. § 1B-4(1). In the present case, however, the Covenant not to Enforce Judgment was entered into after a judgment was entered establishing the joint and several liability of Dr. Erdman, Dr. Mauldin, and Sylva Anesthesiology, creating a conflict between the provisions in § 1B-3(f) and § 1B-4.

To determine which of these sections applies to this situation, we must examine the policies and goals underlying the Act as adopted by our General Assembly; the primary purpose of statutory interpretation is to give effect to the intent of the legislature. *Brown v. Flowe*, 349 N.C. 520, 507 S.E.2d 894 (1998). Where a statutory provision is clear and unambiguous, it must be interpreted in accordance with its plain and ordinary meaning. *Menard v. Johnson*, 105 N.C. App. 70, 411 S.E.2d 825 (1992). As defendants point out, in *Menard* this Court held the language of § 1B-4 "clearly" did not address cross-claims and counterclaims between joint tortfeasors, and they cite the holding as evidence that the language of the section is clear and unambiguous, and, therefore, not subject to judicial construction. However, in *Menard* we were interpreting § 1B-4, standing alone, in the context of whether it operated to bar one defendant, who has settled with the plaintiff, from maintaining a cross-claim against a co-defendant for his own damages allegedly inflicted by the co-defendant. In the present case, we must interpret § 1B-4 as it relates to another provision of the act, § 1B-3(f). Determining which of two *conflicting* provisions of an act should apply to a set of facts is a much different question

than determining the scope of one provision standing alone. *Brown*, 349 N.C. 520, 507 S.E.2d 894.

Where the application of two separate provisions, each clear and unambiguous standing alone, provides incompatible results, the provisions must be interpreted and reconciled so as to give effect to the overall purposes of the legislative act. " '[W]here a statute is ambiguous, judicial construction must be used to ascertain the legislative will.' " *Brown v. Flowe* at 523, 507 S.E.2d at 896 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)). Where more than one statute speaks to a single subject, the Court must read them together to determine legislative intent. *Id.* "Our task is to give effect, if possible, to all sections of each statute and to harmonize them into one law on the subject." *Id.* at 524, 507 S.E.2d at 896. We must therefore examine these provisions in *pari materia*, within the context of the entire Act.

Contribution arises when more than one tortfeasor is liable for a single injury; it permits one tortfeasor to demand assistance from the other tortfeasors if his payment to the injured party exceeds his pro rata share of the damage. David A. Logan & Wayne A. Logan, *North Carolina Torts*, § 8.20[7]. At common law, one who was jointly and severally liable for an injury had no right to compel contribution from others who were also liable for the same injury. *Nationwide Mut. Ins. Co. v. Bynum*, 267 N.C. 289, 148 S.E.2d 114 (1966). A plaintiff could enforce the entire damage award against only one of several joint tortfeasors, allowing the plaintiff to allocate liability as he or she saw fit. A tortfeasor who paid a disproportionate share of the common liability had no recourse against the others. The common law was changed by the enactment of legislation eventually codified as G.S. § 1-240, which permitted a joint tortfeasor who paid a plaintiff more than his pro rata share of the damages to enforce contribution against others jointly and severally liable for the injury. *Nationwide, supra*; see Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 22.61 (1999). In 1968, North Carolina replaced G.S. § 1-240 with the Uniform Contribution Among Tortfeasors Act, G.S. § 1B-1, *et seq.* The purpose of the Act was to "distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law." 12 Uniform Laws Annot., at 187, prefatory note (Master Edition, 1968). The law of contribution was designed to prevent an injured party from obtaining multiple awards for the same injury, and to prevent a tortfeasor who is only partially responsible, though jointly and severally liable, from

paying all of the injured party's damages. David A. Logan & Wayne A. Logan, *North Carolina Torts*, § 8.20[7]. The right to contribution presented a mechanism which allowed the plaintiff to be made whole without pursuing actions against multiple tortfeasors for the enforcement of one damage award, and also prevented an inequitable distribution of liability among the joint tortfeasors.

The Act also incorporated measures to encourage settlement. The drafters of the Act recognized that the contribution scheme described in the Act did not encourage settlement because "[no] defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party." 12 Uniform Laws Annot., s. 4 at 264 (Master Edition 1968). Therefore, the drafters included a provision governing covenants and releases; a plaintiff and tortfeasor could enter into a release, a covenant not to sue, or a covenant not to enforce judgment and be released from liability to other tortfeasors for contribution. See N.C. Gen. Stat. § 1B-4.

[3] Though North Carolina courts have not heretofore addressed the interplay between G.S. § 1B-3(f) and § 1B-4, our General Assembly has instructed that the Act "be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it." N.C. Gen. Stat. § 1B-5. The Supreme Court of Massachusetts has addressed the identical issue in *Bishop v. Klein*, 380 Mass. 285, 402 N.E.2d 1365 (1980). Like North Carolina, Massachusetts modeled its law with respect to contribution, Mass. G.L. c. 231B, after the Uniform Contribution Among Tortfeasors Act. In *Bishop*, the Massachusetts Supreme Court reversed a trial court ruling which held that a settlement and release given after entry of a judgment establishing joint and several liability on the part of multiple tortfeasors extinguished the non-settling tortfeasor's claim for contribution against the tortfeasor who settled after the judgment. The Massachusetts Court, quoting the language contained in §§ 3(f) and 4, interpreted the statutes as "clearly establish[ing] that entry of judgment against two or more joint tortfeasors fixes a defendant's right to contribution for the amount paid in excess of his equitable share and extinguishes any right to settle and thereby discharge liability for contribution." *Bishop* at 293, 402 N.E.2d at 1371. The Court noted

> G.L. c. 231B, § 4(b) was drafted to encourage settlements in multiple party tort actions by clearly delineating the effect

settlement will have on collateral rights and liabilities in future litigation.

> However, to apply the contribution bar of § 4(b) to a settlement reached after judgment has been entered contradicts the general purpose of the statute. . . . Where, as here, a wrongdoer has settled for less than his pro rata share, such a construction would, in essence, constitute a reversion to the common law view that an injured party may apportion the loss among joint tortfeasors as he sees fit. . . . We can resolve this apparent conflict of policies by limiting the preclusive effects of § 4(b) to prejudgment settlements.

Id. at 294-95, 402 N.E.2d 1371-72. In a footnote, the Court noted that the inclusion of "covenant not to sue" in the list of agreements precluding contribution contained in § 4(b) did not require the section to be applied to post-judgment settlements in that a "covenant not to enforce judgment" has been defined as a covenant "entered into after suit is commenced and before judgment." *Id.* (citation omitted).

The opposite result was reached by the Appellate Court of Illinois in *Fernandez v. Tempel Steel Corp.*, 277 Ill. App. 3d 330, 660 N.E.2d 218 (1995) and the Missouri Court of Appeals in *Callahan v. Cardinal Glennon Children's Hospital*, 901 S.W.2d 270 (1995). In both cases, those courts held that language similar to that contained in G.S. § 1B-4 applied equally to pre-judgment and post-judgment settlements. However, the contribution statutes in Illinois and Missouri did not contain any provision similar to our G.S. § 1B-3(f) that "[t]he judgment of the court in determining the liability of the several defendants to the claimant . . . shall be binding as among such defendants in determining their right to contribution." Therefore, we are not persuaded to follow the reasoning of those courts.

Defendants argue, however, that had our General Assembly intended contribution rights to be affected differently by a post-judgment settlement than by a pre-judgment settlement, it would have expressly so provided in § 1B-4. They cite, as an example, California's statutes relating to contribution among joint tortfeasors which expressly provide that the contribution liability of a settling joint tortfeasor is extinguished only when the settlement is entered into before verdict or judgment. See West's Ann. Cal. C.C.P. § 877. However, California's statutory scheme for contribution among joint tortfeasors is significantly different from the North Carolina Contribution Among Tortfeasors Act; a comparison of isolated provi-

sions of each act is neither helpful not relevant. *Compare* Cal. C.C.P. Title 11, Chapter 1 and N.C. Gen. Stat. § 1B.

We hold G.S. § 1B-3(f) controls the liability of joint tortfeasors after a judgment establishing their joint and several liability has been entered; consequently, G.S. § 1B-4 does not permit one of multiple tortfeasors to avoid liability for contribution to other joint tortfeasors by a settlement, after judgment, for less than his pro rata share of the judgment. To hold otherwise would allow an allocation of liability among joint tortfeasors to be decided by the injured party and permit a disproportionate share of the injured party's recovery to be inequitably borne by less than all of the parties equally responsible under the law, the very dangers the Uniform Contribution Among Tortfeasors Act was designed to prevent.

Summary judgment in favor of defendants is reversed and this case is remanded to the trial court for further proceedings consistent herewith.

Reversed and remanded.

Chief Judge EAGLES and TIMMONS-GOODSON concur.

JAMES ROYALS, JR., AND CARL F. BENFIELD, CO-EXECUTORS OF THE ESTATE OF A.G. DRAUGHAN, DECEASED, PLAINTIFFS v. PIEDMONT ELECTRIC REPAIR COMPANY, A NORTH CAROLINA CORPORATION, ROBERT G. DRAUGHAN, SR., AND F.W. SHORT, DEFENDANTS v. NANCY A. DRAUGHAN, JAMES L. ROYALS, JR., ADMINISTRATOR OF THE ESTATE OF BETSY DRAUGHAN HACKLER, JUDY DRAUGHAN PHILLIPS, PEGGY DRAUGHAN HULIN, JAMES L. ROYALS, JR. (INDIVIDUALLY), ROBERT G. DRAUGHAN, JR., DAVID MICHAEL DRAUGHAN, AND STEVEN D. COE, THIRD-PARTY DEFENDANTS

No. COA99-609

(Filed 2 May 2000)

1. Corporations— closely-held—minority shareholders' rights—reasonable expectation analysis—findings

The trial court in a minority shareholder's rights case did not disregard the reasonableness and without-fault requirements of the reasonable expectations analysis where the bulk of the court's findings were geared to other parts of the test in

Meiselman v. Meiselman, 309 N.C. 279, but the court stated that the holders of 39% of the ownership interest had certain reasonable expectations which were set out.

2. Corporations— closely-held—minority shareholders' rights—reasonable expectations—viewed over entire course of dealing—not limited to written instruments

The trial court correctly found that a minority shareholder and director in a closely-held corporation had reasonable financial and management expectations. A complaining shareholder's reasonable expectations cannot be viewed in a vacuum, but must be examined and re-evaluated over the entire course of the various participants' relationships and dealings and are not limited to those memorialized in written instruments.

3. Corporations— closely-held—minority shareholder's rights—reasonable expectations—frustration—faulty conduct of shareholder—causal connection

The reasonable expectations of complaining shareholders in a closely-held corporation were frustrated where the corporation refused to offer fair market value for the shares of one shareholder and systematically excluded from all involvement one of the directors. Although the company contended that any frustration of expectations came as a result of the shareholder's sexual harassment, there was no causal connection between the faulty behavior and the frustration of the complaining shareholder's expectations and no causal connection between the shareholder's conduct and the exclusion of the director from management decisions.

4. Corporations— closely-held—protection of expectations of minority shareholders—dissolution

The trial court did not err by ordering dissolution of a closely-held corporation where that was the only way to safeguard the expectations of the complaining shareholders. The majority shareholders can prevent dissolution if they opt to purchase the shares of the complaining shareholders at the fair value determined by an independent appraiser.

5. Corporations— closely-held—costs of appraiser's report—wholly taxed to defendants—court's discretion

The trial court did not abuse its discretion by taxing the entire cost of an independent appraiser's report to defendants in

an action brought by minority shareholders in a closely-held corporation. Although a pre-trial case management order stated that appraisal costs would be shared by both parties, that order specifically stated that the court could amend any of its provisions when appropriate.

Appeal by defendants from order and judgment entered 3 March 1999 by Judge Ben F. Tennille in Guilford County Superior Court. Heard in the Court of Appeals 23 February 2000.

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

Keziah, Gates & Samet, L.L.P., by Jan H. Samet, for defendant-appellant Piedmont Electric Repair Company.

Roberson, Haworth & Reese, PLLC, by Robert A. Brinson, for defendant-appellant Robert G. Draughan, Sr.

Fisher, Clinard & Craig, PLLC, by Rick Cornwell, for defendant-appellant F.W. Short.

LEWIS, Judge.

Since 1955, North Carolina has served as a pioneer and "shining light" in the protection of minority shareholder rights. Robert Savage McLean, Note, *Minority Shareholders' Rights in the Close Corporation under the New North Carolina Business Corporation Act*, 68 N.C.L. Rev. 1109, 1125-26 (1990) (citing a quote by Professor F. Hodge O'Neal that appeared in the *Charlotte Observer* on May 20, 1989). In this appeal, we are asked to re-affirm that tradition of protection by upholding the dissolution of a closely-held corporation, nearly forty percent (40%) of whose shares have basically been frozen by the controlling shareholders.

Defendant Piedmont Electric Repair Company ("PERCO") is a closely-held corporation engaged in the business of electrical contracting work. Defendant Robert G. Draughan ("Buck") is PERCO's president and owns fifty-one percent (51%) of the company's shares. Defendant F.W. Short ("Short") is the executive vice-president, treasurer, and owner of one share of PERCO stock. A.G. Draughan ("Glenn"), father of Buck, owned thirty-eight percent (38%) of PERCO's shares when he died in 1996. All his shares are currently in a testamentary trust that he established for the benefit of his wife for life and then his four daughters. Plaintiffs serve as trustees of this

trust. The third-party defendants own the remaining eleven percent (11%) of PERCO's stock.

Glenn began working for PERCO in 1938 and gradually worked his way up the management ranks within the company. During his tenure, he held positions as vice-president, president, and chairman of the board of PERCO. As of 1992, he, Buck, and Short were PERCO's three directors, as well as the company's only stockholders. Beginning in 1992, however, Glenn's standing in the company began to deteriorate when allegations of sexual harassment were lodged against him. PERCO hired independent counsel to investigate these allegations. Counsel's report concluded that Glenn had committed various acts of sexual harassment. Upon advice of counsel, PERCO thereafter banned Glenn from the company's premises and limited his job duties to only that of a "consultant" at the rate of $15,000 per year.

Upon learning of this, Glenn attempted to sell his shares of stock. Just as Dan Short (Glenn's former partner and Short's father) had previously done, Glenn wanted to sell his shares in order to fund his retirement. But pursuant to a shareholder restriction agreement, the company and all other shareholders had a right of first refusal on any attempted sale of stock. Accordingly, Glenn offered to sell his shares to either PERCO, Buck, or Short for 120% of the company's book value. Buck and Short, both individually and on behalf of the company, turned down the offer.

At a 10 February 1994 shareholder's meeting, Buck and Short were re-elected as PERCO directors; plaintiff James Royals, Jr. ("Royals"), Glenn's grandson, was elected as the third director. However, at a directors' meeting that afternoon, Buck and Short elected themselves as the two-member executive committee that would run PERCO. That same day, PERCO offered to purchase Glenn's shares for just under half of the company's book value, an offer that was never accepted by Glenn. The following day, PERCO sent Glenn a letter terminating him as vice-president and company consultant and informing him he would no longer receive any compensation from the company. Even though Glenn remained a thirty-eight percent (38%) shareholder in PERCO and Royals remained one of the company's directors, Buck and Short have conducted all of PERCO's business since 1994 without consulting either of them.

In 1997, Royals attempted to enter PERCO's premises with an environmental engineer to investigate some environmental concerns

Glenn had expressed to him before his death. Following this attempt, PERCO banned Royals and all other minority shareholders from its premises. Plaintiffs thereafter filed this action seeking judicial dissolution of PERCO under N.C. Gen. Stat. § 55-14-30(2)(ii). From a judgment and order granting plaintiffs' requested relief, defendants appeal.

Section 55-14-30(2)(ii) provides for judicial dissolution of a corporation when "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." If such grounds exist, the decision to dissolve the corporation is within the trial court's sound discretion. *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 706, 436 S.E.2d 843, 847 (1993). We conclude that the requisite grounds exist and that the trial court did not abuse its discretion in ordering dissolution.

The seminal case with respect to judicial dissolution of closely-held corporations pursuant to N.C. Gen. Stat. § 55-14-30(2)(ii) (formerly section 55-125(a)(4)) is *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983). In *Meiselman*, our Supreme Court outlined the particular dilemma that minority shareholders in closely-held corporations often face. Specifically, that court stated:

> [M]any close corporations are companies based on personal relationships that give rise to certain "reasonable expectations" on the part of those acquiring an interest in the close corporation. . . .
>
> Thus, when personal relations among the participants in a close corporation break down, the "reasonable expectations" the participants had . . . become difficult if not impossible to fulfill. In other words, when the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions.

Id. at 289-90, 307 S.E.2d at 558. Furthermore, "the illiquidity of a minority shareholder's interest in a close corporation renders him vulnerable to [other] exploitation by the majority shareholders." *Id.* at 291, 307 S.E.2d at 559. Given these concerns, our Supreme Court announced that consideration of the "rights or interests" of the complaining shareholder under the statute requires analyzing that shareholder's "reasonable expectations." *Id.* at 298, 307 S.E.2d at 563. If

those expectations are being frustrated, a court may then consider fashioning appropriate relief to protect those interests, including ordering dissolution. *Id.* at 300, 307 S.E.2d at 563.

Specifically, *Meiselman* outlines a four-step requirement for relief under the reasonable expectations analysis. First, the complaining shareholder must prove he had one or more substantial reasonable expectations that were known or assumed by the other shareholders. *Id.* at 301, 307 S.E.2d at 564. Examples of such expectations might include ongoing participation in the management of the company or secure employment with the company. *Id.* at 290, 307 S.E.2d at 558. Second, he must demonstrate that the expectation or expectations have been frustrated. *Id.* at 301, 307 S.E.2d at 564. Next, the complaining shareholder must show that this frustration of expectations was not the product of his own fault and was largely beyond his control. *Id.* Finally, he must show that the specific circumstances warrant some form of equitable relief. *Id.*

[1] At the outset, defendants contend that the trial court ignored two of these four requirements. Specifically, they argue that the trial court focused on what expectations the complaining shareholders had, but never specifically determined whether these expectations were reasonable. Moreover, they argue that the trial court never specifically concluded that any frustration of these expectations was not the fault of the complaining shareholders. We find these arguments unpersuasive. The trial court specifically determined:

> 34. The holders of the 385 shares of stock in PERCO, representing approximately 39% of the ownership interest therein originally owned by A.G. Draughan, and after his death held by Plaintiffs as executors of his estate, as well as [certain third-party defendants], had certain *reasonable* expectations, which are set forth below. These *reasonable* expectations, which were known or assumed to exist by Defendants, have been frustrated *without the fault of the complaining minority shareholders.*

(Emphasis added). Defendants are correct in pointing out that the bulk of the trial court's findings are geared towards the other two parts of the *Meiselman* test. But Finding No. 34 sufficiently demonstrates that the trial court did not wholly disregard the reasonableness and without-fault requirements. We now consider whether the trial court properly applied all four parts.

[2] As stated, the first part of the *Meiselman* test requires an analysis of the complaining minority shareholders' reasonable expectations. The trial court concluded that the various minority shareholders here had six such expectations. These can fairly be subdivided into two categories, financial expectations and management expectations. Each category will be analyzed below.

With respect to the shareholders' financial expectations, the trial court found the following: (1) all minority shareholders would have a reasonable opportunity to realize some return on their equity, either in the form of distribution of PERCO's profits or purchase of their shares at fair market value; and (2) Glenn would be able to redeem his shares in order to fund his retirement and/or his estate plan. Defendants contest these findings by pointing out that, at no time in PERCO's history, had a shareholder ever received fair market value for his shares. As was the case with Short's father, Dan Short, the shares had always been purchased at below market value and then subsidized by additional annual compensation from the company. Based upon this history, defendants maintain the trial court erred by concluding that Glenn and the other minority shareholders had an expectation of receiving fair market return on their equity. We disagree.

Significantly, *Meiselman* states that a complaining shareholder's reasonable expectations cannot be viewed in a vacuum; rather they must be examined and re-evaluated over the entire course of the various participants' relationships and dealings. *Meiselman*, 309 N.C. at 298, 307 S.E.2d at 563. Furthermore, these expectations are not limited to those memorialized in the by-laws or other written instruments; "[they] must be gleaned from the parties' *actions* as well as their signed agreements." 2 F. Hodge O'Neal & Robert B. Thompson, *O'Neal's Close Corporations* § 9.30 (3d ed. 1998) (emphasis added).

Here, all along, Glenn had a reasonable expectation of receiving some sort of fair value for his shares of stock. There is little doubt that Buck and Short both knew of, and concurred in, this expectation. *See Meiselman*, 309 N.C. at 298, 307 S.E.2d at 563 ("In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them.") Although Glenn's initial expectation with respect to fair value might have been less than book value linked with a subsidized annual compensation or consulting fee, this expectation changed following the 10 February 1994 director's meeting, at which time PERCO cut off

Glenn's compensation altogether. Following this meeting, defendants cannot claim that the parties had the same expectations as before. Once informed that he would no longer receive any compensation from PERCO, Glenn could only reasonably expect that fair value return for his shares now meant his shares would be purchased at market value. Thus, the trial court correctly concluded that Glenn had a reasonable expectation in receiving fair market value for his shares.

However, Glenn is not the only complaining shareholder whose expectations need to be considered. On the management side, the trial court concluded that Royals, as one of PERCO's directors, reasonably expected to have a voice in any business decisions and access to all corporate records. This finding is supported by the evidence. His election to PERCO's board of directors by Buck and Short inherently created an expectation that he would be involved in management decisions and have access to corporate records. Accordingly, we also conclude that the trial court properly found that Royals had a reasonable expectation in participating in the management of the company.

[3] Having concluded that the complaining shareholders had substantial reasonable expectations here, we now proceed to the second step in the *Meiselman* inquiry and determine whether these expectations have been frustrated by the corporation. There is no question that frustration of expectations has occurred here. On the financial expectations side, PERCO has refused to offer fair market value for Glenn's shares (or any other minority shareholder's shares for that matter). In fact, PERCO essentially continues to hold these shares captive, forcing the minority shareholders to either redeem them for significantly less than market value or hold on to them until the majority shareholders decide to dissolve the company. On the management expectations side, Royals has been systematically excluded from all involvement whatsoever in PERCO, notwithstanding that he is one of its directors. And when he did try to exercise some management of the company by bringing in an environmental engineer to investigate certain environmental concerns, PERCO responded by permanently banning him from the premises.

Next, we consider whether the frustration of these expectations occurred without the fault of the complaining shareholders. This part of the *Meiselman* test has not to date been developed by our courts. Defendants contend that any frustration of expectations came as the direct result of Glenn's own sexual harassment activities and that, by

cutting off his compensation, banning him from the premises, and terminating him as an officer, PERCO was merely looking out for its best interests. We disagree.

By including a fault-based inquiry within the reasonable expectations analysis, *Meiselman* essentially requires a court to ask whether the complaining shareholder's own conduct was the cause behind the frustration. Thus, in order for fault to be a bar to dissolution, there must be some causal connection between the frustration of the shareholder's reasonable expectations and his faulty behavior. For example, a shareholder with an expectation in management cannot seek dissolution based upon a frustration of this expectation if he never learns the business nor attends corporate management meetings. Likewise, a shareholder with an expectation in secure employment would be barred from seeking dissolution if he embezzled money from the company. *Compare Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834 (Minn. Ct. App. 1994) (upholding trial court's conclusion that the complaining shareholder's expectations had been frustrated, notwithstanding his history of assaults and consequent termination) *with Exadaktilos v. Cinnaminson Realty Co.*, 400 A.2d 554 (N.J. Super. Ct. Law Div. 1979) (barring dissolution because frustration of the complaining shareholder's expectation of participation in management was caused by his own unsatisfactory managerial performance), *aff'd per curiam*, 414 A.2d 994 (N.J. Super. Ct. App. Div. 1980).

We conclude that there was no causal connection between the frustration of the complaining shareholders' expectations and Glenn's faulty behavior here. Although Glenn's conduct did warrant some penalty with respect to his presence and participation in management at PERCO, for purposes of this analysis, any penalty should not have extended to his realization of a fair return on his equity in the company. Glenn's compensation was never tied to any real services he was performing for PERCO at that time. Rather, it was only part of the parties' original arrangement to help fund Glenn's retirement and/or estate plan in return for a below-market buyout of his shares. Any conduct by Glenn should have in no way affected this wholly separate arrangement. Furthermore, there was certainly no causal connection between Glenn's conduct and PERCO's systematic exclusion of Royals from management decisions. This exclusion instead manifests an intent by Buck and Short to control the company without any minority shareholder or director input. Accordingly, we conclude that frustration of the complaining share-

holders' reasonable expectations did not result from any fault on their part.

[4] The last step in the *Meiselman* test requires us to consider whether dissolution or some other relief is appropriate under the circumstances. As previously stated, this analysis is addressed to the sound discretion of the trial court. *Foster*, 112 N.C. App. at 706, 436 S.E.2d at 847. We find no abuse of discretion. The evidence strongly suggests that the minority shareholders have been permanently frozen out of the company, fiscally and physically. Glenn's shares are currently in a testamentary trust for the benefit of his aging widow. The only way these shares will ever produce any money for her is if they are liquidated. But PERCO, in the persons of Buck and Short, has demonstrated no interest in offering a fair return for these shares. Furthermore, PERCO has manifested no desire to involve Royals in any management decisions whatsoever. Under these circumstances, we conclude that judicial dissolution is the only way to safeguard the expectations of the complaining shareholders here.

We do note that the majority shareholders can still prevent dissolution if they opt to purchase the 385 shares held by the complaining shareholders. Our statutes specifically provide:

> In any proceeding brought by a shareholder under G.S. 55-14-30(2)(ii) in which the court determines that dissolution would be appropriate, the court shall not order dissolution if, after such determination, the corporation elects to purchase the shares of the complaining shareholder at their fair value, as determined in accordance with such procedures as the court may provide.

N.C. Gen. Stat. § 55-14-31(d) (1999). After considering an independent appraiser's report of PERCO's value, the trial court found the fair value of each share to be $635. Defendants have not contested this finding in their brief. Accordingly, defendants can prevent dissolution by purchasing the complaining shareholders' stock for $635 per share.

[5] In their final assignment of error, defendants claim the trial court improperly taxed them the entire cost of the independent appraiser's valuation report. We disagree. N.C. Gen. Stat. § 7A-305(d)(7) specifically allows appraisal costs to be assessed against a party. The trial court then has discretion whether or not in fact to award these costs. N.C. Gen. Stat. § 6-20 (1999). Its decision is not reviewable absent an

abuse of that discretion. *Brandenburg Land Co. v. Champion International*, 107 N.C. App. 102, 103, 418 S.E.2d 526, 527 (1992). We find no abuse here.

Defendants claim that the trial court abused its discretion by ignoring the court's pre-trial case management order, in which the court stated that appraisal costs would be shared by both parties. But that order also specifically stated the court could amend any of its provisions when appropriate. The court did so in its final judgment, when it ordered only defendants to pay the appraisal costs. By doing that which it was specifically empowered to do, i.e., change the terms of the case management order, the trial court cannot be said to have abused its discretion. Accordingly, defendants' final assignment of error is without merit.

Affirmed.

Judges JOHN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. SAMUEL FEREBEE, AKA WILLIAM FEREBEE, DEFENDANT

No. COA99-651

(Filed 2 May 2000)

1. Crimes, Other— stalking—elements—warning to desist—subsequent actions

Defendant is entitled to a new trial in a stalking case because the trial court's instruction given in accordance with the applicable pattern jury instruction was improper since: (1) the instruction incorrectly allowed the jury to consider acts prior to the alleged warning as constituting part of the basis of a stalking conviction; and (2) a review of the pertinent 1993 version of N.C.G.S. § 14-277.3(a) reveals that the requirement that an alleged stalker must be warned to desist and, notwithstanding such warning, thereafter follow or be in the presence of the victim on more than one occasion, is essentially a threshold element that must be proven before a jury may consider the remaining elements.

2. Crimes, Other— stalking—instruction on "reasonable fear"

Although the element of "reasonable fear" in a stalking case is not at issue before the Court of Appeals, the trial court is encouraged to instruct the jury on the definition of "reasonable fear" for alleged violations of N.C.G.S. § 14-277.3(a) to ensure that an objective standard, based on what frightens an ordinary, prudent person under the same or similar circumstances, is applied rather than a subjective standard which focuses on the individual victim's fears and apprehensions.

Appeal by defendant from judgment entered 6 January 1999 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 30 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Amy C. Kunstling, for the State.

Wilkinson and Rader, P.A., by Steven P. Rader, for defendant-appellant.

SMITH, Judge.

Defendant appeals a judgment entered upon conviction by a jury of "stalking," in violation of N.C.G.S. § 14-277.3(a) (1993) (amended 1997). In pertinent part defendant contends the trial court erred in charging the jury. We remand for a new trial.

The State's evidence at trial tended to show the following: Andrea Hedrick (Hedrick) moved to New Bern in April 1995 and began attending Centenary Methodist Church (the church). Hedrick met defendant one Sunday in church and the two had a "very basic" conversation. The following Sunday defendant approached Hedrick and told her she was "very pretty," and asked if she had a boyfriend. Hedrick replied that she did and defendant stated, "[o]h, that's always how it is. All the pretty ones have boy friends." After their conversation, Hedrick noticed defendant looking at her during church services, and testified that he would wait outside the church and try to approach her as she was leaving. Hedrick related that she began arriving for church late and leaving early to avoid defendant.

Hedrick's place of employment was located on the second floor of a building which also houses a post office, real estate office and delicatessen on the first floor. Defendant frequented the building

because he kept a post office box and had conducted business with the real estate office on the first floor. In May of 1995, Hedrick encountered defendant on the first floor while walking to her office, and he asked why she had not been to church in three weeks. Subsequently, in August 1995, defendant approached Hedrick on the first floor of her office building and stated he had seen her playing softball and coaching little girls soccer, which Hedrick in fact had been doing in the previous weeks.

On 4 September 1995, Hedrick drove to Atlantic Beach, located forty-five minutes from her home. While she was lying on the beach, Hedrick noticed defendant sitting four or five feet in front of her, wearing long pants and shoes. Hedrick testified that she immediately put her clothes on, but decided to stay when she saw defendant stand to leave. Hedrick asked someone sitting nearby to escort her to the car after defendant left.

Shortly thereafter, Hedrick called Reverend William Sherman, Jr. (Reverend Sherman), the church minister, and asked him to speak with defendant on her behalf to request that he leave her alone. Approximately one week later, Reverend Sherman told defendant that Hedrick was "very uncomfortable and frightened" by him, and that he "did not need to be near her or around her." Defendant told Reverend Sherman he would stay away from Hedrick.

On 5 May 1996, Hedrick and her friend Chuck Anderson (Anderson), attended church services. The couple sat on the back row and both testified that during the service, defendant, who was sitting on the front row, turned around several times and glared at them. After church, Hedrick and Anderson returned to her apartment and sat on the patio, which faced a residential street. The couple noticed a red car pass by and return within "seconds" driving "very slowly." Both Hedrick and Anderson identified defendant as the driver.

The following day, Hedrick was walking across the parking lot of her office building and defendant approached as she reached her vehicle. Hedrick testified that defendant asked where she was going, and said, "[n]ice day to go to the beach." Hedrick thereafter reported the incident to the police.

Defendant was indicted for felonious stalking 20 May 1996, and convicted thereof by a jury on 29 August 1996. Defendant appealed and this Court granted a new trial based on the trial judge's failure to

consider defendant's motion for change of venue. *See State v. Ferebee*, 128 N.C. App. 710, 499 S.E.2d 459 (1998). On remand, defendant's motion for change of venue was granted, along with his motion to reduce the stalking charge from a felony to a misdemeanor. On 6 January 1999, a jury found defendant guilty of misdemeanor stalking. Based on defendant's prior convictions of stalking, assault on a female, and resisting, obstructing, or delaying a police officer, defendant was classified as having a prior conviction level of II. Defendant elected to serve his suspended sentence of 45 days imprisonment in lieu of probation, and was released after time served. Defendant appeals.

[1] Defendant contends the trial court's charge to the jury did not properly set forth the elements required by G.S. § 14-277.3(a), and he was prejudiced thereby.

Initially, we note that G.S. § 14-277.3(a) has been amended by the legislature since defendant's conviction. The 1993 version relevant for this appeal provides as follows:

> (a) Offense.—A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose:
>
> (1) With the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury;
>
> (2) After reasonable warning or request to desist by or on behalf of the other person; and
>
> (3) The acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.

G.S. § 14-277.3(a) (1993).

Defendant argues the trial court's charge, given in accordance with the pattern jury instructions, "incorrectly allow[ed] the jury to consider acts prior to the alleged warning as constituting part of the basis of a stalking conviction." We agree.

During the charge conference, defense counsel voiced concern regarding the trial court's intent to charge the jury in accordance with the pattern instructions, relating:

> [W]ith regard to the third [issue], that the defendant continued his acts after reasonable warning or request to desist, . . . [t]he statute requires specifically that the defendant on more than one

> occasion followed or was in the presence of the alleged victim . . . is rather confusing because it's not specifically setting out what the statute requires. The statute specifically says that this has to be done on more than one occasion *after* being warned to cease and desist. (emphasis added).
>
> Judge . . . the instruction that you are quoting from simply says the defendant continued his acts. . . .

The court then asked how defendant would suggest the instruction be charged, and defense counsel replied:

> Judge, I would simply request that the defendant on more than one occasion after being warned continued his acts, or some wording to that effect, continued his acts after a reasonable request on behalf of the victim.

The trial court refused defendant's proposal and instructed in accordance with the applicable pattern jury instructions as follows:

> The defendant has been accused of stalking. Now, I charge you that for you to find the defendant guilty of stalking the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant willfully on more than one occasion followed or was in the presence of the victim without legal purpose.
>
> Second, that the defendant had the intent to cause emotional distress by placing the victim in reasonable fear of bodily injury. . . .
>
> Third, that the defendant continued his acts after reasonable warning or request to desist made on behalf of the victim.
>
> And fourth, that his acts constituted a pattern of conduct over a period of time evidencing a continuity of purpose.

We believe the trial court's instructions could be construed as improperly allowing the jury to consider acts which occurred prior to Reverend Sherman's warning in determining whether the defendant "willfully on more than one occasion follow[ed]" Hedrick, and if his "acts constituted a pattern of conduct over a period of time evidencing a continuity of purpose." G.S. § 14-277.3(a). Although the given charge tracked applicable pattern jury instructions, pattern instructions, which have neither the force nor effect of the law, may be erroneous and need alteration to conform with the law. *See Wall v. Stout*,

310 N.C. 184, 190-91, 311 S.E.2d 571, 575-76 (1984) (trial court's instructions, "nearly in precise conformity with the pattern jury instructions," were in totality so emphatically favorable to defendant that plaintiffs were entitled to a new trial; ruling based on "exculpatory nature of the pattern jury instructions themselves and to their selections and use by the trial judge"), and *State v. Warren* 348 N.C. 80, 119-20, 499 S.E.2d 431, 453 ("pattern jury instruction . . . has neither the force nor the effect of law . . . [and may be] altered to conform to the law"), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998).

A criminal statute must be strictly construed with regard to the evil which it is intended to suppress, *see 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), and interpreted to "give effect to the legislative intent," *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (citations omitted). It is well established that "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning." *Id.* However,

> when a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent.

Id. In determining legislative intent, "[w]ords and phrases of a statute must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 6-7 (1968) (citation omitted) (where statutory "language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent"). *See State v. Partlow*, 91 N.C. 550, 552 (1884) (legislative intent "ascertained 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 remedy, [and] the end to be accomplished").

The statutory elements of G.S. § 14-277.3(a) must be interpreted in context and considered as a whole to render them harmonious with the intent of the entire statute. We hold that the requirement that an alleged stalker must be warned to desist and, notwithstanding such warning, thereafter follow or be in the presence of the victim on more than one occasion, is essentially a threshold element that must

be proven before a jury may consider the remaining elements. This Court has held that while evidence of acts occurring prior to a warning are relevant and admissible under G.S. § 14-277.3(a) "to show the context in which the warning was made," *Ferebee*, 128 N.C. App. at 714, 499 S.E.2d at 462, section 14-277.3(a) "only criminalizes acts that occur after the warning," *id.* Therefore, a conviction for the offense of stalking may not be based upon acts which occurred prior to the time a defendant was warned to desist, but rather upon acts committed after the warning.

In the case *sub judice*, the trial court's charge, while including each essential element of G.S. § 14-277.3(a), fails to precisely set forth as a threshold requirement that defendant was warned or requested to desist and thereafter ignored such warning, giving rise to acts which may serve as a basis for conviction. The only acts which could be considered in finding defendant guilty are those acts which occurred after Reverend Sherman's warning, including allegations that he rode by Hedrick's apartment several times in a short period, and approached her the next day in a parking lot. The trial court's instructions, based on the ambiguous statute, allowed the jury to improperly consider alleged incidents occurring prior to the warning, including the Labor Day beach incident and various encounters between Hedrick and defendant at church and in her office building.

On reviewing the applicable version of G.S. § 14-277.3(a), we find the legislative intent, that the jury consider only those acts committed after a defendant has been warned, would be more effectively relayed though issuance of the following jury instruction:

> A person commits the offense of stalking if the person, *after a reasonable warning or request to desist by or on behalf of the other person*, willfully on more than one occasion follows or is in the presence of another person without legal purpose:
>
> (1) With the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury; and
>
> (2) The acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.

Based upon the foregoing, we hold the ambiguity of G.S. § 14-277.3(a), as brought forward in the pattern jury instructions, prejudiced defendant and warrants a new trial.

[2] Additionally, though the issue is not before us we believe the trial courts would be well advised to define the phrase "reasonable fear" during its instructions in cases decided under the prior or current version of G.S. § 14-277.3(a). While the 1997 amendments to G.S. § 14-277.3(a) substantially altered the proof necessary for a conviction thereunder, the current version continues to require that the alleged victim be placed "in reasonable fear" of harm. *See* G.S. § 14-277.3(a) (1999) ("[a] person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose and with the intent to cause death or bodily injury or with the intent to cause emotional distress by *placing that person in reasonable fear* of death or bodily injury").

For alleged violations of G.S. § 14-277.3(a), we encourage the trial courts to instruct the jury as to the definition of "reasonable fear" to ensure that an objective standard, based on what frightens an ordinary, prudent person under the same or similar circumstances, is applied rather than a subjective standard which focuses on the individual victim's fears and apprehensions. *See generally State v. Bruce*, 268 N.C. 174, 182, 150 S.E.2d 216, 223 (1966) (offense of kidnapping frequently committed by threats and intimidation, and "appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety"), and *State v. Sawyer*, 29 N.C. App. 505, 507, 225 S.E.2d 328, 328-29 (1976) (citation omitted) (show of force or menace of violence for offense of assault "must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm").

Based on the foregoing, we remand for new trial.

New Trial.

Judges WYNN and HORTON concur.

GARY L. ADERHOLT, EMPLOYEE, PLAINTIFF v. A.M. CASTLE COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA99-174

(Filed 2 May 2000)

1. **Workers' Compensation— maximum medical improvement—determination of date**

The Industrial Commission did not err in a workers' compensation proceeding in determining the date of plaintiff's maximum medical improvement where defendant contended that plaintiff's internal injuries had stabilized prior to an evaluation by Dr. Stutesman on 3 October 1994, but the implication of Dr. Stutesman's testimony concerning her evaluation was that plaintiff's condition will likely continue to deteriorate absent surgery. "Maximum medical improvement" is the point at which the injury has stabilized.

2. **Workers' Compensation— loss of spleen—important organ**

The Industrial Commission did not err in a workers' compensation action by awarding $20,000 for the loss of a spleen. Although defendants contend that the spleen does not serve as an important organ under N.C.G.S. § 97-31(24), there was testimony that the spleen filters the blood and protects the body from bacterial infections; given plaintiff's already vulnerable physical condition, his increased risk of infection, however slight, from loss of his spleen sustained the Commission's determination.

3. **Workers' Compensation— sufficiency of findings—damaged or lost organs**

The Industrial Commission did not abuse its discretion in a workers' compensation action in its awards for damaged organs where there was competent medical evidence to support the Commission's findings regarding the significance of each organ to the body's general health and well being and competent evidence to uphold the finding that the organs were either lost or permanently damaged.

Judge GREENE concurring.

Appeal by defendants from opinion and award entered 31 August 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 1999.

Richard B. Harper for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jack A. Gardner, III, and Jeff Kadis, for defendants-appellants.

TIMMONS-GOODSON, Judge.

A.M. Castle Company ("defendant-employer") and Liberty Mutual Insurance Company (collectively, "defendants") appeal from an opinion and award wherein the North Carolina Industrial Commission ("the Commission" or "the Full Commission") concluded that plaintiff reached maximum medical improvement with respect to all of his injuries on 3 October 1994. In its opinion and award, the Commission also determined the amount of compensation to which plaintiff was entitled for the loss or permanent impairment of various organs and body parts. For the reasons hereinafter stated, we affirm the Commission's decision.

The pertinent factual and procedural background is as follows: On 2 February 1989, while working as a salesman for defendant-employer, plaintiff sustained admittedly compensable injuries to his left arm and chest in an accident involving a logging truck. The truck was traveling toward plaintiff on a two-lane road in rural South Carolina, when a dangling chain from the truck crashed through the window of plaintiff's car and hit him in the left arm and upper torso. The chain struck plaintiff with such force that it mangled his arm, penetrated his chest, punctured his diaphragm, and ruptured his stomach. Despite his injuries, plaintiff managed to drive four additional miles before he received assistance and was transported to Spartanburg Regional Medical Center for emergency medical treatment.

Dr. John Tate performed surgery to repair plaintiff's chest injuries and found that the laceration to his stomach caused gastric contents to spill into the abdominal cavity. Dr. Tate cleaned the organs; however, within twenty-four hours of the surgery, plaintiff developed severe sepsis and required extensive treatment with antibiotics and antifungal medication. As a result of the infection, tissues within the abdominal cavity began to die and, thus, Dr. Tate completed more than a dozen laparotomies to clear out the necrotic tissue. Before bringing the infection under control, Dr. Tate had to remove plaintiff's spleen, most of his pancreas, and much of the omentum covering his internal organs. In the interim, plaintiff contracted adult respiratory distress syndrome and his kidneys tem-

porarily failed. Plaintiff also developed adhesions around his intestines.

Due to the gravity of plaintiff's injuries, he remained in the intensive care unit for over two months. When plaintiff was finally able to move about, he experienced numbness in his feet and legs and exhibited a bilateral foot drop when he walked. Dr. Tate consulted with a neurologist about plaintiff's symptoms and concluded that plaintiff suffered nerve damage from malnutrition and the strong medication he had been taking. However, no nerve testing was conducted to determine the degree of damage done.

Following his discharge on 20 May 1989, plaintiff underwent several surgeries to repair the injury to his left arm. The procedures were unsuccessful, however, and plaintiff ultimately lost virtually all use of his left arm and hand. On 24 January 1994, Dr. Stephen Harley, an orthopedic surgeon, performed a final evaluation of plaintiff's condition and found that he had reached maximum medical improvement of his right and left upper extremities. Dr. Harley was of the opinion that plaintiff would not be able to return to gainful employment.

In September of 1994, plaintiff visited Dr. Andrea Stutesman for a comprehensive evaluation of his medical condition. During the initial consultation, plaintiff reported an inability to use his left arm, bilateral foot drop, chronic diarrhea, non-insulin dependent diabetes, difficulty breathing especially with exertion, hoarseness, frequent urination, and sexual dysfunction. Dr. Stutesman referred plaintiff for an MRI, which revealed a significant compromise of the cervical cord at three levels. Given the likelihood that spur formation in the spine would worsen plaintiff's existing problems, Dr. Stutesman strongly encouraged plaintiff to see a neurosurgeon. Plaintiff refused, however, not wanting to undergo any further surgery. Therefore, Dr. Stutesman completed the impairment evaluation and, on 3 October 1994, gave plaintiff the following disability ratings: 49% permanent partial disability to his back, 13% permanent partial disability to his right lower extremity, 18% permanent partial disability to his left lower extremity, 19% permanent partial disability to his right upper extremity, and 100% permanent total disability to his left upper extremity. Dr. Stutesman further found that plaintiff suffered losses or impairments to his organs as follows: 51-100% of each lung, 49% of the upper digestive tract, 5% due to diabetes, 100% loss of spleen, 29% of the air passage, 14% speech impairment, 9% of sexual function, and 25% of skin flexibility.

Defendants paid disability benefits to plaintiff pursuant to a properly executed Form 21 Agreement for Compensation. On 28 February 1995, plaintiff requested a hearing to determine his benefits under sections 97-31 and 97-29 of the North Carolina General Statutes so that he could make an election of remedies. Deputy Commissioner Morgan S. Chapman heard the matter and entered an order on 27 March 1997 finding plaintiff to be totally and permanently disabled. The deputy commissioner concluded that plaintiff reached maximum medical improvement on 24 January 1994 and that plaintiff should make an election of benefits as of that date. Plaintiff appealed, and the Full Commission entered an opinion and award concluding, instead, that plaintiff achieved maximum medical improvement as to all of his injuries and resulting conditions on 3 October 1994. The Commission, however, reiterated that "[p]laintiff reached maximum medical improvement with respect to his right and left upper extremities on 24 January 1994." Defendants appeal.

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[1] At the outset, defendants argue that the Commission erred in concluding that plaintiff reached maximum medical improvement with respect to all injuries, except those to his right and left upper extremities, on 3 October 1994, the date of his final evaluation by Dr. Stutesman. Defendants contend that the record lacks any competent evidence to support this conclusion and that the evidence, instead, compels a conclusion that plaintiff attained maximum medical improvement of all of his injuries in January of 1994. We must disagree.

The scope of this Court's review on appeal from an opinion and award of the North Carolina Industrial Commission is well defined. We must determine whether the record before the Commission yields any competent evidence to support its findings of fact and whether those findings, in turn, sustain its conclusions of law. *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). Thus, " '[i]f there is any evidence of substance which directly or by reasonable inference tends to support the findings, [we are] bound by such evidence, even though there is evidence that would have supported a finding to the contrary.' " *Haponski v. Constructor's Inc.*, 71 N.C. App. 786, 788, 323 S.E.2d 46, 47 (1984) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980) (citation omitted)).

The workers' compensation statutes do not define the term "maximum medical improvement." *Horne v. Universal Leaf Tobacco*

Processors, 119 N.C. App. 682, 688, 459 S.E.2d 797, 801 (1995). Our courts have, nevertheless, recognized that "maximum medical improvement" is achieved when the healing period ends, i.e., the moment " 'after a course of treatment and observation' " when the injury or condition is found to be permanent. *Id.* (quoting *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 289, 229 S.E.2d 325, 329 (1976)). In other words, "maximum medical improvement" is "[t]he point at which the injury has stabilized." *Id.*

We are satisfied from our review of the record that the Commission had before it competent evidence to support its conclusion that plaintiff reached maximum medical improvement of his chest injury and the resulting conditions on 3 October 1994. Dr. Stutesman testified that when she saw plaintiff in September of 1994, he was suffering from bilateral foot drop, non-insulin dependent diabetes, difficulty breathing, hoarseness, frequent urination, and sexual dysfunction. She further stated that neurological tests indicated "marked compromise of the cervical chord" at three levels. Given the risk that the nerve damage and bone spurring would worsen plaintiff's current condition, Dr. Stutesman strongly recommended that he consult a neurosurgeon, but plaintiff refused.

In light of the implication from Dr. Stutesman's testimony that plaintiff's condition will likely continue to deteriorate absent surgery to repair his cervical spine, we reject defendants' contention that plaintiff's internal injuries had stabilized prior to Dr. Stutesman's evaluation and rating. Thus, we find ample support in the record for the Commission's finding as follows:

> Given his refusal to undergo further surgeries as recommended by Dr. Stutesman, plaintiff has reached maximum medical improvement with respect to all of his injuries and resulting conditions. Plaintiff reached maximum medical improvement with respect to his right and left upper extremities on January 24, 1994.

This finding likewise supports the Commission's conclusion that "[p]laintiff has reached maximum medical improvement with respect to all of his injuries, and is found to be permanently and totally disabled as of October 3, 1994." Accordingly, defendants' argument that the Commission erred in determining the date of plaintiff's maximum medical improvement must fail.

[2] Next, defendants contend that the Commission erred in awarding plaintiff $20,000.00 for the loss of his spleen. Defendants take the

position that "the spleen does not serve as an 'important' organ" and that its "function to the human body is somewhat illusive"; therefore, the award of $20,000.00 was "excessive and constitue[d] an abuse of discretion." We find no merit to this argument.

Section 97-31(24) of the General Statutes allows recovery for the loss of an organ or body part for which workers' compensation benefits are not otherwise payable:

> In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000).

N.C. Gen. Stat. § 97-31(24) (1999). To support an award under this section, the record must contain "evidence as to the value of the [organ or body part] in question to the body of [the] plaintiff." *Porterfield*, 47 N.C. App. at 143, 266 S.E.2d at 762. However, "the amount of such an award is within the discretion of the Commission," *Hicks v. Leviton Mfg. Co.*, 121 N.C. App. 453, 456, 466 S.E.2d 78, 81 (1996), and "will not be overturned on appeal absent an abuse of discretion on [the Commission's] part," *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). An abuse of discretion is shown where the decision is proven to be "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the present case, Drs. Tate and Stutesman both testified that the spleen filters the blood and protects the body from bacterial infections. As Dr. Tate explained, "Early in life [the spleen] helps to provide resistance to infection and disease. Later in adulthood, it probably plays less of a part here, although still some." According to Dr. Stutesman, without the removal of damaged cells provided by the spleen, "you'll see increase in bacteria, so you get bacterial infections you would not ordinarily get." Given plaintiff's already vulnerable physical condition, the increased risk of infection, however slight, attributable to the loss of his spleen, sustained the Commission's determination that plaintiff lost an "important internal organ" for which the "proper and equitable compensation" was $20,000.00. *See Cloutier v. State*, 57 N.C. App. 239, 245, 291 S.E.2d 362, 366 (1982) ("testimony as to the consequences of damage to the sinuses demonstrates they are important internal organs"). Thus, we hold that the Commission committed no abuse of discretion.

[3] Defendants also challenge the following awards made by the Commission pursuant to section 97-31(24) of the General Statutes:

Pancreas	$20,000.00
Lungs ($20,000 for each lung)	$40,000.00
Abdominal wall	$15,000.00
Omentum	$10,000.00
Intestines	$12,000.00
Stomach	$5,000.00
Reproductive organs	$15,000.00

Regarding the propriety of these awards, defendants' arguments follow one of three tracts: (1) that the organ was not "important" within the meaning of section 97-31(24); (2) that the organ was not lost or permanently damaged; or (3) that the Commission failed to consider the actual value of the organ or the damage thereto in determining the amount of compensation. We must disagree, as our review of the record reveals competent medical evidence to support the Commission's findings regarding the significance of each organ to the body's general health and well-being. In addition, the record includes competent medical evidence to uphold the Commission's findings that the organs at issue were either lost or permanently damaged. These findings, in turn, sustain the Commission's conclusion that the organs were important within the meaning of section 97-31(24) and that the amounts awarded for each were proper and equitable. Accordingly, we discern no abuse of the Commission's discretion in setting the challenged awards. Moreover, since we uphold the Commission's decision in favor of plaintiff, we need not address plaintiff's cross-assignments of error.

Based upon the foregoing analysis, we affirm the opinion and award of the Full Commission.

Affirmed.

Judge WALKER concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

I agree with the majority the Full Commission did not err in its award to plaintiff made pursuant to N.C. Gen. Stat. § 97-31(24). I,

however, write separately simply to clarify the test for determining whether an organ or body part is "important" under section 97-31(24).

Section 97-31(24) provides:

> In case of the loss of or permanent injury to any *important* external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000).

N.C.G.S. § 97-31(24) (1999) (emphasis added). An organ or body part is "important," within the meaning of section 97-31(24), if it has some significant value to the body of the employee. *See Porterfield v. RPC Corp.*, 47 N.C. App. 140, 143, 266 S.E.2d 760, 762 (1980); *The American Heritage College Dictionary* 682 (3d ed. 1993). Whether the organ or body part is "important" presents a question of law, *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (determination requiring exercise of judgment or application of legal principles is conclusion of law), which must be supported by findings of fact that the organ or body part has some significant value to the body of the employee, *see id.* (determination reached through logical reasoning from evidentiary facts is finding of fact).

In this case, defendant-employer has assigned error to the award made by the Full Commission pursuant to section 97-31(24) for several organs and body parts. The Full Commission made findings of fact regarding the significant value of each of these organs and body parts to plaintiff's body. These findings of fact, which are supported by competent evidence, support the Full Commission's conclusion of law[1] these organs and body parts are "important" under section 97-31(24). *See Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (appellate review of decision of Industrial Commission is limited to whether the Commission's findings of fact are supported by competent evidence, and whether the Commission's conclusions of law are supported by those findings of fact).

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1. Although this conclusion is contained in the Full Commission's findings of fact, it is more properly labeled a conclusion of law. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (mislabeling of findings of fact and conclusions of law not fatal to opinion and award).

STATE OF NORTH CAROLINA v. JAMES PATRICK McGRAW, SR.

No. COA99-167

(Filed 2 May 2000)

1. **Evidence— minor child's testimony—alleged violation of sequestration order**

The trial court did not abuse its discretion in an indecent liberties with a minor case by refusing to strike the testimony of the minor child victim, based on an alleged violation of the trial court's sequestration order when the minor child looked at her mother while testifying, because defendant has provided no evidence indicating the number of times or the frequency in which the minor victim looked at her mother during the testimony, nor has defense counsel argued that the trial court was even aware of these purported violations.

2. **Appeal and Error— preservation of issues—failure to object—failure to argue plain error**

Although defendant contends the trial court erred in an indecent liberties with a minor case by instructing the jury that it could consider the testimony of an officer concerning statements made by the minor victim only to impeach the credibility of the witness, rather than as corroborative evidence, defendant waived review of this issue since: (1) defendant did not object at trial to any portion of the jury instruction as required by N.C. R. App. P. 10(b)(2); and (2) defendant has not preserved the issue for plain error review by "specifically and distinctly" contending plain error as required by N.C. R. App. P. 10(c)(4).

3. **Evidence— hearsay—not medical diagnosis or treatment exception—corroboration—excited utterance exception**

Although the trial court erred in an indecent liberties with a minor case by allowing the minor child's mother to testify to statements made to her by the minor child after the incident with defendant based on the medical diagnosis or treatment exception of Rule 803(4), this testimony was still admissible because: (1) a witness's prior consistent statements are admissible to corroborate the witness's sworn trial testimony, and the minor child's trial testimony was nearly identical to her mother's testimony; (2) there is no requirement that a trial judge disclose the grounds on which he excludes or admits evidence since it is presumed that

the trial court had a valid reason; (3) if the offering party does not designate the purpose for which properly admitted evidence is offered, the evidence is admissible as either corroborative or substantive evidence; and (4) the testimony could have been admitted as substantive evidence under the excited utterance exception of Rule 803(2).

4. Constitutional Law— effective assistance of counsel—failure to object to corroborative testimony

Defendant's constitutional right to effective assistance of counsel was not violated in an indecent liberties with a minor case, based on defense counsel's failure to object to a police officer's testimony admitted to corroborate the minor victim's testimony, because even though the officer's testimony did not precisely reflect the minor victim's trial testimony, the testimony was not objectionable since it tended to confirm and strengthen the minor victim's testimony.

Judge GREENE concurring in the result.

Appeal by defendant from order entered 12 August 1998 by Judge Larry G. Ford in Cabarrus County Superior Court. Heard in the Court of Appeals 4 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Rankin Thompson, for the State.

Scott C. Robertson for the defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 11 August 1998 session of Cabarrus County Superior Court on one count of taking indecent liberties with a minor. The jury returned a verdict of guilty. Defendant was sentenced to an active sentence of nineteen to twenty-three months imprisonment, suspended except for a one-hundred seventy-two day term. Defendant appeals, making seven arguments.

[1] We will combine defendant's first two arguments for our analysis, as defendant has done on appeal. Defendant argues the trial court erred in refusing to strike the testimony of "K," the prosecuting witness in this case, which he contends was admitted during a violation of the court's sequestration order. Before K, a five-year-old child, testified at trial, the court sequestered all witnesses and one of K's parents, allowing her mother to remain in the courtroom. The court

stated that during K's testimony, her mother should sit outside the child's direct line of vision, where K "would not be able to look" at her. According to the trial transcript, the court designated a place for K's mother to sit. Defendant now contends that since K did look at her mother while testifying at trial, the sequestration order was violated and the court should have thereby stricken K's testimony. We disagree.

Even if defendant were to establish that the sequestration order here was violated, defendant has failed to show that the testimony elicited during this purported violation must be excluded. The institution of a sequestration order is within the sound discretion of the judge and is not reviewable absent a showing of abuse of discretion. *State v. Williamson*, 122 N.C. App 229, 233, 468 S.E.2d 840, 844 (1996). A defendant's showing that a sequestration order has been violated does not result in automatic exclusion of the testimony elicited during the violation; the trial court has discretion to exclude the testimony. *Id.* Defendant has provided no evidence on appeal indicating the number of times or the frequency in which K looked at her mother during her testimony. Nor does defense counsel argue that the court was even aware of these purported violations. Without knowing the extent to which any purported violation occurred, we are unable to conclude either that a violation of the order occurred, or that the trial court abused its discretion. This assignment of error is overruled.

[2] Defendant next argues the trial court erred in its instruction to the jury on certain evidence admitted for corroborative purposes. Officer Audrey Charlene Bridges, who spoke with K following the incident in this case, testified concerning statements made by K. Officer Bridges' testimony was admitted to corroborate the testimony of K; however, the court instructed the jury that they "may consider this evidence that [K] made a prior inconsistent statement only to impeach the credibility of the witness." Our review indicates that defendant did not object at trial to any portion of the jury instruction as required by Rule 10(b)(2) of the Rules of Appellate Procedure. Nor has defendant preserved the issue for plain error review by "specifically and distinctly" contending plain error in his assignments of error as required by Rule 10(c)(4) of the Rules of Appellate Procedure. In failing to assert plain error, defendant has waived review by this Court. *State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25, *disc. review denied*, 350 N.C. 103, 525 S.E.2d 469 (1999).

[3] Next, defendant argues the trial court erred in allowing K's mother to testify to statements made to her by K after the incident with defendant because the statements were hearsay. The State maintains that this testimony falls within the hearsay exception for statements made for the purpose of medical diagnosis or treatment, Rule 803(4). We disagree with the State's argument, yet still conclude that the evidence was admissible.

Statements relevant to medical diagnosis or treatment have been recognized as an exception to the rule prohibiting hearsay testimony. N.C.R. Evid. 803(4). Statements made to an individual other than a medical doctor may constitute statements made for the purpose of medical diagnosis or treatment. *State v. Smith*, 315 N.C. 76, 84-85, 337 S.E.2d 833, 840 (1985). The trial court, nonetheless, must determine whether the proponent has met two inquiries before evidence may be admitted under Rule 803(4): "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). The first inquiry requires the proponent to "affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." Id. at 287, 523 S.E.2d at 669. The purpose underlying this motive requirement is to assure the trustworthiness of the declarant's statements. Id. at 284, 523 S.E.2d at 668.

In determining the motivation for the declarant's statements sought to be admitted, the court may consider all objective circumstances of record surrounding the declarant's statements. *Id.* at 288, 523 S.E.2d at 671. In this case, K's mother testified that K explained defendant touched her in her "private part," was "rubbing her hard," and that it hurt. Our review of the record reveals no evidence that K made these statements to her mother with the understanding that they would lead to medical treatment. The mother's testimony does not reveal how this discussion was initiated, and there is no evidence that K understood her mother to be asking her about the incident in order to provide medical diagnosis or treatment. Because the first requirement under *Hinnant* is not satisfied, we conclude that this testimony was improperly admitted under Rule 803(4). Unlike the child-victim in *Hinnant*, however, K testified at trial. As such, we must consider whether K's statements to her mother were admissible to corroborate K's trial testimony.

It is well-settled that a witness' prior consistent statements are admissible to corroborate the witness' sworn trial testimony. *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991). Corroborative evidence by definition tends to "strengthen, confirm, or make more certain the testimony of another witness." *State v. Adams*, 331 N.C. 317, 328-29, 416 S.E.2d 380, 386 (1992). Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates. *State v. Petty*, 132 N.C. App. 453, 458, 512 S.E.2d 428, 432 (1999). Prior statements by a witness which contradict trial testimony, however, may not be introduced under the auspices of corroborative evidence. *Id.*

At trial, K testified that the defendant "touched her in her private part," and that it hurt. As stated earlier, K's mother later testified that K explained defendant touched her in her "private part," was "rubbing her hard," and that it hurt. K's trial testimony being nearly identical to the trial testimony of her mother, we conclude that the statements of K's mother in this case corroborated K's trial testimony, and were admissible for that purpose.

While it is better for the party offering the evidence to specify the purpose for which it is offered, unless challenged, there is no requirement that such purpose be specified. *State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000). If evidence is admitted for corroborative purposes, as it should have been here, the trial court is not required to provide a limiting instruction unless requested by the party objecting to the use of the evidence. *State v. Goodson*, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968). We therefore conclude that the testimony of K's mother was properly admitted.

The concurring opinion sets forth a rule: "If the evidence is offered for multiple purposes and the trial court rules the evidence is admissible for some but not all of those purposes, the offering party must object to the trial court's ruling and cross-assign error to the ruling to preserve the ruling for appellate review." The trial court in this case simply admitted the testimony under the medical diagnosis or treatment exception to the hearsay rule—it did not specifically exclude admission under any of the other purposes argued, including that of corroboration. In our view, this asserted rule creates several great burdens required by no constitution, statute, case, rule or reason. For instance, under the asserted rule, the party offering the evi-

dence who received a favorable ruling by the trial court would nonetheless be made to object to that favorable ruling and to specifically object to every argument mentioned at trial for which the evidence was *not* admitted. The effect would be that the offering party would be made to preserve for appellate review an issue that may or may not be asserted on appeal by the opponent. Secondly, the trial court would be under a duty to specifically enumerate not only the rule under which it admits evidence, but each rule under which it is *not* admitting evidence, relevant to the possibly convoluted arguments asserted by the parties. There is no requirement that a trial judge disclose the grounds on which he excludes or admits evidence; on review it is presumed that the trial court had a valid reason. *McCombs v. McLean Trucking Co.*, 252 N.C. 699, 705-6, 114 S.E.2d 683, 687 (1960). Further, we find no authority requiring the trial court to disclose the grounds for which it is *not* admitting evidence. And under this newly proposed rule, this Court would be largely narrowed in its own review. If evidence was improperly admitted, but could have been admitted under a rule that no one realized at the time of trial, this Court would be effectively precluded from applying a rule that allows for admission of the evidence, forcing us to find error where none, in the substance of the case, occurred. This rule is not part of the majority opinion.

In addition to our conclusion that the testimony of K's mother was admissible for corroborative purposes, we note that if the offering party does not designate the purpose for which properly admitted evidence is offered, the evidence is admissible as either corroborative or substantive evidence. *Goodson*, 273 N.C. at 129, 159 S.E.2d at 311. Incidentally, the testimony of K's mother relating the child's out-of-court statements, which were made no longer than thirty minutes after the incident with defendant, could have also been admitted as substantive evidence under the excited utterance exception of Rule 803(2). *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); *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).

[4] Defendant next argues his constitutional right to effective assistance of counsel at trial was violated because his trial counsel failed to object to the testimony of Officer Bridges. Defendant contends his

trial counsel should have objected when Officer Bridges' testimony, admitted to corroborate the testimony of K, was "different" from K's testimony.

To establish ineffective assistance of counsel, the defendant must satisfy a two-part test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). *See also State v. Williams*, 350 N.C. 1, 18-19, 510 S.E.2d 626, 638 (1999). Under this test, the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms; and second, the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the failure of counsel. *Id.* To determine whether the defense counsel's performance fell below an objective standard of reasonableness, we must first ascertain whether Officer Bridges' testimony was objectionable.

In this case, Officer Bridges testified that K stated defendant had "rubbed her between her legs," which hurt, and asked her to keep it a secret, whereas K testified defendant touched her with his hand between her legs and held her hand up vertically to demonstrate, rather than horizontally, and that it hurt. K also testified that when defendant touched her he asked her to keep it a secret. Under the rules relating to corroborative evidence set forth above, we find that although Officer Bridges' testimony did not precisely reflect K's trial testimony, it tended to confirm and strengthen her testimony. We therefore conclude that this testimony properly corroborated the trial testimony of K. Accordingly, defense counsel did not inappropriately fail to object, and defendant has failed to satisfy the first part of the *Strickland* test.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judge EDMUNDS concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

I agree with the majority that the testimony of K's mother regarding statements K made to her was not admissible under Rule 803(4)

as statements made for the purpose of medical diagnosis or treatment. I do not believe, however, that this Court can consider whether those statements were admissible under Rule 803(2) (excited utterance) or as corroborative evidence because the trial court ruled this evidence was admissible solely under Rule 803(4) and the State did not object to the trial court's ruling.

When a party offering evidence does not specify for what purpose the evidence is offered, "the evidence is admissible if it qualifies either as corroborative evidence or competent substantive evidence." *State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000). Upon a request by a party challenging the admissibility of the offered evidence, the offering party must specify the purpose for which the evidence is offered. *Id.* If the evidence is offered for multiple purposes and the trial court rules the evidence is admissible for some but not all of those purposes, the offering party must object to the trial court's ruling and cross-assign error to the ruling to preserve the ruling for appellate review. N.C.R. App. P. 10(b)(1), (d).

In this case, defendant objected to the testimony of K's mother relating to statements K made to her, and the trial court held a *voir dire* hearing on the issue. The State and defense counsel questioned K's mother and, at the conclusion of their questioning, the State argued the testimony of K's mother was admissible under the medical diagnosis and excited utterance exceptions to the hearsay rule and as corroborative evidence. The trial court then overruled defendant's objection to the evidence on the sole ground it was admissible under the medical diagnosis exception, thus implicitly denying the State's request to admit the evidence as an excited utterance or as corroborative evidence. Defendant noted his objection to the ruling; however, the State did not object to the trial court's denial of admission of the evidence as an excited utterance or as corroborative evidence. This issue, therefore, is not properly before this Court. Accordingly, I would hold admission of K's mother's testimony regarding statements made by K was error. Nevertheless, because there is no reasonable possibility based on other evidence admitted at trial that the result would have been different without the inadmissible testimony, *see* N.C.G.S. § 15A-1443(a) (1999), I would affirm defendant's conviction.

STATE OF NORTH CAROLINA v. CHARLIE JAMES MACKEY

No. COA99-650

(Filed 2 May 2000)

1. Evidence— expert testimony—usefulness to jury

The trial court did not abuse its discretion in a cocaine prosecution by not admitting defendant's expert witness testimony on drug investigatory procedures where the only purpose of the testimony was to challenge the undercover procedures used in obtaining drugs from defendant, but the record already contained evidence regarding the procedures used in the undercover operation and that the undercover investigator had used the drugs from the buys. The jury had the ability to assess the investigator's credibility on its own.

2. Evidence— offer of proof—denied—content of proffered testimony apparent

There was no prejudicial error in a cocaine prosecution where the court excluded testimony from a defense expert on undercover procedures and refused to allow an offer of proof. Defense counsel forecast the content of the proposed testimony and defendant was not deprived of a trial record sufficient for appellate review.

Judge HORTON dissenting.

Appeal by defendant from judgment entered 5 November 1998 by Judge W. Russell Duke, Jr., in Superior Court, Hyde County. Heard in the Court of Appeals 30 March 2000.

Wilkinson & Rader, P.A., by Steven P. Rader, for the defendant.

Michael F. Easley, Attorney General, by Douglas A. Johnston, Special Deputy Attorney General, for the State.

WYNN, Judge.

A Hyde County jury found Charlie James Mackey guilty of Possession With Intent to Sell and Deliver Cocaine, and Sale and Delivery of Cocaine. On appeal, we find no error in his trial.

The State's evidence showed that Art Manning, a retired police officer, worked with undercover drug investigations throughout the

State for over thirty years. On 15 November 1996, he assisted the Hyde County Sheriff's Department in an undercover drug operation by purchasing crack cocaine from the defendant on two separate occasions.

First, at approximately 6:00 p.m., the defendant asked Manning to step outside of a poolroom where he further asked "was he looking". Manning, understanding that "looking" indicated that a person wanted to purchase drugs or cocaine lines, replied that he was "looking." Manning then purchased two "20's,"—pieces of crack cocaine worth twenty dollars—from the defendant.

Second, at approximately 11:00 p.m., Darryl Shelby asked Manning to step outside of the same poolroom and like the defendant he further asked Manning if he was "looking." Manning responded that he was "looking" for "a couple of 50's"—pieces of crack cocaine worth fifty dollars each. Shelby stated, "As soon as my man gets back, I'll take care of you." At around 11:10 p.m., the defendant drove up in a 1994 Dodge van. Shelby told Manning, "Wait right here for me. We have got to go cut it up." After the men finished cutting the cocaine, Shelby got out of the van, walked up to Manning and stated, "Walk over to the van. My man C.J.'s got you two 50's." Manning walked over to the van and purchased the two "50's" from the defendant.

The defendant presented evidence that when Manning made the undercover purchases, he was neither accompanied by any of the officers with the Hyde County Sheriff Department neither wore any recording devices nor was he frisked by the officers. The defendant also presented evidence that Manning frequently smoked the drugs; shared the drugs with a paid confidential informant; and purchased drugs in one place, but labeled them for another place.

The defendant also attempted to tender Kenneth Johnson—an employee of Blackman Detective services and a retired police officer of 30 years—as an expert witness in drug investigation procedures. The following colloquy occurred during the trial:

> THE COURT: Okay. Mr. Philbeck, tell me in your own words what you intend to elicit from this witness.
>
> . . . .
>
> MR. PHILBECK: Your Honor, for our case, and this is important, and we looked at the actual drug undercover operation here. Major Johnson has extensive experience, 30 years of experience

> in this, and has taught. His experience I think could be unmatched in this state. He can talk about standards of drug investigations. He can talk about how they operate and what is a good undercover operation and what is a poor operation at the buy/sell level, at the informant level, buy/sell, from that end. . . . and, without Major Johnson testifying as to certain standards that are important and universal—it's not just a Raleigh thing; it's for any drug operation—he can help that jury understand. Without him, I can't argue to the jury what was a good investigation or what was not good from the buy/sell level, and I got to have that covered in fairness to Mr. Mackey as far as what he faces. . . .

The trial court did not allow Johnson's testimony upon finding that the standard used in drug investigations was not a consequential fact that would aid the jury in its determination of the case.

From his convictions, the defendant appealed.

On appeal, the defendant contends that the trial court erred in refusing to: (1) allow Johnson to testify as an expert witness and (2) accept Johnson's testimony as an offer of proof to preserve the record for appellate review.

[1] First, the defendant argues that Johnson's testimony should have been admitted as expert testimony for drug investigation procedures.

The admissibility of expert witness testimony is governed by Rule 702 of the North Carolina Rules of Evidence.

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (1992); *see also State v. Bowers*, 135 N.C. App. 682, 522 S.E.2d 332 (1999).

"Usually, a determination of whether a witness is qualified as an expert is exclusively within the discretion of the trial court and will not be reversed absent a complete lack of evidence to support its ruling." *Bowers*, 135 N.C. App. at 685, 522 S.E.2d at 334-35. Nonetheless, an expert's testimony will only be admissible if the testimony is helpful to the jury. *See State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282 (1990); *see also State v. Mitchell*, 283 N.C. 462, 467, 196

S.E.2d 736, 739 (1973) (stating the "essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies.")

> Evidence is relevant if it 'has any logical tendency, however slight, to prove the fact at issue in the case.'. . . It is relevant if it can assist the jury in 'understanding the evidence.'

Huang, 99 N.C. App. at 663, 394 S.E.2d at 283 (citations omitted).

In the present case, the record contained evidence that Manning purchased crack cocaine from the defendant on two separate occasions on 15 November 1996. This evidence was sufficient to prove the substantive offenses for which the defendant was charged—Possession With Intent to Sell and Deliver Cocaine and Sale and Delivery of Cocaine. *See* N.C. Gen. Stat. § 90-95(a)(1) (1993) (it is unlawful for any person to "manufacture, sell or deliver . . . a controlled substance. . . .").

The only purpose for admitting the proposed testimony was to challenge the undercover procedures used by Manning in obtaining the drugs from the defendant. However, the record already contained evidence that Manning used the drugs from the buys and evidence regarding the procedures used in the undercover drug operation. The jury had the ability, on its own, to assess Manning's credibility given this evidence. *See Huang*, 99 N.C. App. at 663, 394 S.E.2d at 283. Thus, the trial court's refusal to admit this testimony did not constitute an abuse of discretion.

[2] Next, the defendant argues that the trial court erred when it refused to allow him to make an offer of proof regarding Johnson's testimony, thereby depriving him of preserving a proper record for appeal.

"It is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review." *State v. Brown*, 116 N.C. App. 445, 447, 448 S.E.2d 131, 132 (1994); *see State v. Rudd*, 60 N.C. App. 425, 427, 299 S.E.2d 251, 253 (1983).

> A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained. In refusing such a request the judge incurs the risk (1) that the Appellate Division may not

concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record, and (2) that he may leave with the bench and bar the impression that he acted arbitrarily.

State v. Chapman, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978).

In the case at bar, although the trial court did not allow Johnson to testify, the trial court did give the defense counsel several opportunities during the trial to describe the content of proposed testimony. For instance, the following dialogue took place during the trial:

MR. PHILBECK: Okay. Your Honor, respectfully, could I make the request that you hear from Major Johnson himself, just a brief synopsis of what he would testify by way of his offer of proof just to make sure that we have exactly what he's going to testify to on the record? If you deny it, Your Honor, that's fine. I just want to get it on the record that I—

THE COURT: Yes, I understand that. I have asked you to state—I assume that you know what your witness is going to say on the stand. Now, I don't want to—you know, to waste my time sitting here listening to the procedures in Raleigh. I'm not going to do that.

MR. PHILBECK: It's statewide procedures—

THE COURT: Or statewide procedures—Now, if he's going to get up here and say that he waited too long, three and a half hours is too long, before he delivered the dope to the sheriff that's irrelevant.

MR. PHILBECK: That's part of what he would say, Your Honor.

THE COURT: Well, now, what is the other part? I've asked you to tell me what he's going to say.

MR. PHILBECK: This control mechanism. This whole case—

THE COURT: Oh, the control mechanism.

MR. PHILBECK: Yes, sir. This whole case revolves from the State the credibility of Mr. Manning.

THE COURT: What aspects of the control mechanism?

MR. PHILBECK: Whether—how drugs, you know, one theory is that and there's some evidence that Mr. Manning was sharing some of the drugs or some drugs, however he received them, at some point in time from other drug dealers in this area. He denied that. The procedures that control this are put in place to prevent that from happening. I think the jury should hear that.

THE COURT: Mr. Philbeck, the Court is going to find that that would not assist the jury in any finding of fact. If the jury determine, finds as fact, that the undercover agent did in fact share controlled substances, which they have ample evidence before them to find if they wish to find that, then how is—I think by their own common sense they know that that's improper and would destroy the credibility of the undercover agent, and to have somebody to come in and testify to that, they don't need that. It's not going to be able to assist them in anything. They already know that's wrong. . . .

From this dialogue, we are able to determine that the defense counsel sufficiently forecasted the content of the proposed testimony. Therefore, if any error resulted from the trial court's refusal to allow Johnson to testify, such error was harmless and did not deprive the defendant of a trial record sufficient for appellate review.

The defendant received a fair trial, free from prejudicial error.

No error.

Judge SMITH concurs.

Judge HORTON dissents in a separate opinion.

Judge HORTON dissenting.

In this prosecution for the possession and sale of illicit drugs, the State relied on the testimony of a former police officer with 30 years of experience in undercover drug investigations. Defendant sought to attack the credibility of the State's witness through the testimony of Major Johnson, also a retired police officer with 30 years of experience. Defendant contended that the State's witness substantially departed from usual and customary undercover procedures, and that his testimony about drug purchases from defendant was suspect. The trial court found that Johnson's testimony would not assist the jury, and declined to allow defendant to place the testimony of Johnson on

the record. The majority hold that the trial court's refusal to allow Johnson's testimony was not an abuse of discretion, and the trial court's refusal to allow defendant to place the excluded testimony in the record was not prejudicial error. I respectfully dissent from both holdings.

When the trial court sustains an objection to a question, it is basic learning that the trial court ordinarily should permit counsel to place in the record the answer to the question so that an appellate court might properly review the action of the trial court. "Indeed, an exception to the action of the trial court will be worthless on appeal unless the answer is thus preserved." *State v. Chapman*, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978). Our Rules of Civil Procedure require that in civil cases tried before the jury, the trial court "on request of the examining attorney shall order a record made of the answer the witness would have given." N.C. Gen. Stat. § 1A-1, Rule 43(c) (1999). Certainly due process demands no less in a criminal trial.

Our Supreme Court ruled in *Chapman* that the failure of the trial court to allow counsel to complete the record was a "regrettable judicial mistake," but ruled that the trial court's error was not prejudicial because the witness had already "answered the question sufficiently to demonstrate the immateriality of the inquiry. . . ." *Chapman*, 294 N.C. 415, 241 S.E.2d 672. Here, the majority hold that defense counsel made a sufficient forecast of the expert testimony he sought to offer, so that any error by the trial court was not prejudicial. I cannot say on this record that the testimony of the expert witness would not have assisted the jury in assessing the credibility of the key witness for the State. The undercover witness for the State had worked in undercover drug investigations for more than 30 years. Testimony which apparently would have shown that, despite his long experience in such undercover investigations, the State's witness significantly departed from proper police procedure in making undercover drug buys, would seem to bear on both his credibility and the weight to be given his testimony by the jury. Because the excluded testimony is not before us, we cannot properly review the actions of the trial court in excluding the testimony. In these circumstances where there are serious questions about the relevancy and materiality of certain testimony, and the trial court's ruling prevents the defendant from bringing the proffered testimony before us for proper review, we should resolve all such threshold evidentiary questions in favor of the defendant and remand for a new trial. Accordingly, I vote to do so.

GUSTAVO MEJIA VAZQUEZ, ADMINISTRATOR OF THE ESTATE OF TOMAS MEJIA, PLAINTIFF v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. COA99-492

(Filed 2 May 2000)

1. Unfair Trade Practices— insurance—contract damages stipulated

The trial court did not err in an unfair and deceptive trade practices action against an insurance company by allowing the jury to consider contract damages as an element of damages for defendant's unfair and deceptive conduct where defendant had stipulated to contractual liability after the jury verdict on negligence. The holding in *Garlock v. Henson*, 112 N.C. App. 243, makes clear that the right to the receipt of contract damages does not eliminate plaintiff's injury under the unfair and deceptive trade practices claim, and it makes no difference whether that right to contract damages arises from a favorable jury verdict as in Garlock or from a stipulation after a verdict. N.C.G.S. § 75-1.1.

2. Unfair Trade Practices— instructions—insurance not paid

The trial court did not err in an unfair and deceptive trade practices action against an insurance company by instructing the jury that defendant had not paid the policy amount. The instruction provided the jury with necessary information that reminded jurors that they could not give defendant credit for any past amount paid.

3. Unfair Trade Practices— attorney fees—award correct

The trial court did not abuse its discretion in an unfair and deceptive trade practices action in its award of attorney fees where defendant argued only that the award was erroneous because the underlying result was erroneous, but that result was held correct in this opinion, and the trial court took evidence as to the reasonableness of the fees.

4. Trial— continuance—denied—defendant not surprised by witness

The trial court did not abuse its discretion in an unfair and deceptive trade practices action by denying defendant's motion to continue based upon the withdrawal of plaintiff's counsel due to his anticipated testimony against defendant. Although defendant claimed to be unfairly surprised by the withdrawal and that it

did not have sufficient opportunity to prepare for his testimony, the record includes statements indicating that defense counsel expected plaintiff's counsel to testify even prior to his motion to withdraw, deposed him, and had adequate time to prepare.

Judge HORTON concurs in the result.

Appeal by defendant from judgment entered 29 September 1998 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2000.

Law Offices of Chandler, DeBrun, Fink & Hayes, by W. James Chandler and Walter L. Hart, and Charles G. Monnett, III & Associates, by Charles G. Monnett, III, for plaintiff-appellee.

Morris, York, Williams, Surles & Barringer, by Gregory C. York and Kevin D. Elliott, for defendant-appellant.

EAGLES, Chief Judge.

This case concerns the amount of damages that the plaintiff may recover from the defendant insurance company in his claim for unfair and deceptive trade practices.

On 24 January 1996, Tomas Mejia was a passenger in a van driven by Oscar Trejo. Mr. Trejo's van was involved in a head-on collision with a vehicle driven by James Eric Brevard, an uninsured motorist. Mr. Mejia died in the accident and his administrator is the plaintiff in this action.

At the time of the accident, Mejia and Trejo both had insurance policies with defendant Allstate Insurance Company. Each policy provided uninsured motorist coverage in the amount of $25,000. The plaintiff commenced this action alleging that defendant Allstate improperly refused to pay under the policies. Plaintiff sought damages for breach of contract and unfair and deceptive trade practices.

The trial court trifurcated the trial. Phase I dealt with the wrongful death claim against Mr. Brevard. Phase II addressed plaintiff's claim for unfair and deceptive trade practices. Finally, in Phase III, the jury considered plaintiff's claim for punitive damages.

At the end of Phase I the jury determined that Mr. Brevard's negligence caused Mejia's death. Additionally, the jury concluded that the plaintiff sustained $104,003.00 in damages. After the verdict,

defendant stipulated that the plaintiff was entitled to payment under any Allstate insurance policy in effect at the time of the accident. Later, the trial court ruled that the plaintiff could stack the uninsured motorist coverage of the Trejo and Mejia policies.

Following the presentation of evidence in Phase II, the trial court submitted a set of special interrogatories to the jury. In answering these questions, the jurors concluded that the defendant had refused to settle the plaintiff's claim in bad faith. Furthermore, the jury determined that the defendant had failed to adjust the plaintiff's loss fairly, follow its own standards, act reasonably in communications, conduct a reasonable investigation and to effect a fair settlement in good faith. The trial court used these answers as support for its ruling that the defendant had committed unfair and deceptive trade practices. The jurors concluded that defendant had damaged plaintiff in the amount of $29,160 for the acts constituting unfair and deceptive trade practices and for the defendant's bad faith refusal to settle. In Phase III, the jurors denied plaintiff's claim for punitive damages.

After the completion of Phase III, the trial court determined that the three jury awards were mutually inconsistent and put the plaintiff to an election of remedies. The trial court made the following relevant conclusions of law:

> 1. That from the orders of the Court and the jury verdicts as recited above, the Plaintiff is entitled to recover under one of the three causes of action:
>
> A. $50,000.00 plus costs and expert witness fees upon a cause of action for breach of contract.
>
> B. $29,160.00 upon a cause of action for bad faith.
>
> C. $29,160.00 trebled for unfair and deceptive trade practices by Allstate Insurance Company, plus costs, expert witness fees and attorneys fees.
>
> . . . .
>
> 3. The plaintiff has elected a recovery upon a cause of action for unfair and deceptive trade practices, specifically $29,160.00 trebled to $87,480.00, plus costs, expert witness fees and attorney fees as is herein after ordered.

Additionally, the trial court awarded the plaintiff $87,480.00 in attorney fees.

[1] First, defendant claims that the trial court erred by allowing the jury to consider the contract damages as an element of damages for defendant's unfair and deceptive conduct. In order to prove an unfair and deceptive trade practice, the plaintiff must show that the defendant committed an unfair or deceptive act or practice, in or affecting commerce, and that plaintiff sustained an actual injury. *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 13, 472 S.E.2d 358, 365 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997) (citation omitted). Defendant argues that the plaintiff failed to show that he sustained an actual injury because of the defendant's stipulation at the end of Phase I. According to the defendant, the plaintiff could recover what the policy entitled him to because the defendant stipulated to contractual liability after the jury verdict. Therefore, defendant claims that its stipulation eliminated any actual injury that the plaintiff suffered because of the defendant's unfair and deceptive trade practices. We disagree and affirm the trial court.

In analyzing this issue, we find *Garlock v. Henson*, 112 N.C. App. 243, 435 S.E.2d 114 (1993) instructive. In *Garlock*, the case centered around the plaintiff's breach of contract action against the defendant. Pursuant to the contract, the defendant was obligated to pay the plaintiff a specified sum if the defendant sold a certain bulldozer to a party other than the plaintiff. *Id.* at 244, 435 S.E.2d at 115. The defendant did sell the bulldozer to a third party and actively concealed the sale from the plaintiff for three years. *Id.* Upon his discovery of the sale, the plaintiff filed an action against the defendant. *Id.* at 245, 435 S.E.2d at 115. The trial court granted the plaintiff unfair and deceptive trade practice damages. *Id.*

On appeal, defendant argued that the plaintiff failed to show that he suffered any actual injury. *Id.* at 246, 435 S.E.2d at 116. The basis of defendant's position was that the plaintiff would ultimately receive the contract price after the plaintiff conducted his breach of contract action successfully. *Id.* Therefore, defendant contended that his actions did not injure the plaintiff other than to delay his recovery of the contract price. *Id.* This Court disagreed stating that the plaintiff could elect to recover unfair and deceptive trade practice damages despite the favorable result that plaintiff received on the breach of contract action. *Id.*

In light of *Garlock*, defendant cannot now successfully suggest that by stipulating to pay the contract damages after a determination of liability he has eliminated the plaintiff's injury. Defendant's course of conduct gave rise to both the breach of contract claim and the

unfair and deceptive trade practices claim. Where the same course of conduct gives rise to both claims, the plaintiff may recover under either the breach of contract action or the action under G.S. § 75-1.1 (1999). *Garlock*, 112 N.C. App. at 246, 435 S.E.2d at 116. If plaintiff elects to recover under G.S. § 75-1.1, the defendant cannot prevent that recovery by stipulating to pay damages for the breach of contract claim. The *Garlock* holding makes clear that the right to the receipt of contract damages does not eliminate plaintiff's injury under the unfair and deceptive trade practices claim. *Id.* We hold that it makes no difference whether that right to contract damages arises from a favorable jury verdict as in *Garlock* or from a stipulation after a jury verdict as happened here. Accordingly, we hold that the trial court correctly allowed the jury to consider the contractual damages as an element for the unfair and deceptive trade practices claim.

We note that G.S. § 75-1.1 is partially punitive in nature. *Marshall v. Miller*, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981). The award of treble damages seeks to deter the guilty parties from future misconduct. *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 190, 437 S.E.2d 374, 379 (1993). Had we accepted the defendant's argument, this punitive purpose would have suffered tremendously. The defendant's contention would encourage misconduct by insurance companies, rather than discourage it. Under the defendant's assertion, insurance companies would have no incentive to settle legitimate claims before a jury verdict. Rather, the defendant could simply take its chances with a jury and then avoid treble damages by stipulating to contractual liability should the jury find for the plaintiff. This method would eliminate the brunt of any damages that the plaintiff could recover under Chapter 75.

Finally, the defendant has placed great reliance on the case of *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997). In *Murray*, the plaintiff obtained a judgment for breach of an insurance contract. The defendant paid most of the judgment but refused to pay interest on the judgment. *Id.* at 5, 472 S.E.2d at 360. The plaintiff then instituted an unfair and deceptive trade practices action for the **defendant's conduct after the judgment.** *Id.* This Court held that the plaintiff could seek damages for unfair and deceptive trade practices. *Id.* at 12-13, 472 S.E.2d at 364-65. Specifically, this Court stated that the plaintiff could pursue damages for prejudgment and postjudgment interest and for the unpaid amount of the judgment. *Id.*

Defendant claims that this case presents the same situation as *Murray*. We disagree. In *Murray*, the plaintiff did not allege that the defendant had engaged in unfair and deceptive conduct until after the defendant had paid part of the judgment. The plaintiff in *Murray* instituted his unfair and deceptive trade practice action so that he could recover the interest on the breach of contract claim. The prejudgment and postjudgment interest were the only possible damages that the plaintiff could recover in *Murray*. *Id.* Here the unfair and deceptive trade practice claim centers around the defendant's action concerning payment of the policy limits. Accordingly, *Murray* does not bind us here.

[2] Next, defendant contends that the trial court erred by instructing the jury that the defendant had not paid the policy amount. Defendant claims that this instruction directed the jury to award damages for $25,000 plus interest. We disagree. The trial court's instruction did not direct the jury to award the policy amount. Rather, the instruction provided the jury with necessary information. Specifically, the instruction reminded the jurors that they could not give the defendant credit for any past amount paid. Accordingly, we find no error in the instruction.

Defendant next alleges that the trial court erred by stacking the Trejo and Mejia policies. However, the trial court put the plaintiff to an election of remedies. The plaintiff chose to recover under the unfair and deceptive trade practices claim and not under the breach of contract claim. In light of our disposition of the unfair and deceptive trade practices claim, we need not consider the stacking issue.

[3] The next issue is whether the trial court erred by awarding plaintiff $87,480 in attorneys fees. Under G.S. § 75-16.1 (1999), the trial judge may allow attorneys fees upon a finding that the party charged willfully engaged in the practice and there was an unwarranted refusal by the party to resolve the issue fully. *Garlock*, 112 N.C. App. at 247, 435 S.E.2d at 116. The decision of whether to award attorney fees is in the trial court's discretion. Here, defendant argues only that because the award for unfair and deceptive trade practices was erroneous, the award of attorneys fees must also be erroneous. Defendant makes no other arguments as to why we should reverse the award for attorneys fees. Accordingly, since we determined that the award for unfair and deceptive trade practices was without error, defendant's argument is not persuasive.

We also note that the trial court here took evidence as to the reasonableness of the attorneys fees. The court concluded that the fees were reasonable due to the attorneys' experience, positions within their respective firms, and the comparable hourly rates for attorneys in the Charlotte area. *See United Laboratories Inc.*, 335 N.C. at 195, 437 S.E.2d at 381. Based on these findings, we hold that the trial court did not abuse its discretion in its attorney fee award.

[4] Next, defendant assigns as error the trial court's denial of his motion to continue. We disagree. The grant or denial of a motion to continue is within the trial court's sole discretion. *Melvin v. Mills-Melvin*, 126 N.C. App. 543, 545, 486 S.E.2d 84, 85 (1997). Absent an abuse of that discretion, we will affirm the trial court's decision. *Id.*

Prior to trial, plaintiff's counsel, James Chandler, withdrew from the plaintiff's representation due to his anticipated testimony against the defendant. Defendant filed a motion to continue alleging that it did not have ample opportunity to prepare for Mr. Chandler's testimony. Additionally, defendant claimed that Mr. Chandler's withdrawal unfairly surprised him. The record indicates otherwise. While arguing for his motion, defense counsel repeatedly stated that "they cannot make out their case without Mr. Chandler's testimony." These statements tend to show that defense counsel expected Mr. Chandler to testify even prior to the plaintiff's motion to withdraw. Additionally, the record indicates that defense counsel deposed Mr. Chandler before the beginning of Phase II and thus had adequate time to prepare for the witness's testimony. In light of these facts, we hold that the defendant has shown no prejudice and that the trial court did not abuse its discretion. We have examined the defendant's remaining assignments of error and find them to be without merit.

For the foregoing reasons the judgment of the trial court is

Affirmed.

Judge McGEE concurs.

Judge HORTON concurs in the result.

LEXINGTON STATE BANK, PLAINTIFF v. PEGGY ELLINGTON MILLER, INDIVIDUALLY, AND PEGGY E. MILLER, EXECUTRIX OF ESTATE OF LARRY EUGENE MILLER, SR., MILLER DODGE, INC. (FORMERLY WELBORN MOTORS, INC.), AND J. BROOKS REITZEL, JR., DEFENDANTS

No. COA99-739

(Filed 2 May 2000)

1. Civil Procedure— summary judgment—affidavit—notarized by party's attorney—repealed statute

The trial court erred in a case involving foreclosure of loans secured by a deed of trust on real property by refusing to consider an affidavit submitted by defendant Peggy Miller for purposes of summary judgment, based on the erroneous conclusion that it was inadmissible under N.C.G.S. § 47-8 since it was notarized by her attorney, because that statute was repealed by our legislature in 1991, long before this action was commenced, thereby eliminating any proscription against attorneys serving as notaries for their clients' affidavits.

2. Civil Procedure— summary judgment—affidavit—admission

Although defendant Peggy Miller's affidavit was not filed with defendants' 1999 motion for summary judgment in a case involving foreclosure of loans secured by a deed of trust on real property, the trial court erred in failing to consider the affidavit because: (1) defendants did submit the affidavit in response to plaintiff's earlier 1998 motion for summary judgment, which was denied, and N.C.G.S. § 1A-1, Rule 6(d) does not require a party to resubmit affidavits that have already been filed in support of or in response to an earlier motion for summary judgment merely because another motion for summary judgment has subsequently been filed; and (2) plaintiff cannot contest the admission of the affidavit on appeal since the record contains no objection by plaintiff nor a motion to strike the affidavit.

3. Mortgages— deed of trust—summary judgment—affidavit—amount owed on loans—no specific facts provided

Although the trial court erred in a case involving foreclosure of loans secured by a deed of trust on real property by failing to consider defendant Peggy Miller's affidavit for purposes of summary judgment, the affidavit is insufficient to create an issue of fact regarding the amount owed on the loans because no specific

facts are provided as to the dates of any uncredited payments, their amounts, or any other relevant information.

4. Mortgages— deed of trust—summary judgment—affidavit—release of collateral—no reduction in obligation

Although the trial court erred in a case involving foreclosure of loans secured by a deed of trust on real property by failing to consider defendant Peggy Miller's affidavit for purposes of summary judgment, the affidavit is insufficient to create an issue of fact regarding an alleged reduction in the amount of defendants' obligation because even if a release of some of the collateral did occur, it does not release the debtor's underlying obligation itself.

5. Mortgages— deed of trust—summary judgment—affidavit—foreclosure sale—less than fair market value—no specific facts provided

Although the trial court erred in a case involving foreclosure of loans secured by a deed of trust on real property by failing to consider defendant Peggy Miller's affidavit for purposes of summary judgment, the affidavit is insufficient to create an issue of fact regarding the allegation that plaintiff intentionally paid less than fair market value for all the property at the foreclosure sale because no specific facts are provided as to the various properties' fair values or other relevant information.

6. Mortgages— deed of trust—summary judgment—affidavit—refinancing of loan—no specific facts provided

Although the trial court erred in a case involving foreclosure of loans secured by a deed of trust on real property by failing to consider defendant Peggy Miller's affidavit for purposes of summary judgment, the affidavit is insufficient to create an issue of fact regarding defendants' claim that plaintiff represented to defendants that the loans would be refinanced because no specific facts are provided for this unsubstantiated conclusion.

7. Mortgages— deed of trust—summary judgment—affidavit—delivery date of foreclosure deeds—genuine issue of fact

The trial court erred in a case involving the deficiency after foreclosure of loans secured by a deed of trust on real property by failing to consider defendant Peggy Miller's affidavit for purposes of summary judgment, and the case is remanded on the issue of the delivery date of the foreclosure deeds to determine

whether the action is barred under N.C.G.S. § 1-54(6), because: (1) copies of the foreclosure deeds are not contained in the record, so the only evidence with respect to delivery of these deeds is provided by the parties' respective affidavits; (2) defendant's affidavit sets forth more than mere allegations and provides specific facts, namely the exact dates of delivery showing the action was filed too late, which is sufficient to create an issue of fact; and (3) it is not for the Court of Appeals to question how defendant might know when the foreclosure deeds were delivered to the purchaser, since it is enough that she stated under oath that she did know and that such delivery occurred on 8 July and 15 July 1996.

8. Mortgages— deed of trust—summary judgment—affidavit—unfair trade practices—no specific facts provided

Although the trial court erred in a case involving foreclosure of loans secured by a deed of trust on real property by failing to consider defendant Peggy Miller's affidavit for purposes of summary judgment, the affidavit is insufficient to create an issue of fact regarding defendants' claim for unfair trade practices because the affidavit merely asserts conclusions with respect to fraudulent behavior by plaintiff, and no specific facts are alleged.

Appeal by defendants from order entered 18 March 1999 by Judge Melzer A. Morgan, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 29 March 2000.

Brinkley Walser, PLLC, by Charles H. McGirt, for plaintiff-appellee.

Metcalf & Beal, L.L.P., by W. Eugene Metcalf, for defendant-appellants Peggy E. Miller, individually and as executrix, and Miller Dodge, Inc.

No brief filed for defendant-appellant J. Brooks Reitzel, Jr.

LEWIS, Judge.

On 25 July 1994, defendant Peggy Miller and her husband Larry, now deceased, borrowed $158,000 from plaintiff ("the personal loan"). This loan was secured by a deed of trust on certain real property owned by the Millers. On 23 September 1994, the Millers, as owners of defendant Miller Dodge, Inc., obtained a company loan in the

amount of $84,781.64 ("the company loan"). This loan was secured by three pieces of collateral: (1) a deed of trust on certain real property owned by the company; (2) all the company's equipment, inventory, and tools; and (3) assignment of a $100,000 life insurance policy for Larry Miller.

The Millers and Miller Dodge eventually defaulted on each loan. After plaintiff foreclosed on part of the collateral, it instituted the instant action to collect the deficiency on each loan. Plaintiff moved for summary judgment, which was denied on 18 February 1998. Summary judgment motions were made nearly a year later by both parties. The trial court this time entered summary judgment in favor of plaintiff on each loan. With respect to the personal loan, the trial court ordered defendants to pay the $75,024.38 balance plus $15,958.47 in interest. It also awarded $12,179.54 in attorney's fees, a figure representing fifteen percent of the outstanding debt. With respect to the company loan, the trial court ordered defendants to pay the $33,448.80 balance plus $6897.98 in interest. It further awarded $5417.61 in attorney's fees, representing fifteen percent of that debt. From this order, defendants appeal.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). This rule requires a court to engage in a shifting burden analysis. The party moving for summary judgment must first meets its burden of demonstrating that no issues of fact exist. *Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984). Plaintiff's pleadings here included the two loan agreements and security agreements. The affidavits plaintiff produced then listed the outstanding balance on each loan, offset by the moneys it received from the various foreclosure sales. We conclude this was sufficient to meet plaintiff's threshold burden as to its own motion for summary judgment.

[1] The burden then shifted to the non-movant defendants to show that genuine issues of fact did indeed exist. *Dixie Chemical*, 68 N.C. App. at 716, 315 S.E.2d at 750. Specifically, in order to defeat plaintiff's motion, defendants had to come forward with *specific facts*, as opposed to mere allegations, revealing those genuine issues. *Id.* The only documentation defendants submitted here to meet its burden was an affidavit by defendant Peggy Miller. The trial court refused to

consider this affidavit for purposes of summary judgment, concluding that it was inadmissible under N.C. Gen. Stat. § 47-8 because it was notarized by her attorney. However, section 47-8 was repealed by our Legislature in 1991, long before this action was commenced, thereby eliminating any proscription against attorneys serving as notaries for their clients' affidavits. Accordingly, the trial court erroneously relied on a repealed statute in refusing to consider Mrs. Miller's affidavit.

[2] Plaintiff nonetheless contends that the affidavit still should not have been considered by the trial court because it was not filed with defendants' motion for summary judgment. We disagree. N.C.R. Civ. P. 6(d) provides: "When a motion is supported by affidavit, the affidavit shall be served with the motion." Although defendants did not submit the affidavit by Mrs. Miller with its 1999 motion for summary judgment, they did submit it in response to plaintiff's earlier 1998 motion for summary judgment, which was denied. We feel it would be a strained reading of Rule 6(d) to require a party to resubmit affidavits that have already been filed in support of, or in response to, an earlier motion for summary judgment merely because another motion for summary judgment has subsequently been filed. Additionally, we note that the record contains no objection by plaintiff nor a motion to strike the affidavit. Absent such an objection or motion to strike, plaintiff cannot now contest the admission of Mrs. Miller's affidavit on appeal. *Lindsey v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 437, 405 S.E.2d 803, 806 (1991). Accordingly, for purposes of our review, we will consider the affidavit in determining whether defendants met their burden of showing that issues of fact exist.

[3] Defendants contend the affidavit raises six genuine issues of fact and/or defenses. First, they contend that an issue of fact exists as to the outstanding balance on the respective loans. Specifically, the affidavit states:

> We strongly contest the amount which Lexington State Bank seeks to recover in this lawsuit. There were payments made toward these loans prior to my husband's death which have not been accounted for or credited by Lexington State Bank.

(Miller Aff. ¶ 3).

As previously stated, to defeat summary judgment, the nonmovant must set forth specific facts; he cannot simply rely on the

same allegations he made in his complaint or answer. *Dixie Chemical*, 68 N.C. App. at 716, 315 S.E.2d at 750. This is because the purpose of summary judgment is to "allow[] one party to force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense." *Id.* at 717, 315 S.E.2d at 750; *see also Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) ("The use of [affidavits and other documentary materials] makes it clear that the real purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact."). Here, the affidavit contains only general allegations and conclusions on the part of the affiant. No specific facts are provided as to the dates of any uncredited payments, their amounts, or any other relevant information. Accordingly, we conclude that Mrs. Miller's affidavit is insufficient to create an issue of fact as to the amount owed on the loans.

[4] Defendants also assert that some of the collateral securing the debt was released by plaintiff, thereby reducing the amount of defendants' obligation. Even if such a release did occur, defendants are confusing secured transactions law and suretyship law as to the effect of the release. In suretyship law, the release of collateral extinguishes the *surety's* obligation in the amount of the collateral. *Mfg. Co. v. Holladay*, 178 N.C. 417, 421, 100 S.E. 597, 598 (1919); 74 Am. Jur. 2d *Suretyship* § 86 (1974). There is no such similar provision with respect to the *debtor's* underlying obligation itself. *Cf. West Branch State Bank v. Gates*, 477 N.W.2d 848, 851 (Iowa 1991) ("Since the creditor has a right to choose which collateral to foreclose upon, we think that the creditor also has the right to release specific collateral without having its value credited or set off against the underlying debt.").

[5] Next, defendants argue that plaintiff intentionally paid less than fair market value for all the property at the foreclosure sales. Specifically, the affidavit states:

> The real property in Davidson County and Montgomery County which was foreclosed on and purchased by Lexington State Bank had a fair market value and was worth substantially more than the amount which was bid and paid by Lexington State Bank. Lexington State Bank intentionally purchased the real property at a price below its fair market value.

(Miller Aff. ¶ 10). Again, defendants have set forth no specific facts with respect to the various properties' fair values or other relevant

information. Their unsupported allegations are insufficient to create an issue of fact as to this point.

[6] Defendants also contend that plaintiff represented to them that their loans would be refinanced. In this regard, the affidavit states:

> Lexington State Bank informed and advised us on numerous occasions that they would extend and refinance these loans. We relied on these representations by Lexington State Bank and were working towards refinancing and restructuring these loans in such a manner that they could be paid. . . . Lexington State Bank made intentional misrepresentations which they knew would be relied on.

(Miller Aff. ¶ 12). Once again, these are nothing more than unsubstantiated conclusions on the part of the affiant. Defendants have not set forth any specific facts as to when such representations were made, by whom they were made, or otherwise.

[7] Next, defendants argue plaintiff's cause of action is barred by the statute of limitations for deficiency actions, which requires all such actions to be commenced within one year from "the date of the delivery of the deed pursuant to the foreclosure sale." N.C. Gen. Stat. § 1-54(6) (1999). Plaintiff filed this action on 18 July 1997. Curiously, copies of the foreclosure deeds are not contained in the record, so the only evidence before us with respect to the delivery of these deeds is provided by the parties' respective affidavits. In its affidavits, plaintiff states the foreclosure deeds were delivered on 24 July and 31 July 1996, which would mean the action was timely filed. In defendants' affidavit, Mrs. Miller counters the deeds were delivered on 8 July and 15 July 1996, such that the action was filed too late. This time, the affidavit of Mrs. Miller sets forth more than mere allegations; it provides specific facts, namely the exact dates of delivery. We conclude that this is sufficient to create an issue of fact with respect to the delivery date of the foreclosure deeds.

Plaintiff correctly points out that all affidavits must be based upon the affiant's own personal knowledge. N.C.R. Civ. P. 56(e). Plaintiff then argues that Mrs. Miller's statement as to the dates of delivery cannot be considered because she could not possibly have any knowledge of when the deeds were delivered to the purchaser. In essence, plaintiff is advancing a circular argument: Mrs. Miller's affidavit cannot be based upon personal knowledge because there is no way for her to know this information. But it is not for us to question

how Mrs. Miller might know when the foreclosure deeds were delivered to the purchaser. It is enough that she stated under oath that she did know and that such delivery occurred on 8 July and 15 July 1996.

[8] Finally, defendants argue that the affidavit of Mrs. Miller alleges sufficient facts to defeat summary judgment with respect to their counterclaim for unfair trade practices. For the same reasons as previously articulated, we reject this argument. The affidavit merely asserts conclusions with respect to alleged fraudulent behavior by plaintiff; no specific facts are alleged.

In sum, we remand this matter solely on the issue of the date the foreclosure deeds were delivered. If by additional discovery it can be ascertained when delivery was accomplished, the matter may be resolved by motion before the trial court. If not, a jury must decide.

Affirmed in part, vacated in part and remanded.

Judges MARTIN and WALKER concur.

MICHAEL GRAY COOKE, PLAINTIFF v. JANICE FAULKNER, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, DEFENDANT

No. COA99-555

(Filed 2 May 2000)

Motor Vehicles— revoked driver's license—reinstatement—subject matter jurisdiction

The trial court did not err by finding that it lacked subject matter jurisdiction to hear plaintiff's claim seeking reinstatement of his driver's license following a conviction for habitual impaired driving. Permanent revocation following a conviction for habitual impaired driving is mandatory pursuant to N.C.G.S. § 20-138.5(d), the legislature did not provide a mechanism for the restoration of a driver's license following a conviction for habitual impaired driving, and N.C.G.S. § 20-25 creates no right to appeal a revocation under N.C.G.S. § 20-138.5(d) because that statute appears in Article 3 rather than Article 2.

Appeal by plaintiff from judgment entered 11 December 1998 by Judge L. Todd Burke in Superior Court, Forsyth County. Heard in the Court of Appeals 15 February 2000.

David R. Tanis for plaintiff-appellant.

Attorney General Michael F. Easley, by Associate Attorney General Kimberly P. Hunt, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Michael Gray Cooke ("plaintiff") appeals the dismissal of his complaint pursuant to Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

Plaintiff was convicted of Driving While Impaired on 6 January 1988, 15 April 1988, and 6 July 1992. As a result of operating a moped on 25 August 1993 while impaired, plaintiff was convicted of Habitual Impaired Driving, and his license was permanently revoked pursuant to North Carolina General Statutes section 20-138.5. Plaintiff filed suit against Janice Faulkner in her capacity as Commissioner of the North Carolina Division of Motor Vehicles ("defendant") seeking reinstatement of his license or a hearing to consider reinstatement of his license. Defendant filed an answer and motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6).

Following a hearing on defendant's motion, the trial court made the following findings of fact:

> 1. [Plaintiff] was convicted of habitual impaired driving pursuant to N.C. Gen. Stat. § 20-138.5.
>
> 2. As required by N.C. Gen. Stat. § 20-138.5(d), [defendant] permanently revoked [plaintiff's] license after receiving notice of [plaintiff's] habitual impaired driving conviction.

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

> 1. The revocation of [plaintiff's] license, in accordance with N.C. Gen. Stat. § 20-138.5, was mandatory.
>
> 2. Unlike other statutes in Chapter 20 which specifically provide for the restoration of an individual's license after a permanent revocation, (i.e. N.C. Gen. Stat. § 20-19), N.C. Gen. Stat. § 20-138.5

does not provide for the restoration of an individual's license who has been found guilty of habitual impaired driving.

3. Therefore, the court lacks subject matter jurisdiction on the above captioned action. [Plaintiff] has no right for judicial review of the mandatory revocation.

4. Because there is no statutory authority for the restoration of a driver's license after a permanent revocation under N.C. Gen. Stat. § 20-138.5, [plaintiff] has failed to state a claim upon which relief may be granted.

Based on its conclusions of law, the trial court entered an order granting defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

The dispositive issue on appeal is whether the trial court lacked subject matter jurisdiction to hear plaintiff's claim.

Plaintiff contends that the trial court was vested with subject matter jurisdiction over the action in that North Carolina General Statutes section 20-25 provides:

> Any person denied a license or whose license has been canceled, suspended or revoked by the Division, except where such cancellation is mandatory under the provisions of this Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court . . . or to the resident judge of the district . . . and such court or judge is hereby vested with jurisdiction and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this Article.

N.C. Gen. Stat. § 20-25 (1999). We cannot agree.

The appellate court reviews *de novo* an order of the trial court allowing a motion to dismiss for lack of subject matter jurisdiction, but the trial court's findings of fact are binding on appeal if supported by competent evidence. *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998). "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).

Plaintiff's license was revoked pursuant to North Carolina General Statutes section 20-138.5, which provides: "A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a) (1999). "A person convicted [of Habitual Impaired Driving] shall have his license permanently revoked." N.C.G.S. § 20-138.5(d).

Several statutory provisions which pertain to the permanent revocation of a driver's license provide a mechanism for the restoration of a driver's license. *See, e.g.*, N.C. Gen. Stat. § 20-28(c) (1999). In contrast, the statutory provision in issue, section 20-138.5, does not provide such a mechanism. Following a conviction for habitual impaired driving, permanent revocation is mandatory and the trial court lacks the authority to provide relief.

In *Palmer v. Wilkins, Com'r of Motor Vehicles*, 73 N.C. App. 171, 325 S.E.2d 697 (1985), this Court held that where suspension of a driver's license is mandated by statute, and the General Assembly has not provided for any appeal from said suspension, then the trial court lacks subject matter jurisdiction to review the suspension. In *Palmer*, the petitioner, who held a North Carolina driver's license, failed to comply with a speeding citation issued in a reciprocating state. The petitioner's license was suspended pursuant to section 20-4.20(b): "[T]he Commissioner *shall* forwith suspend such person's license." N.C. Gen. Stat. § 20-4.20(b) (1999) (emphasis added).

Section 20-4.20 appears in Article 1B of Chapter 20. However, like plaintiff in the present case, the petitioner in *Palmer* argued that he was entitled to a hearing pursuant to North Carolina General Statutes section 20-25, which appears in Article 2. The *Palmer* court held that section 20-25 "empowers courts only to decide whether suspension under Article 2 is appropriate[.]" *Palmer*, 73 N.C. App. at 173, 325 S.E.2d at 698. Noting that the legislature did not provide for appeals from section 20-4.20, the *Palmer* court concluded that the trial court lacked subject matter jurisdiction to entertain the petitioner's appeal.

We believe that the reasoning and holding in *Palmer* are applicable in the case at bar. As stated above, where a person has been con-

victed of Habitual Impaired Driving, permanent revocation of a driver's license is mandatory pursuant to section 20-138.5(d). In its wisdom, the legislature did not provide a mechanism for the restoration of a driver's license to an individual who is convicted of Habitual Impaired Driving. As section 20-138.5 appears in Article 3 rather than Article 2, section 20-25 creates no right to appeal a revocation under section 20-138.5. We conclude that the trial court did not err in finding that it lacked subject matter jurisdiction to hear plaintiff's claim.

Having concluded that the trial court properly dismissed plaintiff's claim for lack of subject matter jurisdiction, we do not need to address whether the trial court erred in finding that plaintiff failed to state a claim on which relief could be granted for purposes of Rule 12(b)(6).

For the foregoing reasons, we find that the trial court did not err in dismissing plaintiff's claim on the merits based on lack of subject matter jurisdiction.

Affirmed.

Judges GREENE and WALKER concur.

MILTON A. HARGROVE v. BILLINGS & GARRETT, INC., A NORTH CAROLINA CORPORATION AND THE CITY OF LOUISBURG, A MUNICIPAL CORPORATION

No. COA99-447

(Filed 2 May 2000)

Municipal Corporations— governmental immunity—public duty doctrine—limited

The trial court erred by granting a dismissal under N.C.G.S. § Rule 1A-1, Rule 12(b)(6) for the City of Louisburg where plaintiff alleged that he was injured by a dynamite blast while constructing a sewer line. The North Carolina Supreme Court has held that the protection afforded by the public duty doctrine does not extend to local governmental agencies other than law enforcement agencies engaged in their general duty to protect the public.

Appeal by plaintiff from order entered 19 January 1999 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 17 February 2000.

Roberti, Wittenberg, Holtkamp & Lauffer, P.A., by R. David Wicker, Jr., and Samuel B. Taylor, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle, for defendant-appellee.

MARTIN, Judge.

Plaintiff appeals from an order dismissing his complaint against defendant City of Louisburg for failure to state a claim upon which relief can be granted. We reverse.

In his complaint, plaintiff alleges that he was employed by defendant Billings & Garrett, Inc., a construction company which had contracted with defendant City of Louisburg for the construction of a sewer line. Plaintiff alleges that excavation for the sewer line necessitated the use of dynamite, an ultra-hazardous activity. He alleges he was injured when he was required to operate a jackhammer in a trench where three sets of dynamite charges had previously been detonated. As he began drilling holes with the jackhammer in preparation for a fourth set of dynamite charges, some undetonated dynamite and dynamite residue exploded, inflicting serious and permanent injuries upon plaintiff, including the loss of an eye. He alleges Billings & Garrett, Inc., was acting as agent for the City of Louisburg in constructing the sewer line and that both defendants are strictly liable for the injuries which he sustained as a result of defendants' use of dynamite. Plaintiff also alleges defendant City of Louisburg waived governmental immunity by the purchase of liability insurance.

Because plaintiff appeals from a Rule 12(b)(6) dismissal, we treat all of the foregoing factual allegations as true. The standard of review of an order dismissing a complaint for failure to state a claim upon which relief can be granted, G.S. § 1A-1, Rule 12(b)(6), is to 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.' " *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406, 413 (1999) (citations omitted). " '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.' " *Id.* (citations omitted).

Blasting is recognized as an ultra-hazardous activity in North Carolina and parties whose blasting causes injury are held strictly liable for damages, regardless of negligence. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963); see Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 20.40, at 421 (2nd ed. 1999). Sovereign immunity is waived to the extent to which a municipality has purchased liability insurance. N.C. Gen. Stat. § 160A-485, *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995). The parties agree that the sole question for our determination is whether plaintiff's claim is barred by application of the public duty doctrine.

The public duty doctrine "provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals." *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L.Ed.2d 449 (1998). The rationale behind the public duty doctrine is "to prevent 'an overwhelming burden of liability' on governmental agencies with 'limited resources.' " *Id.* at 481, 495 S.E.2d at 716 (quoting *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991)). The doctrine was first applied in North Carolina by this Court in *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 375 (1988) and was adopted by our Supreme Court less than a decade ago in *Braswell*. As originally applied and adopted, the doctrine operated to shield a governmental entity from liability for the failure of the government and its law enforcement agents to furnish police protection to specific individuals. *Braswell* at 370-71, 410 S.E.2d at 901.

The doctrine has since been extended by this Court to shield municipalities and their agents from liability for negligence in providing fire protection services, *Davis v. Messer*, 119 N.C. App. 44, 457 S.E.2d 902 (1995), animal control services, *Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216, *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993), municipal building inspection services, *Lynn v. Overlook Development*, 98 N.C. App. 75, 389 S.E.2d 609 (1990), *reversed in part on other grounds*, 328 N.C. 689, 403 S.E.2d 469 (1991), *Sinning v. Clark*, 119 N.C. App. 515, 459 S.E.2d 71, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995), and by our Supreme Court to shield state agencies required by statute to perform

safety inspections for the protection of the general public. *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); *Stone v. N.C. Dept. of Labor*, *supra*. More recently, however, in *Lovelace v. City of Shelby*, 351 N.C. 458, 562 S.E.2d 652 (2000) and *Thompson v. Waters*, 351 N.C. 462, 562 S.E.2d 650 (2000), the North Carolina Supreme Court has held the protection afforded by the public duty doctrine does not extend to local governmental agencies other than law enforcement agencies engaged in their general duty to protect the public. Therefore, the public duty doctrine does not apply to shield the City of Louisburg from liability for the claim alleged in plaintiff's complaint. The order of the trial court dismissing the complaint against the City of Louisburg is reversed and the case is remanded to the trial court for further proceedings.

Reversed.

Judges WYNN and HUNTER concur.

JACQUELINE WILLIS, PLAINTIFF v. CITY OF NEW BERN, A MUNICIPALITY, DEFENDANT

No. COA99-768

(Filed 2 May 2000)

Cities and Towns— fall on sidewalk—constructive notice of defect—summary judgment

The trial court did not err by granting defendant city's motion for summary judgment in a negligence action based upon allegations that plaintiff was injured when she stumbled and fell on an improperly maintained sidewalk. The difference in elevation of the two adjacent sections of sidewalk was about one and one-quarter inch; plaintiff contended only constructive notice of the defect; defendant's Public Works Superintendent stated in an affidavit that he found no record of complaints of defects in that sidewalk for the four-year period prior to the accident and had no personal recollection of any complaints or requests for improvements to the sidewalks in that area; and plaintiff did not offer proof of any other factor which should have given the City constructive notice of a defect.

Appeal by plaintiff from order entered 17 February 1999 by Judge Clifton W. Everett, Jr., in Craven County Superior Court. Heard in the Court of Appeals 30 March 2000.

Jacqueline Willis (plaintiff) alleged in her complaint that on 3 May 1995, she was walking west on New Street in New Bern, North Carolina, near Centenary United Methodist Church. She alleges that she stumbled and fell on the sidewalk due to a defect in the concrete sidewalk. According to plaintiff's deposition, there were no eyewitnesses to the incident, and plaintiff did not report the fall to City officials. At the time of the fall, plaintiff was not suffering from physical problems or limitations. Plaintiff further stated that she was not looking at her feet, and did not see the elevation in the sidewalk before she fell.

Defendant is a municipal corporation organized pursuant to Chapter 160 of the North Carolina General Statutes. On 27 April 1998, plaintiff filed a complaint in Craven County, claiming defendant was negligent in failing to maintain properly its sidewalk, and alleging that such negligence proximately caused injuries to plaintiff in excess of $10,000.00. On 24 July 1998, defendant filed an answer denying that it was negligent, and alleging that plaintiff was contributorily negligent.

In support of its motion for summary judgment, defendant submitted an affidavit from Mr. Richard Morris, Public Works Superintendent for the City of New Bern, who stated that he maintains files of all complaints and requests for action that need to be taken with respect to sidewalks. He reviewed those files for the years 1991 through the end of May 1995, and found no record of complaints with respect to defects in the sidewalk in the area where plaintiff fell.

After a hearing, the trial court concluded that there were no genuine issues of material fact and granted defendant's motion for summary judgment. Plaintiff appealed, assigning error.

Whitley, Jenkins & Riddle, by Robert E. Whitley, Jr., for plaintiff appellant.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, and Robert J. McAfee; and Ward, Ward & Davis, by A. D. Ward for defendant appellee.

HORTON, Judge.

In North Carolina, a city is under a duty to keep the public streets, sidewalks, alleys, and bridges in proper repair. N.C. Gen. Stat. § 160A-296(a)(1) (1999). To prove a claim of negligent maintenance of its sidewalk against defendant,

> "the plaintiff must introduce evidence sufficient to support these findings by the jury: (1) She fell and sustained injuries; (2) the proximate cause of the fall was a defect in or condition upon the sidewalk; (3) the defect was of such a nature and extent that a reasonable person, knowing of its existence, should have foreseen that if it continued some person using the sidewalk in a proper manner would be likely to be injured by reason of such condition; (4) the city had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom."

Cook v. Burke County, 272 N.C. 94, 97, 157 S.E.2d 611, 613 (1967) (citation omitted).

"[S]ummary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). In *Bagwell v. Brevard*, 256 N.C. 465, 124 S.E.2d 129 (1962), the plaintiff fell and injured herself on a sidewalk in the Town of Brevard, and she sued the Town, alleging negligence. Our Supreme Court held that

> [t]he legal duty of defendant, a municipal corporation, is to exercise ordinary care to maintain its sidewalks in a reasonably safe condition for travel by those using them in a proper manner and with due care. It is not an insurer of the safety of its sidewalks.
>
> Here, the alleged defect or irregularity is a difference in elevation of approximately one inch between two adjacent concrete sections of the sidewalk. Defendant's failure to correct this slight irregularity did not constitute a breach of its said legal duty.

Id. at 466, 124 S.E.2d at 130. *See also Joyce v. City of High Point*, 30 N.C. App. 346, 226 S.E.2d 856 (1976) (the trial court properly entered summary judgment for defendants where the evidence tended to show that part of the sidewalk was elevated one to two inches; the

mishap occurred during the day when the sun was shining; the defect had been present for several years; and plaintiff did not see the defect until she fell).

Here, there is no evidence that defendant breached its duty to plaintiff. According to plaintiff's testimony in her deposition, the difference in elevation between the two adjacent sections of the concrete sidewalk at the spot where plaintiff fell, was about one and one-quarter inch. Plaintiff does not contend that defendant had actual notice of any defect in the sidewalk at the place of her fall, but contends that defendant should have had constructive notice of the defect. In response, defendant offered the affidavit of Mr. Morris, in which he stated that he found no record of any complaints for the four-year period prior to plaintiff's accident of any defects in the sidewalk on which plaintiff fell. Mr. Morris also stated in his affidavit that he had no personal recollection of any complaints or requests for improvements to the sidewalks in that area of New Street. The sidewalk in question was resurfaced by Centenary United Methodist Church in 1996, following damage to the area from Hurricane Bertha.

Further, plaintiff cannot offer proof of any factor which should have given the City constructive notice of a defect in its sidewalk. Plaintiff's affidavit reveals that she did not notice any defect in the sidewalk herself until after she had fallen.

> "The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive. (Citing cases). The existence of a condition which causes injury is not negligence *per se*. (Citing a case). The doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets."

Smith v. Hickory, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960) (citation omitted). When the party moving for summary judgment supports his motion as provided in Rule 56, the party opposing the motion

> "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Atkins v. Beasley, 53 N.C. App. 33, 38, 279 S.E.2d 866, 870 (1981) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). Plaintiff fails to offer any evidence that the City had either actual or constructive notice of any alleged defect in its sidewalk so as to create a genuine issue of material fact.

Because the trial court properly entered summary judgment on the issue of negligence, we need not reach the issue of plaintiff's alleged contributory negligence.

The judgment of the trial court is hereby

Affirmed.

Judges WYNN and SMITH concur.

STATE OF NORTH CAROLINA v. ARNOLD GENE HOLBROOK

No. COA99-570

(Filed 2 May 2000)

Appeal and Error— plain error doctrine—cumulative application

There was no plain error in a prosecution for first-degree statutory sexual offense where defendant did not object to the admissibility of eight unrelated pieces of evidence but argued that they were cumulatively plain error. The plain error doctrine will not be applied on a cumulative basis where defendant is assigning error to unrelated admissions of evidence to which he did not object and on which the trial court made no affirmative ruling.

Appeal by defendant from judgment entered 16 October 1998 by Judge Steve A. Balog in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Margaret A. Force, for the State.

Jeffrey S. Lisson for defendant-appellant.

HUNTER, Judge.

Arnold Gene Holbrook ("defendant") appeals his conviction of first degree statutory sexual offense with a child under the age of thirteen, defendant's step-daughter, ("victim"). Defendant asserts error as to the admissibility of eight unrelated portions of evidence; however, he did not object to any of this evidence at trial. Defendant argues that cumulatively, the admission of this evidence by the trial court was plain error. We disagree, holding that there is no error.

Briefly, the State's evidence at trial tended to show that defendant, his wife Mary Ann Holbrook, and her daughters, victim and her sister ("sister"), either lived in hotels in Winston-Salem, North Carolina or stayed in their car during part of 1996. At trial, victim and sister both testified that during this time, defendant and their mother molested them on several occasions by fondling their "private parts," and putting their fingers up into their vaginas. Both testified that their mother and defendant used drugs, including heroin and cocaine. Victim testified that defendant also put his "private part" in her "private part." Victim's and sister's testimonies were corroborated by other witnesses including police officers, their father, a psychologist and social workers. Defendant was convicted of first degree statutory sexual offense with victim, and was sentenced to a minimum prison term of 336 months and a maximum of 413 months. Defendant subsequently gave notice of appeal to this Court.

Defendant brings forward eight assignments of error, and admits that the evidence he complains of was not objected to at trial. Therefore, he asks this Court to invoke the plain error doctrine. Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Our Supreme Court has stated that:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is

such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original)). "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the *judicial action questioned is specifically and distinctly contended to amount to plain error.*" N.C.R. App. P. 10(c)(4) (emphasis added). The North Carolina Supreme Court has chosen to review such "unpreserved issues for plain error when . . . the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

Defendant admits that each assignment of error he brings before this Court, individually, does not rise to the level of plain error; however, he argues that altogether, their cumulative effect amounts to plain error, and directs this Court to the holding in *State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992), *appeal after remand*, 343 N.C. 378, 471 S.E.2d 593, *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996). In *State v. White*, our Supreme Court held that defendant failed to show that any of the court's rulings, considered individually, were sufficiently prejudicial to require a new trial, but their cumulative effect may have deprived him of his fundamental right to a fair trial. *Id.* However, *State v. White* is distinguishable from the present case because the defendant in that case did not rely on the plain error rule. In that case, the trial court ruled on the objections by defendant, which were, in turn, the subject of the defendant's assignments of error before the appellate court.

In the present case, defendant admits that he made no objection to, and thus the trial court did not affirmatively rule on, any issue which he now asks this Court to review. Thus, there was no judicial action as required for plain error to apply by Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure. Additionally, the present case does not involve the cumulative effect of a single, blatant error, such as admission of testimony on one issue, but rather

involves the cumulative effect of numerous pieces of evidence. As we have noted, the essence of the plain error rule is that it be obvious and apparent that the error affected defendant's substantial rights. If we were to adopt defendant's proposition that the plain error rule may apply cumulatively to several unrelated portions of evidence where the trial judge was not asked to, and did not, make any affirmative ruling, we would be departing from the fundamental requirements of the plain error rule of obviousness and apparentness of error. A trial judge would be required to review all evidence cumulatively for errors of admissibility even though defendant had made no objections to any evidence during trial. We agree with the State that under such a holding, a trial judge would be required to be omniscient. A defendant could fail to make any objection to the admission of evidence at trial, but could then require this Court to cumulatively review the evidence for possible errors amounting to plain error. Such rule would be in contradiction of our Rules of Civil Procedure and Rules of Appellate Procedure, and the plain error doctrine as defined by the North Carolina Supreme Court. *See State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244; *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375; *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550; *State v. White*, 331 N.C. 604, 419 S.E.2d 557.

Based on the foregoing, we refuse to apply the plain error doctrine on a cumulative basis when defendant is assigning error to unrelated admissions of evidence to which he did not object, and the trial court made no affirmative ruling on the admissibility of any of them. Because defendant asserts plain error but concedes that each of his assignments of error do not rise to the standard required by the plain error doctrine, we hold that each error complained of does not meet the standard required by *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375, and hold that the trial court did not commit plain error.

No error.

Judges WYNN and MARTIN concur.

GARY HARRISON LAWS AND TERESA LEE LAWS v. HORIZON HOUSING, INC., D/B/A CHOICENTER; BRIGADIER HOMES OF NORTH CAROLINA, INC.; AND GREEN TREE FINANCIAL SERVICING CORPORATION AND BRIGADIER HOMES OF NORTH CAROLINA, INC., v. CANA INCORPORATED; GEORGIA-PACIFIC; AND WEYERHAEUSER COMPANY

No. COA99-723

(Filed 2 May 2000)

Appeal and Error— appealability—interlocutory order—order compelling arbitration—certification erroneous

The trial court's attempt to grant Rule 54(b) certification based on an order compelling arbitration fails because: (1) N.C.G.S. § 1-567.18 does not provide for an immediate appeal from an order compelling arbitration; and (2) the Court of Appeals has expressly held that there is no immediate right of appeal from an order compelling arbitration.

Appeal by plaintiffs from order entered 11 March 1999 by Judge Michael E. Helms in Ashe County Superior Court. Heard in the Court of Appeals 29 March 2000.

Don Willey for plaintiff-appellants.

John A. Meadows, P.A., by John A. Meadows and Mark T. Aderhold for defendant-appellee Green Tree Financial Servicing Corporation.

MARTIN, Judge.

Plaintiffs appeal from an order compelling arbitration of their claims against Green Tree Financial Servicing Corporation. Although plaintiffs acknowledge their appeal is from an interlocutory order because it does not determine all claims against all parties, they contend the order compelling arbitration affects their substantial rights and is immediately appealable pursuant to G.S. § 1-277(a) and G.S. § 7A-27(d). In addition, they contend the trial court's action in finding "that there is no just reason for delay" and in certifying its order compelling arbitration "for appeal pursuant to Rule 54(b)" renders the order immediately appealable.

We first consider the trial court's Rule 54(b) certification. A Rule 54(b) certification by the trial court is reviewable by this Court on appeal; a trial court's certification of no just reason to delay the

appeal does not bind the appellate court because " 'ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.' " *First Atlantic Management Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 61 (1998) (quoting *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984)); see *Tridyn Industries, Inc. v. American Mutual Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979).

With respect to orders regarding arbitration, G.S. § 1-567.18 provides:

(a) An appeal may be taken from:

(1 An order denying an application to compel arbitration made under G.S. 1 567.3;

(2) An order granting an application to stay arbitration made under G.S. 1-567.3(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this Article.

The statute does not provide for an immediate appeal from an order compelling arbitration, and this Court has expressly held "that there is no immediate right of appeal from an order compelling arbitration." *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 286, 314 S.E.2d 291 (1984) (holding that an order compelling arbitration is interlocutory and does not affect a substantial right so as to be immediately appealable pursuant to G.S. 1-277(a) or G.S. 7A-27(d)).

Plaintiffs' appeal is dismissed.

Dismissed.

Judges LEWIS and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 MAY 2000

BUCK v. BANKS No. 99-762	Pitt (98CVS2363)	Appeal Dismissed
CATERSON v. BRETAN No. 99-554	Yancey (87CVS131)	Affirmed
IN RE FENTON No. 99-1258	Moore (94J16) (95J91)	Dismissed
IN RE PERRY No. 99-1109	Hyde (98J3) (98J4)	Affirmed
IN RE WOOD No. 99-1359	Onslow (98J270) (98J271) (98J185)	Affirmed
MOORE v. CHARLOTTE MECKLENBURG HOSP. AUTH. No. 99-892	Ind. Comm. (445081)	Affirmed
SMD ENTERS., INC. v. CITY OF MONROE No. 99-991	Union (98CVS1839)	Dismissed
STATE v. BAKER No. 99-1236	Forsyth (95CRS34343)	No Error
STATE v. COUCH No. 99-1104	Cumberland (96CRS61625)	No Error
STATE v. CRABTREE No. 99-1136	Cumberland (97CRS24988)	No Error
STATE v. DICKENS No. 99-1182	Martin (98CRS2508)	No Error
STATE v. GAINES No. 99-1233	Buncombe (98CRS57421) (98CRS57422)	No Error
STATE v. HEFLIN No. 99-1077	Mecklenburg (98CRS34500)	No Error
STATE v. HUDSON No. 99-882-2	Mecklenburg (97CRS26747)	No error in trial. Sentences vacated and remanded for resentencing.

STATE v. HUNTER No. 99-1031	Edgecombe (98CRS11173)	No Error
STATE v. JOHNSON No. 99-1128	Guilford (97CRS56471)	No Error
STATE v. JONES No. 99-660	Catawba (98CRS12908)	No Error
STATE v. LANGE No. 99-1062	Rowan (98CRS4442) (98CRS8635)	No Error
STATE v. LASSITER No. 99-1072	Rockingham (96CRS14210)	No Error
STATE v. MOSES No. 99-916	Forsyth (97CRS45706)	No Error
STATE v. ROBINSON No. 99-1061	Durham (97CRS28273)	No Error
STATE v. SOUTHERN No. 99-617	Caswell (98CRS2664) (98CRS2665) (98CRS2666) (98CRS3045)	No Error
STATE v. WATERS No. 99-1219	Cabarrus (98CRS7549)	No Error
STATE v. WELCH No. 99-1148	Guilford (99CRS563) (99CRS564) (99CRS565)	No Error
WALTERS FAMILY LTD. PART. v. COMPREHENSIVE HEALTH SERVS., INC. No. 99-736	Columbus (98CVS01188)	Dismissed

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APPEAL AND ERROR—Continued

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Preservation of issues—arbitration—no challenge at trial level—Plaintiff waived the issue of whether arbitrators in an automobile accident case were unduly influenced by the UIM policy limit where nothing in the record indicates that plaintiff took advantage of the procedure set out in N.C.G.S. § 1-567.13 or otherwise challenged the validity of the award at the trial level. **Murakami v. Wilmington Star News, Inc., 357.**

Preservation of issues—constitutional issue—no authority to preserve claim—Although defendant contends his claim of ineffective assistance of counsel should be preserved for a hearing in superior court, the issue of whether defendant received ineffective assistance of counsel is not properly before the Court under N.C. R. App. P. 28(a), and the Court of Appeals has no authority to preserve this claim for a hearing in superior court. **State v. Jackson, 570.**

Preservation of issues—failure to object—failure to argue plain error—Although defendant contends the trial court erred in an indecent liberties with a minor case by instructing the jury that it could consider the testimony of an officer concerning statements made by the minor victim only to impeach the credibility of the witness, rather than as corroborative evidence, defendant waived review of this issue since: (1) defendant did not object at trial; and (2) defendant has not preserved the issue for plain error review. **State v. McGraw, 726.**

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ARBITRATION

Award—not reduced to judgment—finality and preclusive effect—The trial court did not err by granting summary judgment for defendant on a personal injury claim which had been subject to arbitration. Although plaintiff contended that collateral estoppel did not apply because the arbitration award did not result in a judgment, the finality and preclusive effect of an arbitration award is determined by the agreement to arbitrate; if the agreement to arbitrate states that the decision of the panel is binding on the contracting parties, the award is final

COLLATERAL ESTOPPEL AND RES JUDICATA

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Claim preclusion—summary judgment—final judgment on the merits—The trial court did not err in a negligence case involving a multi-vehicle collision by granting summary judgment in the present case in favor of third-party defendants Rea and P.S.I. based on res judicata since the prior cause of action determined by an order for summary judgment is a final judgment on the merits. **Green v. Dixon, 305.**

Claim preclusion—summary judgment reversed—no longer a final judgment on the merits—The trial court erred in a negligence case involving a multi-vehicle collision by granting summary judgment in favor of third-party defendant NC DOT in the prior case, and therefore, the elements of res judicata are not met with respect to this party in the present action since there is no longer a "final judgment on the merits." **Green v. Dixon, 305.**

Collateral estoppel—no issue preclusion—parties not identical nor in privity—dissimilar issue—The doctrine of collateral estoppel does not apply to preclude plaintiff from pursuing its contribution claim in this medical negligence action against defendants Dr. Mauldin and Sylva Anesthesiology, who entered into a settlement agreement with the Houston estate while an appeal was pending following a jury finding that Houston's death resulted from the negligence of both Dr. Erdman and Dr. Mauldin, because the parties to the 3 August 1994 proceeding for approval of the settlement were neither identical to nor in privity with the parties to the current action, and the issue resolved by the order approving the settlement between the estate and the present defendants is dissimilar to the issue presented in the current action. **Medical Mut. Ins. Co. v. Mauldin, 690.**

Federal action—identical issue litigated and necessary—The trial court properly dismissed plaintiffs' state wrongful death claim against a Highway Patrol trooper under N.C.G.S. § 1A-1, Rule 12(b)(6) where that claim was collaterally estopped by a federal ruling that defendant was entitled to qualified immunity. The issue raised in the federal district court's decision (the standard of defendant's conduct under the circumstances) was identical to the issue raised in the state wrongful death action, the federal court determined that issue in defendant's favor, and the determination was necessary to the federal district court's judgment. **Estate of Fennell v. Stephenson, 430.**

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CONSTITUTIONAL LAW—Continued

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

DAMAGES AND REMEDIES

EVIDENCE—Continued

EVIDENCE—Continued

Hearsay—no plain error—The trial court did not commit plain error in an assault with a deadly weapon with intent to kill case by failing to exclude an officer's alleged hearsay testimony ex mero motu. **State v. Ridgeway, 144.**

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Hearsay—not truth of matter asserted—The trial court did not err in a first-degree murder case by admitting the testimony of the victim's mother concerning what her daughter told her about her problems with defendant, the daughter's ex-boyfriend, and about her request to have someone pick her up at the bus stop, because these statements are not hearsay. **State v. Lesane, 234.**

Hearsay—prior inconsistent statements—credibility—impeachment—The trial court did not err in an indecent liberties with a minor, first-degree sexual exploitation, statutory sexual offense, and statutory rape case by admitting the testimony of three witnesses concerning prior statements made by the minor, acknowledging living with defendant and having engaged in various sexual activities with him, because even if this evidence should have been excluded as hearsay at the time it was offered, the minor's subsequent testimony on defendant's behalf denying sexual contact with defendant prior to their marriage rendered her earlier statements relevant and admissible as prior inconsistent statements bearing upon her credibility. N.C.G.S. § 8C-1, Rule 607. **State v. Miller, 450.**

Hearsay—state of mind exception—subsequent conduct—The trial court did not err in a first-degree murder case by admitting the testimony of a detective concerning defendant's family not knowing his whereabouts because these statements are not hearsay since they were offered to show the effect the statements had on the testifying witness's state of mind and to explain his subsequent conduct. **State v. Lesane, 234.**

Lay opinion—shorthand statement of fact—The trial court did not err in a first-degree murder case by allowing the testimony of an eyewitness, stating it looked to him like defendant was trying to shoot the victim in the head, because the statement was a permissible opinion in the form of a shorthand statement of fact. N.C.G.S. § 8C-1, Rule 701. **State v. Lesane, 234.**

Minor child's testimony—alleged violation of sequestration order—The trial court did not abuse its discretion in an indecent liberties with a minor case by refusing to strike the testimony of the minor child victim, based on an alleged violation of the trial court's sequestration order when the minor child looked at her mother while testifying. **State v. McGraw, 726.**

EVIDENCE—Continued

Motion in limine—standing objection—no contemporaneous objection—Defendant did not preserve for appellate review the admissibility of a prior conviction because he failed to object when the evidence was offered, despite the fact that the trial court granted a standing objection at the hearing on a motion in limine. **State v. Gray, 345.**

Offer of proof—denied—content of proffered testimony apparent—There was no prejudicial error in a cocaine prosecution where the court excluded testimony from a defense expert on undercover procedures and refused to allow an offer of proof. Defense counsel forecast the content of the proposed testimony and defendant was not deprived of a trial record sufficient for appellate review. **State v. Mackey, 734.**

Photographs—crash victims' automobile—The trial court did not err in an impaired driving second-degree murder prosecution by admitting photographs of the victims' vehicle. **State v. Gray, 345.**

Prior crime or act—drug sales—intent—common plan or purpose—identity—The trial court did not err in a case involving two sale and delivery of cocaine offenses by denying defendant's motion for a mistrial based on the admission of testimony from a detective that the informant had previously been arrested for buying cocaine from defendant and agreed to help the police catch defendant, because the evidence of defendant's prior drug sales was admissible under N.C.G.S. § 8C-1, Rule 404(b) to prove intent, to show a common plan or purpose, and to identify defendant as the one selling the cocaine. **State v. Montford, 495.**

Redirect examination—permissible scope—opened the door—dispel favorable inferences—The trial court did not err in concluding the prosecutor did not exceed the permissible scope of redirect examination of a witness in a first-degree murder case by asking questions concerning defendant's financial support of his child because defendant opened the door to this evidence. **State v. Lesane, 234.**

Relevancy—homicide—impaired driving—prior conviction—The trial court did not err in a prosecution for impaired driving second-degree murder by admitting a prior conviction for violation of N.C.G.S. § 20-138.3, which makes it unlawful for a person under 21 to drive while consuming alcohol. **State v. Gray, 345.**

Spoliation—destruction or non-production—adverse inference—In a case where plaintiff-employee placed numerous entries in a company logbook during the course of her employment concerning the sexual harassment of plaintiff by two co-workers, a partial new trial must be granted since the trial court erred in failing to give a requested jury instruction concerning the alleged destruction or non-production of corporate records by defendant Taylor Foods, which would have allowed the jury to determine that spoliation of evidence gives rise to an adverse inference. **McLain v. Taco Bell Corp., 179.**

Telephone calls—identification of caller—There was no plain error in a first-degree murder prosecution where the trial court admitted hearsay evidence of defendant's telephone calls to the victim's workplace. **State v. Jones, 221.**

INSURANCE—Continued

home being left in an uninhabitable position after it was moved. Under the language of the policy, coverage was not provided under a provision dealing with damaged property, but the allegations of the underlying complaint triggered "Liabilities Covered" provisions. Exclusions for "completed work" and for individuals involved in real estate sales or management do not apply because the work never reached a state of completion which would trigger the clause and because a reasonable person in plaintiff's position would have understood that normal business operations were covered under the policy. Defendant's construction of the policy would render the policy worthless for all practical purposes. **Lambe v. Realty Inv., Inc. v. Allstate Ins. Co., 1.**

Homeowners—expiration—not renewed due to nonpayment of premium—not a cancellation—The trial court did not err by granting summary judgment for defendant insurance company in an action arising from the destruction of a homeowner's property after the policy expired. Although plaintiff-mortgagee argued that defendant's attempted cancellation of the policy did not comply with N.C.G.S. § 58-41-15 and was ineffective, the policy expiration resulted from not renewing the policy due to nonpayment of premium rather than a cancellation within the statutory meaning. **Associates Fin. Servs. of Am. v. N.C. Farm Bureau Mut. Ins. Co., 526.**

Homeowners—expiration—notice to mortgagee—The trial court did not err by granting summary judgment for defendant-insurer in an action arising from the destruction of a home where plaintiff-mortgagee contended that the terms of the policy required defendant to notify plaintiff of the expiration of the policy. The policy contained a clause which required notification if defendant unilaterally determined that it would cancel or not renew the policy, but defendant extended an offer to renew to the homeowners and the policy lapsed when they unilaterally determined that they would not accept the offer to renew. **Associates Fin. Servs. of Am. v. N.C. Farm Bureau Mut. Ins. Co., 526.**

Homeowners—failure to renew—notice—The trial court did not err by granting summary judgment for defendant-insurer where a homeowner's policy did not remain in effect subsequent to its expiration date because the homeowner failed to pay the premium. The undisputed facts show that defendant mailed two renewal declarations to the homeowner that indicated a willingness to renew the policy. **Associates Fin. Servs. of Am. v. N.C. Farm Bureau Mut. Ins. Co., 526.**

Serviceman's death benefits—federal preemption—Although plaintiff-first wife attempted to get a constructive trust placed on decedent's Servicemember's Group Life Insurance death benefits since decedent signed a Hawaiian divorce decree stating he would keep at least $50,000 in life insurance benefits for his child but subsequently named his second wife as the sole beneficiary of his $200,0000 death benefits, the trial court did not err in granting summary judgment in favor of defendant-second wife. **Lewis v. Estate of Lewis, 112.**

Settlement of alleged fraudulent claim—breach of contract—12(c) dismissal—The trial court did not err by dismissing plaintiff's claim for breach of contract under N.C.G.S. § 1A-1, Rule 12(c) where plaintiff had alleged that defendant-insurer settled fraudulent claims against plaintiff arising from an automobile accident. An affidavit which was part of the pleadings presented evidence that defendant investigated the accident and acted in the interest of plaintiff in

JUVENILES—Continued

first-degree sexual offense case to superior court under N.C.G.S. §§ 7A-608 and 7A-610(a) (both statutes now replaced by N.C.G.S. § 7B- 100 et seq.), based on failing to consider "the age or the maturity of the juvenile" or his "condition and needs for treatment" under N.C.G.S. § 7B-2203(b), because N.C.G.S. § 7B-2203(b) is not applicable to this case since it applies to hearings related to acts committed on or after 1 July 1999. **In re Wright, 104.**

Transfer of case—reasons for transfer—The juvenile court did not abuse its discretion in transferring the defendant-juvenile's first-degree sexual offense case to superior court under N.C.G.S. §§ 7A-608 and 7A-610(a) (both statutes now replaced by N.C.G.S. § 7B-100 et seq.) because: (1) N.C.G.S. § 7A-610(c) does not require the trial court to make findings of fact, but only to set forth its reasons for transfer; and (2) the trial court's reasons are supported by the evidence. **In re Wright, 104.**

KIDNAPPING

Indictment and instruction—use of conjunctive and disjunctive—The trial court did not err in its instructions on kidnapping where the indictment charged defendant with kidnapping by confining, restraining, and removing, and the instruction allowed a conviction upon a showing of either confining, restraining, or removing. There was substantial evidence to support any of the three methods set out in the indictment and an indictment alleging all three theories is sufficient and puts defendant on notice that the State intends to show that defendant committed kidnapping in any one of the three theories. **State v. Lancaster, 37.**

Instructions—false imprisonment as lesser included offense—The trial court did not err in a second-degree kidnapping prosecution by not instructing the jury on the lesser-included offense of false imprisonment where the evidence shows that defendant confined, restrained, or removed the victim in order to commit a robbery and there was no evidence that defendant acted for any other purpose. **State v. Lancaster, 37.**

Instructions—restraint and removal separate from armed robbery—The trial court's instructions in a kidnapping and armed robbery prosecution were not erroneous where defendant contended that the instruction was ambiguous as to whether the kidnapping was an inherent and inevitable feature of armed robbery, but the court gave the pattern jury instruction that a finding of kidnapping was warranted if defendant's act of confinement, restraint, or removal was a separate complete act independent of and apart from armed robbery or common law robbery, and the evidence established that defendant's binding of the victim's hands and feet, dragging her 15 feet into a storage closet, and moving her several times while in the closet were acts independent of and apart from the robbery. **State v. Lancaster, 37.**

LARCENY

Indictment—variance—owner of stolen property—The trial court committed reversible error by failing to dismiss the charge of larceny when there was a fatal variance between the indictment and the evidence as to who was the actual owner of the stolen suitcase. **State v. Salters, 553.**

WORKERS' COMPENSATION—Continued

Consideration of testimony—authority to reject—There was no error in a workers' compensation proceeding where defendant contended that the Industrial Commission had not given weight to evidence or had failed to give proper weight to testimony. It was apparent from the Commission's findings of fact that it had considered the opinion testimony and the evidence and it was well within the Commission's authority to reject what it deemed to be unreliable evidence. **Young v. Hickory Bus. Furn., 51.**

Credibility—determination by full Industrial Commission—The full Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony under N.C.G.S. § 97-85, and this rule is to be applied retroactively to cases remanded by the Court of Appeals to the Industrial Commission. **Brice v. Sheraton Inn, 131.**

The Industrial Commission did not assign undue weight to the opinion testimony of plaintiff-employee's treating psychiatrists in awarding plaintiff compensation for psychiatric problems because: (1) a physician's opinion testimony with respect to causation is not rendered incompetent unless his opinion is based on mere speculation; and (2) the full Commission could consider the opinion testimony and assign whatever weight it deemed appropriate. **Calloway v. Memorial Mission Hosp., 480.**

Denial of coverage—estoppel—A workers' compensation action was remanded to consider whether the facts supported a conclusion that the employer or the insurance carrier should be estopped from denying coverage where the plaintiff's partnership initially indicated that it had applied for workers' compensation insurance, the employer began deducting an amount to cover workers' compensation premiums when the Certificate of Insurance was not provided, and the Commission failed to consider the application of estoppel. **Purser v. Heatherlin Properties, 332.**

Fibromyalgia—related to workplace injury—The Industrial Commission did not err by finding and concluding that plaintiff's fibromyalgia was causally related to an earlier injury at work where defendant contended that the etiology of fibromyalgia cannot be scientifically or objectively determined, but plaintiff's doctor, who was an expert in the field of rheumatology and the treatment of fibromyalgia and was in a better position to draw a conclusion from the relevant circumstances, testified that plaintiff's injury could have or would have aggravated or caused the fibromyalgia and that her history did not reveal any other causative factor. **Young v. Hickory Bus. Furn, 51.**

Findings of fact—drafted by plaintiff's attorney—independent decision made by Commission—The Industrial Commission did not err in adopting the findings of fact from the proposed findings written by plaintiff's attorney because the Commission can request one side or the other to prepare the proposed opinion and award so long as the Commission made its own decision. **Calloway v. Memorial Mission Hosp., 480.**

Independent contractor—owner of property as general contractor—The Industrial Commission erred in a workers' compensation action by finding that a brick mason was a subcontractor and therefore covered by N.C.G.S. § 97-19 where the owners of the land constructed homes under the business name of Heatherlin Properties, the business was listed as the general contractor on the

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building permit, and one of the individual owners (Mr. McMahan) built houses on the land under his general contracting license. It has been held that it is unreasonable to assume that a person could contract with himself to do something for his own benefit, making himself a general contractor if he should contract the job to another person. **Purser v. Heatherlin Properties, 332.**

Loss of spleen—important organ—The Industrial Commission did not err in a workers' compensation action by awarding $20,000 for the loss of a spleen. Although defendants contend that the spleen does not serve as an important organ under N.C.G.S. § 97-31(24), there was testimony that the spleen filters the blood and protects the body from bacterial infections; given plaintiff's already vulnerable physical condition, his increased risk of infection, however slight, from loss of his spleen sustained the Commission's determination. **Aderholt v. A.M. Castle Co., 718.**

Maximum medical improvement—determination of date—The Industrial Commission did not err in a workers' compensation proceeding in determining the date of plaintiff's maximum medical improvement where defendant contended that plaintiff's internal injuries had stabilized prior to an evaluation by Dr. Stutesman on 3 October 1994, but the implication of Dr. Stutesman's testimony concerning her evaluation was that plaintiff's condition will likely continue to deteriorate absent surgery. "Maximum medical improvement" is the point at which the injury has stabilized. **Aderholt v. A.M. Castle Co., 718.**

Pre-existing psychiatric problem—aggravated by work-related injury—competent evidence—Even though plaintiff-employee had a pre-existing history of psychiatric problems and her work-related injury was a physical one, the Industrial Commission did not err in awarding plaintiff compensation for aggravation of her psychiatric problems. **Calloway v. Memorial Mission Hosp., 480.**

Sufficiency of findings—damaged or lost organs—The Industrial Commission did not abuse its discretion in a workers' compensation action in its awards for damaged organs where there was competent medical evidence to support the Commission's findings regarding the significance of each organ to the body's general health and well being and competent evidence to uphold the finding that the organs were either lost or permanently damaged. **Aderholt v. A.M. Castle Co., 718.**

Total disability—return to work—The Industrial Commission did not err by concluding that plaintiff was entitled to continue receiving temporary total disability benefits despite a video of plaintiff mowing a lawn and an appearance before a Board of Adjustment. **Lewis v. Sonoco Prods. Co., 61.**

Witnesses—right to cross-examine—The Industrial Commission abused its discretion in a workers' compensation action by allowing significant new evidence to be admitted from physicians but denying defendants the opportunity to depose or cross-examine the physicians or requiring plaintiff to be examined by defendant's experts. Where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence. **Allen v. K-Mart, 298.**

WORD AND PHRASE INDEX

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