NORTH CAROLINA COURT OF APPEALS REPORTS

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2. Currently assigned to Court of Appeals.

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1. Appointed Chief Judge effective 1 May 2001.
2. Appointed and sworn in 1 March 2000.
3. Appointed and sworn in 1 May 2001.
4. Appointed and sworn in 26 April 2001.
5. Appointed to a new position and sworn in 6 April 2001.
6. Appointed as Chief Judge 1 May 2001 to replace Harley B. Gaston, Jr. who retired 30 April 2001.
7. Appointed and sworn in 1 May 2001.

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARTA DOBROWOLSKA, A MINOR, AND PAWEL DOBROWOLSKI, A MINOR, BY AND THROUGH THEIR GUARDIAN AD LITEM, ROBERT DOBROWOLSKI, AND ROBERT DOBROWOLSKI, INDIVIDUALLY, PLAINTIFFS V. MICHAEL W. WALL AND THE CITY OF GREENSBORO, DEFENDANTS

No. COA98-1533

(Filed 16 May 2000)

1. Immunity— governmental—police officer—automobile accident—governmental function

The trial court did not err in granting summary judgment in favor of defendants on the basis of governmental immunity for damages incurred by plaintiffs in an automobile accident with a police officer while the officer was driving defendant city's van back to work after taking the van for repairs, because: (1) the officer was performing a governmental function since the repair and subsequent return of the van to the city's garage was incident to the police power of the city; and (2) the officer was acting within the scope of his duties as a police officer in returning the police van to storage, and thus, was immune from liability in his individual capacity.

2. Immunity— governmental—police officer—automobile accident—excess liability fund—not local government risk pool

The trial court did not err in granting summary judgment in favor of defendants and concluding defendants did not waive governmental immunity for damages of $350,000 incurred by

plaintiffs in an auto accident with a police officer while the officer was driving the city's van back to work after taking the van for repairs, because: (1) the city only waived immunity for claims in excess of $2,000,000 and less than $4,000,000 by their purchase of excess liability insurance coverage for these claims; and (2) the city's participation in the Local Government Excess Liability Fund, Inc. (fund) is not classified as a local government risk pool since the fund will not actually pay for any part of the claim, and the fund has not complied with N.C.G.S. § 58-23-5 for the creation of a local government risk pool.

3. Civil Rights— 1983 action—city's unwritten policy on governmental immunity—substantive due process—equal protection

The trial court erred in granting summary judgment in favor of defendants on the issue of defendant city's alleged violations of plaintiffs' substantive due process and equal protection rights under 42 U.S.C. § 1983 and Article I, Section 19 of the North Carolina Constitution, based on the city's unwritten policy of waiving governmental immunity and paying claims for damages to tort claimants similar to plaintiffs while asserting immunity and refusing to pay plaintiffs' claims, because there are genuine issues of material fact concerning: (1) whether the city's policy is arbitrary and capricious; and (2) whether such behavior is reasonably related to a legitimate governmental objective.

Appeal by plaintiffs from an order entered 14 August 1998 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 5 October 1999.

Fisher, Clinard & Craig, PLLC, by John O. Craig, III and Shane T. Stutts, for plaintiff-appellants.

Hill, Evans, Duncan, Jordan & Davis, PLLC, by Polly D. Sizemore and Joseph P. Gram, for defendant-appellees.

HUNTER, Judge.

Plaintiffs appeal from an order granting defendants Michael W. Wall ("Wall") and the City of Greensboro ("City") summary judgment. The issues relevant to this appeal are whether defendants may assert governmental immunity for damages incurred by plaintiffs in an auto accident with Wall while he was driving the City's van; whether the City participates in a local government risk pool; and, whether the

City has violated plaintiffs' equal protection and substantive due process rights by its assertion of governmental immunity as to their claims while it has admitted settling claims of similar tort claimants. We affirm in part and reverse in part.

Evidence submitted to the trial court indicated that on Monday, 13 February 1995, defendant Wall, a Greensboro police officer, was driving a van owned by the City when he struck a vehicle operated by Alicja Dobrowolska. Her children, the two minor plaintiffs Marta and Pawel Dobrowolska, were passengers in the vehicle and were injured as a result of the accident.

Wall was on his way to work when the accident occurred. He had driven the van home over the weekend because he had taken it for repairs the preceding Friday afternoon, and returning to work that same day would have caused him to work past his shift. Wall also performed minor repairs while the van was at his home during the weekend, for which he received permission by his supervisor.

This suit was subsequently filed, wherein plaintiffs made claims against defendants for Wall's negligence in the auto accident and violation of a city ordinance, waiver of governmental immunity by the City due to participation in a local government risk pool, and the City's violation of plaintiffs' equal protection and substantive due process rights. On 14 August 1998, the trial court granted summary judgment to defendants on all claims, stating in pertinent part:

> IT APPEARING TO THE COURT that at the time of the accident defendant Michael W. Wall was performing a duty as a police officer, a purely governmental function; that the City of Greensboro has not waived governmental immunity by the purchase of insurance for claims of $2,000,000.00 or less and $4,000,000.00 or more; that plaintiffs and defendants stipulate that plaintiffs' damages do not exceed $2,000,000.00; that the City of Greensboro does not participate in a risk pool; that the Local Government Excess Liability Fund, Inc. is not an illegal risk pool and therefore, [defendants] are entitled as a matter of law to summary judgment . . . [.]

The court concluded that there was no showing that Wall acted outside of and beyond the scope of his duties as a police officer in returning the police van to storage, and therefore he was immune from liability in his individual capacity. It also ruled that the City was not a person under U.S.C.A. § 1983 when the remedy sought is monetary

damages, thus plaintiffs' substantive due process and equal protection claims were dismissed.

First, we note that 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. "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of material fact by the record properly before the court." *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980).

[1] Plaintiffs first contend that the trial court erred in granting summary judgment on the basis of governmental immunity. They argue that defendants waived any defense under this doctrine because defendant City was engaged in the proprietary function of vehicle repair and/or modification rather than a governmental function at the time of the collision.

The rule of governmental immunity was adopted by the North Carolina Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). The rule set out in *Moffitt* and stated with approval by our Supreme Court in *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971), is as follows:

> "The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. A town acts in the dual capacity of an *imperium in imperio*, exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit.
>
> "When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality. . . .
>
> "On the other hand, where a city or town in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of

> the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. . . ."

Id. at 592-93, 184 S.E.2d at 241-42 (quoting *Moffitt*, 103 N.C. 237, 254, 9 S.E. 695, 697). The Court in *Steelman* held that a city's operation of its public street lighting system was a governmental function rather than proprietary, thus the city was completely immune from liability for an individual's death due to the city's negligent maintenance of a guy wire. *Steelman*, 279 N.C. 589, 184 S.E.2d 239. Based on *Moffitt* and its progeny, "[t]he rule that a municipal corporation is immune to suit for negligence in the performance of a *governmental* function of the municipality, but is liable if it is fulfilling a function of a *proprietary* character is well settled in this jurisdiction." *Glenn v. Raleigh*, 246 N.C. 469, 473, 98 S.E.2d 913, 916 (1957) (emphasis in original).

In the present case, there are no genuine issues of material fact as to why the van was in use at the time of the accident. It was being returned to the City after repairs by defendant Wall and a repair shop at the same time it was transporting a city police officer to work. A similar factual situation occurred in *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814 (1937), where a vehicle used by a city in exercise of its police power was involved in an accident after being returned to the police garage after a repair. In that case, our Supreme Court stated:

> [I]t is contended by the plaintiff that since Spear, the driver of the Terraplane automobile, was not invested with any police authority, the automobile was not in use at the time in the performance of any police duty. While it is true the driver of the car was not a policeman, he was employed by the hour by the city to keep in proper repair and condition the radio on said automobile, and it was the function of the city in the exercise of its police power to maintain the radio, and in the performance of the work for which he was employed Spear was performing duties incident to the police power of the city, whether he was engaged in repairing or testing the radio or whether in returning the automobile to the police garage after such repairing or testing, and anything that he did for the city with the automobile in the scope of his employment was done as an incident to the police power of the city—a purely governmental function.

Id. at 509, 193 S.E. at 817. Likewise, the van in the present case was being returned to the City's garage for the City's use after it had been

repaired. Additionally, a police officer was using the van to report to duty for the City. Thus, we hold as a matter of law that the repair and subsequent return of the van was incident to the police power of the City, a governmental function. Accordingly, we overrule plaintiffs' first assignment of error, concluding that the City and Wall are both immune from liability because Wall's negligence took place while he was performing a governmental function for the City. In so holding, we note that the trial court concluded that Wall did not act outside of or beyond the scope of his duties as a police officer in returning the police van to storage, and was thus immune from liability in his individual capacity. Plaintiffs did not assert error on this issue. Therefore, the trial court's ruling on this issue became the law of the case. *Pack v. Randolph Oil Co.*, 130 N.C. App. 335, 337, 502 S.E.2d 677, 678 (1998) (*citing Duffer v. Dodge, Inc.*, 51 N.C. App. 129, 130, 275 S.E.2d 206, 207 (1981); *Sutton v. Quinerly*; *Sutton v. Craddock*; *Sutton v. Fields*, 231 N.C. 669, 677, 58 S.E.2d 709, 714 (1950) (the law of the case doctrine is the "little brother" of *res judicata*); 18 James W. Moore et al., *Moore's Federal Practice* § 134.20[1] (3d ed. 1997) (law of the case doctrine is "similar" to collateral estoppel "in that it limits relitigation of an issue once it has been decided").

[2] Next, plaintiffs contend that the trial court erred in granting summary judgment because the City has waived governmental immunity by participating in a local government risk pool.

By statutory rule, municipalities are deemed to waive governmental immunity only through the purchase of insurance: "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability." N.C. Gen. Stat. § 160A-485(a) (1999); *see Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 321-22, 420 S.E.2d 432, 435 (1992). However, our statutory code "equates participation in a 'local government risk pool' with the purchase of insurance for the purposes of a city's immunity from liability." *Lyles v. City of Charlotte*, 120 N.C. App. 96, 101, 461 S.E.2d 347, 350 (1995), *reversed on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996), *reh'g denied*, 345 N.C. 355, 483 S.E.2d 170 (1997). To participate in a local government risk pool, "two or more local governments may enter into contracts or agreements . . . for the joint purchasing of insurance or to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool. . . ." N.C. Gen. Stat. § 58-23-5 (1999).

"[T]he risks of the parties must be put in one pool for the payment of claims in order to have a local government risk pool." *Lyles v. City of Charlotte*, 344 N.C. 676, 680, 477 S.E.2d 150, 153.

The City contends that it does not participate in a local government risk pool pursuant to Article 58 of our General Statutes, but does participate in the Local Government Excess Liability Fund, Inc. ("Fund"). The Fund was incorporated in 1986 for the payment of claims and in 1993 was divided into three separate funds—A, B, and C. According to the affidavit of Everette Arnold, Executive Director of the Guilford City/County Insurance Advisory Committee, the Fund operates as follows in regards to claims against the City:

> The City of Greensboro pays directly out of its budget any claim which it settles or for which it is found to be legally liable up to $100,000.00. Fund B is available to pay claims exceeding $100,000.00, up to $600,000.00, subject to the City of Greensboro paying the first $100,000.00. In the event Fund B makes any claims payments, the City of Greensboro is obligated to repay Fund B the entire amount so paid. Fund A was established to pay claims in excess of $600,000.00 up to a maximum of $1,600,000.00, after exhausting the City's direct responsibility for payment of the first $100,000.00, and after Fund B payment of $500,000.00. Fund C was established to provide payment for any amount in excess of $1,600,000.00 up to $1,900,000.00. If the claim against the City of Greensboro exceeds $1,900,000.00, the City would be obligated to pay the additional amount up to $2,000,000.00. The City has purchased a $2,000,000.00 excess liability insurance policy above the $2,000,000.00 liability limit.
>
> Members of the Fund in 1995 were the City of Greensboro, the City of High Point, Guilford County, the Guilford County Board of Education, and Guilford Technical Community College. . . . The governmental agencies participating in the Fund share costs only for the administration of the Fund. There is no sharing of risks among the members of the Fund for any claim under $600,000.00. All such claims under $600,000.00 which are paid from Fund B are the direct responsibility of the participating member against which the claim is asserted, and any payments made by Fund B must be repaid by the participating governmental agency.

Thus, the City individually retains the risk for claims under $100,000.00, and is obligated to repay Fund B the entire amount so paid for claims exceeding $100,000.00 but under $600,000.00.

A risk pool is required "to pay all claims for which each member incurs liability during each member's period of membership, except where a member has individually retained the risk, where the risk is not covered, and except for amount of claims above the coverage provided by the pool." N.C. Gen. Stat. § 58-23-15(3) (1999). Our Supreme Court has interpreted this statute by holding that

> there must be more risk-sharing than is contained in the City's agreement in order to create a local government risk pool. . . . [A] local government risk pool agreement must contain a provision that the pool pay all claims for which a member incurs liability. We do not believe the pool has paid a claim if it is reimbursed for it.

Lyles, 344 N.C. at 680, 477 S.E.2d at 153. Thus, immunity is not waived when a claim is paid for which the pool is reimbursed, because the pool has not paid the claim and the requirements of N.C. Gen. Stat. § 160A-485 have not been met. *See* N.C. Gen. Stat. § 160A-485(a) ("[i]mmunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability").

It is uncontroverted that the City has purchased excess liability insurance coverage for claims in excess of $2,000,000.00 and less than $4,000,000.00; therefore, it has waived immunity as to claims that are within this range. Plaintiffs in the present case are seeking $350,000.00 in damages. The evidence in the record indicates that if the Fund were to pay plaintiffs' claims, the City would be required to reimburse the fund for payment in excess of $100,000.00 up to $600,000.00, and the City would be responsible for paying the first $100,000.00. Under *Lyles*, the Fund cannot be classified as a local government risk pool as to the present case because it will not actually pay for any part of the claim. Additionally, the fund in question has not complied with the requirements of North Carolina General Statutes Chapter 58, "Insurance," Article 23, "Local Government Risk Pools" for the creation of a local government risk pool. Among other things, the Fund does not comply with this article because two members of the fund are not "local governments," no notice was given to the Commissioner of Insurance that the participating entities intended to organize and operate a risk pool pursuant to statute, and the Fund does not contain a provision for a system or program of loss control as required by statute. Under *Lyles*, these factors are to be considered in determining the existence of a risk pool. Based on the foregoing, we hold that the Fund is not a local government risk pool

in regards to plaintiffs' claims and thus the City has not waived governmental immunity by participating in the Fund. Accordingly, we overrule plaintiffs' second assignment of error.

[3] Plaintiffs next contend that the trial court erred by granting defendant City's motion for summary judgment because there are genuine issues of material fact as to whether the City violated their Equal Protection and Substantive Due Process rights under the United States Constitution as enforced by 42 U.S.C. § 1983, and Article I, Section 19 of the North Carolina Constitution. Plaintiffs assert that they have been denied due process and equal protection of the law because the City has asserted sovereign immunity in their case but has customarily waived it for similarly situated individuals, who were compensated for tort damages incurred due to the City's performance of a governmental function. The City contends that it is not a person under § 1983 and therefore is immune from suit under this statute.

Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress.

42 U.S.C.A. § 1983 (1994). Our Supreme Court has held that neither a state nor its officials acting in their official capacity are "persons" for purposes of § 1983 when the remedy sought is monetary damages. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Based on *Corum*, this Court held a § 1983 action is not permitted against a municipality when damages are sought in the form of monetary relief because the municipality is not a "person" under § 1983. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 460 S.E.2d 899 (1995), *affirmed in part and reversed in part*, 345 N.C. 356, 481 S.E.2d 14 (1997). However, our Supreme Court reversed on this issue stating that in determination of this issue,

> the Court of Appeals erroneously relied on *Corum v. University of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985,

121 L. Ed. 2d 431 (1992). In *Corum*, this Court correctly relied on *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), in holding that the State of North Carolina and its agencies are not "persons" within the meaning of section 1983 and therefore could not be sued for monetary damages under that statute. In the present case, the Court of Appeals erroneously applied the holding of *Corum* to dismiss plaintiffs' claims against a municipality and its officials. Although a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies. *See Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673 (1990).

. . .

The United States Supreme Court, in *Monell v. Department of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978), overruled *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492 (1961), and held that a municipality is a "person" within the meaning of section 1983. The United States Supreme Court stated: "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690, 56 L. Ed. 2d at 635. *Monell* did not, however, overrule *Monroe* insofar as *Monroe* held that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under section 1983 for constitutional torts of their employees. Id. at 663 n.7, 56 L. Ed. 2d at 619 n.7. Instead, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690, 56 L. Ed. 2d at 635. This decision was recently reaffirmed in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 122 L. Ed. 2d 517 (1993).

For a governmental entity to be liable under section 1983, the "official policy must be 'the moving force of the constitutional violation.' " *Polk County v. Dodson*, 454 U.S. 312, 326, 70 L. Ed. 2d 509, 521 (1981) (quoting *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638). Thus, the entity's "policy or custom" must have played a part in the violation of federal law. *Monell*, 436 U.S. at 694, 56 L. Ed. 2d at 638. Further, it is well settled that a municipal entity has no

claim to immunity in a section 1983 suit. *See Owen v. City of Independence*, 445 U.S. at 657, 63 L. Ed. 2d at 697.

Moore, 345 N.C. at 365-66, 481 S.E.2d at 20-21 (emphasis in original). Plaintiffs in the present case have alleged that the City has acted unconstitutionally by implementing a policy which violates their due process and equal protection rights. These acts include the custom of waiving governmental immunity and paying claims for damages to tort claimants similar to plaintiffs while asserting immunity and refusing to pay plaintiffs' claims. These acts are adopted and implemented by the City's officers. Thus, plaintiffs' claims and request for damages are sufficient to sue the City as a person pursuant to § 1983. We shall now determine if genuine issues of material fact exist as to these claims, and if there are none, whether the City was entitled to summary judgment under Rule 56.

The City has revealed that for the period of 1992 to 1995 it settled a number of claims for personal injury and property damage. Included was a claim settled for $25,025.95 for injuries suffered by a minor when a police officer pulled into the path of claimants' vehicle. Another claim for injuries suffered in a similar automobile accident case was settled by the City for $95,000.00. According to the deposition of Deputy City Attorney Becky Jo Peterson-Buie, the amount of damages is not dispositive in the City's decision in any case as to whether it will assert the governmental immunity defense. Buie stated that a portion of claims are delegated to an adjuster who has full settlement authority without any oversight from the City as to whether sovereign immunity is asserted or waived. She also admitted that the City has paid damages in the settlement of cases where the sovereign immunity defense was available. However, Buie testified that the City always raises the defense of sovereign immunity if applicable. Further, Buie testified that the City Manager has unbridled discretion to resolve any claims under $50,000.00, and in cases exceeding this amount, the recommendation of the City Manager must be approved by the City Council.

The substantive Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no government shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' Only after finding the deprivation of a protected interest do we look to see if the

State's procedures comport with due process." *American Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59, 143 L. Ed. 2d 130, 149 (1999) (citations omitted). In making this determination, it is necessary to assess whether the right allegedly implicated was clearly established at the time of the events in question. *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5, 140 L. Ed. 2d 1045, 1054, n.5 (1998).

The right implicated in the present case is one to recover damages for bodily injury of the two minor plaintiffs. In legal contemplation, the term "damages" is the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of either a breach of a contractual obligation or a tortious act. 22 Am. Jur. 2d *Damages* § 1 (1988). Generally, a person who acts tortiously or in breach of a contractual obligation is liable for the damage caused by such wrongful act. 22 Am. Jur. 2d *Damages* § 4 (1988).

> Compensatory damages are damages in satisfaction of, or in recompense for, loss or injury sustained. They compensate a plaintiff for actual injury or loss resulting, for instance, from bodily injury or property damage. The term covers all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages.

22 Am. Jur. 2d *Damages* § 23 (1988) (footnotes omitted). While plaintiffs would ordinarily be entitled to seek damages in a tort action in the courts of this state, as we have held, the City in the present case is immune from suit under the doctrine of governmental immunity due to performance of a governmental function. We have also held that the City has not waived immunity by the purchase of liability insurance, and it is uncontroverted that the City has not consented, by any other means, to being sued by plaintiffs. However, the record reveals that at the same time the City has asserted governmental immunity towards plaintiffs, denying them any damages, it has asserted such immunity against injured individuals similar to plaintiffs, but then waived immunity by paying damages to those injured individuals. The United States Supreme Court has held that when a state has no constitutional obligation to grant certain rights to individuals, but establishes a policy wherein it does grant that right, it must do so in accordance with due process:

> Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must

> satisfy the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985). Likewise, even if a State has no duty to authorize parole or probation, if it does exercise its discretion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process. *Morrissey v. Brewer*, 408 U.S. 471, 480-490, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-782, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973). . . .

Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272, 292-93, 140 L. Ed. 2d 387, 403-04 (1998) (Stevens, J., concurring in part and dissenting in part). As with state welfare programs, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401, 83 L. Ed. 2d 821, 833 (1985). The City has opted to pay damages to some claimants after asserting governmental immunity; therefore, it must carry out this custom, or "unwritten" policy in a way which affords due process to all similarly situated tort claimants with actions against the City.

The Due Process Clause was intended to prevent government officials " 'from abusing [their] power, or employing it as an instrument of oppression.' " *Collins v. Harker Heights*, 503 U.S. 115, 126, 117 L.Ed.2d 261, 274 (1992) (quoting *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 103 L. Ed. 2d 249, 259 (1989)). The United States Supreme Court has stated:

> Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:
>
> "The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, [17 U.S. 235,] 4 Wheat 235-244, [4 L. Ed. 559 (1819)]: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.' " *Hurtado v. California*, 110 U.S 516, 527, 28 L. Ed. 232, 4 S. Ct. 111 (1884).

> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolf v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), whether the fault lies in a denial of fundamental procedural fairness, *see, e.g., Fuentes v. Shevin*, 407 U.S. 67, 82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972) . . ., or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see, e.g., Daniels v. Williams*, 474 U.S. at 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 . . . .

County of Sacramento v. Lewis, 523 U.S. at 845-46, 140 L. Ed. 2d at 1056-57.

Arbitrary and capricious acts by government are also prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions. No government shall deny any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1; N.C. Const. art. 1, § 19. " 'The purpose of the [E]qual [P]rotection [C]lause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 433, 471 S.E.2d 342, 346, *reh'g denied*, 344 N.C. 444, 476 S.E.2d 115 (1996), *cert. denied*, 519 U.S. 1112, 136 L. Ed. 2d 839 (1997) (quoting *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352-53, 62 L. Ed. 1154, 1155-56 (1918)). "The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. This principle requires that all persons similarly situated be treated alike." *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) (citations omitted). The Supreme Court of North Carolina has held that the decisions of the United States Supreme Court on the issue of equal protection are binding in this state and:

> Courts traditionally have employed a two-tiered scheme of analysis when evaluating equal protection claims. The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. . . .
>
> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvan-

> tage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity.

White v. Pate, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983) (citations omitted). Similarly, the traditional test to judge whether government action violates substantive due process is to determine whether the challenged action has "a rational relation to a valid state objective." *In re Moore*, 289 N.C. 95, 101, 221 S.E.2d 307, 311 (1976). Plaintiffs concede that they are not a member of any suspect class under an equal protection analysis and do not allege discriminatory intent. Because they merely allege the City's treatment of them is "arbitrary" and "capricious," plaintiffs argue that the City's custom or policy of settling claims triggers constitutional review under the lower tier "rational basis" test. We agree. Therefore, in consideration of plaintiff's claims for violations of substantive due process and equal protection by the City, we shall first examine what acts have been ruled to constitute arbitrariness and capriciousness by the courts of this state.

Several cases in courts of this state give guidance as to what action constitutes arbitrary and disparate treatment. In *City-Wide Asphalt Paving v. Alamance County*, 132 N.C. App. 533, 513 S.E.2d 335 (1999), the plaintiff had made a bid for paving which was rejected by Alamance County, and plaintiff asserted that the county had arbitrarily and capriciously failed to accept its bid. This Court held that "defendant's reasons for rejecting plaintiff's bid, namely concern about whether plaintiff was 'competent and qualified and financially able' to operate the landfill, were reasonable in relation to the government's objective to protect the health and safety of its citizens, and its decision to reject plaintiff's bid was not arbitrary or capricious." *Id.* at 540, 513 S.E.2d at 340.

In *Bizzell v. Goldsboro*, 192 N.C. 348, 135 S.E. 50 (1926), the plaintiff contended that an ordinance was unconstitutional and void in that it vested arbitrary discretion in public officials, without prescribing a uniform rule of action or making uniform regulations applicable to all alike. The ordinance at issue provided that no gasoline filling or gaso-

line storage station should be located, conducted, or operated in the City of Goldsboro "without first obtaining consent from the board of aldermen at some regular meeting thereof." *Id.* at 350, 135 S.E. at 51. Our Supreme Court held that the ordinance was void, stating:

> The ordinances are far-reaching, and the law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike.
>
> No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike—then there can be no special privilege or favoritism. The ordinance gives the power to the board of aldermen at their pleasure to grant one person a license and refuse another under the same circumstances. . . . The right of individuals to engage in any lawful calling and use their property for lawful purposes is guaranteed to them, and any unreasonable restraint or oppressive exaction upon the use of property and utmost liberty of business growth and advancement is contrary to the fundamental law of the land.

Id. at 358, 135 S.E. at 55.

In *In re Application of Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970), our Supreme Court held that the action of the county commissioners denying an application for a permit to establish a mobile home park as a special exception was arbitrary and capricious where all ordinance requirements were met and stating that the commissioners could not deny a permit "solely because, in their view, a mobile-home park would 'adversely affect the public interest.' The commissioners must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits." *Id.* at 425, 178 S.E.2d at 81.

Although plaintiffs in the present case are not seeking a permit to do business, they do allege they are enjoined from their right to enjoyment of life, liberty, and property because they have been denied damages for bodily injuries caused by the City while similarly situated individuals have been awarded damages. Plaintiffs have presented evidence that the City's custom, or unwritten policy, does not apply any uniform rule of action or regulations applicable to all tort claimants against the City. As we have noted, the deputy city attorney testified that a portion of claims are delegated to an adjuster who has

full settlement authority without any oversight from the City as to whether sovereign immunity is asserted or waived. The adjuster has the authority to settle a claim for property damage up to $15,000.00 and up to $10,000.00 for a claim for personal injury. Likewise, the city manager may settle a claim without any oversight for up to $50,000.00. There is no evidence that any criteria are used to refer cases to these individuals, or that any criteria are applied by these individuals in making a decision to settle a claim. The deputy city attorney further testified if a claim is not settled by the city manager or outside adjuster, the City's legal department determines whether to settle a claim based on the following factors:

a. whether there was a negligent act by an employee of the City;

b. whether there was an intentional tort by a City employee;

c. what, if any, defenses are available for the City, including the defense of governmental immunity and contributory negligence;

d. whether any defenses, including governmental immunity, is available for the employee in his individual capacity;

e. whether the employee of the City violated any departmental regulations;

f. the cost of defending the case;

g. goodwill on behalf of the citizens; and,

h. the best use of the taxpayer's money in a cost effective manner.

Several of these factors, such as "goodwill on behalf of the citizens" are subjective, and do not indicate or mandate that similarly situated individuals be treated alike. The City gives no explanation or rules for applying all of these factors in a factual situation; thus, it appears that the ultimate decisionmaker, whoever it may be, is granted total discretion despite analysis using these factors.

While the City may not have established written "classification" categories for claimants, the record reveals that it classifies claims under $2,000,000.00 into two different categories—(1) immunity is asserted with no exception, or (2) immunity is asserted but the claim is paid in settlement. The City states that it must be given the unlimited discretion in these cases due to a legitimate governmental interest. However, the United States Supreme Court has stated that

"[d]iscretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496, 97 L. Ed. 469, 509 (1953). Under *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998), governmental classification of individuals into two categories is admissible under an equal protection analysis if (1) the classifications are based on differences between the individuals, and (2) these differences are rationally related to the purpose of the policy. *Id.* at 675, 509 S.E.2d at 177. Also, the City's actions may pass constitutional muster under the Equal Protection Clause "if they have a reasonable basis and are rationally related to a legitimate governmental objective." *City-Wide*, 132 N.C. App. at 541, 513 S.E.2d at 340. In *Lyles*, 344 N.C. 676, 477 S.E.2d 150, the Court considered whether a city participated in a local government risk pool, and the present issue was not considered by the Supreme Court. However, the present Chief Justice Frye opined in his dissent the subject city's policy, which is similar to the policy in the present case, is both arbitrary and capricious:

> The problem with allowing local governments to enter into "joint undertaking" contracts, such as the one at issue in the instant case, is that it gives local governments the unbridled discretion to pay some claims and to assert governmental immunity as to those claims that it does not wish to pay. Under such a scheme, the decision of the local government officials is not reviewable, and the awards to injured parties may be distributed on an arbitrary basis without any opportunity for the injured party to have the decision of the local government reviewed by the courts. *Even the State of North Carolina does not have such unbridled discretion. . . .*

Lyles v. City of Charlotte, 344 N.C. 676, 684, 477 S.E.2d 150, 155 (1996) (Frye, J., dissenting) (emphasis in original).

When viewed in the light most favorable to plaintiffs, we are not prepared to hold that summary judgment should be granted to defendant on this final issue as a matter of law. The City asserts that it reviews cases for certain factors and that it should be given total discretion as to whether or not it settles tort claims under $2,000,000.00. However, the City has shown no determining principle or rules to apply to these factors, or claims, which require that similarly situated individuals be treated equally. The City argues that assertion of sovereign immunity in certain tort claims saves tax dollars and encourages the morale of its police officers. While we do not rule as to whether these are valid governmental objectives, we note

that if they are, the City does not offer an explanation as to how its differing treatment of tort claimants is based on differences between the claimants and how these differences are rationally related to a legitimate governmental objective. Our review indicates that plaintiffs may bring suit under § 1983 for monetary damages against the City, and there are genuine issues of material fact as to whether or not the policy of the City has violated plaintiffs' due process and equal protection rights due to arbitrary and capricious behavior, and likewise, whether such behavior is reasonably related to a legitimate governmental objective.

Based on the foregoing, we hold that summary judgment for both defendants was proper as to their (1) lack of liability for damages stemming from the automobile accident under the doctrine of governmental immunity, and (2) failure to waive governmental immunity due to participation in a local government risk pool. However, we hold that summary judgment for defendant City as to plaintiffs' third, fourth, and fifth claims for relief, based on the City's alleged violations of their substantive due process and equal protection rights was error and that portion of the trial court's order is reversed, and those claims are remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges GREENE and WALKER concur.

CARL WILLIAM POOR AND WIFE, RUBY N. POOR, AND CARL A. ROSE AND WIFE, MARIE K. ROSE, PLAINTIFFS V. BEVERLY J. HILL AND HUSBAND, GARY A. HILL, SR., AND SEA GATE ENTERPRISES, DEFENDANTS

No. COA98-1494

(Filed 16 May 2000)

1. Contracts— breach—real estate closing—readiness to perform

The trial court did not err by denying defendant's directed verdict and JNOV motions on defendant-Mr. Hill's breach of contract claims arising from the failure of a real estate transaction to close where the evidence, taken in the light most favorable to

plaintiffs, indicates that plaintiffs were ready and willing to perform at all times and the defendants breached the contracts.

2. Unfair Trade Practices— real estate sale—failure to close

The trial court did not err by denying defendants' JNOV motion on an unfair and deceptive trade practice claim arising from the failure of a real estate transaction to close and the resale of the property by defendants where it was undisputed that quitclaim deeds from another party were not signed until December 1994, providing support for the jury's answer that defendant-Mr. Hill knew he was not in a position to perform the contract with plaintiffs on 22 September, when defendants declared plaintiffs in default on their offer, having already resold the property at a higher price.

3. Unfair Trade Practices— real estate sale—failure to close—resale

The trial court did not err by determining that defendants' acts surrounding a real estate transaction which failed to close constituted an unfair or deceptive trade practice, given the deceptive nature of the male defendant's letter to plaintiffs, his imposition of an increased price upon the lots and entry into sales contracts with third parties, and his retention of plaintiffs' earnest money deposits.

4. Contracts— breach—liability of spouse

The trial court erred by granting a directed verdict in favor of defendant-Mrs. Hill on a breach of contract claim arising from the failure of a real estate transaction to close where Mr. Hill testified that he and Mrs. Hill did business and sold lots in Sea Gate under the name Sea Gate Enterprises; that the Sea Gate Enterprises operating account, into which plaintiffs' earnest money payments had been deposited following withdrawal from defendants' trust accounts, was maintained in the name of Mr. and Mrs. Hill; both Mr. and Mrs. Hill were required to obtain quitclaim deeds from Weyerhaeuser; and Weyerhaeuser ultimately conveyed its interest in the three lots to both Mr. and Mrs. Hill.

5. Unfair Trade Practices— real estate sale—failure to close—liability of spouse

The trial court erred by granting a directed verdict for defendant-Mrs. Hill on an unfair and deceptive trade practices claim arising from the failure of a real estate sale to close where

defendants contended that the evidence focused upon the actions of Mr. Hill, but the evidence, taken in the light most favorable to plaintiffs, tended to show that Mr. Hill was at all times acting as agent for Mrs. Hill during the course of his dealings with plaintiffs regarding the lots at issue.

6. Unfair Trade Practices— breach of real estate sales contract—damages

The trial court erred in a claim for unfair and deceptive trade practices arising from a real estate transaction which did not close by setting aside the jury's Chapter 75 damage award and substituting the sum imposed for breach of contract upon a finding that a portion of the verdict was against the greater weight of the evidence. The proper remedy for a verdict against the greater weight of the evidence is a new trial on the issue of damages, and damages on a Chapter 75 claim are not necessarily limited to those that might be had for breach of contract; however, upon a damage verdict favorable to plaintiffs and the trial court's determination that the same course of conduct gave rise to the breach of contract as well as the Chapter 75 claims, plaintiffs must elect their damages remedy.

7. Unfair Trade Practices— attorneys' fees—prevailing party—actual damages

The portion of a judgment awarding counsel fees on a claim for unfair and deceptive trade practices was vacated where a new trial was ordered on the issue of damages. Attorneys' fees may be allowed to a prevailing party under N.C.G.S. § 75-16.1 in a Chapter 75 claim, but one must suffer actual damages to be a "prevailing party."

Appeal by plaintiffs and defendants from judgment filed 28 May 1998 and appeal by defendants from order filed 9 June 1998 by Judge James R. Vosburgh in Carteret County Superior Court. Heard in the Court of Appeals 16 September 1999.

Byrant & Stanley, P.A., by Richard L. Stanley for plaintiffs.

James W. Thompson for defendants.

JOHN, Judge.

At the outset, we observe that the appeals of both plaintiffs and defendants are subject to dismissal, *see Northwood Homeowners*

Assn. v. Town of Chapel Hill, 112 N.C. App. 630, 632, 436 S.E.2d 282, 283 (1993), in that the parties' appellate briefs violate the North Carolina Rules of Appellate Procedure (the Rules) by failing to support their respective summary of the facts with sufficient "references to pages in the transcript of proceedings, the record on appeal, or exhibits," N.C.R. App. P. 28(b)(4). Notwithstanding, in view of the errors identified herein, we elect in our discretion to address the instant appeals. *See* N.C.R. App. P. 2 (Court may suspend operation of the Rules "[t]o prevent manifest injustice").

In this dispute concerning contracts for the sale of real property, plaintiffs and defendants appeal the trial court's judgment (the judgment) awarding plaintiffs $15,000.00 in damages for breach of contract and unfair and deceptive trade practices as well as $7,500.00 in counsel fees. We affirm the judgment in part, reverse in part, and vacate the award of counsel fees.

Pertinent facts and procedural history include the following: In 1993, defendants Gary and Beverly Hill (Mr. and Mrs. Hill) purchased approximately 150 lots in Sea Gate Subdivision, located in Carteret County, North Carolina. Operating and doing business under the trade name "Sea Gate Enterprises," defendants later sought to resell the lots for profit.

Plaintiffs Carl and Ruby Poor (Mr. and Mrs. Poor) and Carl and Marie Rose (Mr. and Mrs. Rose) contacted defendants in the fall of 1993 concerning three Sea Gate lots located on the Intracoastal Waterway. On 16 October 1993, defendants entered into three contracts for sale (the contracts) with plaintiffs. Defendants agreed to sell Lot 129 to Mr. and Mrs. Rose for the price of $27,000.00, Lot 130 to Mr. and Mrs. Poor for $36,000.00, and Lot 128 to the four plaintiffs jointly for $27,000.00. Plaintiffs advanced the sums of $810.00, $1,080.00, and $810.00, respectively, as earnest money for each lot.

The contracts, each signed by both Mr. and Mrs. Hill on 16 October 1993, were conditioned upon defendants' procurement of "a septic permit" for each lot, "an unclouded deed from Weyerhaeuser Timber Company" for each lot, and Coastal Area Management Act (CAMA) permits allowing docks on lots 128 and 130. Defendants disputed the claim of Weyerhaeuser, an adjoining property owner, to ownership of nearly two-thirds of the acreage covered by the lots, thereby prompting the quitclaim deed condition. The contracts specified a closing date of 1 May 1994.

Between 16 October 1993 and October 1994, Mr. Rose exchanged numerous telephone calls with Mr. Hill. Mr. Rose also contacted defendants' attorney during the same period seeking information regarding closing, but was told defendants had not obtained the requisite quitclaim deeds from Weyerhaeuser. However, by mid-June 1994, septic tank permits for each lot and one CAMA dock permit had been secured.

Mr. Hill and plaintiffs met in early June 1994 to discuss closing, but the transaction did not take place. On 15 September 1994, Mr. Rose wrote Mr. Hill inquiring about closing and referencing an earlier discussion of modifying financing arrangements for the purchase of lot 130. Mr. Rose also requested "copies of the deeds from Weyerhaeuser to you to know for sure that you have these lots in order to close with us."

In his 22 September 1994 written reply, Mr. Hill maintained he had previously assured plaintiffs that Weyerhaeuser was prepared to issue deeds, but that he had not heard from plaintiffs thereafter. Accordingly, Mr. Hill continued,

> [a]s far as we are concerned, any contracts we have had with you and the Poor's are in default. I have spoken with my attorney concerning this matter . . . [and] he feels that we had an enforceable contract and that we are quite possibly entitled to damages due to the fact that those three lots had been taken off of the available real estate market . . . .
>
> Those lots have since been re-established on the real estate market and are now for sale with the asking price of $35,000 for lot [128], $40,000.00 for lot [129] and $45,000.00 for lot [130]. If you would still like to purchase them, it will require $2000.00 in earnest money on each lot, up front . . . .

At about the same time, defendants transferred plaintiffs' earnest money from Sea Gate's trust account into an operating account.

In a letter to Mr. Hill dated 17 October 1994, Mr. Rose asserted plaintiffs were "ready, willing, and able to close in May," but were unable to do so because of defendants' failure to secure quitclaim deeds from Weyerhaeuser. Mr. Rose reiterated that plaintiffs remained ready to close on the contracts as written if defendants had indeed obtained the deeds. Quitclaim deeds from Weyerhaeuser on all three lots were recorded 12 December 1994.

In the meantime, however, Mr. Hill had executed sales contracts with Richard and Joyce Cross (Mr. and Mrs. Cross) for lot 128 on 12 September 1994 and with Roy Davis (Davis) for lot 129 on 4 November 1994. Closing on these contracts was held 7 April 1995 and 3 February 1995, respectively, and lot 130 was sold 27 September 1995 to Edward and Jo Ann Chadwick (Mr. and Mrs. Chadwick).

As late as 16 February 1995, plaintiffs, through their lawyer, informed defendants they still wished to close on the contracts. Plaintiffs thereafter filed the instant suit 18 July 1995 alleging (1) breach of contract and (2) unfair or deceptive acts or practices in violation of N.C.G.S. § 75-1—75-35 (1999) (Chapter 75).

Defendants filed answer 18 September 1995 asserting as an affirmative defense that

> [a]t all times, the Defendants were ready, willing and able to close on the purchase of the three lots pursuant to the contracts sued upon. The Defendants would have closed at any time the Plaintiffs were prepared to close, but the Plaintiffs never came forward to tender their performance . . . . By virtue of [their] conduct, the Plaintiffs themselves breached their own contract and therefore have no rights in it . . . . In fact, the Plaintiffs had a falling out between themselves over the contract and gave every indication to the Defendants that they had lost interest in the contracts . . . .

At trial, following presentation of all the evidence, defendants renewed an earlier motion for directed verdict as to both claims against Mrs. Hill based upon the "absolute lack of evidence regarding [her] liability for default." Plaintiffs objected, asserting that "nothing in their evidence . . . absolve[d] her from liability." The trial court, after questioning why Mrs. Hill had not been called as a witness, allowed defendants' motion. However, defendants' renewed directed verdict motion addressed to plaintiffs' claims against Mr. Hill was denied.

By its verdict, the jury determined Mr. Hill, but not plaintiffs, had breached and repudiated the contracts, and awarded Mr. and Mrs. Rose $3,000.00 in damages and $2,000.00 to Mr. and Mrs. Poor. The jury also answered special interrogatories submitted by the trial court as follows:

> 11. Did the defendant, Gary A. Hill, Sr. commit any one or more of the following acts:

a. Did the defendant, knowing that he was not in a position to perform his contract with the plaintiffs, . . . intentionally terminate his contracts with the plaintiffs on September 22, 1994, retain their down payment, and increase the sales price?

ANSWER: Yes

b. At the time of the termination of the contracts, had the defendant, . . . already entered into a contract to sell any one or more of the lots to third parties?

ANSWER: Yes

c. Did the defendant . . . retain plaintiffs' . . . earnest money, not having met the contract terms and resell the three lots to third parties for an increased price?

ANSWER: Yes

d. Was the [defendant's] conduct in commerce or did it affect commerce?

ANSWER: Yes

e. Were the plaintiffs . . . injured as a proximate result of the [defendant's] conduct?

ANSWER: Yes

f. What amount, if any, have the plaintiffs . . . been injured?

ANSWER: $30,000

In the judgment entered 22 May 1998, the trial court set aside the jury's award of damages in issue 11f, and trebled the remaining damage award, *see* G.S. § 75-16, thereby increasing to $9,000.00 the damages of Mr. and Mrs. Rose and to $6,000.00 the damages of Mr. and Mrs. Poor; the court also awarded counsel fees to plaintiffs in the amount of $7,500.00, *see* G.S. § 75-16.1. Defendants subsequently moved to set aside the jury's verdict, for judgment notwithstanding the verdict (JNOV), and for new trial (collectively, defendants' post-trial motions), which motions were denied by the trial court 9 June 1998.

[1] We first note defendants have expressly abandoned two assignments of error relating to the jury instructions given in the instant case. We therefore turn to defendants' arguments concerning denial of their directed verdict and post-trial motions, in particular that for

JNOV, as to Mr. Hill on both the breach of contract and Chapter 75 claims. In challenging the trial court's denial of said motions, defendants maintain the evidence was insufficient to send either claim to the jury. We disagree.

A JNOV motion constitutes renewal of an earlier motion for directed verdict, *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985), and similarly tests the legal sufficiency of the evidence to take the case to the jury. *Taylor v. Walker*, 84 N.C. App. 507, 509, 353 S.E.2d 239, 240, *rev'd on other grounds*, 320 N.C. 729, 360 S.E.2d 796 (1987). Such motion "shall be granted if it appears that the motion for directed verdict could properly have been granted." N.C.G.S. § 1A-1, Rule 50(b)(1) (1999).

Accordingly, the test for determining sufficiency of the evidence is the same under both motions. *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E.2d 897, 903 (1974). A court ruling on a JNOV motion must consider the evidence in the light most favorable to the non-movant, with all reasonable inferences drawn in its favor. *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993). If there is more than a scintilla of evidence supporting each element of the non-movant's claim, the motion should be denied. *Ace Chemical Corporation v. DSI Transports, Inc.*, 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994).

The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract. *Jackson v. California Hardwood Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995). Defendants do not dispute that valid contracts existed between plaintiffs and defendants; rather, defendants argue Mr. Hill's performance under the contracts was excused, such that no breach occurred, because plaintiffs were not "ready, willing, and able to perform their part of the contract."

To the contrary, the evidence taken in the light most favorable to the plaintiffs, *see Abels*, 335 N.C. at 215, 436 S.E.2d at 825, indicates plaintiffs at all times were ready and willing to perform and that defendants, and specifically Mr. Hill, breached the contracts. For example, the 17 October 1994 letter of Mr. Rose to Mr. Hill stated plaintiffs had been "ready, willing, and able to close in May," but were prevented by defendants' failure to procure quitclaim deeds from Weyerhaeuser. As to breach, undisputed evidence in the record reflects that the required quitclaim deeds were not obtained from Weyerhaeuser until seven months after the closing date set in the con-

tracts, *see Sale v. State Highway Commission*, 242 N.C. 612, 619, 89 S.E.2d 290, 296 (1955) (failure to comply with duty imposed by contract terms constitutes breach), that Mr. Hill entered into subsequent sales contracts with third parties regarding the lots subject to the contracts with plaintiffs, and that Mr. Hill terminated the contracts by means of the 22 September 1994 letter.

Plaintiffs having presented more than a scintilla of evidence on each element of their breach of contract claim as to Mr. Hill, the trial court properly denied defendants' directed verdict and post-trial motions, notably that for JNOV, *see Ace Chemical Corporation*, 115 N.C. App. at 242, 446 S.E.2d at 103, on that issue. We next consider the sufficiency of the evidence regarding plaintiffs' Chapter 75 claim against Mr. Hill.

[2] To survive a JNOV motion on a claim of unfair and deceptive trade practices, the non-moving party must have presented more than a scintilla of evidence the movant engaged in

> (1) an unfair *or* deceptive act or practice, *or* an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the [non-movant] or to his business.

Spartan Leasing v. Pollard, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991) (emphasis added). Defendants concede Mr. Hill was engaged in commerce and present no argument in their appellate brief disputing the presence of proximate cause. *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"). Denial of defendants' JNOV motion was therefore proper if plaintiffs presented more than a scintilla of evidence supporting the first element, *i.e.*, whether Mr. Hill engaged in "an unfair *or* deceptive act or practice, *or* an unfair method of competition." *Spartan Leasing*, 101 N.C. App. at 460, 400 S.E.2d at 482 (emphasis added).

Issue 11 of the verdict sheet, set out in full above, required the jury to answer several special interrogatories directed at the conduct of Mr. Hill. Defendants contend plaintiffs presented no evidence to support interrogatory 11a, and that the conduct described in interrogatories 11a, b, and c, to which the jury responded in the affirmative, "do[es] not rise to the level of an unfair or deceptive trade practice." We are not persuaded by either argument.

As to interrogatory 11a inquiring whether Mr. Hill knew "he was not in a position to perform his contract with the plaintiffs . . . on

September 22, 1994," we note it is undisputed in the record that quitclaim deeds from Weyerhaeuser were not obtained until December 1994. Such evidence alone, viewed in the light most favorable to plaintiffs, *see Abels*, 335 N.C. at 215, 436 S.E.2d at 825, furnished an adequate basis upon which the jury could have based its affirmative answer to the interrogatory.

[3] Regarding defendants' second argument, it is well established that upon a jury's determination that certain specified acts were committed, the trial court must then determine as a matter of law whether the "proven facts constitute an unfair or deceptive trade practice." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988). In the case *sub judice*, the jury's special interrogatory responses determined as fact that:

> a. Mr. Hill, "knowing that he was not in a position to perform his contract . . . intentionally terminate[d] his contracts with the plaintiffs on September 22, 1994, retain[ed] their down payment, and increase[d] the sales price";
>
> b. "At the time of the termination of the contracts, . . . [Mr. Hill had] already entered into a contract to sell . . . one or more of the lots to third parties;" and,
>
> c. Mr. Hill "retaine[d the plaintiffs'] earnest money, not having met the contract terms and res[old] the three lots to third parties for an increased price."

Defendants assert the facts established by the jury constituted at most breach of contract, not legally sufficient to constitute a violation of Chapter 75. Defendants are correct that a

> [s]imple breach of contract . . . do[es] not qualify as [a violation of Chapter 75], but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies.

Norman Owen Trucking v. Morkoski, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998).

Applicable aggravating circumstances include conduct of the breaching party that is deceptive. *See Mosley & Mosley Builders v. Landin Ltd.*, 97 N.C. App. 511, 518, 389 S.E.2d 576, 580 (breach accompanied by fraud or deception constitutes unfair or deceptive trade practice), *disc. review denied*, 326 N.C. 801, 393 S.E.2d 898 (1990). A practice is deceptive if it "possesse[s] the tendency or

capacity to mislead, or create[s] the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981).

Mr. Hill's 22 September 1994 letter to plaintiffs had the capacity to mislead and was therefore deceptive for Chapter 75 purposes. *See id.* Even though Mr. Hill indicated therein that plaintiffs might purchase all three lots if they assented to an increased purchase price, the jury's finding established that at least one lot had become subject to an unrelated contract to purchase by the date of the letter. *See Mosley & Mosley*, 97 N.C. App. at 519, 389 S.E.2d at 580 (letter from lessor to lessee expressing wishes for "another profitable year" deceptive when lessor was simultaneously negotiating with another tenant for lessee's retail space).

In addition, although not necessary to support a Chapter 75 claim, *see Johnson v. Insurance Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980) ("[p]roof of actual deception is unnecessary"), evidence was also introduced that plaintiffs were in fact deceived, believing the three lots would continue to be available. In a 16 February 1995 letter from their attorney, plaintiffs indicated a continued willingness to close on the contracts; however, the undisputed evidence was that closing on one lot in an unrelated transaction had previously occurred on 3 February 1995.

Given the deceptive nature of Mr. Hill's 22 September 1994 letter, his imposition of an increased price upon the lots and entry into sales contracts thereon with third parties, as well as the retention of plaintiffs' earnest money deposits, we hold the trial court properly concluded that aggravating circumstances necessary to sustain a Chapter 75 claim against Mr. Hill were present, *see Norman Owen Trucking*, 131 N.C. App. at 177, 506 S.E.2d at 273, and that the court did not err in denying defendants' directed verdict and post-trial motions addressing that claim.

[4] We turn now to plaintiffs' assignments of error and consider *ad seriatim* their challenge to the trial court's grant of defendants' directed verdict motion on plaintiffs' claims of breach of contract and unfair and deceptive trade practices against Mrs. Hill.

To reiterate, the elements of a claim of breach of contract are (1) existence of a valid contract and (2) breach of that contract, specifically by Mrs. Hill in the present context. *Jackson*, 120 N.C. App. at 871, 463 S.E.2d at 572. At trial, defendants indicated they did not

"deny that [Mrs. Hill] signed the contract[s] and in fact we don't deny that she was bound by the contract[s]." Accordingly, to have survived defendants' directed verdict motion, plaintiffs simply must have produced more than a scintilla of evidence that Mrs. Hill breached the contracts. *See Ace Chemical Corporation*, 115 N.C. App. at 242, 446 S.E.2d at 103.

Although Mrs. Hill was not called as a witness, Mr. Hill testified he and Mrs. Hill did business and sold lots in Sea Gate under the name Sea Gate Enterprises and that the Sea Gate Enterprises operating account, into which plaintiffs' earnest money payments had been deposited following withdrawal from defendants' trust account, was maintained in the name of both Mr. and Mrs. Hill. Additionally, under the terms of the contracts, both Mr. and Mrs. Hill were required to obtain quitclaim deeds from Weyerhaeuser, and Weyerhaeuser indeed conveyed its interest in the three lots to both Mr. and Mrs. Hill, although not until 12 December 1994, seven months after the closing date specified in the contracts.

Taken in the light most favorable to plaintiffs, *see Abels*, 335 N.C. at 215, 436 S.E.2d at 825, the foregoing provided more than a scintilla of evidence that Mrs. Hill failed to perform a term of the contracts, *see Ace Chemical Corporation*, 115 N.C. App. at 242, 446 S.E.2d at 103, even absent consideration of the agency implications raised by the evidence and discussed below. The trial court's directed verdict in favor of Mrs. Hill on plaintiffs' breach of contract claim therefore must be reversed.

[5] With reference to plaintiffs' claim of unfair and deceptive trade practices against Mrs. Hill, defendants emphasize that the evidence presented at trial focused upon the actions of Mr. Hill, notably the 22 September 1994 letter in which he claimed plaintiffs were in default on the contracts and purported to raise the price of the lots. Mrs. Hill was neither a signatory to that letter, nor to the later contracts for sale entered into for lots 128 and 129 in September and November 1994. Further, while defendants vigorously reasserted at trial that there was no evidence Mrs. Hill breached the contracts, they argued in the alternative that her conduct in any event comprised no more than breach of contract, which without more does not violate Chapter 75. *See Norman Owen Trucking*, 131 N.C. App. at 177, 506 S.E.2d at 273.

However, although plaintiffs do not stress the point, the record is replete with evidence tending to show Mr. Hill acted as the agent of

Mrs. Hill throughout his dealings with plaintiffs, thereby implicating her in any violation of Chapter 75. *See Lee v. Keck*, 68 N.C. App. 320, 324-25, 315 S.E.2d 323, 327 (wife who committed no acts of misrepresentation or fraud in real estate transaction held liable on plaintiffs' claims for unfair trade practices and fraud for acts of husband determined to be her agent), *disc. review denied*, 311 N.C. 401, 319 S.E.2d 271 (1984). Although "[n]o presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife," *Norburn v. Mackie*, 262 N.C. 16, 22, 136 S.E.2d 279, 284 (1964), only " 'slight evidence' " of agency suffices to charge a spouse as a principal if that spouse "receives, retains, and enjoys the benefit of [a] contract" entered into by the other spouse, *id.* at 23, 136 S.E.2d at 284 (citing 41 C.J.S. *Husband and Wife* § 70 (now renumbered as 41 C.J.S. *Husband and Wife* § 58 (1991))).

In the case *sub judice*, for example, the record reflects that Mrs. Hill retained the benefits of the contracts in that plaintiffs' earnest money was deposited into a joint trust account of Mr. and Mrs. Hill and was subsequently transferred to a joint bank account following Mr. Hill's declaration that plaintiffs were in default. In the 22 September 1994 letter, moreover, Mr. Hill stated both he and Mrs. Hill owned the lots, and several times employed the inclusive phrase "we": "we were still ready to close," "we would sell all 3 lots," and "[a]s far as we are concerned," plaintiffs had defaulted on the contracts. The letter was signed by Mr. Hill as President of Sea Gate Enterprises, which, according to his testimony, was the name he and his wife utilized in conducting the business of selling lots in Sea Gate subdivision.

In addition, the evidence tended to show Mrs. Hill retained the benefits of the contracts conveying the lots to Mr. and Mrs. Cross and Mr. and Mrs. Chadwick in that both Mr. and Mrs. Hill were denominated as "seller" on the settlement statements, and Mrs. Hill executed both the settlement statement for the Cross lot and the deed for the Chadwick lot. Finally, Mrs. Hill was specifically named on the quitclaim deeds from Weyerhaeuser.

The foregoing evidence, taken together in the light most favorable to plaintiffs, *see Abels*, 335 N.C. at 215, 436 S.E.2d at 825, tended to show Mr. Hill was at all times acting as agent for Mrs. Hill during the course of his dealings with plaintiffs regarding the lots at issue. Where evidence of an agency relationship has been presented, agency becomes a fact to be proved and a question for the jury, *Industries*,

Inc. v. Distributing, Inc., 49 N.C. App. 172, 173, 270 S.E.2d 515, 516 (1980), and a directed verdict would be proper only if "there [wa]s no evidence presented tending to establish an agency relationship," *Smith v. VonCannon*, 17 N.C. App. 438, 439, 194 S.E.2d 362, 363, *aff'd*, 283 N.C. 656, 197 S.E.2d 524 (1973).

In short, because the evidence tended to show Mr. Hill was acting as Mrs. Hill's agent, *see Industries, Inc.*, 49 N.C. App. at 173, 270 S.E.2d at 516, the trial court's directed verdict in favor of Mrs. Hill on plaintiffs' Chapter 75 claim may be sustained only if such motion were appropriate as to Mr. Hill. In that we have determined defendants' renewed directed verdict motion regarding Mr. Hill on plaintiffs' Chapter 75 claim was properly *denied* by the trial court, it was error for the court to allow defendants' directed verdict motion on this issue as to Mrs. Hill, *see Lee*, 68 N.C. App. at 324-25, 315 S.E.2d at 327 (even though wife committed no acts of misrepresentation, court correctly denied her summary judgment motion on unfair trade practices claim where evidence was presented of husband acting as her agent).

At retrial, the jury must determine only whether Mr. Hill indeed acted as the agent of Mrs. Hill in regard to the conduct described in the instant jury's affirmative answers to the special interrogatories. If so, in light of our opinion herein, it would be unnecessary for the trial court to consider anew whether such conduct of Mr. Hill was violative of Chapter 75.

[6] Plaintiffs next assign error to the action of the trial court in setting aside the jury's damage award on plaintiffs' Chapter 75 claim as to Mr. Hill. Prior to discussing this issue, we interject that, no error having been assigned to the jury's verdict assessing damages on plaintiffs' breach of contract claim, resolution at trial in plaintiffs' favor of such claim against Mrs. Hill, either under a theory of actual breach or of agency, would result in the latter's joint liability for the previously determined amount of damages. *See, e.g., McLain v. Taco Bell Corp.*, 137 N.C. App. 179, —, 527 S.E.2d 712, — (2000) (damages having been previously determined as to one of two jointly liable parties, retrial limited to issue of liability), and *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357 ("although plaintiff is entitled to full recovery for its damages, plaintiff is nevertheless not entitled to 'double recovery' for the same loss or injury") (citation omitted), *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997).

The jury awarded plaintiffs $30,000.00 in damages for injuries resulting from Mr. Hill's violation of Chapter 75, as outlined in issue 11. In the judgment, the trial court stated that

> issue 11f should not have been submitted to the jury without first instructing them that if they answered issues 9 and 10 [awarding damages for breach of contract] that issue 11f would have to be answered in the same amount. Issue 11f as answered by the jury is against the greater weight of the evidence and is not in keeping with the instructions of the court with regard to the issue of damages and, therefore, issue 11f and the answer thereto is hereby set aside.

However, the proper remedy in the instance of a verdict against the greater weight of the evidence or contrary to the trial court's instructions is a new trial on the issue of damages. *See* N.C.G.S. § 1A-1, Rule 59(a)(5),(7) (1999); *Insurance Co. v. Chantos*, 298 N.C. 246, 251, 258 S.E.2d 334, 338 (1979) (term "insufficiency of the evidence" in Rule 59(a)(7) includes the reason that the verdict "was against the greater weight of the evidence"). Notwithstanding, the trial court herein instead apparently replaced the jury's Chapter 75 damages in the amount of $30,000.00 with the sum imposed by the jury for breach of contract, *i.e.*, $5,000.00, and then trebled the latter amount, ostensibly pursuant to G.S. § 75-16, thereby awarding plaintiffs a total of $15,000.00.

> "It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum as damages, the court cannot increase or diminish the amount, except to add interest, where [it] is allowed by law and has not been included in the findings of the jury." 2 McIntosh, North Carolina Practice and Procedure § 1691 (2d ed. 1956); *Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 [(1916)]. In this case, the judge should have set aside the verdict in his discretion if he deemed it against the weight of the evidence or considered the damages excessive. Instead of doing so, he attempted to change the verdict as to the defendants . . ., and this he could not do.

Bethea v. Kenly, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam). Accordingly, a new trial must be had on the issue of damages, *see* G.S. § 1A-1, Rule 59(a), resulting from plaintiffs' Chapter 75 claim against Mr. Hill.

As to the trial court's apparent theory that Chapter 75 damages on a claim arising out of a breach of contract must be limited to the dam-

ages awarded by the jury on the related breach of contract claim, we point out that G.S. § 75-16 provides:

> If any person shall be injured . . . by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of [Chapter 75], such person . . . so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

This Court has previously observed that

> [t]he statute merely refers to the person being "injured" and does not state the method of measuring damages. Consequently, there is confusion as to the proper measure of damages in an unfair or deceptive act or practice case.

Bernard v. Central Carolina Truck Sales, 68 N.C. App. 228, 231, 314 S.E.2d 582, 585, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

Damages on a Chapter 75 claim are not necessarily limited to those that might be had for breach of contract.

> [A]n action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty. Since the remedy was created partly because those remedies often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used.

Id. at 232, 314 S.E.2d at 585.

On retrial, therefore, plaintiffs must prove they "suffered actual injury as a proximate result of defendants' " misconduct. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980). Such injury may

> include the (1) [earnest money deposits]; (2) loss of the use of specific and unique property; and (3) loss of the appreciated value of the property,

Edwards v. West, 128 N.C. App. 570, 575, 495 S.E.2d 920, 924, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998) (citation omitted), and such other elements of damages as may be shown by the evidence. In short,

> [t]he measure of damages used should further the purpose of awarding damages, which is "to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money."

Bernard, 68 N.C. App. at 233, 314 S.E.2d at 585 (quoting *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950)).

While considering the topic of Chapter 75 damages, we note that upon submission to the jury and an answer favorable to plaintiffs on the latter's Chapter 75 claim against Mrs. Hill under an agency theory, Mr. and Mrs. Hill would thereupon be jointly liable for the resultant amount of damages determined by the jury. *See McLain*, 137 N.C. App. at —, 527 S.E.2d at —; *Markham*, 125 N.C. App. at 455, 481 S.E.2d at 357.

Finally, in the damages context, we note that should the "same course of conduct give[] rise" to plaintiffs' breach of contract and Chapter 75 claims, plaintiffs may recover damages "either for the breach of contract, or for violation of [Chapter 75], but not for both." *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981). Upon a damage verdict favorable to plaintiffs at retrial on their Chapter 75 claim and the trial court's determination that the "same course of conduct" gave rise to plaintiffs' breach of contract as well as then Chapter 75 claims, *see id.*, plaintiffs must elect their damages remedy, *see Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 427, 344 S.E.2d 297, 301, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 464 (1986) (requiring election of remedy prior to jury resolution of all issues would be "manifestly unfair").

[7] In their remaining assignment of error, defendants' contend the trial court's grant of counsel fees to plaintiffs was erroneous. We decline to address defendants' arguments in regards thereto, however, as the trial court's award must be vacated.

> In any suit instituted by a person who alleges that the defendant violated G.S. [§] 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the *prevailing party*, . . . upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such

> party to fully resolve the matter which constitutes the basis of such suit . . . .

G.S. § 75-16.1 (emphasis added). Plaintiffs,

> in order to be the "prevailing party" within the meaning of G.S. [§] 75-16.1, must prove not only a violation of G.S. [§] 75-1.1 by the defendant[s], but also that plaintiff[s] ha[ve] suffered actual injury as a result of that violation.

Mayton v. Hiatt's Used Cars, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. review denied*, 300 N.C. 198, 269 S.E.2d 624 (1980).

In the instant case, although plaintiffs have established Mr. Hill's violation of G.S. § 75-1.1, a new trial as to the resultant damages has been ordered herein. Absent an award of damages, plaintiffs have not yet established the amount of actual injury. *See Mayton*, 45 N.C. App. at 212, 262 S.E.2d at 864 (jury award of zero damages for Chapter 75 violation "was in essence a determination that plaintiff suffered no injury"). Consideration of an award of counsel fees based upon G.S. § 75-16.1 would therefore be premature at this stage, because plaintiffs' damages, if any, occasioned by defendants' violation of Chapter 75 will be determined on remand. Accordingly, that portion of the judgment awarding counsel fees to plaintiffs is vacated.

To summarize, the trial court's denial of defendants' directed verdict and post-trial motions as to Mr. Hill is affirmed; the court's grant of defendants' directed verdict motions as to Mrs. Hill is reversed; the trial court's award of counsel fees is vacated; and this case is remanded (1) for trial on all issues (as to Mrs. Hill) save damages for breach of contract and (2) for trial on the issue of damages as to Mr. Hill's (and potentially Mrs. Hill's) violation of Chapter 75.

Affirmed in part, reversed in part, vacated in part, and remanded.

Judges WYNN and EDMUNDS concur.

STATE OF NORTH CAROLINA v. TAMANCHI LAKEWONDO KRIDER

No. COA99-313

(Filed 16 May 2000)

1. Homicide— felony murder—child abuse—motion to dismiss—sufficiency of evidence

The trial court did not err in denying defendant-mothers's motion to dismiss a first-degree murder charge, while committing felonious child abuse with a deadly weapon, because: (1) defendant admitted she shook the child victim and threw him down, and as a result, the child was seriously injured; and (2) the State presented substantial evidence that defendant intentionally assaulted the child on occasions prior to the assault which led to his death, showing the jury could infer defendant intentionally injured him on the day of his death.

2. Homicide— deadly weapon—hands

The trial court did not err in denying defendant-mothers's motion to dismiss a first-degree murder charge, while committing felonious child abuse with the use of defendant's hands as a deadly weapon, because: (1) the size of both the actor and the victim are important factors in the determination of whether hands are deadly weapons; and (2) when a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons.

3. Homicide— felony murder—child abuse—not ex post facto law

Although defendant argues that her conviction for first-degree murder while committing felonious child abuse with the use of defendant's hands as a deadly weapon should be overturned since the first case establishing felony child abuse as first-degree murder was decided after the victim's death in this case and should be inapplicable due to the prohibition of ex post facto laws, the Court of Appeals has previously noted that hands were treated as deadly weapons well before the date of this offense, and there was nothing to preclude its use for that purpose, nor does this use expand the felony murder statute in any way.

4. Indigent Defendants— assistance of experts—failure to establish particularized need

The trial court did not err in a first-degree murder case by denying defendant's motion for the assistance of experts in pathology and dentistry because: (1) defendant failed to establish a particularized need for a forensic pathologist or forensic dentist; and (2) the mere hope or suspicion of the availability of certain evidence that might erode the State's case or support a defense will not satisfy the threshold showing of a specific necessity for expert assistance.

5. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court erred in a first-degree murder case by admitting the opinion testimony of an oral pathologist who testified that the bite marks on the victim were consistent with defendant's dentition, defendant failed to object to this opinion at trial and has therefore waived review of this issue. N.C. R. App. P. 10(b)(1).

Appeal by defendant from judgment entered 20 May 1998 by Judge Howard E. Manning, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 27 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Anne M. Middleton, for the State.

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

HUNTER, Judge.

Tamanchi Lakewondo Krider ("defendant") was convicted of first degree murder for causing the death of her two year-old son, DeMallon Krider ("DeMallon"), while committing felony child abuse with the use of her hands as a deadly weapon. Defendant appeals. We find no error.

The State's evidence at trial indicated that defendant was sent to prison in 1994 when she was a twenty-four year-old single mother. At the time, defendant's son DeLondon was one year-old and defendant's mother took custody of him. DeMallon was born while defendant was in prison in December 1994 and the North Carolina Department of

Social Services ("DSS") awarded custody of him to foster parent Doris Boyd ("Boyd").

Defendant was released from prison in September 1996, and at that time, acquired housing and employment, participated in DeMallon's medical appointments and speech therapy for mild speech delay, and maintained visitation with DeMallon. Defendant remained drug free, participated in narcotics anonymous, and complied with her medical treatment through the county health department. Defendant was eager to regain custody of her children. The facts relevant to the present appeal indicate that DSS worked to help defendant and Boyd develop a permanent plan for DeMallon. With monitoring by DSS, defendant's visits with DeMallon were gradually increased from supervised to unsupervised, then to overnight visits. On 5 May 1997, when DeMallon was just over two years old, defendant was given probationary physical custody of him. On that date, DeMallon had no physical injuries, although tubes had been put in his ears to remedy a hearing problem when he was one and a half years old.

Defendant testified that trouble began on Mother's Day 1997, when Boyd telephoned DeMallon, and DeMallon referred to her as "Mama." Defendant admitted she was jealous, and DeMallon's whining for Boyd hurt defendant's feelings and made her angry. When DeMallon stayed with Boyd on Memorial Day weekend, he did not want to get out of the car when she returned him to the home of defendant.

On or about 31 May 1997, defendant's sister Monica Boyd ("Monica") came from Texas on vacation to help her and defendant's other sister, April Boyd ("April"), with their children. On 1 June, Monica was at April's apartment, which was right across the street from defendant's apartment. Monica heard the children screaming for her to come over there, and when she got to defendant's apartment, she found DeMallon lying unconscious at the bottom of the stairs. Monica called for Emergency Medical Services ("EMS"), which responded and checked DeMallon, concluding that he did not need to be transported to the hospital.

Boyd visited DeMallon on 8 June 1997, and had to sit outside the defendant's apartment "a long time" before defendant came out with DeMallon. When defendant finally came out, she was carrying DeMallon like a newborn baby, a way that Boyd had never seen before. DeMallon was dressed in winter clothes—long dark pants and

a long-sleeved shirt. Defendant stood so close to the car door that Boyd could not open it, and seemed very unhappy with Boyd for being there. Boyd then noticed a "shocking" and "frightening" bruise that ran all the way down the left side of DeMallon's face. Defendant told Boyd that some children had hit DeMallon on the head with a truck. Boyd then noticed some scratches on DeMallon's face and hand and as a result became very upset. Defendant seemed uneasy and said "I've told these people they're going to have to quit beating on my baby." Boyd asked if DSS knew about this, and defendant replied that she had taken DeMallon to the doctor.

The next day, 9 June 1997, defendant took DeMallon to the emergency room at Rowan Regional Medical Center. DeMallon was wearing a long-sleeved shirt and had bruises on both cheeks. The doctor on duty asked that a nurse notify DSS of defendant's report that other children had beaten and bitten DeMallon. Defendant stated that she had already reported this to law enforcement, but that nothing had been done about it.

As a result of the report to DSS, social workers went to defendant's apartment the next day, 10 June 1997. DeMallon was drowsy, glassy-eyed, and did not appear to feel well. He had what appeared to them to be two bite marks to the right of his navel and one bite mark below what appeared to be a patch of eczema on his upper back. Defendant told the social workers that the bite marks came from April's one year-old son Tony, and that another boy in the apartment building had scratched DeMallon's face. Since this was consistent with the information given by defendant at the hospital the day before, the social workers believed it was reasonable, and offered to help defendant with supervision problems to prevent future injuries. DSS determined that no abuse had occurred and defendant's probationary physical custody of DeMallon was allowed to continue.

On 15 June 1997, EMS was dispatched to defendant's apartment. Officer Mark Shue of the Salisbury Police Department heard the dispatch on a scanner and reported to the scene. When he arrived, he heard a female screaming upstairs, and proceeded to find defendant, Monica, and several small children in an upstairs bedroom. DeMallon was lying on his back on the floor in a pool of clear liquid combined with orange-colored vomit around his face. The child was unresponsive, with no pulse or respiration. Defendant reported that DeMallon had been this way for ten to fifteen minutes, and Shue began cardiopulmonary resuscitation. DeMallon showed no signs of life and was cool to the touch. Shue noticed bite marks on his chest, bruises

on his face, and a burn in the shape of an iron on his inner forearm. EMS arrived and transported DeMallon to the hospital, where he was declared dead.

Defendant initially reported that DeMallon had woken up, gasped for air, and starting vomiting. Although she told her probation officer she did not give DeMallon mouth-to-mouth resuscitation because she was HIV positive and did not want to give him her disease, she told the Salisbury police that she had attempted mouth-to-mouth resuscitation on DeMallon.

On 17 June 1997, defendant agreed to go with the police and have dental impressions made of her teeth. After the impressions were made, defendant confessed that she hurt DeMallon in the weeks before his death by throwing him around and biting him, and that she shook him and threw him to the floor on the day of his death. On the day of his death, DeMallon had wet himself while taking a nap and defendant asked him what was wrong with him. When DeMallon did not answer, defendant started shaking him and yelling, asking him what was wrong. Defendant first stated that after she shook DeMallon, she threw him to the bed and he fell off and hit the floor. Later, defendant admitted that after shaking DeMallon, she threw him directly to the floor, where he hit his head on the bed frame.

An autopsy was performed on DeMallon which revealed that his cause of death was head trauma resulting from impact to the head. Internal injuries to DeMallon's head may have also been a result of his having been shaken. Expert testimony revealed that DeMallon had two hemorrhages, one of which appeared to be very recent—the brain was markedly swollen, and subdural blood was present around the brain stem. In addition, there were indications of previous subdural hematomas, suggesting prior head trauma at least weeks old. There were multiple hemorrhages into DeMallon's retina, indicating recent head injury, as well as reddish-brown coloration of the optic nerves and chronic inflammation around the optic nerve, which was evidence of prior head injury. At the time of his death, DeMallon was thirty-six inches tall and weighed twenty-six pounds, and had several healing scars and multiple bruises to the face, abdomen, chest, and both arms and legs, all indicative of inflicted injuries. The bite marks on his body were compatible with defendant's arch size and location of her teeth.

Defendant was indicted for first degree murder of DeMallon Krider on 23 June 1997. The case was tried at the 11 May 1998 crimi-

nal session of Rowan County Superior Court, where defendant was found guilty of first degree murder and sentenced to life imprisonment. Defendant appeals.

[1] Defendant first assigns error to the trial court's denial of her motion to dismiss, arguing that there was insufficient evidence from which the jury could have reasonably found that she intentionally injured DeMallon or used her hands as deadly weapons.

On a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and that the defendant is the person who committed the offense. *State v. Olson*, 330 N.C. 557, 411 S.E.2d 592 (1992). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' ", *State v. Rogers*, 109 N.C. App. 491, 504, 428 S.E.2d 220, 228, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54, *reh'g denied*, 511 U.S. 1102, 128 L. Ed. 2d 495 (1994) (quoting *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)), but it must do more than merely raise a suspicion of conjecture as to the existence of a necessary element of the charged offense. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). When testing the sufficiency of evidence in a criminal case, the trial court must find that "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, *reh'g denied*, 444 U.S. 890, 62 L. Ed. 2d 126 (1979) (emphasis in original). In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must consider "all the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997) (citing *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995)).

Murder in the first degree is defined as:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon . . . .

N.C. Gen. Stat. § 14-17 (1999). In the case *sub judice*, the State pursued the theory that defendant killed DeMallon while committing felonious child abuse with the use of a deadly weapon, the deadly weapon being defendant's hands. We shall first examine whether substantial evidence supported each element of felonious child abuse.

Our statutory code provides:

> (a) 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) (1999) (emphasis added). It is uncontroverted that defendant was the parent of DeMallon, was providing care to him, and he was under sixteen years of age at the time of his death. Defendant admitted that she shook him and threw him down, and as a result, DeMallon was seriously injured. Therefore, we can conclude that defendant's assault caused DeMallon's injury and the only question remaining is whether defendant intentionally committed the assault.

For the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim, evidence of a defendant's prior assaults on the victim for whose murder the defendant is being tried is admissible at trial under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). *State v. Gary*, 348 N.C. 510, 520, 501 S.E.2d 57, 64 (1998). Furthermore, to show intent in child abuse cases, past incidents of mistreatment are admissible. *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). In order to prove intent in felonious child abuse, the State does not have to show that defendant intended that the injury be serious, only that he intentionally inflicted an injury that proved to be serious. *State v. Campbell*, 316 N.C. 168, 340 S.E.2d 474 (1986). Our review indicates that the State presented substantial evidence that defendant assaulted DeMallon on occasions prior to the assault which led to his death. The statement of defendant which was read into evidence at trial states, in pertinent part:

> ". . . I woke up around 12:00 P.M. and DeMallon was laying on the bed like something was wrong. I asked DeMallon what was wrong with him, and he did not answer me. I became upset and angry at

> DeMallon and grabbed him up and shaking him and yelling, asking DeMallon what was wrong. . . ." "DeMallon would not answer me, and I threw him, I thought, on the bed, but DeMallon hit the floor instead of the bed. After DeMallon hit the floor, I knew I had done something wrong. . . ." ". . . I had gotten angry at DeMallon before and threw DeMallon around. I have also gotten angry at DeMallon and would bite DeMallon on his cheeks and body, but I never thought I bit him that hard. I didn't mean to kill DeMallon. I would get so angry that DeMallon was scared of me. I tried to tell the people at Social Services, my probation officer, and my mother that they needed to take DeMallon away from me because I would get so angry and seemed like I always took it out on DeMallon. . . ."

Due to substantial evidence that defendant had committed abuse in the past, which was intentional, the jury could infer that she intentionally injured him on the day of his death. Substantial evidence also indicated that while defendant may not have intended to cause serious injury to DeMallon, she shook him and threw him to the floor, causing serious injury. Therefore, under *State v. Campbell*, we hold that substantial evidence supported the intent element of defendant's charge of felonious child abuse. Thus, the only question remaining as to dismissal of the charge of first degree murder is whether or not defendant's hands constituted "deadly weapons."

[2] The size of both the actor and his victim are important factors in the determination of whether or not hands are deadly weapons. In *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429, *disc. review denied*, 309 N.C. 463, 307 S.E.2d 368 (1983), this Court held that a defendant's fists could have been deadly weapons when:

> The defendant, a thirty-nine year old male who weighed two hundred ten pounds, hit the victim, a sixty year old woman, in the head and stomach. Brain hemorrhages and other injuries resulted from the beating, causing the victim to be unable to care for herself. The defendant's fists could have been a deadly weapon given the manner in which they were used and the relative size and condition of the parties.

Id. at 611, 301 S.E.2d at 430. This Court also held that defendant's fists could be considered deadly weapons when defendant weighed approximately one hundred seventy five pounds and his victim weighed approximately one hundred seven pounds, and he beat her about the head with his fists, breaking her jaw, and choked her three

separate times leaving marks around her neck that appeared to be "just like fingerprints." *State v. Grumbles*, 104 N.C. App. 766, 769-70, 411 S.E.2d 407, 409-10 (1991). In the case at bar, it is uncontroverted that defendant was an adult, and presumably was much larger in stature than DeMallon, who was thirty-six inches tall and only weighed twenty-six pounds at the time of his death. Furthermore, defendant described the child as "sickly."

In a more recent case, *State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576, our Supreme Court held that the trial court did not err by refusing to grant defendant's motion to dismiss the felony murder charge when the State presented evidence that defendant shook the child victim and caused her death:

> When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons. *Cf. Elliott*, 344 N.C. at 268-69, 475 S.E.2d at 213 (stating that malice may be inferred from the willful blow by an adult on the head of an infant); *State v. Lang*, 309 N.C. 512, 527, 308 S.E.2d 317, 325 (1983) (stating that the trial court could have instructed the jury that it could infer malice if it found "that the defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons*"). Defendant is an adult male who weighed approximately 150 pounds at the time of his arrest. The evidence that he caused a small child's death by shaking her with his hands was sufficient to permit the jury to conclude that defendant committed felonious child abuse and that he used his hands as deadly weapons. Thus, the trial court did not err by refusing to grant defendant's motion to dismiss the charge of first-degree murder under the felony murder rule.

State v. Pierce, 346 N.C. at 493, 488 S.E.2d at 589 (emphasis in original). Similarly, in the present case, defendant, an adult female, admitted not only shaking DeMallon, but also throwing him to the floor.

[3] Defendant argues that *State v. Pierce* was the first case establishing felony child abuse as first degree murder, and because it was decided on 24 July 1997, after DeMallon's death, it has no applicability to this case due to the prohibition of *ex post facto* laws. In regard to this issue, this Court has stated:

> Both the North Carolina and United States Constitutions forbid the enactment of *ex post facto* laws. U.S. Const. art. I, § 10;

N.C. Const. art. I, § 16. From the beginning of American jurisprudence, the United States Supreme Court has defined an *ex post facto* law to be a law that "(1) makes an action criminal which was done before the passing of the law and which was innocent when done, (2) aggravates a crime or makes it greater than when it was committed, (3) allows imposition of a different or greater punishment than was permitted when the crime was committed, or (4) alters the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed." *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991). *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 650 (1798). In other words, in order for a criminal law to be an *ex post facto* violation, it must be both retrospective by applying to events which occurred " 'before its enactment, and it must disadvantage the offender affected by it.' " *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981)).

Although *ex post facto* laws have traditionally been directed specifically at legislative actions, the United States Supreme Court has held that the Fifth and Fourteenth Amendments to the U.S. Constitution "forbid retroactive application of an unforeseeable judicial modification of criminal law, to the disadvantage of the defendant." *Id.* In this case, however, there is no judicial modification of any criminal law. The felony murder rule has existed in its present form since 1977 and automobiles were treated as deadly weapons well before the date of the offense in this case. Although a felony perpetrated by an automobile has apparently not been used to support a felony murder conviction in the past, there is nothing to preclude its use for that purpose, nor does it expand the statute in any manner. . . .

State v. Jones, 133 N.C. App. 448, 456-57, 516 S.E.2d 405, 411, *review on additional issues allowed*, 351 N.C. 189, — S.E.2d — (1999). Similarly, we have noted that hands were treated as deadly weapons well before the date of the offense in this case. *State v. Grumbles*, 104 N.C. App. 766, 770-71, 411 S.E.2d 407, 410; *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429. Likewise, we hold that while at the time of DeMallon's death felony child abuse had not been used to support a first degree murder conviction due to the use of the hands as deadly weapons, there was nothing to preclude its use for that purpose, nor does this use expand the felony murder statute in any way. Under the laws of this state, a defendant may be convicted of first degree mur-

der despite the lack of premeditation or deliberation if she attempted to or committed a felony with the use of a deadly weapon, causing the victim's death. *See* N.C. Gen. Stat. § 14-17 (1999). Accordingly, this assignment of error is overruled.

[4] Next, defendant contends that the trial court erred in denying her motion for the assistance of experts in pathology and dentistry.

Our Supreme Court has held:

> An indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a "particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). "The particularized showing demanded by our cases is a flexible one and must be determined on a case-by-case basis." *Id.* at 656-57, 417 S.E.2d at 471. "The determination of whether a defendant has made an adequate showing of particularized need lies within the trial court's discretion." *State v. Rose*, 339 N.C. 172, 187, 451 S.E.2d 211, 219 (1994), *cert. denied*, [515] U.S. [1135], 132 L. Ed. 2d 818 (1995).

State v. McCullers, 341 N.C. 19, 34, 460 S.E.2d 163, 172. Our review indicates that defendant failed to establish a particularized need for a forensic pathologist or forensic dentist in her motion before the trial court. The motion merely reflects defendant's wish that a pathologist might assist in developing evidence to erode the State's case. The mere hope or suspicion of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of a specific necessity for expert assistance. *State v. Pierce*, 346 N.C. 471, 484, 488 S.E.2d 576, 583.

In *Pierce*, the defendant made a motion for a pathologist, which was denied, wherein he contended that such an expert could assist him in determining how the victim's injuries were inflicted. The Court noted that two doctors testified that the child was a victim of the battered-child syndrome and the shaken-baby syndrome, and all the evidence at trial suggested that her death was caused by the injuries to her brain and that these injuries were incurred as a result of child abuse. Also, "[d]efendant's pretrial statements that [the child] had been attacked by the family dog and assaulted by other children in the neighborhood and that she bruised easily were overwhelmingly

refuted by the evidence presented by the State." *Id.* at 484, 460 S.E.2d at 584. The Court in *Pierce* held that defendant's assertions that the requested expert assistance would be beneficial or even essential to the preparing of an adequate defense, were undeveloped and were insufficient to satisfy the threshold requirement of specific necessity. *Id.* Similarly, defendant here presented an undeveloped assertion in her motion for expert assistance that DeMallon's bruises may have been a rash, but this assertion was refuted by other evidence, including defendant's confession. Defendant has failed to show how she was denied a fair trial by denial of this motion, and accordingly, we find no error in the trial court's denial.

[5] Next, defendant contends the trial court erred in admitting the opinion testimony of oral pathologist Dr. Ernest Burkes, who testified that the bite marks on DeMallon were "consistent with" defendant's dentition. Our review of the transcript reveals that defendant failed to object to this opinion at trial and has therefore waived this issue on appeal. N.C.R. App. P. 10(b)(1). Accordingly, this assignment of error is dismissed.

No error.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. PATSY E. COPLEN, DEFENDANT

No. COA99-523

(Filed 16 May 2000)

1. Evidence— gunshot residue test—obtained without nontestimonial identification order—probable cause and exigent circumstances—right to counsel

The trial court did not err in a noncapital first-degree murder prosecution (second-degree murder conviction) by denying defendant's motion to suppress a gunshot residue test conducted without a nontestimonial identification order, even though the test lies within the purview of N.C.G.S. § 15A-271. Gunshot residue evidence may be properly admitted if it was obtained by some other lawful procedure; here, there were findings of fact to support the conclusion of probable cause and exigent circum-

stances. Although defendant contended that her right to counsel was violated, there is no constitutional right to counsel during a gunshot residue test. Defendant had statutory protection from the use of statements made during a nontestimonial identification procedure when counsel was not present, but she only sought to suppress the results of the test and not the statements.

2. Homicide— premeditation and deliberation—sufficiency of evidence—conviction of second-degree murder

Any error was not prejudicial in a first-degree murder prosecution where the court denied defendant's motion to dismiss based upon insufficient evidence of premeditation and deliberation. There was substantial evidence that the killing was premeditated and deliberated and the jury returned a verdict of second-degree murder, which does not require premeditation and deliberation.

Appeal by defendant from judgment entered 19 October 1998 by Judge Ronald L. Stephens in Superior Court, Brunswick County. Heard in the Court of Appeals 22 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Tina A. Krasner, for the State.

Mary March Exum for defendant-appellant.

TIMMONS-GOODSON, Judge.

Patsy E. Coplen ("defendant") and Richard Martin ("the victim") lived together in a mobile home in the Oscar Long Subdivision of Leland, North Carolina. On 6 May 1996 at approximately 10:30 or 11:00 p.m., Betty Harper ("Harper"), a neighbor, heard defendant call for help. Defendant informed Harper that she had gone to the store to buy beer for her husband and that when she returned home, she found his body lying in a pool of blood.

Harper owned a .38 caliber Tahitian Tiger revolver which she had loaned to defendant approximately six months before the victim was shot. Harper asked defendant to return the weapon, but defendant had not returned the weapon prior to the date of the shooting. Defendant had worked as a law enforcement officer. In her duties as a police officer, defendant carried a .357 caliber Magnum revolver. Harper's .38 caliber revolver and defendant's .357 caliber revolver were found at defendant's residence.

Another neighbor, Norman Roberts ("Roberts") heard banging noises between 10:30 p.m. and 11:00 p.m. on 6 May 1996. Approximately ten minutes after he heard the noises, Roberts saw defendant's car entering the trailer park and headlights shone in his window. Roberts heard defendant screaming as she exited her home, "Oh my God; Richard's been shot." Roberts entered defendant's trailer and saw the victim in the bedroom. He noted that the bedroom window was shattered and glass covered the bed, but the window screen was still in place.

Terry Shambley ("Shambley"), who lived across the street from defendant heard a banging noise at approximately 11:00 p.m. when she was outside walking. Shambley did not see defendant's car at the time. Approximately ten to fifteen minutes after she heard the noise, Shambley saw defendant drive into defendant's driveway.

According to the owner of the Leland Grocery Store, defendant entered the store between 11:00 p.m. and 11:30 p.m. and bought a six-pack of beer. The grocery store is located approximately seven miles from defendant's residence.

Dr. Charles Garrett ("Dr. Garrett") of the Chief Medical Examiner's Office for the State of North Carolina performed an autopsy on the victim. The autopsy revealed that the victim had suffered gunshot wounds to the right arm, right leg, and to the head and that the victim had died from the gunshot wound to the head.

Special Agent Mike Garrett ("Garrett") with the State Bureau of Investigations ("SBI") conducted a crime scene search at defendant's residence. Garrett recovered .38 caliber revolver ammunition from the master bedroom of the mobile home. Additionally, Garrett discovered law enforcement paraphernalia, including handcuffs, a badge and a night stick holder. He also recovered cartridges from a gray Honda that was parked in front of the mobile home. There were no signs of forced entry or theft. A bag containing a six-pack of beer was located on the kitchen counter and the beers were cool to the touch.

Special Agent Eugene Bishop ("Bishop") of the SBI observed that the bullet fragments taken from the victim's body were consistent in design with the bullets taken from defendant's bedroom and from the Honda automobile. Bishop testified that both a .38 caliber weapon and a .357 caliber weapon could have fired all of the ammunition that was discovered in defendant's home and in the car, but that the bullet

fragments taken from the victim's leg could not have been fired from the .357 revolver.

Tom Hunter, a detective with the Brunswick County Sheriff's Department, arrived at defendant's residence at 12:42 a.m. on 7 May 1996. He informed defendant that he was going to take her to the hospital to see her husband. Defendant replied, "Okay." As defendant walked to the car, she stated to a neighbor, "I guess I am going to jail." Defendant entered the car. She was not handcuffed, nor was she told she was under arrest.

In the waiting room at the hospital, Detective Hunter informed defendant he was "going to have to do a gunshot residue kit on her hands." Defendant initially refused, stating, "No, no. Don't I have the right to counsel?" A few minutes later, defendant submitted to the hand wiping.

Special Agent Charles McClelland, Jr. of the SBI tested the gunshot residue kit that had been taken from defendant and discovered gunshot residue particles in samples taken from defendant's left palm.

At 6:30 a.m. on 7 May 1996, defendant called Harper and asked why Harper had informed law enforcement officers that defendant was in possession of Harper's revolver. Harper responded that she did not want either of them to get in trouble. Defendant informed Harper that she "had opened up a fine goddamned can of worms there," and hung up.

On the morning of 7 May 1996, defendant also called Robby Robbins ("Robbins"), and requested that he meet her at McDonald's. At the restaurant, defendant informed Robbins that her husband had been shot the night before and that she thought she was a suspect in the crime. On 8 May 1996, she again requested to meet with Robbins. She informed him that she had done something which would make him angry: she had told the sheriff's department that the two of them had been target shooting. Robbins had never been target shooting with defendant.

Defendant was indicted on 20 May 1996 for murder. Prior to trial, on 11 July 1997, defendant filed a motion to suppress the gunshot residue test. After considering all of the evidence and arguments of counsel, the trial court denied defendant's motion. Defendant was tried noncapitally for first degree murder. Following a jury verdict of guilty of second degree murder, the trial court imposed an active sen-

tence of a minimum of 120 months with the corresponding maximum of 153 months. Defendant appeals.

On appeal, defendant argues that the trial court erred in: (I) denying her motion to suppress the gunshot residue test; and (II) denying her motion to dismiss the case at the close of the evidence.

I. Motion to Suppress

[1] By her first assignment of error, defendant argues that the trial court erred by denying her motion to suppress the gunshot residue test administered by Detective Hunter. Specifically, defendant argues that the trial court erred in concluding that North Carolina General Statutes section 15A-271 does not apply to gunshot residue evidence. While we agree with defendant that gunshot residue evidence is nontestimonial identification for purposes of section 15A-271, we believe the trial court properly denied defendant's motion to suppress the evidence.

Appellate review of a denial of a motion to suppress is limited to a determination of whether competent evidence supported the trial court's findings of fact and whether the findings of fact supported the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). In the present case, defendant does not object to the findings of fact which the trial court made in the order denying defendant's motion to suppress. Defendant merely assigns error to the denial of the motion to suppress. Therefore, the issues before this Court are whether the trial court's findings of fact support its conclusions of law and whether its conclusions of law are legally correct.

The trial court made the following pertinent conclusions of law in the order denying defendant's motion to suppress the gunshot residue evidence:

> 1. N.C.G.S. 15A-271 et. seq. does not apply to gunshot residue evidence in that gunshot residue is evidence found on a person's body and not evidence of a person's body such as hair or saliva.
>
> 2. If 15A-271 does apply to this type [sic] evidence, it is not the exclusive means by which this type of evidence may be collected by law enforcement officers.
>
> . . . .

7. Under the totality of the circumstances, probable cause and exigent circumstances existed at the time the evidence in this case was seized.

Defendant argues that North Carolina General Statute section 15A-271 *et. seq.* applies to gunshot residue evidence because such evidence is "nontestimonial identification." N.C. Gen. Stat. § 15A-271 (1999). As such, defendant contends that she was entitled to the benefit of the procedures outlined in section 15A-271 *et. seq.*, including the presence of counsel. According to that provision:

> A nontestimonial identification order authorized by this Article may be issued by any judge upon request of a prosecutor. As used in this Article, "nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a suspect.

N.C.G.S. § 15A-271.

Article 14, in which North Carolina General Statutes section 15A-271, *et. seq.* appears, was enacted in order to "provide the State with a valuable new investigative tool to compel the presence of unwilling suspects for nontestimonial identification procedures, even though insufficient probable cause existed to permit their arrest." *State v. Watson*, 294 N.C. 159, 164, 240 S.E.2d 440, 444 (1978) (emphasis omitted). In other words, Article 14 serves as a supplement to existing investigative procedures for use in cases where a lawful arrest is not yet warranted. *State v. McDonald*, 32 N.C. App. 457, 232 S.E.2d 467, *disc. review denied*, 292 N.C. 469, 233 S.E.2d 925 (1977).

Clearly, section 15A-271 does not set out exclusive procedures for obtaining nontestimonial identification. *State v. McCain*, 39 N.C. App. 213, 217, 249 S.E.2d 812, 815 (1978). "Nothing in [Article 14] shall preclude such additional investigative procedures as are otherwise permitted by law." N.C. Gen. Stat. § 15A-272 (1999). Therefore, the trial court properly concluded that "[i]f 15A-271 does apply to this type [sic] evidence, it is not the exclusive means by which this type of evidence may be collected by law enforcement officers."

In *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352 (1981), our Supreme Court indicated that a gunshot residue test is a nontestimo-

nial identification procedure governed by section 15A-271 *et. seq.* "[D]efendant did have a statutory right to have counsel present during the [gunshot residue test] by virtue of G.S. 15A-279(d) (1978)." *Id.* at 168, 277 S.E.2d at 356, n.3. While the above determination was not central to the holding in *Odom*, we agree that a gunshot residue test falls within the purview of section 15A-271 based on our analysis of the statutory language.

Like the other procedures described in section 15A-271, a gunshot residue test is a relatively non-intrusive procedure which requires the presence of the suspect. A gunshot residue test may logically be considered "other reasonable physical examination" in a class with identification by fingerprints, blood specimens, urine specimens, saliva and hair samples. N.C.G.S. § 15A-271. Similarly, a residue test falls within the broad language "similar identification procedures" in that it is comparable to handwriting exemplars, voice samples, photographs, and lineups. *Id.*

We hold that section 15A-271 *et. seq.* applies to gunshot residue evidence and the trial court erred in concluding otherwise. However, as indicated above, the gunshot residue evidence was properly admitted into evidence if it was obtained by some lawful procedure other than the one described in section 15A-271 *et. seq.*

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures and establishes, as a general rule, that a valid search warrant must accompany every search or seizure. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973). However, an exception arises when law enforcement officers have probable cause to search and "the circumstances of a particular case render impracticable a delay to obtain a warrant." *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979). "If probable cause to search exists and the exigencies of the situation make a warrantless search necessary, it is lawful to conduct a warrantless search." *State v. Smith*, 118 N.C. App. 106, 111, 454 S.E.2d 680, 684, *rev'd on other grounds*, 342 N.C. 407, 464 S.E.2d 45 (1995).

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L. Ed. 1879, 1890 (1949)).

In the present case, the trial court made the following findings of fact in support of its conclusion that probable cause and exigent circumstances existed at the time the evidence in this case was seized:

> 3. Detective Tom Hunter had previously known the defendant as early as 1993 when the defendant interviewed with Det. Hunter for a job at the Sandy Creek Police Department.
>
> 4. Detective Hunter was familiar with the defendant's normal tone of voice and normal disposition.
>
> 5. Detective Hunter knew that the defendant and the victim had a stormy marriage and had responded in a back up capacity to the marital home to answer a domestic call on a prior date.
>
> 6. Detective Hunter arrived at the crime scene or marital home at approximately 12:42 a.m. on the morning of May 7, 1997 [sic]. The marital home or crime scene is a double wide mobile home located off of Mt. Misery Road in Leland.
>
> 7. Det. Hunter spoke with officers Wilson, Huntsman, and Mason of the Brunswick County Sheriff's Department. These officers stated to Det. Hunter that there was a shooting inside the residence.
>
> 8. At the crime scene, Det. Hunter and other officers were able to determine that:
>
> a. There were no signs of forced entry into the home;
>
> b. There were no signs that the home had been ransacked;
>
> c. There were no signs of larceny from the home in that there were valuable appliances and jewelry inside of the home;
>
> d. There were signs of a dispute or struggle inside the bedroom where the victim was located in that there was a window that appeared to have been broken from the inside;
>
> e. There was a bag of beer in the kitchen and cold beer in the refrigerator[.]
>
> . . . .
>
> 9. At the crime scene, Det. Hunter and other officers were able to learn, either by direct [sic] observation or from reliable hearsay that:

a. The defendant had reportedly found her husband and told neighbors that he had been shot;

b. The defendant and victim had had an argument earlier in the day;

c. The defendant had a 5 shot revolver that had been loaned to her by a neighbor;

d. No one other than the defendant and victim were home the evening of the shooting;

e. The defendant stated that her husband was alive when she left the home to get him some beer and she found him in a pool of blood when she returned home.

10. Prior to leaving the crime scene with Det. Hunter, the victim was asked by a neighbor where she was going. The defendant responded, "To jail, I guess". [sic] At the time, the defendant was actually going to the hospital with Det. Hunter to check on the condition of the victim.

11. During the ride in Det. Hunter's car, the defendant made several statements that were recorded by Det. Hunter's tape recorder.

12. One of the recorded statements was inconsistent with earlier statements attributed to the defendant about her husband having been shot. This statement is considered as having some weight by the court.

13. The taped conversation indicates that at no time did the defendant express any concern about her husband's condition.

14. The tape indicates that the defendant volunteered information concerning other suspects.

15. The tape indicates that the defendant never appeared to be hysterical nor did her normal voice ever change.

16. Chuck McClelland, a special agent of the State Bureau of Investigation, was tendered and accepted by the court as an expert in the area of forensic chemistry.

17. Agent McClelland testified that gunshot residue wipings must be taken within a four hour time frame, measured from the time of shooting, in order to have any evidentiary value when dealing with a live subject engaging in normal activities.

18. Agent McClelland testified, and this court finds, that the taking of the wipings outside the four hour window in this case would have had no evidentiary value.

19. Agent McClelland testified, and this court finds, that gunshot residue may be easily removed or destroyed through normal activities such as wringing hands, putting hands in pockets, or shaking hands. The court also finds that gunshot residue evidence may be easily destroyed by a person wishing to destroy evidence by such action as hand washing. Gunshot residue evidence is more evanescent than the types of evidence mentioned under 15A-271.

20. Court finds that rural Brunswick County requires law enforcement officers to travel great distances during the course of their duties.

21. The court finds that it would have been a practical impossibility for Det. Hunter to secure a non-testimonial identification order under the procedures set forth under 15A-271 et seq. due to the geographical limitations of Brunswick County and the evanescent nature of the gunshot residue evidence.

Believing that the above findings of fact adequately support the conclusion that probable cause and exigent circumstances existed at the time of the gunshot residue test, we hold that the warrantless search was valid.

Defendant further argues that her right to counsel was violated by the administering of the gunshot residue kit. Under the constitution, there is no right to have counsel present during a gunshot residue test. *Odom*, 303 N.C. at 167, 277 S.E.2d at 355. "[W]e hold that the administration of a gunshot residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches . . . ." *Id.* However, defendant argues that she enjoyed a statutory right to have counsel present. According to section 15A-279(d):

> Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by

> the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

N.C.G.S. § 15A-279(d). Section 15A-279(d) "addresses the implementation of orders requiring submission for nontestimonial identification procedures." *State v. Young*, 317 N.C. 396, 410, 346 S.E.2d 626, 634 (1986).

In the present case, we have already determined that no order was required in that probable cause and exigent circumstances existed which justified the search. In any event, according to the plain language of section 15A-279(d), the provision protects the defendant from having statements made during the nontestimonial identification procedure used against her at trial where counsel was not present during the procedure. *See, e.g., id.* In the instant case, defendant did not seek to suppress statements made during the procedure but instead sought to suppress the results of the test. We conclude that section 15A-279(d) does not afford defendant any relief on the counsel issue.

The trial court's error in concluding that "15A-271 *et. seq.* does not apply to gunshot residue evidence" is rendered harmless by its second conclusion of law: "If 15A-271 does apply to this type [sic] evidence, it is not the exclusive means by which this type of evidence may be collected by law enforcement officers." We hold that the trial court did not err in denying defendant's motion to suppress the results of the gunshot residue test.

II. Motion to Dismiss

[2] By her second assignment of error, defendant argues that the trial court erred in denying her motion to dismiss the case at the close of the evidence because the evidence was insufficient to support a conviction for first degree murder. Defendant contends that the State failed to present substantial evidence that the murder was premeditated and deliberated. We cannot agree.

When a defendant makes a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether the State presented substantial evidence of each essential element of the offense and that the defendant was the perpetrator of the offense. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The evidence must be considered in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

First degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. Premeditation and deliberation usually must be proved by circumstantial evidence. *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991). Circumstances to consider in determining whether a killing was premeditated and deliberate include: the conduct and statements of the defendant before and after the killing, ill-will or previous difficulty between the parties, and evidence that the killing was done in a brutal manner. *Id.* at 181-82, 400 S.E.2d at 416.

In the instant case, the State presented the following evidence that the killing was premeditated and deliberate. Defendant and the victim had a stormy relationship and had argued on the day of the killing. Betty Harper had loaned defendant a revolver over six months before the killing and defendant failed to return the weapon. The victim suffered gunshot wounds to the arm, leg, and head. Following the killing, defendant spoke in a normal tone of voice and never inquired about the condition of the victim. Although Detective Hunter informed defendant that he was going to take her to the hospital to see her husband, defendant stated to a neighbor, "I guess I am going to jail." On the day after the killing, defendant called Betty Harper at 6:30 a.m., asked why Harper had told law enforcement officers about the revolver, and informed Harper that she had "opened a fine goddamned can of worms there." Defendant requested that Robby Robbins meet with her and informed Robbins that she had told the sheriff's department that the two of them had been target shooting when in reality they had never been target shooting together. We conclude that the case was properly submitted to the jury in that there was substantial evidence that the killing was premeditated and deliberate.

Furthermore, while the offense of first degree murder was submitted to the jury, the jury returned a verdict of guilty of second degree murder. Second degree murder does not require premeditation and deliberation. Therefore, even if there was not substantial evidence of premeditation and deliberation, defendant could not have been prejudiced by the submission of the issue to the jury.

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

No error.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA v. JARED LEE PUGH

No. COA99-673

(Filed 16 May 2000)

1. **Witnesses— child—competency to testify**

The juvenile court abused its discretion by finding a four-year-old victim incompetent to testify and by thereafter admitting hearsay statements of the victim under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 803(24), because the voir dire was insufficient to allow the juvenile court to determine whether the victim was incapable of expressing herself concerning the matter or incapable of understanding the duty to tell the truth.

2. **Sexual Offenses— first-degree sexual offense—indecent liberties—motion to dismiss—sufficiency of evidence**

The juvenile court did not err by denying the juvenile's motions to dismiss first-degree sexual offense and indecent liberties charges because the testimony of the minor victim's treating physician, a protective services investigator, an investigator with child protective services, an officer, and a detective were sufficient to withstand this motion.

3. **Sexual Offenses— first-degree sexual offense—indecent liberties—burden of proof—beyond a reasonable doubt**

The juvenile court did not err in finding that the State had proven the charges of first-degree sexual offense and indecent

liberties beyond a reasonable doubt because: (1) the trial court acted as the trier of fact in this case, empowering it to assign weight to the evidence; and (2) the trial court's findings were supported by competent evidence, and were therefore binding on appeal even if there is evidence to the contrary.

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

Appeal by juvenile-respondent from an adjudication and disposition order entered 23 March 1999 by Judge Ernest J. Harviel in Alamance County District Court. Heard in the Court of Appeals 14 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Rankin Thompson, for the State.

Walker & Bullard, by Daniel S. Bullard, for respondent-appellant.

WALKER, Judge.

The juvenile-respondent (juvenile) was adjudicated delinquent for committing a first degree sexual offense, indecent liberties, and assault inflicting serious injury on a child under the age of sixteen. After a dispositional hearing, the juvenile court ordered the juvenile to be placed in a residential training school facility for a period not to exceed his eighteenth birthday and to complete the sex offender treatment program.

At the adjudicatory hearing, the State's evidence tended to establish the following: In May 1998, D.R., age 4, moved into the residence of Amy Cruz. Also living in the residence was Ms. Cruz's boyfriend and her two sons, one of which is the juvenile, age 13. Prior to May 1998, D.R. had lived in Durham County, where she was physically abused by the husband of her biological mother. On 8 December 1998, at approximately 8:00 p.m., Ms. Cruz left her home to pick up her son, T.J., from basketball practice and was gone from the residence for about 30 minutes. During this time, the juvenile was alone with D.R., and he admitted striking her with an electrical cord.

At the outset of the hearing, the State called D.R. to testify. After asking D.R. five questions, the juvenile judge found that "[b]ased on the observations of the demeanor of the victim child and her answers

and the lack thereof to the questions propounded to her, the Court finds as a Matter of Law that she is not competent to testify."

The State then called Dr. Diane Duffey, a pediatrician at Burlington Pediatrics as an expert in the field of medicine with a specialty in pediatrics and child abuse. Dr. Duffey testified that she examined D.R. on 14 December 1998 and found that D.R. had multiple bruises on her face, arms, and legs and that her eyes were "swollen shut and very bloodshot." When Dr. Duffey asked D.R. what happened to her eyes, D.R. answered, "I fell out a van." When asked about the bruises on her legs, D.R. stated that her brother, the juvenile, had hit her with an electrical cord when her mother, Ms. Cruz was not at home. D.R. denied that anything had happened to her vaginal area, but Dr. Duffey's vaginal examination of D.R. revealed "a hymen that had a notch, or a tear between 12:30 and 1 o'clock, with some thickening of the hymen between two and three o'clock" and "a bluish color to her labia and a small ulceration," indicating that she had been sexually abused or "had penetrating injury to her vaginal area." Dr. Duffey further testified that when she examined D.R. in October and November 1998, her vaginal examinations were normal.

On cross-examination, Dr. Duffey was of the opinion that, based on the discoloration of the bruises, the vaginal injuries and the bruises to D.R.'s eyes did not occur more than five days before her examination. On redirect, Dr. Duffey admitted that "dating the ages of bruises" is not exact but depends on other factors such as the "overall health of the individual, the nutritional status, etc."

Cathy Barrow, a protective services investigator with Alamance County Department of Social Services (D.S.S.), testified that she responded to a call from Alamance Regional Medical Center on 12 December 1998 regarding D.R.'s injuries. Ms. Barrow observed D.R.'s injuries and spoke with a doctor and D.R. regarding her injuries. Ms. Barrow testified that D.R. informed her that the juvenile had hit her with a cord. Later that day, Ms. Barrow interviewed the juvenile, who admitted hitting D.R. with a cable wire or cord approximately five times, but denied touching D.R. in her private parts.

Mary Lynn Needham, an investigator with child protective services in Alamance County, testified that she scheduled the medical examination with Dr. Duffey on 14 December 1998 and interviewed D.R. on 15 December 1998. Also present during the 15 December 1998 interview was Janet Fuquay, who is employed by the Youth Division of the Alamance County Sheriff's Department. Both Ms. Needham and

Ms. Fuquay testified that during the 15 December 1998 interview, D.R. stated that the juvenile hit her in the face and hurt her vagina with a white stick. D.R. was interviewed again on 29 January 1999, after which Ms. Needham and Ms. Fuquay took her to the bathroom. Ms. Needham and Ms. Fuquay testified that while D.R. was in the bathroom, she removed a toilet paper spindle from its holder and told them that the juvenile had used one of these to hurt her vagina. On cross examination, Ms. Needham admitted that D.R. had been the subject of another D.S.S. investigation in May 1998, based on an allegation of sexual abuse when she lived with her biological mother in Durham County. D.R. had stated that "a man named Charles had touched her coocoo" but the report was unsubstantiated.

Danny Walker, a detective with the Alamance County Sheriff's Department, testified that he began his investigation on 12 December 1998 and that he was present with Ms. Fuquay during the 29 January 1999 interview of D.R. Detective Walker further testified that during this interview, D.R. stated that the juvenile hurt her vaginal area with a stick while she was in the bathroom and that this occurred the same day that the juvenile hit her with the cord. Detective Walker interviewed the juvenile on 14 December 1998, and during this interview, the juvenile admitted hitting D.R. at least five times on her legs and buttocks with a cord while he was babysitting her on 8 December 1998, because she would not listen to him. The juvenile denied inserting any object into her vagina.

During the adjudication hearing, the juvenile testified that he had a good relationship with D.R., but admitted hitting her legs about five times with a cord on 8 December 1998. The juvenile denied sexually abusing D.R. or hitting her in the face. Alicia Cox, the youth director at Nall Memorial Baptist Church, testified that the juvenile was an active member of the youth group at church and had made a commitment to abstain from sex until marriage. She further testified that the juvenile appeared to have a good relationship with D.R. and that she trusted him with her own small child. Sara Elizabeth Mowery, the juvenile's grandmother, also testified that the juvenile was a "good boy" and had never done anything that would cause her to believe that he might have the propensity toward engaging in a sexual offense. Ms. Mowery further testified that the juvenile told her "the only thing that he did was hit her with that cord."

The juvenile assigns as error the juvenile court's: (1) finding that D.R. was incompetent to testify and thereafter admitting the hearsay

statements of D.R. under N.C. Gen. Stat. § 8C-1, Rule 803(24); (2) denying his motions to dismiss the first degree sexual offense and indecent liberties charges since there was insufficient evidence; and (3) finding that the State had proven the charges of first degree sexual offense and indecent liberties beyond a reasonable doubt.

[1] The juvenile first contends that the juvenile court erred in finding D.R. incompetent to testify and thereafter admitting hearsay statements of D.R. under the residual hearsay exception, N.C. Gen. Stat. § 8C-1, Rule 803(24). The juvenile argues that the trial court failed to consider the six inquires as required by *State v. Smith*, 315 N.C. 76, 92, 337 S.E.2d 833, 844 (1985). In *Smith*, our Supreme Court held that prior to admitting or denying proffered hearsay evidence pursuant to Rule 803(24), the trial court must determine that: (1) proper written notice was given to the adverse party; (2) the hearsay statement is not specifically covered by any other hearsay exception; (3) the proffered statement possesses circumstantial guarantees of trustworthiness; (4) the proffered evidence is offered as evidence of a material fact; (5) the proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (6) the proffered evidence will best serve the general purposes of the rules of evidence and the interests of justice. *Id.* at 92-97, 337 S.E.2d at 844-847.

The juvenile contends that only the second and fourth elements set forth above were satisfied and that the remaining four elements were not met. Specifically, the juvenile argues that the fifth element from *Smith* was not satisfied since the hearsay statements of D.R. are not more probative on the issue for which they were offered than other evidence the State could procure since D.R. was competent to testify. According to the juvenile, the juvenile judge improperly found that D.R. was incompetent to testify where she had correctly answered four out of the five questions he asked. Furthermore, the juvenile contends that D.R.'s failure to answer the fifth question does not indicate she is incompetent to testify since it is natural for a four-year-old to be confused when asked how she is related to her foster mother.

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. *State v. 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). "There is no age below which one is incompetent, as a matter of law, to testify." *State v. Turner*, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966); *See also State v. Rael*, 321 N.C. 528, 364 S.E.2d 125 (1988) (holding that the trial court properly found a four-year-old victim competent to testify). 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.*

Here, after D.R. was called by the State to testify, the following exchange occurred:

COURT: . . . Mr. Morris, you've alleged that [D.R.] is how old, four?

MR. MORRIS: (prosecutor): Four years old, Your Honor.

COURT: And she appears to be four. Are you calling her as a witness?

MR. MORRIS: Yes, sir, Your Honor.

COURT: Do you believe that she is contending that she is competent to testify?

MR. MORRIS: I'm going to try to establish that she's competent to testify; but in the event that the Court finds that she's not, I have filed and served a notice of my intent to use hearsay evidence in this case on Mr. Bullard.

COURT: Well, at one time there was a common law presumption that anyone under the age of six was not competent to testify. Does that still exist?

MR. MORRIS: No, sir. I believe the latest or one of the later cases, . . ., indicates that the law in this State is there is no age below which a child could not be competent to testify. It's an individual determination based on the child and the observation the Court makes about the child's ability to understand the nature of the oath and be able to communicate about the incident.

COURT: If you'll have her come up and have a seat here. Her mother can come with her, and I'll ask her the questions.

At that time, D.R. came forward with her foster mother and sat at the witness stand on her foster mother's lap. The juvenile judge then asked and D.R. answered the following questions:

> COURT: [D.R.], how old are you sweetheart?
>
> D.R.: Four.
>
> COURT: Four. Do you go to school? And where do you go to school?
>
> D.R.: North Graham.
>
> COURT: And North Graham. Is that what you said? Are you in kindergarten? Do you know what kindergarten is?
>
> D.R.: Yes.
>
> COURT: And who is that you're with? Who's this lady?
>
> D.R.: Margaret.
>
> COURT: Are y'all related?
>
> D.R.: Yes.
>
> COURT: Do you know? How are you related to her? Thank you. You may step down. She may return to the room from which she [came]. Very well. In this case, based on my observation of the demeanor of the child, of her answers and lack thereof to the questions that I propounded to her, I'm finding as a matter of law that she is not competent to testify.

The juvenile's attorney then asked that the record reflect that D.R. is "probably unable to answer because she is of no relation. That was her foster mother. So I would, there would naturally, we contend, be some confusion from a four year old about [that]." The juvenile judge asked, "Do you believe four year olds are competent? Do you think she's, are you saying you think she's competent to testify?" The juvenile's attorney answered that he could not tell.

Based on the exchange between the juvenile court and D.R., we conclude that the juvenile court disqualified D.R. without making an appropriate inquiry into her competency to testify. This *voir dire* was insufficient to allow the juvenile court to determine whether D.R. was incapable of expressing herself concerning the matter or incapable of understanding the duty to tell the truth. Therefore, we remand this

case to the juvenile court for further findings after a proper inquiry of D.R.'s competency to testify.

[2] The juvenile next contends that the juvenile court erred in denying his motions to dismiss the first degree sexual offense and indecent liberties charges at the end of the State's evidence and again at the close of all of the evidence since there was insufficient evidence. In order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged. *In re Bass*, 77 N.C. App. 110, 334 S.E.2d 779 (1985). On review, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence. *Id.*

Here, the juvenile court found that D.R. was incompetent to testify and admitted her hearsay statements pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(24). The State presented the testimony of D.R.'s treating physician, a protective services investigator with the Alamance County D.S.S., an investigator with child protective services in Alamance County, an officer with the Youth Division of the Alamance County Sheriff's Department, and a detective with the Alamance County Sheriff's Department. Viewed in the light most favorable to the State, the State's evidence was sufficient to withstand the juvenile's motion to dismiss.

[3] The juvenile also contends that the juvenile court erred in finding that the State had proven the charges of first degree sexual offense and indecent liberties beyond a reasonable doubt. N.C. Gen. Stat. § 7A-635 (1995) (repealed 1 July 1999) provides that the "allegations of a petition alleging the juvenile is delinquent shall be proved by a reasonable doubt." "When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397-398 (1996). "In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *Id.* "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." *Id.*

In the case at bar, the juvenile court stated that "[a]fter hearing all the evidence presented, the Court finds that the State has met its burden of proof beyond a reasonable doubt. . . ." A careful review of the record reveals that the trial court's finding was supported by

competent evidence. *See In re Phillips*, 128 N.C. App. 732, 497 S.E.2d 292, *disc. review denied*, 348 N.C. 283, 501 S.E.2d 919 (1998).

In summary, we affirm the juvenile court's finding that the juvenile committed an assault inflicting serious injury. We remand to the juvenile court, for a determination consistent with this opinion, the issue of D.R.'s competency to testify. If, after conducting an appropriate *voir dire* of D.R., the juvenile court determines that D.R. is incompetent to testify, the adjudicatory and dispositional order filed 23 March 1999 is affirmed. If, however, after proper inquiry, the juvenile court determines that D.R. is competent to testify, the juvenile shall be entitled to a new adjudicatory hearing on the charges of first degree sexual offense and indecent liberties.

Affirmed in part and remanded in part.

Judge GREENE concurs.

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

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

I agree with the majority that the trial court erred in determining that the child was not competent to testify based on the inadequate inquiry. However, I disagree that the error can be cured by conducting a new competency hearing and, in the event that the trial court determines anew that the child is incompetent to testify, retroactively applying the new determination to the former hearing. I believe that the juvenile is entitled to a new trial on the charges of first degree sexual offense and indecent liberties.

Specifically, I disagree with that portion of the majority opinion which concludes:

> We remand to the juvenile court, for a determination consistent with this opinion, the issue of D.R.'s competency to testify. If, after conducting an appropriate *voir dire* of D.R., the juvenile court determines that D.R. is incompetent to testify, the adjudicatory and dispositional order filed 23 March 1999 is affirmed. If, however, after proper inquiry, the juvenile court determines that D.R. is competent to testify, the juvenile shall be entitled to a new adjudicatory hearing on the charges of first degree sexual offense and indecent liberties.

Whether a witness is qualified to testify is a preliminary question. N.C. Gen. Stat. § 8C-1, Rule 104(a) (1999). As such, I do not believe it would be proper, as the majority suggests, to conduct such an inquiry following the trial. To affirm the 23 March 1999 order if the child is found, over one year later, to be incompetent to testify is to place the proverbial cart before the horse. This is especially true in a case involving a young child who experiences significant developmental changes within a short time span.

After the trial court determined that the juvenile was not competent to testify at trial, the State offered the testimony of witnesses regarding out of court statements made by the child. The juvenile court may not admit proffered hearsay evidence without making a preliminary determination that such evidence is "more probative on the issue than any other evidence which the proponent can procure through reasonable efforts[.]" *Smith*, 315 N.C. at 95, 337 S.E.2d at 846. I agree with the majority's conclusion that "the juvenile court disqualified D.R. without making an appropriate inquiry into her competency to testify." Having failed to satisfy the threshold test set forth in *Smith*, the trial court erred in admitting the hearsay statements of D.R. under the residual hearsay exception, section 8C-1, Rule 803(24).

The hearsay statements which the trial court improperly admitted were highly prejudicial in that they identified the juvenile as the perpetrator and included descriptions of the injuries he allegedly inflicted on D.R. *See State v. Fearing*, 315 N.C. 167, 172, 337 S.E.2d 551, 554 (1985).

In *Fearing*, our Supreme Court held that the trial court improperly concluded that a child victim was incompetent to testify where the trial court judge had not personally observed the child's demeanor, but had instead adopted counsel's stipulation that the child was incompetent to testify. Because the trial court relied on the improperly based conclusion that the child was not competent to testify in admitting prejudicial hearsay testimony, the *Fearing* court arrested the convictions for rape, incest, and indecent liberties with a minor and remanded the matter to the Superior Court for a new trial.

In the case at bar, in light of the fact that highly prejudicial testimony was erroneously admitted on the basis of the improper conclusion regarding the competency of the child to testify, I would hold that the interests of justice require a new trial.

RED HILL HOSIERY MILL, INC., PLAINTIFF v. MAGNETEK, INC., AND LITHONIA LIGHTING, INC., A DIVISION OF NATIONAL SERVICES INDUSTRIES, INC., DEFENDANTS

No. COA99-597

(Filed 16 May 2000)

Products Liability— contract and negligence basis—summary judgment

Summary judgment for defendants in a products liability action arising from a fire that damaged a hosiery mill was affirmed in part and reversed in part where there was conflicting evidence as to whether the fire began in the ballast within a flourescent light fixture manufactured by defendants. A products liability recovery is premised on either negligence or contract principles of warranty and, on either theory, a product defect may be inferred from evidence of the product's malfunction if there is evidence that the product had been put to its ordinary use (but it is not permissible to infer manufacturer negligence from a product defect inferred from a product malfunction). There is a genuine issue of material fact in this case of whether the ballast was defective at the time it left the manufacturers' control and summary judgment on implied warranty of merchantibility was improper, but summary judgment on negligence was proper because there was no evidence of negligent manufacture, design, assembly, or inspection by either defendant.

Appeal by plaintiff from order for summary judgment filed 12 January 1999 and from order filed 29 January 1999 by Judge Loto Greenlee Caviness in Catawba County Superior Court. Heard in the Court of Appeals 22 February 2000.

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

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr.; and Yopp & Sweeney, PLC, by Kathryn A. Stephenson, for defendant-appellee MagneTek, Inc.

Sigmon, Clark, Mackie, Hutton & Hanvey, PA, by J. Scott Hanvey; and Bovis, Kyle & Burch, LLC, by John H. Peavy, Jr., for defendant-appellee Lithonia Lighting, Inc.

GREENE, Judge.

Red Hill Hosiery Mill, Inc. (Plaintiff) appeals from an order granting summary judgment for MagneTek, Inc. (MagneTek) and Lithonia Lighting, Inc., a division of National Services Industries, Inc. (Lithonia) (collectively, Defendants) entered 12 January 1999, and an order denying Plaintiff's motions for reconsideration, to amend the judgment, and for relief from the judgment entered 29 January 1999.

Plaintiff is the owner of a building located in Hickory, North Carolina, which was damaged by fire in March of 1996. Plaintiff alleges in its complaint the fire "began as a result of the malfunctioning of the ballast within a fluorescent lighting fixture" located in the building. It is further alleged the ballast and fluorescent light fixture, purchased in 1991, were "designed, manufactured and/or distributed by [D]efendants" who are, pursuant to "N.C.G.S. § 99B-1," responsible for the damage. Plaintiff asserts claims of negligence and breach of implied warranty of merchantability against both Defendants.[1] As for the negligence claims, it is alleged Defendants negligently produced, designed, manufactured, assembled, and inspected the ballast and fluorescent lighting fixture. As for the breach of implied warranty claim, it is alleged Defendants warranted the ballast and fluorescent lighting fixture to be of "merchantable quality," "reasonably fit for the purposes for which [they were] intended," and that they were "not reasonably fit for the purposes for which [they were] intended, but [were] instead defective."

The record reveals that during the early morning hours of 13 March 1996, a fire destroyed Plaintiff's greige manufacturing mill (the mill) located in Hickory, North Carolina. Hickory Fire Marshall Tommy Richard Bradshaw (Bradshaw), two agents of the North Carolina State Bureau of Investigation, and the Fire Inspector of the City of Hickory (collectively, the investigators) investigated the fire to determine its cause and origin. By interpreting the fire patterns, the investigators determined the area of origin of the fire was one of the flourescent light fixtures in the mill. This particular fluorescent light fixture sustained more damage than the adjacent fluorescent light fixtures in the mill.

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1. Originally Plaintiff also asserted claims against other defendants; Bryant Electric Supply, Inc., NSI Enterprises, Inc., General Electric Capital Corporation, and Philips Electronics North America Corporation. Plaintiff filed voluntary dismissals of the claims against these other defendants.

The cover of the fluorescent light fixture was off,[2] there was oxidation on the fixture, indicative of exposure to high temperatures, and it displayed a discoloration on top of the fixture that indicated a specific area of heating, which was consistent with the location of the ballast installed on the underside of the fixture. Bradshaw testified if these heat patterns were caused by an external heat source as opposed to an internal heat source within the fixture, he would expect to see similar discoloration patterns on the adjacent fluorescent light fixtures. The investigators examined the adjacent fluorescent light fixtures and did not observe any similar discoloration patterns. The investigators were unable to find any faults within the fixture or its power cord, excluding the ballast.

The investigators concluded the fire was caused by the ignition of lint following the overheating of the ballast[3] within the flourescent light fixture. The investigators excluded all other possible sources of the fire, including the mill's electrical and mechanical systems.

After the investigators made their determination, Bradshaw released the fire scene to Plaintiff in order to begin its clean-up efforts. Bradshaw was satisfied he had established a cause and origin of the fire and the relevant evidence to that effect had been preserved.

Plaintiff's expert in electrical engineering, physics, and fire investigation, James Samuel McKnight, Ph.D. (McKnight), reviewed the fire scene approximately one week after the fire. By that time, extensive clean-up efforts were underway, and McKnight was able to view only the physical layout of the mill and some fire damage.

Bradshaw had removed the suspect fluorescent light fixture from the mill and later provided it to McKnight. Bradshaw did not, however, preserve the adjacent fluorescent light fixtures he had used to compare to the suspect light fixture, as they were discarded after their removal from the mill. McKnight's review and conclusion as to the cause of the fire was that the ballast malfunctioned and overheated. McKnight based his conclusions on the facts that the suspect fluorescent light fixture displayed a specific area of heat intensity and over one-half of the potting compound within the ballast had

2. The investigators agreed the cover of the fluorescent light fixture was probably knocked off during the fire fighting efforts.

3. A ballast is a black metal box containing electrical components, a thermal protector, and potting compound that is an asphalt-like substance that holds the components in place and dissipates heat generated by normal operation of a light fixture.

seeped out. McKnight believes the ballast had improperly overheated to such an extent that the potting compound located within the ballast liquified and leaked out of the ballast. McKnight considered other possible sources for the fire but concluded no other cause was reasonable. Although McKnight opined the ballast overheated, he could not identify any specific defect within the ballast.

MagneTek's expert witness David Walter Powell (Powell) performed a disassembly of the suspect ballast to determine if any failures occurred to the ballast prior to the fire. According to Powell, the tear-down demonstrated there was no damage to any interior electrical components of the ballast. Further, the potting compound showed no extensive heat damage. The thermal protector inside the suspect ballast was tested and found to function at a temperature that was not a hazardous temperature for the combustion of lint. Powell testified "[t]he purpose of the thermal protector is for any reason the ballast should reach a preset temperature, it is to disconnect power to the ballast until it cools down."

McKnight observed the tear-down and testified he did not find any evidence of arcing on the exterior or interior of the suspect ballast, and he had no opinion as to whether the thermal protector was operational at the time of the fire. McKnight, however, did opine "[t]he failure may have happened in such a way that the temperature increased in part of the ballast rapidly enough that it ignited the lint on top of the fixture before the thermal protector operated."

Powell and the fire investigator for MagneTek, Donald Robert Dowling, opined the pattern on top of the suspect fluorescent light fixture's housing was not indicative of internal overheating, rather it was a "fire-pattern" coming from external heat. Powell did not know what caused the fire at the mill, but he stated the suspect ballast was not the culprit.

The suspect ballast was independently manufactured by MagneTek and purchased by Lithonia for incorporation into flourescent light fixtures Lithonia assembled. The suspect ballast was tested by MagneTek and represented to Lithonia as meeting the Underwriters Laboratories' standards.

Powell testified the suspect ballast "is . . . designed to operate . . . in just about any conventional [flourescent light] fixture." Powell also testified the suspect flourescent light fixture "is a straight commercial strip" and the ballast was appropriate for incorporation into the fluorescent light fixture.

Russell Vern Rouse (Rouse), a representative for Lithonia, testified the suspect fluorescent light fixture was appropriate for operation in a facility such as the mill, and it was a reasonable and expected use of both the ballast and the fluorescent light fixture to operate in a hosiery mill. Rouse also testified the suspect fluorescent light fixture can be suspended from above by chains or directly mounted to a surface.

Tony Moretz Whitener (Whitener), a representative for Plaintiff, testified the mill's fluorescent light fixtures were installed by an electrical contractor, were suspended from the ceiling by chains approximately eight feet off of the floor, and were powered by a ground power cord plug, so that the fixtures could be easily replaced. Whitener testified if a fluorescent light fixture stopped working they would replace the flourescent light bulbs, and if the fixture was still inoperable, Plaintiff would not attempt to replace the ballast but instead would replace the entire fluorescent light fixture. Whitener testified that to his knowledge none of the fluorescent light fixtures in the area of the mill where the fire started had been replaced, because they were still relatively new. Whitener also stated Plaintiff's employees cleaned lint and dust off of the top of the mill's fluorescent light fixtures every third day, and all of the fluorescent light fixtures in the mill were operational at the time of the fire.

The issues are whether there is: (I) a genuine issue of material fact that the fluorescent light fixture (ballast) was defective; and (II) a genuine issue of material fact that Defendants were negligent in the manufacture, design, assembly, and/or inspection of the fluorescent light fixture (ballast).

Products Liability

Plaintiff's claims against Defendants are within the scope of Chapter 99B of our General Statutes and thus constitute a products liability action. N.C.G.S. § 99B-1(3) (1999) (action for property damage caused by manufacturing or assembling of a product); *see Crews v. W.A. Brown & Son*, 106 N.C. App. 324, 328, 416 S.E.2d 924, 928 (1992). A products liability claim "normally contemplates injury or damage caused by a defective product,"[4] 1 M. Stuart Madden,

4. For example, "if the damage is exclusively to the product itself, or if it does not perform in the manner represented or reasonably expected, or if it is of inferior quality, the claim for the resulting loss does not fall within the usual meaning of 'products liability.' " 1 M. Stuart Madden, *Products Liability* § 1.1, at 5 (2d ed. 1988) [hereinafter 1 *Products Liability*]; *see* 3 Ronald A. Anderson, *Anderson on The Uniform*

Products Liability § 1.1, at 5 (2d ed. 1988) [hereinafter 1 *Products Liability*], and recovery is premised on either negligence or on the contract principles of warranty, *id.* at 6; *Crews*, 106 N.C. App. at 329, 416 S.E.2d at 928.

A products liability claim grounded in *negligence* requires the plaintiff prove (1) the product was defective at the time it left the control of the defendant, (2) the defect was the result of defendant's negligence, and (3) the defect proximately caused plaintiff damage.[5] 1 *Products Liability* § 2.3, at 26; *Jolley v. General Motors Corp.*, 55 N.C. App. 383, 385-86, 285 S.E.2d 301, 303 (1982). Under a claim based on negligence, a manufacturer has the duty to use reasonable care throughout the manufacturing process, including making sure the product is free of any potentially dangerous defect in manufacturing or design. This "duty of care . . . may involve inspection or testing of [the] product, which includes [the] duty to inspect products manufactured by another which are component parts of the product produced by the manufacturer." 1 *Products Liability* § 3.11, at 69; *see* N.C.G.S. § 99B-1(2) (manufacturer includes persons who assemble component parts of product). An inference of a manufacturer's negligence arises upon proof of an actual defect in the product. *Pouncey v. Ford Motor Company*, 464 F.2d 957, 961 (5th Cir. 1972) (jury permitted to infer negligence from expert's testimony of product defect); 1 *Products Liability* § 2.3, at 27 (inference of negligence permitted upon "direct evidence of an actual defect in the product").

A products liability claim grounded in *warranty* requires the plaintiff prove (1) the defendant warranted the product (express or implied) to plaintiff, (2) there was a breach of that warranty in that the product was defective at the time it left the control of the defendant, and (3) the defect proximately caused plaintiff damage. 1 *Products Liability* § 2.7, at 32-33; *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 301, 354 S.E.2d 495, 497 (1987). Thus, a products liability claim based on breach of warranty is not dependent upon a showing of negligence.

Commercial Code § 2-314:167, at 363-65 (3d ed. 1995) (breach of warranty does not always require showing of a defect, as products failure to conform to contract standard is sufficient).

5. "To prove a product defective is one thing; to prove that the defect flowed from a failure to exercise reasonable care is quite another. Proof of defect does not, without more, prove negligence, as even the most careful manufacturer may produce a defective product." 1 *Products Liability* § 4.7, at 127.

Product Defect

There is some dispute among the courts as to whether the plaintiff has the burden of showing the specific nature of the product defect in a products liability action. *See* 1 *Products Liability* § 2.3, at 26. Some courts require plaintiff to prove the product defect with particularity. *E.g.*, *MacDougall v. Ford Motor Co.*, 257 A.2d 676, 678 (Pa. Super. 1969), *overruled on other grounds*, *REM Coal Co., Inc. v. Clark Equipment Co.*, 563 A.2d 128 (Pa. Super. 1989). Other courts, and apparently the majority view, hold a product defect is properly inferred from evidence of the product's malfunction in ordinary use, whether the products liability claim is grounded in tort or warranty. *E.g.*, *Mitchell v. Maguire Co., Inc.*, 542 N.Y.S.2d 603, 604 (A.D. 1 Dept. 1989); *see* 1 *Products Liability* § 5.10, at 156-57; 1 *Products Liability* § 2.3, at 38 (Supp. 1999). Although our North Carolina courts have not specifically addressed this issue, our courts have permitted an inference of a product defect upon a showing the product malfunctioned after the product had been put to ordinary use.[6] *See Bernick v. Jurden*, 306 N.C. 435, 450, 293 S.E.2d 405, 415 (1982) (claim of injuries caused by broken mouth guard survives summary judgment of breach of implied warranty claim, even though no evidence of specific defect of mouth guard); *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E.2d 190, 194 (1980) (evidence fire suppression system malfunctioned supports "fair inference" of product defect); *Rose v. Motor Sales*, 288 N.C. 53, 59, 215 S.E.2d 573, 577 (1975) (fire originating in motor compartment of vehicle gives rise to inference of product defect); *Maybank v. Kresge Co.*, 46 N.C. App. 687, 692, 266 S.E.2d 409, 412 (1980) (flashcube "which does not work properly" is not merchantable and supports claim for breach of implied warranty of merchantability), *aff'd on warranty issue and modified on notice requirement*, 302 N.C. 129, 273 S.E.2d 681 (1981). We hold in a products liability action, based on tort or warranty, a product defect may be inferred from evidence of the prod-

6. Defendants point to two Court of Appeals cases and argue they require evidence of the specific nature of the product defect. We disagree. In *Jolley v. General Motors Corp.*, 55 N.C. App. 383, 285 S.E.2d 301 (1982), plaintiff sought damages for injuries sustained in a vehicle accident he claims was caused by a blown tire purchased from defendant. *Id.* at 384, 285 S.E.2d at 302-03. This Court held there was no showing the tire was defective and affirmed a directed verdict for defendant. *Id.* at 386, 285 S.E.2d at 304. In *Cockerham v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 262 S.E.2d 651, *disc. review denied*, 300 N.C. 195, 269 S.E.2d 622 (1980), plaintiff claimed damages for injuries sustained when a rubber strap broke and struck him in the eye as he was attempting to use it to secure a tarpaulin over a load of oats in a truck. *Id.* at 619-20, 262 S.E.2d at 655. This Court affirmed summary judgment for defendants on the ground there was "no evidence to show that a defect existed." *Id.* at 619, 262 S.E.2d at

uct's malfunction if there is evidence the product had been put to its ordinary use.[7]

I

Implied Warranty of Merchantability

Plaintiff argues there exists genuine issues of material fact regarding whether the flourescent light fixture and ballast at issue were fit for the ordinary purpose for which such goods are used, thus, supporting its claim of products liability based on breach of implied warranty of merchantability. N.C.G.S. § 25-2-314(1), (2)(c) (1999) (warranty that goods are merchantable is implied if "seller is a merchant" and goods are merchantable if they are "fit for the ordinary purposes for which such goods are used"); *Gillispie v. Bottling Co.*, 17 N.C. App. 545, 549, 195 S.E.2d 45, 48 (implied warranty of merchantability applies to manufacturer of goods), *cert. denied*, 283 N.C. 393, 196 S.E.2d 275 (1973). We agree.

In this appeal, neither MagneTek nor Lithonia dispute that the fluorescent light fixture, of which the ballast was a component part, is subject to an implied warranty of merchantability. Defendants do argue, however, there was no breach of this warranty because there is no evidence the fluorescent light fixture or the ballast were defective at the time they left their respective control. We disagree.

There is evidence from McKnight and the investigators that the fire that destroyed the mill originated at the suspect fluorescent light fixture and was caused by the ballast, even though they could not point to a specific defect within the ballast. Although there was also evidence the ballast was not defective and did not cause the fire, the evidence from Powell, Rouse, Whitener, McKnight, and the investigators, considered in the light most favorable to Plaintiff, is such that reasonable minds might accept it as adequate to support the conclu-

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655. We do not read *Jolley* and *Cockerham* as holding that proof of a malfunctioning product cannot support an inference of a defect in that product. In *Jolley*, there was no evidence the tire malfunctioned, as its explosion could have been caused by something other than the tire. Likewise, in *Cockerham*, there was no evidence the rubber strap malfunctioned, as it could have been weakened by a cut. In any event, to the extent these cases can be read as holding otherwise, they are inconsistent with the opinions of our Supreme Court and must be rejected. *See Bernick v. Jurden*, 306 N.C. 435, 450, 293 S.E.2d 405, 415 (1982); *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E.2d 190, 194 (1980); *Rose v. Motor Sales*, 288 N.C. 53, 59, 215 S.E.2d 573, 577 (1975).

7. It is not, however, permissible to infer manufacturer negligence from a product defect which has been inferred from a product malfunction.

sion the ballast malfunctioned in its ordinary use, thus, giving rise to an inference that the ballast was defective. Consequently, there is a genuine issue of material fact of whether the ballast was defective at the time it left MagneTek's and Lithonia's control, and summary judgment on this basis was, therefore, improper. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (summary judgment inappropriate if evidence raises genuine issue(s) of material fact and a "genuine issue is one which can be maintained by substantial evidence"); *Brice v. Moore*, 30 N.C. App. 365, 367, 226 S.E.2d 882, 883 (1976) (evidence presented at summary judgment hearing must be viewed in the light most favorable to nonmovant); *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977) (substantial evidence is that evidence which would support a conclusion, among reasonable minds, that a certain fact has been proven); *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) ("[a]ll inferences of fact must be drawn . . . in favor of nonmovant").

Defendants argue the evidence from McKnight and the investigators, based in large part on a comparison of the suspected fluorescent light fixture with the "other flourescent light fixtures" in the mill, cannot be relied upon to establish a genuine issue of fact. This is so, Defendants contend, because they were allowed access to the suspected fluorescent light fixture only and denied access to the mill's "other flourescent light fixtures" used in the comparison. Our courts have held a party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case. *See McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 183-84, 527 S.E.2d 712, 715-16 (2000). This principle is known as "spoliation of evidence."

In this case, the evidence shows the "other flourescent light fixtures" were destroyed by Plaintiff in its effort to repair the mill, and they were not made available to Defendants. At the summary judgment stage of these proceedings and based on the evidence in this record, the evidence does not give rise to an inference the "other flourescent light fixtures," if available for inspection by Defendants, would harm Plaintiff's case. The issue of Plaintiff's spoliation of the evidence is, nonetheless, proper for development at trial after remand of this case.

II

Negligence

Defendants again argue there is no evidence to show a defect existed in the fluorescent light fixture or ballast at the time of their manufacture. We disagree for the reasons given in section I of this opinion. In the alternative, they argue there is no evidence the items were negligently manufactured, designed, assembled, or inspected. We agree with the alternative argument.

Although there is a genuine issue of fact with respect to the malfunction of the suspect fluorescent light fixture (ballast), which malfunction can support an inference the fluorescent light fixture (ballast) was defective, there is no evidence of negligent manufacture, design, assembly, or inspection by either of the Defendants. Because there was no specific evidence of a defect in the suspect fluorescent light fixture (ballast), an inference of negligence does not arise, and summary judgment for both Defendants on this issue was, therefore, proper.

Affirmed in part, reversed in part, and remanded.

Judges WALKER and TIMMONS-GOODSON concur.

JAMES R. KIRKPATRICK, TRUSTEE FOR JAMES R. KIRKPATRICK FAMILY REVOCABLE TRUST, PETITIONER v. VILLAGE COUNCIL FOR THE VILLAGE OF PINEHURST, RESPONDENT

No. COA99-841

(Filed 16 May 2000)

1. Zoning— nonconforming use—expansion—geographical area

The trial court did not err by affirming respondent's decision that petitioner was not permitted to construct an RV park on an existing nonconforming campground. The relevant ordinance restricts the enlargement and increase of a nonconforming use and the extension of any nonconforming use to a greater area of land; the phrase "enlargement and increase" applies to any enlargement or increase within the geographical area originally covered by the permitted nonconforming use.

2. Zoning— nonconforming use—meaning of enlarge

Although petitioner contended that "renovations" of a campground did not constitute enlargement of a nonconforming use, the evidence supported the finding that the existing campground contained 50 identifiable sites and petitioner wished to construct an RV park capable of accommodating 150 vehicles. The plain meaning of "enlarge" is to become bigger, and respondent's finding supported the conclusion that the establishment of more than 50 total sites constitutes an enlargement of the pre-existing use.

3. Zoning— nonconforming use—expansion—reliance on building permits—good faith

The trial court correctly affirmed respondent's decision that the conversion of a campground to an RV park was an expansion of a nonconforming use even though petitioner argued that it had relied upon building permits. Respondent's finding that petitioner did not proceed in good faith because it knowingly took actions and made expenditures after it knew the project might not be permitted was supported by the evidence.

Appeal by petitioner from order filed 29 December 1998 by Judge Catherine C. Eagles in Moore County Superior Court. Heard in the Court of Appeals 18 April 2000.

Van Camp, Hayes & Meacham, P.A., by James R. Van Camp and Michael J. Newman, for petitioner-appellant.

Poyner & Spruill, by Robin Tatum Morris, for respondent-appellee.

GREENE, Judge.

James R. Kirkpatrick Family Revocable Trust, by and through its Trustee James R. Kirkpatrick (Petitioner), appeals an order filed 29 December 1998 affirming a 16 September 1996 decision of the Village Council for the Village of Pinehurst (Respondent).

The evidence shows that in September of 1994, Petitioner purchased approximately 55 acres of property located in the Village of Pinehurst (the Village). The property, which contained a campground, had been zoned RDD (Residential Development District) in 1981, and the campground existed as a nonconforming use of the property. The 1981 ordinance stated with regard to the nonconforming use of land:

11.1 General

> . . . It is the intent of this Ordinance to permit . . . non-conforming uses to continue until they are removed, discontinued, or destroyed but not to encourage such continued use, and to prohibit any further non-conformance or expansion thereof.

. . . .

11.3 Non-Conforming Uses of Land

> a. The non-conforming use of land shall not be enlarged or increased, nor shall any non-conforming use be extended to occupy a greater area of land than that occupied by such use at the time of the passage of this Ordinance.

Village of Pinehurst, N.C., Zoning Ordinance §§ 11.1, 11.3(a) (1981).

When Petitioner purchased the property, the campground was located on an approximately thirteen-acre tract[1] and included campsites and recreational facilities. In 1995, Petitioner began preparations to construct on the property a campground capable of accommodating 150 recreation vehicles (RVs). Petitioner's evidence shows that in 1994, prior to construction on this proposed RV campground, a survey of the property identified approximately 142 individual campsites on the property. Additionally, in April of 1995, a contractor retained to perform work on the campsite's roads identified approximately 163 individual campsites. In contrast, Respondent heard evidence that appraiser Michael Sparks (Sparks) appraised the property in 1994 and determined it contained "[f]ifty useable sites." Additionally, tax records from 1985 showed that at that time the property contained 50 sites that were in use.

On 19 September 1994, Respondent adopted an ordinance creating a commercial building moratorium in the Village because of Respondent's plan to "revise comprehensively the Village's current land-use plan and the ordinances related thereto." In a 10 February 1995 letter to the Village, Petitioner requested the Village consider rezoning the property on which the campground was located to include the operation of a campground as a conforming use. The letter stated Petitioner's "commitment to an upgrade and renovation of

1. Although Petitioner states in its brief to this Court that at the time of its purchase approximately 20 acres were utilized as a campground, Petitioner concedes "approximately 6.5 acres of this area included the lake and wetlands, resulting in the amenities and facilities being located on approximately a 13 acre tract."

this facility," and its intent "to provide a premier recreation vehicle type resort."

On 22 June 1995, Petitioner obtained from the Village a permit for 116 water and sewer taps for individual campsites on the campground. These water and sewer taps were installed, and on 23 June 1995, Sam Fowler (Fowler), the Chief Building Inspector and Interim Village Planner, inspected the installations. Fowler also inspected the campsite's sewer system seven additional times between 11 July 1995 and 13 September 1995.

On 24 August 1995, Respondent informed Petitioner by letter that no rezoning of property had occurred during the moratorium period, and the use of Petitioner's property as a campground continued to be a nonconforming use. The letter stated that "[f]urther expansion of this use . . . would be a direct violation of the current zoning ordinance."

In September of 1995, the Village Manager visited the property where construction on the proposed campground was being performed. Then, on 16 October 1995, Petitioner obtained from the Village an electrical installation permit which allowed an 800 amp., 1000 amp., and 1200 amp. electrical service at the campground. On 16 and 17 October 1995, the campground's electrical service was inspected by the Village.

On 23 October 1995, Respondent adopted a new developing code (the 1995 ordinance),[2] and the property containing the campground was rezoned as R-20.[3] The 1995 ordinance permitted a property owner to obtain a Major Special Use Permit to use the property for "Recreational Vehicle Parks" containing up to 120 sites for RV use. In a 6 November 1995 letter, Respondent informed Petitioner it was

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2. The 1995 ordinance contains the following pertinent language regarding nonconforming use of land:

> (a) . . . . A nonconforming use of land shall not be enlarged or extended in any way except as provided [in this ordinance]. . . .
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> (b) . . . . The continuation of a nonconforming use of land and the maintenance or minor repair of a structure containing a nonconforming use are permitted, provided that the continuation, maintenance, or minor repair does not extend or expand the nonconforming use. . . .

The Pinehurst Development Code § 16.1.2(a), (b) (1995).

3. R-20 zoning permits the use of property for single family dwellings, open space land, resource conservation facilities, roadside stands, and accessory uses. The Pinehurst Development Code § 8.5.2 (1995).

required under the 1995 ordinance to submit to the Village a Major Special Use Application for consideration by the Village's Planning and Zoning Board. Petitioner submitted the application on 15 November 1995; however, the application requested a permit for a 150-site RV campground. The application also requested permits to continue construction of the proposed RV campground on the grounds the proposed RV campground was a continuation of a previously existing nonconforming use, and Petitioner had obtained a common law vested right to construct the proposed RV campground based on its receipt of permits from the Village and the Village's inspections of the property in 1995.

On 15 November 1995, Petitioner was issued building permits for concrete work at the then existing pavilion and pool and foundation work on a proposed recreation building. Additionally, on 17 November 1995, the Village issued Petitioner a permit for plumbing work on the proposed recreation building, and on 11 December 1995 the Village issued Petitioner a permit for additional electrical service at the campground. In an 11 January 1996 letter to Petitioner, however, Respondent revoked the 17 November 1995 permit. The 11 January 1996 letter also stated that it is "in the best interest of all parties to wait before continuing with this construction until the process is complete with regards to [Petitioner's] application for a Major Special Use."

On 16 September 1996, Respondent denied Petitioner's Major Special Use Application.[4] Respondent additionally made the following pertinent finding of fact regarding Petitioner's nonconforming use of the property:

> C. At the time . . . [Petitioner] purchased the [p]roperty, only the following sites and structures existed on the property:
>
> 1. A maximum of not more than 50 identifiable sites, some of which had water service, some of which had electrical service, some of which had both water and electrical service, and some of which had neither water nor electrical service and were "unimproved" in any way. None of these 50 sites had sewer service or were connected to a dump station.

4. Petitioner has not appealed Respondent's denial of the Major Special Use Application, which was denied on the ground the application did not conform to the requirements of a Major Special Use Application for an RV park. *See* The Pinehurst Development Code § 8.5.4 (1995).

Respondent then made the following pertinent conclusion of law: "The non-conforming use of the property was no more than 50 campsites which were used in a limited fashion on a 13 acre tract . . . which included those amenities listed above, . . . [t]hose facilities destroyed may not be replaced[, and] . . . [t]hose campsites added to the 50 campsites must be removed." Respondent also concluded "[t]he establishment of more than 50 total sites constitutes an . . . enlargement of the pre-existing non-conforming use and is not permitted under [the 1981 ordinance]."[5] Finally, Respondent made the following pertinent findings of fact regarding whether Petitioner had obtained a vested right to construct the proposed RV campground:

> A. The [1995 ordinance] does not now and has never allowed campgrounds as a permitted use except as a major special use. Likewise, the proposed use [as an RV campground] was not a permitted use under the prior [1981] [o]rdinance.
>
> . . . .
>
> F. . . . [Petitioner] did not proceed with development of the RV Park in good faith. [Petitioner] knowingly took actions and made expenditures after [it] knew the project might not be permitted.

Based on these findings, Respondent concluded Petitioner "fail[ed] to show any basis whereby . . . [Petitioner] has any Vested Right to construct a proposed RV park."

Pursuant to N.C. Gen. Stat. § 160A-388(e), Petitioner then filed a petition for writ of certiorari in the superior court for review of Respondent's decision. In an opinion filed 29 December 1998, the superior court affirmed Respondent's decision.

The issues are whether: (I) a nonconforming use is "enlarged" within the meaning of section 11.3 of the 1981 ordinance when the "enlarge[ment]" of the nonconforming use occurs within the geographical area of the original nonconforming use; (II) an intensification of a nonconforming use is an "enlarge[ment]" of the use under section 11.3 of the 1981 ordinance; and (III) the record contains substantial evidence to support Respondent's finding of fact Petitioner acted in bad faith in "renovating" the property, therefore precluding

5. We note this conclusion is contained in Respondent's findings of fact; however, it is more properly labeled a conclusion 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 a conclusion of law).

Petitioner from obtaining a common law vested right to construct the RV campground.

I

[1] Petitioner first contends a nonconforming use is not "enlarged" within the meaning of section 11.3 of the 1981 ordinance[6] when the enlargement occurs within the geographical area of the existing nonconforming use. We disagree.

A city may enact a zoning ordinance prohibiting the enlargement of a nonconforming use of property. *In re Appeal of Hasting*, 252 N.C. 327, 329, 113 S.E.2d 433, 434 (1960). Such zoning ordinances are construed in accordance with their legislative intent, which is ascertained under the same rules of construction used to determine the legislative intent of a statute. *In re O'Neal*, 243 N.C. 714, 720, 92 S.E.2d 189, 193 (1956). Restrictions must be interpreted based upon the language used in each particular ordinance, *id.* at 723, 92 S.E.2d at 195, and the proper interpretation of a zoning ordinance is a question of law, *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994).

In this case, section 11.1 of the 1981 ordinance states "[t]he nonconforming use of land shall not be enlarged or increased, nor shall any non-conforming use be extended to occupy a greater area of land." Village of Pinehurst, N.C., Zoning Ordinance § 11.1. Because the ordinance restricts the "enlarge[ment] [and] increase[]" of a nonconforming use and the "exten[sion]" of any nonconforming use to a "greater area of land," the phrase "enlarge[ment] [and] increase[]" applies to any enlargement or increase within the geographical area originally covered by the permitted nonconforming use. *See Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706 ("no part of a statute is mere surplusage . . . [and] each provision adds something not otherwise included therein"), *disc. review denied*, 312 N.C. 82, 321 S.E.2d 895 (1984). This interpretation of section 11.1 is in accordance with the stated intent of the ordinance "not to encourage . . . continued [nonconforming] use, and to prohibit any

6. We note the parties dispute whether Petitioner's "renovations" are subject to the 1981 or 1995 ordinance. The record reveals some of Petitioner's "renovations" took place prior to the date the 1995 ordinance went into effect and some took place subsequent to this date. Because Petitioner argues in its brief to this Court its nonconforming use of the property was not an "enlarge[ment]" under the 1981 ordinance and does not address its use of the property under the 1995 ordinance, we address only the 1981 ordinance.

further non-conformance or expansion thereof." Village of Pinehurst, N.C., Zoning Ordinance § 11.1; *see Turlington v. McLeod*, 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988) ("when a statute on its face reveals the legislative intent and purpose, its terms are to be given meaning consistent with that intent and purpose"). Accordingly, Petitioner was not permitted under the 1981 ordinance to "enlarge" its nonconforming use of the property even within the geographical area of the original nonconforming use.

II

[2] Petitioner alternatively argues the "renovations" it made to the campground in 1995 did not constitute an "enlarge[ment]" under the 1981 ordinance, but instead amounted to an intensification of the nonconforming use and were, therefore, permitted as a continuation of a nonconforming use.

Words in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning. *State v. Raines*, 319 N.C. 258, 262, 354 S.E.2d 486, 489 (1987). The plain meaning of "enlarge" is "to become bigger"; "to widen in scope." *New Webster's Dictionary and Thesaurus of the English Language* 314 (1992). A nonconforming use is, therefore, "enlarged" when the scope of the use is increased.

Petitioner contends based on this Court's holding in *Stegall v. Zoning Bd. of Adjustment of County of New Hanover*, 87 N.C. App. 359, 361 S.E.2d 309 (1987), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 671 (1988), an intensification of a nonconforming use does not constitute an "enlarge[ment]" of the use. The zoning ordinance in *Stegall* permitted a nonconforming use to be changed if the changes "amount only to changes in degree of activity rather than changes in kind." *Id.* at 363, 361 S.E.2d at 312. Based on the language of the ordinance permitting "changes in degree of activity," the *Stegall* court held "an increase in the intensity of the nonconforming activity is permissible [and] a change in the kind of activity conducted on the land is prohibited" under the ordinance. *Id.* at 364, 361 S.E.2d at 312. Because the ordinance in the case *sub judice* does not permit "changes in degree of activity" of a nonconforming use but prohibits any "enlarge[ment]" of a nonconforming use, the teaching of *Stegall* has no application to the facts of this case.

In this case, Respondent made a finding of fact that prior to Petitioner's renovations to the campground, the campground contained "not more than 50 identifiable sites." This finding of fact is

supported by evidence that in 1994 an appraiser determined the property contained "[f]ifty useable sites," and tax records showed that in 1985 the property had only 50 sites in use. We are therefore bound by this finding. *See Cannon v. Zoning Bd. of Adjustment of Wilmington*, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983) (appellate review of decision of zoning board limited to whether findings of fact are supported by substantial evidence in the whole record and whether those findings of fact support the zoning board's conclusions of law); *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) ("substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Additionally, because any "renovations" resulting in an increase in the number of existing campsites would be an increase in the scope of the nonconforming use, Respondent's finding supports its conclusion of law that "[t]he establishment of more than 50 total sites constitutes an . . . enlargement of the pre-existing non-conforming use and is not permitted under [the 1981 ordinance]." *See Cannon* 65 N.C. App. at 47, 308 S.E.2d at 737.

III

[3] Petitioner also argues it obtained a common law vested right to construct the proposed RV campground because it relied in good faith on permits issued to it by Respondent for "renovations" to the campground, and these "renovations" were inspected by the Village. We disagree.

A party claiming a common law vested right in a nonconforming use of land must show: (1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party's detriment. *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969); *Browning-Ferris Industries v. Guilford County Bd. of Adj.*, 126 N.C. App. 168, 171-72, 484 S.E.2d 411, 414 (1997). A party acts in good faith reliance when it has "an honest belief that the [nonconforming use] would not violate declared public policy." *Warner v. W & O, Inc.*, 263 N.C. 37, 43, 138 S.E.2d 782, 786-87 (1964). A party, therefore, does not act in good faith reliance when it has knowledge the nonconforming use has been "declared unlawful by [a] duly enacted ordinance." *Id.* at 43, 138 S.E.2d at 787. Whether a party acts in good faith reliance is a question of fact to be determined by the zoning board, *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986), and we are bound by this finding if it is supported by substantial evidence in the whole record, *see Cannon*, 65 N.C. App. at 47, 308 S.E.2d at 737.

In this case, Respondent found as fact a campground has never been a conforming use under either the 1981 or 1995 ordinance, and Petitioner "did not proceed with development of the RV Park in good faith" because Petitioner "knowingly took actions and made expenditures after [it] knew the project might not be permitted." This finding of fact is supported by evidence Petitioner sent Respondent a letter on 10 February 1995 acknowledging a campground was a nonconforming use under the 1981 ordinance and requesting Respondent consider rezoning the property to allow a campground. Prior to any rezoning, Petitioner began construction of an RV campground on the property, and Petitioner continued construction efforts after receiving a 24 August 1995 letter from Respondent stating "[f]urther expansion of this use [of the property as a campground] . . . would be [a] direct violation of the current zoning ordinance." Because Respondent's finding of fact that Petitioner did not act in good faith is supported by substantial evidence, we are bound by this finding.[7] *See Cannon*, 65 N.C. App. at 47, 308 S.E.2d at 737. Additionally, this finding of fact supports Respondent's conclusion of law Petitioner "fail[ed] to show any basis whereby . . . [Petitioner] has any Vested Right to construct a proposed RV park." *See Warner*, 263 N.C. at 43, 138 S.E.2d at 786-87. Accordingly, we affirm the superior court's 29 December 1998 order affirming Respondent's 16 September 1996 decision.

Affirmed.

Judges McGEE and EDMUNDS concur.

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7. Petitioner argues in its brief to this Court that "[t]here is no evidence in the record . . . [P]etitioner had knowledge of a 'specific' change which would ultimately occur in the zoning of [the] campground," and Petitioner, therefore, acted in good faith as a matter of law. Whether Petitioner had knowledge of changes that would be made to the 1995 ordinance, however, is not the dispositive issue regarding whether Petitioner acted in good faith. This is because Petitioner's "renovations" violated the 1981 ordinance which was duly enacted at the time "renovations" began. *See Warner*, 263 N.C. at 43, 138 S.E.2d 786-87. Additionally, Petitioner argues it acted in good faith because it received building permits for the "renovations" it performed. Whether Petitioner received permits for the "renovations," however, applies to the issue of whether Petitioner acted based on valid governmental approval and not whether Petitioner acted in good faith.

STATE OF NORTH CAROLINA v. CHRISTOPHER PATTON HOLDER

No. COA99-638

(Filed 16 May 200)

1. Homicide— first-degree murder—short-form indictment

The trial court did not err in a first-degree murder prosecution by entering judgment on a short-form indictment. Under *State v. Wallace*, 351 N.C. 481, the Fourteenth Amendment does not require a state indictment to list all of the elements or facts which might increase punishment for a crime.

2. Constitutional Law— right to be present at trial—first-degree murder—excusal of jurors

A first-degree murder defendant's constitutional right to be present at every stage of his trial was not violated where jury selection commenced on 27 July; prospective jurors summoned for that date who had not been called into the courtroom were kept in a separate room; an additional panel was summoned on 29 July; the court heard in open court requests to be excused; and the court stated for the record that one juror held over who had called the clerk's office with an illness in the family would be excused. The trial court's memorialization of the private communication between the prospective juror, the clerk, and the trial court explained the circumstances of the communication and the reason for excusing the prospective juror, the memorialization was neither questioned nor objected to by defendant or his counsel, and the memorialization disclosed a valid reason for the excusal and that the communication was harmless beyond a reasonable doubt.

3. Arson— second-degree not submitted—continuous transaction with murder

The trial court did not err in a prosecution for first-degree arson and first-degree murder by denying defendant's request for second-degree arson to be submitted as a possible verdict where, during the time between the murder and the arson, defendant and an accomplice disposed of the murder weapon, burned their bloody clothes, purchased gasoline to ignite the fire at the victim's house, and set the house on fire. These undisputed facts show that the murder and arson were so joined by time and circumstances as to be part of one continuous transaction so that the house was "occupied" when it was set on fire.

4. Criminal Law— prosecutor's argument—arson—continuous transaction—no plain error

There was no plain error in a prosecution for first-degree murder and first-degree arson where the court did not correct a statement by the prosecutor in her closing argument that the judge was going to instruct the jury that this was a continuous transaction. Defendant contended that "continuous transaction" establishes the occupation element for first-degree arson, which had not been proven; even assuming that the prosecutor misstated the law, the court gave proper instructions regarding first-degree arson, thereby curing any prejudice.

5. Evidence— defendant's state of mind when giving statement

There was no plain error in a first-degree murder and first-degree arson prosecution where the trial court allowed an officer to testify to defendant's state of mind when he gave his statement. In light of defendant's confession and his trial testimony, the officer's testimony neither constituted a miscarriage of justice nor did it probably cause the jury to reach a different verdict than it otherwise would have.

Appeal by defendant from judgments entered 11 August 1998 by Judge William H. Helms in Anson County Superior Court. Heard in the Court of Appeals 29 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Joan M. Cunningham, for the State.

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

MARTIN, Judge.

Defendant was tried capitally at the 27 July 1998 Criminal Session of Anson County Superior Court upon bills of indictment alleging first degree arson, first degree burglary, and first degree murder. On 10 August 1998, the jury returned verdicts finding defendant guilty as charged of all offenses; defendant's first degree murder conviction was based on both premeditation and deliberation and the felony-murder rule. After a sentencing proceeding conducted pursuant to G.S. § 15A-2000 *et seq.*, the trial court entered judgment upon defendant's conviction of first degree murder, disregarding felony murder as a basis for the conviction, and sentenced defendant to life imprison-

ment. The trial court also entered judgment upon defendant's convictions of first degree burglary and first degree arson and imposed consecutive sentences of 82 to 108 months for each offense. Defendant appeals.

Summarized only to the extent required for an understanding of the issues raised on appeal, the State's evidence tended to show that on 3 April 1995, Richard Holder, defendant's brother, called Andy Weaver (Weaver) and asked Weaver to bring him a twelve gauge shotgun and an SKS assault rifle which Weaver had been keeping for him. Weaver, accompanied by Donny Carpenter and defendant, drove to Richard Holder's camper with the guns. Richard Holder told the three men that he was preparing to return to Tennessee, where he had previously taken his minor son, Matthew Holder. Richard Holder believed that his son was being sexually abused by Jimmy Burris, who was the boyfriend of Richard Holder's former mother-in-law. Before Richard Holder was able to leave for Tennessee, however, three police officers arrived to arrest him for parental kidnaping. Following a brief and unsuccessful flight attempt, Richard Holder was arrested. Defendant became enraged that his brother had been arrested, cursed the police officers and screamed, "[t]hat son of a bitch (Burris) needs to die for what he did." After the police left, Weaver vowed to kill Burris.

Later the same day, after they had consumed two pints of "Mad Dog 20/20", an alcoholic beverage, Weaver and defendant began to plan to kill Burris. They bought shells for the SKS assault rifle and went looking for Burris. When they were unable to find Burris at his girlfriend's house, defendant and Weaver drove to Burris' house, arriving at approximately 10:00 p.m. Weaver knocked on Burris' door, while defendant remained behind him, concealing the weapon. When Burris answered the door, Weaver claimed that his car had broken down and asked to use the telephone. Burris let Weaver into the house, and defendant followed him inside. Defendant then uncovered the weapon, pointed it at Burris, and said, "[y]eah, mother------, you know what it is, you know what time it is."

Burris asked if defendant was Chris Holder and tried to grab the weapon. A struggle ensued, during which defendant struck Burris in the face several times and Weaver managed to pin him to the floor. Defendant and Weaver debated whether to cut Burris' throat with a knife or shoot him with the SKS assault rifle. Weaver was unable to hold Burris down, however, while defendant searched for a knife, and defendant returned to the room and kicked Burris in the face.

Defendant handed the rifle to Weaver and told him to shoot Burris; Weaver returned the weapon to defendant and told him to shoot Burris. By this time, Burris managed to get to his feet and pleaded with the men not to kill him. Defendant pointed the SKS assault rifle at Burris and shot him in the chest, the force of the blast knocking Burris into an adjoining bedroom. Weaver ran out of the house while defendant went into the bedroom and shot Burris five more times. He and Weaver then fled.

Following the shooting, defendant and Weaver threw the SKS assault rifle into the Pee Dee River, and they burned the clothes they had worn at Burris' house. In order to destroy any evidence at Burris' house that might link them to the murder, defendant and Weaver decided to burn the house. They filled an antifreeze container with gasoline and drove back to Burris' house, where defendant poured the gasoline inside the house and set the house afire with Burris' body still inside.

On 4 April 1995, SBI Special Agent T. M. Caulder and Wadesboro Police Detective Charlie Little interviewed defendant about Burris' murder. Defendant initially denied any involvement in Burris' death but he contacted police the following day and, after being advised of his rights and signing a waiver, gave a statement to Detective Little, Wadesboro Police Detective Steve Erdmanczyk and SBI Special Agent Mark Isley in which he admitted his involvement in the murder and provided a detailed account.

Defendant testified in his own behalf; his testimony was generally consistent with the statement he had given the officers, and he explained that he believed Burris had molested his nephew and that he was angry that the police had arrested Richard Holder for parental kidnaping. He also testified that after Richard Holder was arrested, Weaver said repeatedly that they should kill Burris, that he had attempted to get Richard released on bond, but was unsuccessful, and that he told the officers he had killed Burris in order to protect his nephew. Defendant testified that at the time he gave the statement to the officers, he had planned to kill himself. Defendant also offered the testimony of Richard Holder concerning Burris' alleged abuse of Matthew Holder.

I.

[1] Defendant first argues that the trial court erred by entering judgment upon his conviction of first degree murder because the indict-

ment was insufficient to charge the offense of first degree murder. The indictment alleged that defendant "unlawfully, willfully and feloniously and of malice aforethought did kill and murder James Osborn Burris." Defendant argues that because the indictment failed to allege two essential elements of first degree murder, i.e., premeditation and deliberation, his conviction of first degree murder based thereon violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 19, 22 and 23 of the North Carolina Constitution. Though he did not object to the form of the indictment at trial, our Supreme Court has held that "the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981).

The North Carolina Supreme Court has, for nearly one hundred years, held the short form indictment authorized by G.S. § 15-144 sufficient to charge both first degree and second degree murder. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 792-93 (1985); *State v. Banks*, 143 N.C. 652, 656, 57 S.E. 174, 176 (1907) (applying Revisal, sec. 3631) ("Both before and since the statute [dividing murder into first degree and second degree], murder is the unlawful killing of another with malice aforethought."). Defendant argues, however, that as a result of the recent United States Supreme Court decision in *Jones v. United States*, 526 U.S. 227, 143 L.Ed.2d 311 (1999), North Carolina's extensive precedent is now invalid. However, our North Carolina Supreme Court has recently considered and rejected a similar argument in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (5 May 2000) and has held that the Fourteenth Amendment does not require a state indictment for a state offense to list all of the elements or facts which might increase the punishment for a crime. This assignment of error is overruled.

II.

[2] Defendant contends his constitutional right to be present at every stage of his trial was violated by the trial court's alleged *ex parte* communication with, and the excusing of, a juror. We find no prejudicial error in the trial court's actions.

Jury selection in this case commenced on the afternoon of 27 July 1998. Prospective jurors summoned for that date, who had not yet

been called into the courtroom for *voir dire*, were kept together in a separate room; an additional panel of jurors was summoned to appear on 29 July in the event a jury could not be obtained from the initial panel. On 29 July, when the new panel reported, the trial court heard, in open court with defendant present, requests from some of the new jurors to be excused from service. After hearing all the requests, the trial court stated:

> THE COURT: All right, appears we'll have plenty of jurors without you folks anyway. And so you're free to go, all of you. Thank you. Just note for the record that neither side objected to excusing these jurors. Put on the record, if you would, that prior to entering the courtroom, I mentioned to the attorneys that several people had called in to the clerk's office last night who were being held over in the—we'll call it the jury assembly room. And that some of them had had—one of them came to say one of them—one of them had an illness in the family. So we're just going to excuse them. The defendant wasn't present, but tell him about it. Anything else we need to put on the record about that?
>
> MR. NICHOLS (Defendant's counsel): No, sir.
>
> THE COURT: Do you understand that, sir?
>
> MR. HOLDER: Yes, sir.
>
> THE COURT: Anything you want to ask me about it or ask your lawyers?
>
> MR. HOLDER: No, sir.

The Confrontation Clause of the North Carolina Constitution guarantees a criminal defendant the right to be present at every stage of his capital trial, N.C. Const. art. I, § 23; *see also State v. Atkins*, 349 N.C. 62, 101, 505 S.E.2d 97, 121 (1998), *cert. denied*, 562 U.S. 1147, 143 L.Ed.2d 1036 (1999), and our Supreme Court has long held that a defendant in a capital case may not waive his right to be present. *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992). Jury selection is a phase of the trial at which a capital defendant has a right to be present. *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). Thus, it is error for the trial court to conduct private unrecorded conversations with prospective jurors, even in the absence of objection by the defendant. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991). However, the Court has also recognized that such error does not require a new trial where the State can show, beyond a reasonable

doubt, that such error was harmless. *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, 513 U.S. 891, 130 L.Ed.2d 162 (1994). "The State may show that the error was harmless beyond a reasonable doubt where the transcript reveals the substance of the trial court's conversation with the juror, or where the trial judge reconstructs the substance of the conversation on the record." *Id.* at 262, 439 S.E.2d at 555.

In *Lee*, the trial court excused two jurors under circumstances similar to those in the present case. As the clerk called prospective jurors to the box, the trial court disclosed, on the record, that it had excused the jurors, one due to personal illness and the other due to the illness of a family member. The Court held the trial court's disclosure revealed the substance of the communication between the court and the jurors, and that both had been excused upon proper grounds. *Lee* at 262-263, 439 S.E.2d at 555-56. Similarly, in *State v. Hartman*, 344 N.C. 445, 476 S.E.2d 328 (1996), the trial court disclosed on the record that it had excused a juror who had presented a doctor's note. The defendant did not object to the court's memorialization of the communication and the Supreme Court found no reason, therefore, to doubt its accuracy or completeness. The Court held that the memorialization showed that the juror had been properly excused for medical reasons and the trial court's private communication with the juror was harmless beyond a reasonable doubt.

The trial court's memorialization of the private communication between the prospective juror, the clerk and the trial court in the present case explained the circumstances of the communication and the reason for excusing the prospective juror. The memorialization was neither questioned nor objected to by defendant or his counsel. As in *Lee* and *Hartman*, the memorialization disclosed that the prospective juror was excused for a valid reason and that the communication was harmless beyond a reasonable doubt. This assignment of error is overruled.

III.

[3] Defendant also assigns error to the trial court's denial of his request to submit second degree arson as a possible verdict and to instruct the jury with regard to the lesser offense. G.S. § 14-58 (1999) provides:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burn-

> ing, the offense is arson in the first degree and is punishable as a Class D felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class G felony.

Our Supreme Court has said:

> It is well settled that "a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977). On the other hand, the trial court need not submit lesser degrees of a crime to the jury "when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime.*

State v. Drumgold, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979), (quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)) (emphasis in original). Defendant argues the evidence would have supported a verdict of second degree arson because a jury could reasonably have concluded that when defendant burned Burris' house with Burris' body inside, the house was "unoccupied" because Burris had been dead for between two and three and a half hours. In essence, defendant argues that the time span between the murder and the arson presented a factual issue for the jury to decide whether the building was "occupied."

In *State v. Campbell*, 332 N.C. 116, 418 S.E.2d 476 (1992), the North Carolina Supreme Court applied for the first time the "continuous transaction doctrine" to a murder-arson situation. In that case, the court held that "a dwelling is 'occupied' if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction." *Campbell*, 332 N.C. at 122, 418 S.E.2d at 479. The continuous transaction doctrine was subsequently applied in the case *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518 U.S. 1024, 135 L.Ed.2d 1080 (1996), in which the facts are similar in important respects to the facts of the present case. In *Jaynes*, the defendant and an accomplice murdered the victim inside a mobile home, drove away from the scene, and then returned to the mobile home approximately three and a half hours later to burn it. *Jaynes*, 342 N.C. at 274, 464 S.E.2d at 464. The North Carolina Supreme Court upheld the defendant's first degree arson conviction, observing that "given the extent to which the defendant went to hide the stolen property and the complexity of defendant's

criminal scheme, the murder and arson were 'so joined by time and circumstances as to be part of one continuous transaction,' [*Campbell*, 332 N.C. at 122, 418 S.E.2d at 479] and therefore support a finding that the dwelling was 'occupied' within the meaning of N.C.G.S. § 14-58." *Id.* at 275, 464 S.E.2d at 464.

Based on the reasoning underlying *Jaynes*, the trial court correctly denied defendant's request to submit second degree arson as a possible verdict. During the time which elapsed between the murder and the arson, defendant took additional actions designed to further his "criminal scheme," i.e, defendant and Weaver disposed of the murder weapon, burned their blood-soiled clothes, purchased gasoline to ignite the fire at Burris' house, and set the house on fire. As in *Jaynes*, these undisputed facts show "the murder and arson were 'so joined by time and circumstances as to be part of one continuous transaction.' " *Id.* (quoting *Campbell*, 332 N.C. at 122, 418 S.E.2d at 479).

IV.

[4] Defendant also contends the trial court committed plain error when it failed to intervene, *ex mero motu*, to correct an erroneous statement of law made by the prosecutor in her closing argument. The prosecutor argued:

> Now, you might say well, Jimmy Burris was already dead. But ladies and gentlemen, you don't stop being someone just because you're dead. The body was still there. *And the Judge is going to instruct you that this was a continuous transaction, that it was ongoing.* And the fact that Jimmy Burris died during these transactions, these events, doesn't make it any less culpable that they actually succeeded in killing Jimmy Burris. So I'm going to ask you, ladies and gentlemen, to find him guilty of first degree arson (emphasis added).

Defendant contends that the highlighted sentence constituted an erroneous statement of law because "continuous transaction" establishes the "occupation" element for first degree arson, and the State had not proven the "occupation" element of first degree arson beyond a reasonable doubt.

As stated in *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 194-95 (1998), *cert. denied*, 528 U.S. 835, 145 L.E.2d 80 (1996):

> The standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly

improper that the trial court erred in failing to intervene *ex mero motu*. "The impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)). In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers. *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609, *cert. denied*, 522 U.S. 1001, 118 S.Ct. 571, 139 L.Ed.2d 411 (1997); *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, 516 U.S. 1148, 116 S.Ct. 1021, 134 L.Ed.2d 100 (1996).

Even assuming, *arguendo*, that the prosecutor misstated the law, it was not plain error for the trial court not to intervene *ex mero motu* to correct the argument. The trial court gave proper instructions regarding first degree arson, thereby "cur[ing] any prejudice to defendant which may have resulted from the alleged misstatements of law in the prosecutor's arguments." *Id.* at 452, 509 S.E.2d at 194. Accordingly, this assignment of error is overruled.

V.

[5] Defendant's final contention is that the trial court erred when it allowed one of the State's witnesses, Officer Isley, to testify as to defendant's state of mind in violation of G.S. § 8C-1, Rule 602. The prosecutor asked Officer Isley, "[w]hat was the defendant's emotional state during [the giving of his statement to police]?" Officer Isley replied, "[h]e was very calm, expressionless. No emotions whatsoever. Not remorseful in any regard." Defendant failed to object to this question and answer at trial, rendering the assignment of error subject to a plain error standard of review. *State v. York*, 347 N.C. 79, 489 S.E.2d 380 (1997). Plain error is error that is "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." *Id.* (citations omitted). In light of defendant's confession, as well as his trial testimony concerning his involvement in these crimes, the testimony of Officer Isley neither constituted "a miscarriage of justice" nor did it probably cause the jury to reach a different verdict than it otherwise would have. Therefore, this assignment of error is overruled.

Defendant has abandoned the remaining assignments of error contained in the record. N.C.R. App. P. 28(a). We conclude defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WALKER concur.

LISA BAKER CUCINA, PLAINTIFF v. CITY OF JACKSONVILLE AND DIXIE FAYE PICKETT, DEFENDANTS

No. COA99-364

(Filed 16 May 2000)

1. **Motor Vehicles— automobile accident—negligence—proper lookout—summary judgment improper**

The trial court erred in an automobile accident case by granting summary judgment in favor of defendant Pickett because there are genuine issues of material fact concerning: (1) Pickett's negligence, since the evidence viewed in the light most favorable to plaintiff indicates plaintiff's vehicle entered the intersection first and that Pickett thereby was required to yield the right-of-way; and (2) Pickett's maintenance of a proper lookout, since Pickett testified that it did not look like an intersection and she did not recall seeing an intersecting street.

2. **Motor Vehicles— automobile accident—contributory negligence—summary judgment improper**

The trial court erred in an automobile accident case by granting summary judgment in favor of defendants on the basis that plaintiff was contributorily negligent as a matter of law, because it remains an issue for the jury whether a reasonably prudent person exercising ordinary care should have remembered the stop sign was down at the intersection of the accident, and whether plaintiff should have taken some sort of precautionary measures upon approaching the intersection many hours later.

3. **Cities and Towns— automobile accident—stop sign knocked down—public duty doctrine inapplicable**

Plaintiff's claims against the City of Jacksonville for damages sustained in an automobile accident at an intersection where the

stop sign normally controlling the street was knocked down fifteen hours earlier in a prior accident is not barred by the doctrine of governmental immunity based on the public duty doctrine, because plaintiff has not alleged that the City negligently failed to protect her from a crime.

4. Immunity— governmental—waiver—liability insurance

The trial court erred in granting summary judgment in favor of defendant City of Jacksonville because although the maintenance of stop signs constitutes a discretionary function entitling the City to the defense of governmental immunity in plaintiff's claim for damages sustained in an automobile accident at an intersection where the stop sign normally controlling the street was knocked down fifteen hours earlier in a prior accident, the City waived this immunity since it was covered by a liability insurance policy at the time of this collision. N.C.G.S. § 160A-485(a).

Appeal by plaintiff from judgments entered 21 September and 23 September 1998 by Judge Carl L. Tilghman in Onslow County Superior Court. Originally heard in the Court of Appeals 6 January 2000. An opinion was filed by this Court 4 April 2000 and withdrawn 19 April 2000. The present opinion supersedes the 4 April 2000 opinion.

John W. Ceruzzi, Jeffrey S. Miller and Anne K. O'Connell, for plaintiff-appellant.

Crossley, McIntosh, Prior & Collier, by Samuel H. MacRae, for defendant-appellee City of Jacksonville.

Wallace, Morris & Barwick, P.A., by P.C. Barwick, Jr. and Elizabeth A. Heath, for defendant-appellee Dixie Faye Pickett.

JOHN, Judge.

Plaintiff Lisa Baker Cucina appeals the trial court's grant of summary judgment in favor of defendants City of Jacksonville (the City) and Dixie Faye Pickett (Pickett). We reverse the trial court.

Pertinent facts and procedural history include the following: At approximately 6:00 p.m. on 27 January 1996, plaintiff and Pickett were involved in an automobile collision. Plaintiff was traveling north on Pine Valley Road (Pine Valley) in Jacksonsville while Pickett was proceeding west on Brynn Marr Road (Brynn Marr). Traffic at the

intersection of the two streets was normally governed by stop signs on Brynn Marr. However, an accident at 3:00 a.m. on 27 January 1996 had resulted in the stop sign controlling west-bound traffic on Brynn Marr being knocked down. None of the parties disputes Pickett's failure to stop at the intersection and the subsequent collision between plaintiff's vehicle and that of Pickett. It is further undisputed that plaintiff, who resides on Pine Valley, was cognizant of the 3:00 a.m. incident and had observed the downed stop sign when traveling to work on the morning of 27 January 1996.

Plaintiff filed suit 3 September 1997, asserting Pickett had been negligent, *inter alia*, in failing to yield the right of way and by failing to keep a proper lookout. As to the City, plaintiff alleged it had been aware of the downed Brynn Marr stop sign for fifteen hours prior to the collision at issue and that it had negligently failed to conduct repairs thereto during that period of time.

Pickett filed answer 30 October 1997 asserting plaintiff's contributory negligence; plaintiff's subsequent reply alleged Pickett was accorded the last clear chance to avoid colliding with plaintiff's vehicle. The City's 3 November 1997 answer denied it had notice of the downed stop sign and further set forth immunity from suit and contributory negligence as defenses.

The City and Pickett subsequently moved for summary judgment, which motions were allowed by the trial court on 21 September and 23 September 1998 respectively. Plaintiff timely appealed.

A motion for summary judgment is properly granted when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.G.S. § 1A-1, Rule 56(c) (1999). A defendant moving for summary judgment bears the burden of showing either that (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff is unable to produce evidence which supports an essential element of its claim; or, (3) the plaintiff cannot overcome affirmative defenses raised in contravention of its claims. *Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, accepting the latter's asserted facts as true, and drawing all reason-

able inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994).

[1] We first review the trial court's grant of Pickett's summary judgment motion.

> The purpose of a summary judgment motion is to foreclose the need for a trial when . . . the trial court determines that only questions of law, not fact, are to be decided. Summary judgment may not be used, however, to resolve factual disputes which are material to the disposition of the action.

Robertson v. Hartman, 90 N.C. App. 250, 252, 368 S.E.2d 199, 200 (1988) (citation omitted). Further, summary judgment is rarely appropriate in a negligence action. *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997).

In order to set out a *prima facie* claim of negligence against Pickett, plaintiff was required to present evidence tending to show that (1) Pickett owed a duty to plaintiff; (2) Pickett breached that duty; (3) such breach constituted an actual and proximate cause of plaintiff's injury; and, (4) plaintiff suffered damages in consequence of the breach. *Davis v. Messer*, 119 N.C. App. 44, 54-55, 457 S.E.2d 902, 908-09, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

Thorough review of the record reflects a genuine issue of material fact as to the negligence of Pickett. The uncontradicted evidence was that the stop sign normally controlling the street on which Pickett was traveling had been knocked down. Pickett's conduct thus "must be judged in the light of conditions confronting" her. *Dawson v. Jennette*, 278 N.C. 438, 446, 180 S.E.2d 121, 126-27 (1971).

N.C.G.S. § 20-155(a) (1999) provides:

> When two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

As Pickett's vehicle was located on the right, she was entitled to rely upon plaintiff's statutory obligation to yield the right-of-way if the "two vehicles approach[ed] or enter[ed] [the] intersection . . . at approximately the same time." *Id.*; *see Douglas v. Booth*, 6 N.C. App. 156, 159-60, 169 S.E.2d 492, 495 (1969) (where plaintiff and defendant approached intersection at approximately the same time and plaintiff

"was approaching from [defendant's] left and [the latter] was approaching from plaintiff's right . . ., [defendant] was entitled to rely on G.S. 20-155(a) granting the vehicle on the right the right of way when [two vehicles] approach an intersection at approximately the same time"). However, if plaintiff's vehicle

> reached the intersection first and had already entered the intersection, [Pickett] was under [a duty] to permit the plaintiff's automobile to pass in safety.

Bennett v. Stephenson, 237 N.C. 377, 380, 75 S.E.2d 147, 150 (1953). In addition, Pickett's conduct was governed by the general duty required of all motorists "to keep a reasonable and proper lookout in the direction of travel and see what [they] ought to see." *Keith v. Polier*, 109 N.C. App. 94, 99, 425 S.E.2d 723, 726 (1993).

Viewed in the light most favorable to plaintiff, *see Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, evidence in the record indicates plaintiff's vehicle entered the intersection first and that Pickett thereby was required to yield the right-of-way, *see Bennett*, 237 N.C. at 380, 75 S.E.2d at 150. Plaintiff testified in her deposition that she was "almost through the intersection" when the collision occurred. In addition, plaintiff's vehicle was damaged on the passenger side while the front driver's portion of Pickett's vehicle was damaged, circumstantial evidence tending to show plaintiff's vehicle entered the intersection first and was struck by Pickett's vehicle as plaintiff was attempting to traverse the intersection. *Compare Douglas*, 6 N.C. App. at 160, 169 S.E.2d at 495 (damage to front of plaintiff's automobile and left front door of defendant's vehicle tended to show plaintiff had not entered intersection first).

While we acknowledge that "the right of way . . . is not determined by a fraction of a second," *Dawson*, 278 N.C. at 445, 180 S.E.2d at 126, and that the instant case is close, the evidence viewed most favorably to plaintiff, *see Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, raises a genuine issue as to which vehicle first entered the intersection and obtained the right-of-way.

The record also reflects a genuine issue of material fact as to whether Pickett was maintaining a proper lookout. The latter testified in her deposition that

> [i]t didn't look like no intersection to me. . . . I don't recall seeing [an intersecting street].

To conclude, therefore, a reasonable jury could find that plaintiff entered the intersection first and obtained the right-of-way, that Pickett breached the duty to yield to plaintiff or to keep a proper lookout by proceeding through the intersection, and that such breach was a proximate cause of injury to plaintiff. Plaintiff's evidence thus set out a *prima facie* case of negligence against Pickett, *see Davis*, 119 N.C. App. at 54-55, 457 S.E.2d at 908-09, and summary judgment in favor of the latter was inappropriate, *see Lyles*, 120 N.C. App. at 99, 461 S.E.2d at 350.

[2] Notwithstanding, Pickett interjects a final argument, also raised by the City, claiming plaintiff was contributorily negligent as a matter of law because

> she knew the stop sign controlling [Pickett's] direction of travel had been knocked down in an accident occurring earlier that morning . . . [but] did not take a single precautionary measure in going through the intersection . . . .

However, assuming *arguendo* the foregoing contentions sustain a factual issue as to plaintiff's contributory negligence, such negligence is not thereby established as a matter of law.

> Issues of contributory negligence, like those of ordinary negligence, are ordinarily questions for the jury and are rarely appropriate for summary judgment. Only where the evidence establishes the plaintiff's own negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted.

Nicholson, 346 N.C. at 774, 488 S.E.2d at 244 (citation omitted). It therefore remains an issue for the jury whether "a reasonably prudent person exercising ordinary care," *Smith v. Wal-Mart Stores*, 128 N.C. App. 282, 288, 495 S.E.2d 149, 153 (1998), should have remembered the stop sign was down and consequently taken some sort of precautionary measures upon approaching the intersection many hours later, *see id.* (jury must determine whether plaintiff's failure to notice wet floor inside store entrance on rainy day constituted contributory negligence barring claim for injuries resulting from fall), and summary judgment in favor of either Pickett or the City on the basis that plaintiff was contributorily negligent as a matter of law constituted error by the trial court.

[3] We consider next the primary arguments addressed to the trial court's grant of the City's summary judgment motion. The City asserts

plaintiff's claims are barred by the doctrine of governmental immunity, and devotes the majority of its appellate brief to discussion of the public duty doctrine (the doctrine). However, two recent decisions of our Supreme Court, *Lovelace v. City of Shelby*, 351 N.C. 458, — S.E.2d — (2000) and *Thompson v. Waters*, 351 N.C. 462, — S.E.2d — (2000), indicate that the doctrine does not operate to bar plaintiff's claims *sub judice*.

The doctrine was first adopted by our Supreme Court in the context of a sheriff accused of negligently failing to protect a citizen from a criminal act, *see Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). The Court formulated the doctrine as follows:

> [t]he general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish *police protection* to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every *criminal act*.

Id. at 370-71, 410 S.E.2d at 901 (citation omitted) (emphasis added).

The doctrine has since been extended by this Court "to a variety of local governmental operations." *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 480, 495 S.E.2d 711, 715, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998). Such extensions were disavowed, however, in *Lovelace* and *Thompson*.

> While this Court [our Supreme Court] has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, *see Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998); [*Stone*, 347 N.C. 473, 495 S.E.2d 711], we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public, *see Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999) (refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard). . . . Thus, the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*.

Lovelace, 351 N.C. at 461, — S.E.2d at —; *see also Thompson*, 351 N.C. at 465, — S.E.2d at — ("This Court has not heretofore

applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement.")

Accordingly, as plaintiff has not alleged that the City negligently failed to protect her from a crime, *cf. Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901, the doctrine does not bar plaintiff's claim against the City, *see Lovelace*, 351 N.C. at 461, —— S.E.2d at ——.

[4] In the alternative, the City asserts that its

> acts with regard to maintaining stop signs falls under [its] discretionary powers,

thus insulating the City from a claim of negligence by operation of governmental immunity. Absent a statute imposing liability, municipalities

> acting in the exercise of . . . discretionary . . . authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit, . . . are not liable for the tortious acts of their officers or agents.

Hamilton v. Hamlet, 238 N.C. 741, 742, 78 S.E.2d 770, 771 (1953).

The City contends N.C.G.S. § 160A-300 (1999) governs re-erection of downed stop signs, while plaintiff maintains N.C.G.S. § 160A-296 (1999) applies. Relevant portions of each statute include the following:

> A city may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic upon the public streets, sidewalks, alleys, and bridges of the city.

G.S. § 160A-300.

> (a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:
>
> (1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair; [and,]

> (2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions . . . .

G.S. § 160A-296.

Although G.S. § 160A-296 imposes a "positive duty" upon cities "to maintain [their] streets in a reasonably safe condition," *Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976), G.S. § 160A-300 "grants cities discretionary authority but imposes no affirmative duty," *Talian v. City of Charlotte*, 98 N.C. App. 281, 287, 390 S.E.2d 737, 741, *aff'd*, 327 N.C. 629, 398 S.E.2d 330 (1990). Accordingly, the defense of governmental immunity would be applicable herein only if G.S. § 160A-300 controls. *See Hamilton*, 238 N.C. at 742, 78 S.E.2d at 771.

Our courts have

> consistently held that installation, *maintenance* and timing of traffic control signals at intersections are discretionary governmental functions.

Talian, 98 N.C. App. at 286, 390 S.E.2d at 741 (emphasis added). Notably, in *Rappe v. Carr*, 4 N.C. App. 497, 167 S.E.2d 48 (1969), this Court held the defense of governmental immunity barred plaintiffs' suit against the Town of Belmont based upon a collision occurring at an intersection governed by a malfunctioning traffic signal. The plaintiffs had alleged the signal governing their lane of travel "was not exhibiting any light," that it had been malfunctioning for "several days," and that the Town had notice of the defect. *Id.* at 498, 167 S.E.2d at 49. Pursuant to N.C.G.S. § 160-200, the predecessor statute to G.S. § 160A-300, this Court held that

> [w]hile municipalities are not required to install . . . traffic control signals, they may do so as an exercise of their police power. The installation and *maintenance* of such signals in and by municipalities are governmental functions . . . .

Rappe, 4 N.C. App. at 499, 167 S.E.2d at 49 (citation omitted) (emphasis added).

If writing upon a clean slate, we might be persuaded to delineate a distinction between installation and maintenance of a traffic control device. Under such a theory, although G.S. § 160A-300 would govern installation of traffic control devices, G.S. § 160A-296 would impose a duty on the City, not subject to the defense of governmental immu-

nity, to repair such devices in order "to maintain [the] streets in a reasonably safe condition," *Stancill*, 29 N.C. App. at 710, 225 S.E.2d at 836; *see also Hamilton*, 238 N.C. at 742, 78 S.E.2d at 771 (statute may subject city to liability); *Wagshal v. District of Columbia*, 216 A.2d 172, 174 (D.C. Ct. App. 1966) (although decision to install stop sign is discretionary, once sign is installed, municipality has duty to keep its streets "reasonably safe" by repairing or replacing downed sign); *Grantham v. City of Topeka*, 411 P.2d 634 (Kan. 1966) (same).

However, given that this Court, unlike our Supreme Court, is bound by decisions of previous panels on "the same issue, albeit in a different case," *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we must follow the ruling in *Rappe* and hold that maintenance of stop signs constitutes a discretionary function, thereby entitling the City to the defense of governmental immunity.

Notwithstanding, we reverse the trial court's grant of summary judgment in favor of the City. Construing all reasonable inferences in plaintiff's favor, as we must, *Kennedy*, 115 N.C. App. at 583, 448 S.E.2d at 281, it appears from the record the City was covered by a liability insurance policy at the time of the collision at issue, thereby waiving immunity from suit. *See* N.C.G.S. § 160A-485(a) (1999) (city waives tort immunity to extent it is indemnified by liability insurance policy); *Barnett v. Karpinos*, 119 N.C. App. 719, 729, 460 S.E.2d 208, 213 (city's acknowledgment of insurance policy precluded summary judgment in its favor), *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995); *cf. Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5 (waiver of governmental immunity does not create cause of action where none previously existed), *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).

In closing, we note the record reflects the parties focused in the trial court almost exclusively upon the public duty doctrine. Indeed, not only the earlier arguments, but the appellate briefs filed with this Court likewise address applicability of the doctrine in depth, with only cursory attention, if any, given to governmental immunity, the City's insurance policy, the effect of the City's ordinance governing installation of traffic control devices, *see* Jacksonville City Code § 25-62, or the elements of plaintiff's underlying claim. As the record thus has not been fully developed on these issues, we decline to address the merits of plaintiff's claim, and simply hold that summary judgment was inappropriate at this stage of the proceedings. *See Barnett*, 119 N.C. App. at 729, 460 S.E.2d at 213 (grant of summary

judgment in city's favor based on governmental immunity reversed, but merits of plaintiff's claim not reached in "belie[f] that such an undertaking would be premature").

In sum, we reverse the trial court's grant of summary judgment as to both Pickett and the City, and remand this case for further proceedings not inconsistent with our opinion herein.

Reversed and remanded.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. KENNETH KENYON CROCKETT

No. COA99-459

(Filed 16 May 2000)

1. Rape— statutory—conviction vacated—prior to amended statute

Defendant's conviction for statutory rape in case 97 CRS 20047 must be vacated because defendant was convicted for having sex with a fourteen-year-old on 26 November 1995, five days prior to the effective date of the amended statute charging statutory rape if the victim is under fifteen, and the statutory rape law under N.C.G.S. § 14-27.2(a)(1) in effect at the time of the crime stated the victim had to be under thirteen years of age.

2. Rape— statutory—sufficiency of evidence—exact date immaterial

Although defendant's conviction for statutory rape in case 97 CRS 20048 must be remanded for resentencing since it was consolidated for the purpose of judgment with a vacated conviction in 97 CRS 20047, the conviction in 97 CRS 20048 is affirmed because the indictment charging that defendant committed the offense during the period from 22 November 1995 to 19 February 1996 is sufficient and the exact date is immaterial because the evidence at trial showed the offense occurred in January 1996, when the victim was fourteen, thus satisfying the requirements of amended statute N.C.G.S. § 14-27.7A.

3. Evidence— other crimes—void statutory rape charge—intent—knowledge—plan

Defendant is not entitled to a new trial on the charges for sexual activity by a custodian, even though evidence was admitted on a void statutory rape charge, because the evidence was relevant under N.C.G.S. § 8C-1, Rule 401 to show defendant's intent, knowledge, and plan.

4. Jury— peremptory challenge—racial discrimination—failure to make prima facie showing

The trial court did not err in concluding that defendant failed to make a prima facie showing that the State's use of its peremptory challenges was based on purposeful discrimination because: (1) the prosecutor explained his challenge of one potential black juror was based on his failure to disclose that he had previously been charged with contributing to the delinquency of a minor, and the fact that the prosecutor thought the potential juror was not being truthful in his answers to questions about other charges pending against him; (2) the prosecutor explained his challenge of a second potential black juror was based on the fact that she was quiet, she would not make eye contact with the prosecutor, she gave only yes and no answers, and she failed to disclose her involvement in an assault case at her home; (3) the prosecutor did accept a black juror on the panel, but that juror was later excused by defendant; (4) the prosecutor made no comment tending to support an inference of racial discrimination; and (5) no showing was made of any pattern of the State in exercising peremptory challenges solely to remove black jurors.

5. Sexual Offenses— sexual activity by a custodian—motion to dismiss—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charge of sexual activity by a custodian in 97 CRS 20050 because: (1) the victim's testimony revealed that she believed she was in a custodial relationship with defendant on the date of their sexual encounter; (2) employees from the Youth Opportunity Home testified that the victim was still a participant in their program on the date of the victim's sexual encounter with defendant; and (3) the State demonstrated sufficient evidence that defendant was an employee of the Youth Opportunity Home at that time.

6. Evidence— impeachment—collateral issue—no prejudicial error

Although the trial court erred in a prosecution for statutory rape and sexual activity by a custodian when it allowed the impeachment of defendant's wife through the use of extrinsic evidence from a policeman concerning the collateral issue of defendant pulling out a patch of his wife's hair, defendant has failed to establish prejudice in light of the extensive evidence of defendant's guilt.

7. Sentencing— aggravating factor—statutory rape—sexual activity by a custodian—position of trust or confidence

The trial court did not err in finding as an aggravating factor for the statutory rape charges that defendant took advantage of a position of trust or confidence because evidence used to prove an element of the joined offense of sexual activity by a custodian could also be used to support an aggravating factor for the separate offense of statutory rape.

Appeal by defendant from judgments entered 13 October 1998 by Judge Thomas W. Ross in Forsyth County Superior Court. Heard in the Court of Appeals 21 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Joyce S. Rutledge, for the State.

Hough & Rabil, by S. Mark Rabil, for defendant-appellant.

EAGLES, Chief Judge.

The defendant, Kenneth Kenyon Crockett, was convicted of two counts of statutory rape and four counts of "sexual activity by a custodian" at the 14 September 1998 criminal session of Forsyth County Superior Court.

The evidence presented at trial indicated that the defendant worked as an employee of the Youth Opportunity Home in Winston-Salem, North Carolina. The home provides food, shelter, and adult supervision for abused, neglected juveniles.

Defendant had consensual sex with a sixteen-year-old female resident named Candi Corvin on two occasions. The first occasion was in March 1996, shortly after Ms. Corvin began staying at the home. The second occasion was shortly after Ms. Corvin left the home. On

this occasion, Ms. Corvin contacted the defendant when he was off-duty, using the pager number which he had previously given her. Defendant picked Ms. Corvin up and took her to a hotel where they had sex. Additionally, defendant had consensual sex with a fourteen-year-old female resident named Sandra Ware in November, 1995 and in January, 1996.

The rules of the home directed that staff were not to have sexual contact with the residents. Additionally, if a resident tried to communicate with a staff member when the employee was not on duty, the off-duty staff member was obliged to alert the on-duty staff member to the resident's need. Further, the rules forbade employees to give out their personal telephone numbers to residents.

The defendant was convicted of two charges of statutory rape and four charges of sexual activity by a custodian. Defendant appeals.

[1] We first address whether the indictments for statutory rape are fatally defective. Defendant was charged and convicted of statutory rape in 97 CRS 20047 and 97 CRS 20048. In 97 CRS 20047, the defendant was convicted for having sex with fourteen-year-old Sandra Ware on 26 November 1995. On 26 November 1995, the date the defendant and Ms. Ware had sex, the statutory rape law in effect was N.C.G.S. § 14-27.2(a)(1). Under this law, the victim had to be *under thirteen* years of age for the defendant to be charged with statutory rape. Under an amended version of the statutory rape law, N.C.G.S. § 14-27.7A, defendants may be guilty of statutory rape if the victim is *under fifteen* years of age. However, this amended version did not become effective until 1 December 1995, five days after defendant had sex with the fourteen-year-old. The State concedes that the defendant's pre-December 1995 conviction for statutory rape with a fourteen-year-old cannot stand. Accordingly, we conclude that defendant's conviction in 97 CRS 20047 must be vacated.

[2] Defendant's convictions in 97 CRS 20047 and 97 CRS 20048 were consolidated for judgment. Defendant contends his conviction in 97 CRS 20048 is also invalid. The indictments for both counts charge that defendant committed statutory rape during the period from 22 November 1995 to 19 February 1996. Defendant contends that the indictments are impermissibly vague because they do not specify the exact date the offense was committed.

An indictment is sufficient if it sets out a time period during which the crime allegedly occurred. *See State v. Hatfield*, 128 N.C.

App. 294, 299, 495 S.E.2d 163, 166, *disc. review denied*, 348 N.C. 75, 505 S.E.2d 881, *cert. denied*, 525 U.S. 887, 142 L. Ed. 2d 165 (1998). *See also State v. Oliver*, 85 N.C. App. 1, 7-8, 354 S.E.2d 527, 531, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). In the case of 97 CRS 20048, the exact date that defendant had sex with Sandra Ware is immaterial because the evidence at trial showed that this offense occurred in January 1996 when the victim was fourteen. This satisfied the requirements of the amended statute, N.C.G.S. § 14-27.7A. Accordingly, we conclude that the conviction in 97 CRS 20048 should be affirmed. Because 97 CRS 20048 previously was consolidated for the purpose of judgment with 97 CRS 20047, we remand 97 CRS 20048 to the superior court for resentencing.

[3] Next we consider defendant's argument that he is entitled to a new trial on the remaining charges for "sexual activity by a custodian" because the admission of evidence on the void statutory rape charge was irrelevant and unfairly prejudicial. We are not persuaded.

The State argues that the evidence of defendant's sexual activity with Ms. Ware in 1995 was relevant to establish intent, motive, knowledge, as well as defendant's scheme of involving himself with vulnerable, disturbed teenage girls at the home. According to the State, this evidence "was highly probative of an intent and design to prey on vulnerable young women."

Under N.C.G.S. § 8C-1, Rule 401, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, "as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) (quoting 1 *Brandis on North Carolina Evidence* § 91 (2d rev. ed. 1982)). Even if the evidence may tend to show other crimes, or bad acts committed by the defendant, the evidence is admissible under Rule 404(b) as long as it "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)). Here, the evidence is relevant to show defendant's intent, knowledge and plan. Accordingly, we conclude that defendant's argument is without merit; the defendant is not entitled to a new trial on the remaining charges.

[4] Next, we consider whether the trial court erred in concluding that there was no purposeful racial discrimination in the peremptory challenges exercised by the State. Here, the African American defendant was tried by an all-white jury. The prosecutor exercised three peremptory challenges. Two of the three excused were African Americans. Once the jury panel had been selected, defendant moved the trial court to strike the jury panel because, he argued, the prosecutor had challenged two jurors solely on the basis of race. After the prosecutor gave his reasons for the peremptory challenges, the trial court denied defendant's motion. The court stated, "since there has been no *prima facie* case and since the State has shown nondiscriminatory reasons for the exercises in the preemptory [sic] challenges, the Court would conclude that the motion to discharge the twelve jurors selected on the grounds of racial discrimination in the jury selection should be and same is hereby denied."

When analyzing a claim of racial discrimination based on the prosecution's use of peremptory challenges,

> (1) defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race, and if this showing is made; (2) the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case; and (3) the trial court must determine whether defendant has proven purposeful discrimination.

State v. Smith, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000) (citing *State v. Cummings*, 346 N.C. 291, 308-9, 488 S.E.2d 550, 560 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998)). Here, the trial court concluded that the defendant had not made a *prima facie* showing that the peremptory challenges were exercised on the basis of race. Nevertheless, the court allowed the State to offer an explanation of its use of peremptory challenges. The prosecutor explained his peremptory challenge of Mr. Farris by stating that Mr. Farris had failed to disclose that he had previously been charged with contributing to the delinquency of a minor. The prosecutor also explained that he did not think that Mr. Farris was being truthful in his answers to questions about other charges pending against him. The district attorney explained his challenge of Ms. Fletcher by stating that she was quiet, would not make eye contact with him, and gave only yes and no answers. The prosecutor also stated that Ms. Fletcher failed to disclose her involvement in an assault case at her home.

"Where the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges." *Smith*, 351 N.C. at 262, 524 S.E.2d at 37 (citing *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722-23 (1998)). In determining whether a defendant has made a *prima facie* showing that the peremptory challenge was exercised on the basis of race, one of the factors for our consideration is whether the prosecution accepted other African American jurors. *See Smith*, 351 N.C. at 263, 524 S.E.2d at 37. Here, the prosecutor did accept an African American woman on the panel. However, this juror was later excused by the defendant. Another factor to review in evaluating the peremptory challenges is whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors that raise an inference of discrimination. *See State v. Gregory*, 340 N.C. 365, 397-98, 459 S.E.2d 638, 656 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Our careful review of the trial transcript indicates that the district attorney made no comment tending to support an inference of racial discrimination.

Finally, we note that the trial court's determination regarding peremptory challenges will be upheld unless the appellate court is convinced that the trial court's decision is clearly erroneous. *See State v. White*, 349 N.C. 535, 549, 508 S.E.2d 253, 262 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). "Since the trial court's findings as to purposeful discrimination depend in large measure on its evaluation of credibility, they are given great deference . . . ." *Id.* Here, the trial court found that "[n]o showing has been made with regard to the questioning procedure of the State or any pattern of the State in exercising peremptory challenges solely to remove African Americans." We conclude that the trial court did not err in determining that the defendant failed to make a *prima facie* showing of racial discrimination and that there was no purposeful racial discrimination in the peremptory challenges exercised by the State.

[5] Next, we consider whether the trial court erred in denying the motion to dismiss the charge of sexual activity by a custodian in 97 CRS 20050. In 97 CRS 20050, defendant is charged with having sex with Candi Corvin on 23 April 1996 at a hotel. The defendant argues that the State failed to offer substantial evidence that Ms. Corvin was in the custody of the Youth Opportunity Home at the time of this incident. Additionally, defendant asserts that the State did not offer

substantial evidence that the defendant was an employee of the Youth Opportunity Home at the time he and the victim engaged in sexual activity. The State counters by asserting that there was adequate evidence at trial to support the conclusion that (1) defendant engaged in a sexual act with a person over whom his employer had custody on 23 April 1996, and (2) defendant was an employee of the home at the time of this sexual act.

Where the defendant raises a sufficiency of the evidence claim, the trial court must view the evidence in the light most favorable to the State. *See State v. Roddey*, 110 N.C. App. 810, 813, 431 S.E.2d 245, 247 (1993). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (quoting *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 415-16 (1991)).

Here, the defendant relies on Ms. Corvin's testimony at trial indicating that she had sex with defendant in April after she had voluntarily left the Youth Opportunity Home. Records from the Youth Home show that Ms. Corvin left the home on 20 April 1996 and did not return. Ms. Corvin testified that she was living in an apartment complex at the time she called defendant. They met and had sex at a Holiday Inn on 23 April 1996.

The State argues that Ms. Corvin was still enrolled in the home and still in a custodial relationship with the defendant on the date of the incident. Some time after Ms. Corvin and defendant had sex the first time in March 1996, while Ms. Corvin was still living at the home, defendant gave her his pager number for her to call him "any time I needed anything or anytime I just needed somebody to talk to." After Ms. Corvin ran away from the home, she testified, "I wasn't very happy and there wasn't a lot of food available. So I paged him [defendant] to see if he could come and get me or help me or whatever." In response to her request for help, defendant bought her a meal at McDonald's and then took her to the hotel where he had sex with her. When the State asked Ms. Corvin whether she had placed trust in the defendant, she responded, "Yes. That was natural because he was a counselor. I thought I was—he was suppose [sic] to—I thought I was suppose [sic] to be able to trust him." Ms. Corvin's testimony indicates that she believed she was in a custodial relationship with defendant on the date of their sexual encounter.

Additionally, employees from the home testified that Ms. Corvin was still a participant in their program as of 23 April 1996. Some of her belongings were at the home. Her bed was held open for her until 26 April 1996. Employees continued to make daily notes about Ms. Corvin after she ran away; she was listed in the home's records as a resident until 26 April 1996. Accordingly, we conclude that the State demonstrated sufficient evidence that Ms. Corvin was in the custody of the Youth Opportunity Home at the time of the 23 April 1996 encounter.

We turn to defendant's assertion that the State did not offer substantial evidence that defendant was an employee of the Youth Home at the time he and the victim engaged in sexual activity on 23 April 1996. Defendant argues that he was not employed by the home on the date of the incident. He relies on testimony from Mr. Beasley, the CEO of the Youth Home, that the defendant was terminated as a full time employee on 27 March 1996.

However, Mr. Beasley also testified that defendant was working as a "temporary fill in" employee after late March. He testified that the defendant worked the second and third shifts at the home between March 1996 and 20 April 1996. Additionally, the defendant worked at the home after the 23 April 1996 incident; he worked on 21 May 1996. Defendant was not terminated from his position as a "fill in" employee until August 1996. We conclude that the State demonstrated sufficient evidence that defendant was an employee of the Youth Opportunity Home at the time of the 23 April 1996 encounter. Accordingly, we conclude that the trial court did not err in denying defendant's motion to dismiss the charge of sexual activity by a custodian in 97 CRS 20050.

[6] Next we consider whether the trial court erred in permitting the impeachment of defendant's wife. At trial defendant's wife gave alibi testimony indicating that she and defendant celebrated their wedding anniversary by spending a few hours together at the Holiday Inn in late April 1996. On cross examination, the prosecutor asked Mrs. Crockett whether the defendant had ever pulled her hair out. She answered, "no." The State later impeached Mrs. Crockett through the use of extrinsic evidence from a policeman, Officer Bowens. Over objection, Officer Bowens testified that he had gone to the defendant's home after Mrs. Crockett had called the police. He stated, "Mrs. Crockett admitted she bit him [defendant] on his hand, when he grabbed her face and pulled a small patch of hair from her head."

A witness' prior inconsistent statements are admissible to shed light on the witness' credibility. *See State v. Workman*, 344 N.C. 482, 504, 476 S.E.2d 301, 313 (1996). "When a prior inconsistent statement by a witness relates to material facts in the witness' testimony, the prior statement may be proved by extrinsic evidence." *State v. Jones*, 347 N.C. 193, 205, 491 S.E.2d 641, 648 (1997) (citing 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 161 (4th ed. 1993)). Facts are material when they involve matters pertinent to the pending inquiry. *See State v. Larrimore*, 340 N.C. 119, 146, 456 S.E.2d 789, 803 (1995). However, when the facts are immaterial to the pending inquiry, "[i]t is a general rule of evidence in North Carolina 'that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them . . . .' " *State v. Robinette*, 39 N.C. App. 622, 625, 251 S.E.2d 635, 637 (1979) (quoting *State v. Long*, 280 N.C. 633, 639, 187 S.E.2d 47, 50 (1972)). Here, Mrs. Crockett's statement to Officer Bowen that defendant had pulled out a patch of hair is collateral to the main issues in the prosecution, and should not have been admitted.

Nevertheless, the defendant has failed to establish prejudice sufficient to constitute grounds for a new trial. "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a). Officer Bowen's statement does not rise to this level; in light of the State's evidence as a whole, it could not have tilted the scales against the defendant. Here, the State produced the testimony of Candi Corvin and Sandra Ware describing the defendant's sexual encounters with them. This testimony was corroborated by the testimony of Pamela Stuart, a Department of Social Services employee, and by the testimony of Mickey Hutchens, a Winston-Salem police officer. In light of the extensive evidence of defendant's guilt, the trial court's admission of Officer Bowen's statement cannot be said to constitute prejudicial error. This assignment of error is overruled.

[7] Finally, we consider whether the trial court erred in finding as an aggravating factor for the statutory rape charges, 97 CRS 20047 and 97 CRS 20048, that "defendant took advantage of a position of trust or confidence." Defendant argues that the evidence that proved the aggravating factor was necessary to prove the custodial element of the joined offense of sexual activity by a custodian. Defendant concedes in his brief that his argument is not supported by current North

Carolina law. Evidence used to prove an element of one offense may also be used to support an aggravating factor of a separate joined offense. *See State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994). Accordingly, we conclude that defendant's argument lacks merit and overrule this assignment of error.

For the reasons stated above, we find no prejudicial error in defendant's convictions for sexual activity by a custodian. However, we vacate the judgment for statutory rape in 97 CRS 20047 and remand for resentencing in 97 CRS 20048.

Affirmed in part, vacated in part and remanded.

Judges McGEE and HORTON concur.

ARUN BAHL AND RAYETTA BAHL, ADMINISTRATORS OF THE ESTATE OF RENE LORRAINE BAHL, PLAINTIFFS V. SCOTT LEE TALFORD AND ROBERT JORDAN, JR., DEFENDANTS

ARUN BAHL AND RAYETTA BAHL, ADMINISTRATORS OF THE ESTATE OF RIANA ELIZABETH BAHL, PLAINTIFFS V. SCOTT LEE TALFORD AND ROBERT JORDAN, JR., DEFENDANTS

No. COA98-1571

(Filed 16 May 2000)

Damages— wrongful death of children—lost income of parents

The portion of a wrongful death judgment awarding plaintiffs sums for income they might reasonably have expected to receive from their deceased daughters was remanded where there was no evidence tending to show that the deceased had ever expressed an intent to provide any of their income to their parents. Although they were brought up in a culture within which intra-family financial assistance may have been favored, absolutely no evidence tended to show that the deceased, specifically, would grow up to follow this example. N.C.G.S. § 28A-18-2(b)(4).

Appeal by unnamed defendant from orders and judgments filed 12 August 1998 by Judge Sanford L. Steelman, Jr., in Union County Superior Court. Heard in the Court of Appeals 6 October 1999.

Harry B. Crow, Jr. and Charles B. Brooks, II, for plaintiffs-appellees.

Cranfill, Sumner & Hartzog, by William C. Robinson, for defendants-appellees Scott Lee Talford and Robert Jordan, Jr. No brief filed.

Caudle & Spears, P.A., by Lloyd C. Caudle, for unnamed defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

JOHN, Judge.

Unnamed defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals the trial court's judgment in favor of plaintiffs Arun and Rayetta Bahl, administrators of the estates of Rene Lorraine Bahl (Rene) and Riana Elizabeth Bahl (Riana) (jointly, the deceased). We vacate the judgment in part and remand.

Pertinent facts and procedural history include the following: On 10 January 1995, Rene, age eleven, and Riana, age sixteen, daughters of plaintiffs, were passengers in an automobile operated by Michael Vega (Vega) in Union County. A vehicle driven by defendant Scott Lee Talford (Talford) and owned by defendant Robert Jordan (Jordan) struck the Vega automobile in the rear, whereupon it collided with a third vehicle, resulting in the deaths of Rene and Riana.

Plaintiffs filed separate actions on behalf of the estates of the deceased against Talford and Jordan 16 April 1996, alleging Talford's negligence had been a proximate cause of the deaths of Rene and Riana. Talford and Jordan answered, and Farm Bureau also filed answer in each case, as well as a third party complaint against Vega, alleging his negligence had caused the collision. Plaintiffs' subsequently amended complaints included wrongful death claims against Vega, and the amended answers of Talford and Jordan asserted cross-claims against Vega for contribution.

On 9 May 1998, plaintiffs settled with Vega for a total sum of $20,000.00 and thereafter dismissed with prejudice all pending claims against him. The trial court thereupon granted Vega's motion to dismiss with prejudice the remaining claims against him by Talford, Jordan and Farm Bureau.

Plaintiffs' actions were consolidated for jury trial and heard 21 July 1998. Prior to trial, Talford placed into the record his admission

> that on the date of the alleged accident he was negligent and that negligence was a proximate cause of the collision and the death of the two minor deceased plaintiffs.

As a consequence, the sole issue for jury resolution was that of damages. Both plaintiffs testified at trial and also called as witnesses two state highway patrol officers and Dr. Charles Alford (Alford).

The trial court accepted Alford as "an expert witness in the field of forensic economics and projection of future income streams of children." Alford expressed his opinion that the earnings of Rene and Riana "through [their] parents life expectancy after subtracting personal subsistence expenditures would be in present value after taxes" the sums of $228,077.00 and $293,912.00, respectively. Alford acknowledged the amounts constituted estimates and represented the "discretionary income that would have been available to the girls," or money that "they could have used had they elected for the support of their parents."

At the close of plaintiffs' evidence, defendants moved for directed verdict, *see* N.C.G.S. § 1A-1, Rule 50(a) (1999), asserting plaintiffs had presented insufficient evidence to submit as an element of damages the amount of income plaintiffs might have received from the deceased. The motion was denied and defendants rested without presenting evidence. The jury returned verdicts awarding plaintiffs total damages of $400,000.00.

In addition, the jury responded to the following special interrogatory:

> [w]hat portion of your award is for the present value of the amount of money which the deceased . . . could have expected to earn during the remainder of the lives of her parents, less the amount she would have spent on herself or for other purposes which would not have benefited (sic) her next of kin?

In its answer, the jury indicated it attributed the sums of $22,800.00 as applicable to Rene and $29,300.00 to Riana, *i.e.*, ten percent of the amount Alford had estimated as the future discretionary income of each.

Defendants moved for judgment notwithstanding the verdict (JNOV), *see* G.S. § 1A-1, Rule 50(b), new trial, *see* N.C.G.S. § 1A-1, Rule 59(a) (1999), and amended verdict, *see* G.S. § 1A-1, Rule 59(e). The trial court denied the motions and entered judgment in favor of plaintiffs 12 August 1998.

Farm Bureau timely appealed, specifying eight assignments of error addressed to two main issues: (1) that the trial court

> allowed the jury to speculate on the amount of income [plaintiffs], as parents, might have received from the [deceased] as an element of their damages on the grounds that, as a matter of law, the plaintiffs presented insufficient evidence during the trial to submit those issues to the jury;

and, (2) that statements made to the jury by plaintiffs' counsel in closing arguments were "highly inflammatory and prejudicial." However, Farm Bureau does not address the second issue in its appellate brief, and the three assignments of error relating thereto are deemed abandoned. *See* N.C.R. App. P. 28(b)(5) ("[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned").

Farm Bureau's remaining five assignments of error are consolidated into one argument. Essentially, Farm Bureau asserts the trial court erroneously denied its directed verdict and JNOV motions, thereby allowing the jury to award as an element of damages the amount plaintiffs could have expected to receive from the deceased had they lived. Farm Bureau contends the sums attributed to this element of damages, $22,800.00 and $29,300.00, should be "credited on the verdicts and [the] interest . . . re-calculated." We must agree.

A JNOV motion seeks entry of judgment in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict returned by the jury. See G.S. § 1A-1, Rule 50(b); *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). A ruling on such motion is a question of law, *see Penley v. Penley*, 314 N.C. 1, 9 n.1, 332 S.E.2d 51, 56 n.1 (1985), and presents for appellate review the identical issue raised by a directed verdict motion, *i.e.*, whether the evidence considered in the light most favorable to the non-movant was sufficient to take the case to the jury and to support a verdict for the non-movant, *see Henderson v. Traditional Log Homes*, 70 N.C.App. 303, 306, 319 S.E.2d 290, 292, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). If more than a scintilla of evidence was presented in support of each element of the non-movant's claim, the motion would properly be denied. *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994).

Damages recoverable for wrongful death are prescribed by statute, and include

> [t]he present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
>
> a. Net income of the decedent . . . .

N.C.G.S. § 28A-18-2(b)(4) (1999). Farm Bureau does not maintain plaintiffs presented insufficient evidence of the "present monetary value of the . . . [n]et income of the decedent[s]," *id.*, but rather challenges the sufficiency of the evidence regarding the income plaintiffs could have "reasonably expected" to receive from the deceased, *id.*; *see also State v. Smith*, 90 N.C. App. 161, 169, 368 S.E.2d 33, 38-39 (1988) (parents may "only recover the amount of [the] income that they reasonably might have received had [the decedent] lived"), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 104 L. Ed. 2d 1007 (1989).

In response, plaintiffs point to certain appellate decisions holding parents may recover for pecuniary injury, measured as loss of net income, resulting from the death of a thirteen year old child, *Gurley v. Power Co.*, 172 N.C. 690, 90 S.E. 943 (1916), or even a five month old infant, *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900). We note, however, that the cases cited by plaintiffs were decided well before enactment of G.S. § 28A-18-2 in its present form.

The original wrongful death statute, N.C.G.S. § 28-174, was significantly amended in 1969, *see Bowen v. Rental Co.*, 283 N.C. 395, 413-17, 196 S.E.2d 789, 801-04 (1973) (reciting history of wrongful death statute), and was recodified effective 1975 as G.S. § 28A-18-2, *see* 1973 N.C. Sess. Laws ch. 1329, §§ 3, 5. Prior to 1969, the statute simply provided as follows:

> "Damages recoverable for death by wrongful act.—The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death."

Bowen, 283 N.C. at 414, 196 S.E.2d at 802 (quoting prior version of statute). Damages were calculated as the "*present value* of the *net pecuniary worth* of the deceased based on *his* life expectancy." *Id.* at 415, 196 S.E.2d at 803 (final emphasis added). Under this standard, the award of $1,000.00 to the parents in *Russell* upon the death of their five month old son was approved. *Russell*, 126 N.C. at 961, 970, 36 S.E. at 191, 193.

The 1969 amendment, however,

> shift[ed] the focus for the determination of wrongful death damages from ascertaining the loss of net income to the decedent's estate to ascertaining all monetary losses to the beneficiaries. . . . [N]ot only the present worth of the decedent's net income . . . but also the beneficiaries' life expectancies and expectations of gain from the decedent must be considered . . . .

Robert G. Byrd, *Recent Developments in North Carolina Tort Law*, 48 N.C.L. Rev. 791, 805 (1970). As the current statute emphasizes loss of the income "reasonably expected" to be received by beneficiaries, G.S. § 28A-18-2(b)(4), earlier cases construing G.S. § 28-174, with its emphasis on loss to the decedent's estate, are inapposite to the issue at hand.

We therefore turn to a consideration of plaintiffs' evidence on the question of whether they "reasonably expected" to receive any portion of the net income of Rene and Riana. *See* G.S. § 28A-18-2(b)(4). Taken in the light most favorable to plaintiffs, *see Henderson*, 70 N.C. App. at 306, 319 S.E.2d at 292, the evidence tended to show that:

> Arun, the father of Rene and Riana, was of Indian descent;
>
> Rene and Riana were partially raised in the Indian culture;
>
> Arun's family had a history of giving financial assistance to members of the family;
>
> Arun's brother provided financial help to his and Arun's mother after their father died;
>
> Arun assisted his brothers and sisters financially and Rene and Riana were aware of this; and,
>
> "it's nothing out of the ordinary" for Indian children to help their parents financially as the parents age.

However, no testimony was presented tending to show the deceased had contributed money to their parents on any occasion in the past nor that they may have contemplated doing so in the future. Moreover, even though the deceased may have been "aware" of the pattern of financial assistance in Arun's family, it appears the subject was never discussed with their father, as evidenced by the following testimony from Arun:

> Q (Mr. Brooks, plaintiffs' attorney): Your daughter—given that your daughters were aware that your family helped support each other, had they ever said anything to you about the way your family helped each other out?
>
> A (Arun Bahl): Not specifically.
>
> Q: And had they, uh, ever said anything to you about the way you helped your brother in London?
>
> . . . .
>
> A: No. They never had anything positive or negative to say about it.

Few North Carolina cases speak directly to the issue. In *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987), our Supreme Court held that

> lost income damages normally available under N.C.G.S. § 28A-18-2(b)(4)a. cannot be recovered in an action for the wrongful death of a stillborn child,

id. at 432, 358 S.E.2d at 494, because the calculation of damages would simply be too speculative, *id.* For older children and adults, courts in this jurisdiction have recognized that "[i]t would be difficult, if not impossible, to formulate a rule of general application for the measurement of such damages," *Bowen*, 283 N.C. at 419, 196 S.E.2d at 805, and that "*[s]ome* speculation . . . must always be necessary," *Stutts v. Adair*, 94 N.C. App. 227, 238, 380 S.E.2d 411, 418 (1989). Nonetheless, the decisions reflect certain guidelines.

First, although "concrete manifestations of the child's intent to provide support . . . would obviously demonstrate that the parents had reasonable expectations to the child's income," it is not necessary "to demand actual support of the parents as the sole ground for any recovery of lost income." *Id.* However, some evidence must be presented "to show that either of the victim's parents reasonably expected to receive any . . . of his income," *Smith*, 90 N.C. App. at 169, 368 S.E.2d at 39, and "such expectations could . . . be shown through . . . the verbally-expressed intentions of the child," *Stutts*, 94 N.C. App. at 238, 380 S.E.2d at 418.

Significantly, this Court in *Stutts* held that

> the trial judge erred by submitting the issue of damages for lost income because there was no evidence before the judge that [the

> deceased] had ever expressed an intent to provide any of her income to her parents.

Id. at 239, 380 S.E.2d at 418-19.

In the case *sub judice*, it appears plaintiffs were allowed to testify freely, yet presented no evidence Rene and Riana "had ever expressed an intent to provide any of [their] income to [their] parents." *Id.* at 239, 380 S.E.2d at 419. Indeed, during the directed verdict motion hearing, plaintiffs' counsel conceded his clients had brought forward "no absolute direct evidence" on the issue of what plaintiffs "could have expected to receive."

In short, we conclude it was error for the trial judge to have submitted to the jury as an element of damages the amount of income plaintiffs could reasonably have expected from the deceased. *See id.; see also Knoles v. Salazar*, 766 S.W.2d 613, 616 (Ark. 1989) (parents could not recover lost income damages upon death of sixteen-year old child who had never "expressed a hope or desire, or demonstrated an intention or disposition, to be of financial assistance to [his] parents"). At best, plaintiffs' evidence tended to show the deceased were non-communicative on the question of providing aid for their family. In the words of Arun, they "never had anything positive or negative to say about" the manner in which his family accorded financial help to other family members. Although it appears, taking the evidence in the light most favorable to plaintiffs, *see Henderson*, 70 N.C. App. at 306, 319 S.E.2d at 292, the deceased were brought up in a family and culture within which intra-family financial assistance may have been favored, absolutely no evidence tended to show that Rene and Riana, specifically, would grow up to follow this example.

We acknowledge our earlier dicta that "*[s]ome* speculation" nearly always is required to establish the element of damages at issue, *Stutts*, 94 N.C. App. at 238, 380 S.E.2d at 418; however,

> [d]amages available under [G.S. § 28A-18-2] are not automatic; they are what the legislature will permit the beneficiaries to recover *provided those damages can be proved.* The law disfavors—and in fact prohibits—recovery for damages based on sheer speculation. Damages must be proved to a reasonable level of certainty, and may not be based on pure conjecture.

DiDonato, 320 N.C. at 430-31, 358 S.E.2d at 493 (citation omitted). A "reasonable level of certainty," *id.* at 431, 358 S.E.2d at 493, is not an

impossible standard in regard to the element of damages at issue herein, even though the case may involve a minor child. For example, testimony as to a child's monetary contributions to the family from part-time employment, expressions of a future intent to assist parents financially, *see Stutts*, 94 N.C. App. at 238, 380 S.E.2d at 418, or evidence that an older sibling had provided monetary aid to her parents, might in the appropriate case suffice to allow the issue to go to the jury. However, no such testimony is reflected in the instant record.

In sum, the challenged amount of damages must necessarily have been based upon "sheer speculation," *DiDonato*, 320 N.C. at 430, 358 S.E.2d at 493, in that no evidence was presented tending to show that plaintiffs could "reasonably [have] expected," G.S. § 28A-18-2(b)(4), to receive any portion of the deceased's future income. Although submission of that element of damages was error, we commend the trial court's foresight in submitting the special interrogatory noted above which allows remand without the necessity of ordering a new trial.

To conclude, that portion of the trial court's judgment awarding plaintiffs $22,800.00 and $29,300.00 for income they might reasonably have expected to receive from Rene and Riana, respectively, is vacated and this case remanded for entry of a corrected judgment and recalculation of the amount of interest on the final damage award.

Vacated in part and remanded.

Judges LEWIS and McGEE concur.

STATE OF NORTH CAROLINA v. GREGORY WILSON FARMER, DEFENDANT

No. COA99-493

(Filed 16 May 2000)

1. Venue— motion for change—witnesses afraid—pretrial publicity

The trial court did not abuse its discretion in a non-capital first-degree murder case by denying defendant's pretrial motion to change venue since defendant failed to meet his burden under N.C.G.S. § 15A-957 of showing that the population of an entire

county was infected with prejudice against him by: (1) providing a broad statement from his investigator that certain unnamed witnesses were afraid to testify for the defense because they feared reprisal from other unnamed parties; and (2) presenting the existence of pretrial publicity, without showing how prospective jurors were tainted by it.

2. Homicide— first-degree murder—requested instruction—prior threats by victim

The trial court did not commit plain error in a non-capital first-degree murder case by denying defendant's request for jury instructions on the effect of evidence of threats by the victim against defendant because the trial court: (1) permitted defendant to present evidence that the victim had assaulted defendant in July 1997 and had threatened defendant on two other occasions, even though the latter threat was not communicated to defendant; (2) allowed defendant to present evidence of his theory of self-defense; and (3) instructed the jury that defendant would not be guilty of any murder or voluntary manslaughter if he acted in self-defense, if he was not the aggressor, and if he did not use excessive force under the circumstances.

3. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence

Although defendant contends the State failed to present substantial evidence of premeditation and deliberation since the killing of the victim occurred during a quarrel, the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder because the record reveals that: (1) the victim did not make any statement to defendant before defendant first shot him; and (2) defendant's own statement is that defendant said something to the victim, and defendant subsequently pulled out a gun and began shooting at the victim.

Appeal by defendant from judgment entered 7 January 1999 by Judge G. K. Butterfield, Jr. in Superior Court, Nash County. Heard in the Court of Appeals 27 March 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas J. Pitman, for the State.

David C. Braswell for defendant-appellant.

TIMMONS-GOODSON, Judge.

Gregory Wilson Farmer ("defendant") was indicted on one charge of murder. Prior to the selection of the jury, defendant filed several pretrial motions including a motion for change of venue pursuant to North Carolina General Statutes section 15A-957, which the trial court denied. Defendant was tried noncapitally for first degree murder.

The evidence at trial tended to show the following. On 14 January 1998, Byron G. Bales ("the victim"), his son Jerry, and his adopted brother, Renwood Pierce, entered Booney's hot dog stand in Rocky Mount, North Carolina to have lunch. They sat at a table in the middle of the restaurant and ordered their meal. Shortly after the victim's party had been seated, defendant entered the front door of the restaurant with his girlfriend, Tracy Starling.

Defendant made a statement to the victim, drew a gun, and shot the victim six times. The victim did not have a weapon and did not make any movement towards defendant, but was attempting to flee when he was fatally wounded by the gunshots. Three of the six shots were fired from a distance of two to four feet and entered the victim's cranial cavity.

Defendant was the ex-brother-in-law of the victim. According to defendant's evidence, the victim was prone to fight, had attacked defendant in July of 1997, and had threatened defendant. Donna Starling, the sister of defendant's girlfriend, testified that the victim, while drunk, told her on 24 December 1997 that he intended to kill defendant. She informed defendant of the threat two days later. A second witness, John Coley, testified that he heard the victim threaten to kill defendant on 14 January 1998, the day the victim was killed. Coley did not inform defendant of the threat prior to the shooting.

Defendant maintained throughout the trial that he acted in self-defense. Following a jury verdict of guilty of first degree murder, defendant was sentenced to life imprisonment without parole. Defendant appeals.

On appeal, defendant argues that the trial court erred in: (I) denying defendant's motion to change venue; (II) denying defendant's request for a jury instruction regarding evidence of threats by the victim against defendant; and (III) denying defendant's motion to dismiss.

[1] By his first assignment of error, defendant argues that the trial court erred in denying defendant's pretrial motion to change venue because the totality of the circumstances showed there was such a probability that prejudice would result that defendant would be denied due process. We cannot agree.

North Carolina General Statutes section 15A-957 provides in pertinent part:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

N.C. Gen. Stat. § 15A-957 (1999).

"The burden of proof in a hearing on a motion for change of venue due to existing prejudice in the county in which a prosecution is pending is upon the defendant." *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). The defendant must demonstrate that there is a reasonable likelihood he will not receive a fair trial as a result of such prejudice. *Id.* Even where the defendant cannot show specific, identifiable prejudice, he can fulfill his burden by demonstrating that, based on the totality of the circumstances, the population of an entire county is "infected" with prejudice against him. *State v. Billings*, 348 N.C. 169, 177, 500 S.E.2d 423, 428, *cert. denied*, 525 U.S. 1005, 142 L. Ed. 2d 431 (1998).

The determination of whether the defendant has carried his burden rests within the sound discretion of the trial court, and will not be disturbed on appeal absent a showing of abuse of discretion. *Madric*, 328 N.C. at 226-27, 400 S.E.2d at 33-34. Abuse of discretion occurs where the ruling of the trial court is manifestly unsupported by reason such that it could not have been the result of a reasoned decision. *State v. Wooten*, 344 N.C. 316, 474 S.E.2d 360 (1996).

In the present case, defendant's motion was made before the jury was selected and impaneled and was not subsequently renewed. Our Supreme Court has held that "[o]nly in the most extraordinary cases

can an appellate court determine *solely* upon evidence adduced prior to the actual commencement of jury selection that a trial court has abused its discretion by denying a motion for change of venue due to existing prejudice against the defendant." *Madric*, 328 N.C. at 227, 400 S.E.2d at 34. Therefore, we will not disturb the ruling of the trial court unless we find that a change of venue was compelled by extraordinary circumstances.

In his motion for change of venue, defendant relied on two arguments. First, defendant contended that "the removal of this case to another county [was] essential to the defense's case to alleviate defense witnesses' fear of reprisal[.]" In support of this argument, defendant offered the affidavit of his court-appointed investigator, which stated in pertinent part: "While investigating this case, I have interviewed essential defense witnesses who have expressed their fear in testifying for the defense because of circulated intimidating threats." Defendant provided no additional evidence at his motion hearing. After considering defendant's argument, the trial court stated: "Number one under his motion for change of venue about the fear of reprisal, there still will be fear of reprisal no matter where we try the case. That's irrelevant, I think, in this particular situation."

We do not believe that defendant met his burden of showing that the population of an entire county was infected with prejudice against him by providing a broad statement from his investigator that certain unnamed witnesses were afraid to testify for the defense because they feared reprisal from other unnamed parties. Furthermore, our examination of defendant's first argument does not reveal that the trial court's ruling was unsupported by reason as the trial court logically reasoned that a change of venue would not eradicate any fear of reprisal.

In his second argument in support of his motion for change of venue, defendant contended that he was prejudiced by pretrial publicity:

> [N]umerous newspaper and media articles have been circulated throughout the Nash and Edgecombe Counties publicizing the facts surrounding the death of [the victim]; . . . that said media publicity is inflammatory and it is reasonably likely that prospective jurors would base their decision in the case upon pre-trial information rather than evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed.

We note that juror exposure to news accounts of the crime with which the defendant is charged does not in and of itself deprive the defendant of due process. *Billings*, 348 N.C. at 179, 500 S.E.2d at 429. "We have consistently held that factual news accounts with respect to the commission of a crime and the pretrial proceedings relating to that crime do not of themselves warrant a change of venue." *Id.* The defendant bears the burden of establishing a reasonable likelihood that prospective jurors would rely on pretrial publicity rather than on the evidence presented at trial. *State v. Trull*, 349 N.C. 428, 439, 509 S.E.2d 178, 186 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999).

The trial court considered defendant's second argument and responded as follows:

> I don't believe that it's that well publicized. It happened a year ago, . . . it was publicized at that point, then on Sunday the newspaper article that you see there was run by the Telegram as they always do for some reason before the murder trial starts. But I don't think that it will inhibit our ability to get twelve fair and impartial jurors in this particular situation.

We hold that defendant failed to meet his burden of showing that prospective jurors were tainted by pretrial information. We note that defendant did not exhaust his peremptory challenges during the selection of the jury. In light of the fact that the residents of Nash County have a recognized interest in having the defendant tried locally, *State v. Vereen*, 312 N.C. 499, 511, 324 S.E.2d 250, 258 (1985), we conclude that the trial court did not abuse its discretion in denying defendant's motion for change of venue.

[2] By his second assignment of error, defendant argues that the trial court committed plain error by denying defendant's request for jury instructions on the effect of evidence of threats by the victim against defendant on the ground the denial of the requested instructions prevented the jury from finding the deceased was the aggressor in the fatal confrontation. We cannot agree.

Defendant failed to object at trial to the omission of the requested jury instruction. According to our rules of appellate procedure, a defendant waives his right to assign error to the omission of a jury instruction where he does not object to such omission before the jury retires to deliberate. N.C.R. App. 10(b)(2).

However, defendant argues that the omission of his requested instruction is reviewable by this Court in that it constituted plain error. Plain error is "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." *State v. Robinson*, 346 N.C. 586, 603, 488 S.E.2d 174, 185 (1997) (citations omitted). "To constitute plain error, an instructional error must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Flowers*, 347 N.C. 1, 22, 489 S.E.2d 391, 403 (1997) (citations omitted). On appeal, defendant must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law. *State v. Thompson*, 118 N.C. App. 33, 454 S.E.2d 271, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995).

Defendant made a motion that the following proffered instruction be submitted to the jurors:

> Evidence has been received with regard to threats made by [the victim] against [defendant]. The law recognizes that a person who has threatened another person is more likely to be the aggressor if the persons involved are later involved in a fight. Therefore, if you believe from the evidence that [the victim] threatened [defendant], you may consider this fact in your determination of who was the aggressor in the confrontation between [the victim] and [defendant] and give it such weight as you decide it should receive in connection with all of the evidence. Further, if you find that [defendant] knew of these threats, you may consider this fact in your determination of whether [defendant] had a reasonable apprehension of death or bodily harm or both when he encountered [the victim] and give it such weight as you decide in connection with all of the other evidence.

The trial court denied the motion, stating, "I'm not going to charge the jury on this point but I will permit you to argue that case to the jury. You may, as you see fit, argue the law as you understand it to be, to the jury."

In support of his motion and in his brief, defendant argues that *State v. Ransome*, 342 N.C. 847, 467 S.E.2d 404 (1996) controls in the case at bar. *Ransome* is distinguishable from the instant case in that it did not address the issue of jury instruction. Rather, our Supreme Court held in *Ransome* that the trial court erred in excluding evidence of statements by the victims that they intended to "get" the

defendant which were not communicated to the defendant. In the present case, the trial court permitted defendant to present evidence that the victim had assaulted defendant in July of 1997 and had threatened defendant on 24 December 1997 and on 14 January 1998, although the latter threat was not communicated to defendant.

The trial court granted defendant latitude to present evidence in support of his theory of self-defense and defendant does not argue otherwise. Furthermore, the trial court instructed the jury on that theory, defining the term "self-defense" and concluding, "The defendant would not be guilty of any murder or voluntary manslaughter if he acted in self-defense as I have just defined it to be, and if he was not the aggressor in bringing on the fight and did not use excessive force under the circumstances."

Defendant failed to cite any authority in support of his argument that his proffered instruction was required or correct at law. We conclude that the trial court adequately instructed the jury and did not commit plain error in denying defendant's request for jury instructions on the effect of evidence of threats by the victim against defendant.

[3] By his third assignment of error, defendant argues that the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence for insufficiency of the evidence. We cannot agree.

"A defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator." *Trull*, 349 N.C. at 447, 509 S.E.2d at 191. The State must present substantial evidence of each element of the offense. *State v. Walton*, 90 N.C. App. 532, 369 S.E.2d 101 (1988).

First degree murder is the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *Trull*, 349 N.C. at 448, 509 S.E.2d at 191. An act is premeditated if it was thought over beforehand, but no particular length of time is required and the time can be quite short. *State v. Taylor*, 344 N.C. 31, 45, 473 S.E.2d 596, 604 (1996). Deliberation is the "intent to kill formed by defendant in a cool state of blood, and not as a result of a violent passion arising from legally sufficient provocation." *Id.* (citations omitted).

In the instant case, defendant argues that the State failed to present substantial evidence of premeditation and deliberation. Instead, defendant contends that the killing occurred during the course of a quarrel, and that the evidence does not support a finding that he formed the specific intent to kill in a cool state of blood before the quarrel. In support of his argument, defendant states in his brief that "all of the evidence showed that the shooting did not occur until after the defendant engaged in a verbal exchange with [the victim] in the Booney's restaurant." However, the record indicates that the victim did not make any statement to defendant before defendant first shot him. According to defendant's own statement of the facts: "The defendant said something to [the victim] and subsequently pulled out a gun and began shooting at [the victim]." As such, defendant's characterization that the shooting arose out of a "verbal exchange" is not fairly supported by the facts. We find defendant's argument that the trial court erred in failing to grant his motion to dismiss is without merit.

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

No error.

Chief Judge EAGLES and Judge HUNTER concur.

MITCHELL GARNET EVANS v. VONDA WILSON EVANS

No. COA99-355

(Filed 16 May 2000)

1. Child Support, Custody, and Visitation— custody—change of circumstances—remarriage of parent—relocation of parent—best interests of child

Even though defendant mother planned to relocate with her child to live with her new husband in Maryland and the trial court found the proposed relocation would adversely affect the relationship between plaintiff father and his child, the trial court erred by modifying the parties' custody decree based on a change of circumstances because: (1) speculation or conjecture that a detrimental change may take place sometime in the future will

not support a change in custody; (2) remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child; (3) a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child which justifies a modification of a custody decree; and (4) the trial court failed to address the issue of the best interests of the child.

2. Child Custody, Support, and Visitation— custody—retention of jurisdiction

The trial court erred in a child custody case by attempting to retain exclusive jurisdiction over future hearings because the legislature has not acted to grant authority to the trial court to retain jurisdiction in a domestic relations case.

Appeal by defendant from judgment entered 28 December 1998 by Judge John M. Britt in Nash County District Court. Heard in the Court of Appeals 21 February 2000.

The Rosen Law Firm, by Lee S. Rosen, for plaintiff-appellee.

W. Michael Spivey, for defendant-appellant.

EAGLES, Chief Judge.

This is an appeal from an order modifying a custody decree based on a change of circumstances. The plaintiff and the defendant are the parents of Mitchell Evans, Jr., who was born 1 May 1991. Mr. and Mrs. Evans divorced 25 May 1994. Upon divorce, Mrs. Evans, the defendant-appellant, was given primary physical custody of the child, and Mr. Evans was given visitation rights.

Later, plaintiff-husband and defendant-wife each remarried. The defendant-wife's new husband lives in Maryland. Mrs. Evans planned to relocate with the child to live with her new husband in Maryland, but has not yet moved. In response to defendant's plans to move, the plaintiff filed a "Motion in the Cause for Change of Circumstances" requesting that "the primary care, custody and control of the child be placed with the Plaintiff." The plaintiff also requested "[t]hat the court order that the child not be taken out of the State of North Carolina except as is reasonably necessary for brief vacations and trips for travel . . . ."

After a hearing, the trial court made the following pertinent findings of fact:

> 5. That the parties developed a pattern soon after they separated wherein the Plaintiff did in fact visit with the child every other weekend, and the parties seemed to have little trouble in reaching an agreement on holiday and summer time visitation.
>
> 6. That at some point in early to mid 1997 the parties developed a pattern where for one six month period, in addition to his other visitation, the Plaintiff would pick up the child after school on Monday, Tuesday and Wednesday, and keep him until the Defendant would pick him up that evening . . . in the next six month period the Plaintiff would have the child on Tuesday and Thursday for the same purposes and under the same circumstances. That this was done to accommodate the Defendant in educational endeavors that she was pursuing at one of the local community colleges, and by the agreement of the parties.
>
> 7. That the Plaintiff presented in court calendars, journals that he kept, and graphs that he had prepared based on this information and a daily planner that he kept, and alleged to the court that according to his books and records and his recollection that he had kept the child approximately fifty-four (54%) percent of the child's waking hours during the last fifteen months. . . .
>
> 8. That at a point in time after Plaintiff had filed his Motion, he remarried to the person he has had a consistent and stable relationship with for over four years. . . . [T]hat she is a responsible person, who has developed a good relationship with the minor child.
>
> 9. That the Defendant has also remarried, and her husband, who is fourteen years her senior, is divorced and owns his home in the State of Maryland . . . . [H]er marriage to him was one of the reasons leading to this lawsuit, as she had intended to relocate with this minor child to the State of Maryland.
>
> 10. That there was much testimony from both of the parties, and their family members on both sides, and the court found as a fact that the child as [sic] an excellent relationship with all of his extended family. That the child's grandparents, aunts and uncles,

and many other kin people live within thirty miles of both the mother and the father's current residences. . . .

. . . .

12. That the child is enrolled and in attendance at the school that he normally would attend while living in this community. That he is also enrolled in a day care. That both the school and the day care are environments the child has become used and accustomed to, where he has developed friendships and ties to the community.

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

2. That the court finds that there are in fact substantial and material changes of circumstances effecting [sic] the welfare of the child and justifying change or modification of past orders of this court insuring that the child will not be taken from the State of North Carolina. That said reasons include, but are not limited to, the following:

(a) The child's escalating and material and important relationship with his father over the course of the last fifteen months and the fact this is a young male child who is more and more in need of the guidance and involvement with his father;

(b) The fact that virtually all of the child's extended family have been heavily involved in his life on a regular basis and live within thirty miles of the homes of both parents;

(c) The fact that the child was born and raised in this community where he has spent all of his life, and is in attendance at school and day cares where he has established other ties to this area.

3. That in the event that the Defendant shall determine to relocate to Maryland, then the primary custody of the child shall be assigned to the Plaintiff with reasonable visitation designated to the Defendant.

4. That in the event that the Defendant shall determine that she shall remain in this area then the parties shall continue to share joint custody and visitation with the Plaintiff . . . .

5. That if the child were to be removed from the State of North Carolina at this time it would have an adverse effect on

the relationship of the child with his father and his extended family.

The trial court then ruled "[t]hat for so long as the Defendant shall continue to remain in the immediate vicinity, then the parties shall continue to have and share joint custody of the minor child, with the primary placement with the Defendant." However, if the defendant-mother leaves North Carolina to join her new husband in Maryland, then the primary custody of the child will be awarded to the plaintiff-father. The record on appeal indicates that the mother currently remains in North Carolina. The defendant-mother appeals from this ruling.

[1] We first address whether the trial court's findings of fact support its conclusions of law and the judgment entered. Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child, *see Hamilton v. Hamilton*, 93 N.C. App. 639, 647, 379 S.E.2d 93, 97 (1989), N.C.G.S. § 50-13.7(a) (1999); and (2) a change in custody is in the best interest of the child. *See Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 876 (1963). A party seeking modification of a child custody order bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child. *See Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967). The change in circumstances need not have adverse effects on the child. *See Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). ("[A] showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Id.* at 620, 501 S.E.2d at 900.)

If the party bearing the burden of proof does not show that there has been a substantial change in circumstances, the court does not reach the "best interest" question. *See Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992). However, if the party *does* show that there has been a substantial change in circumstances, there is no burden of proof on the "best interest" question. *See In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

Although the parties have an obligation to provide the court with any pertinent evidence relating to the "best interest" question, the trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue.

> The "best interest" question is thus more inquisitorial in nature than adversarial.

Ramirez-Barker, 107 N.C. App. at 78, 418 S.E.2d at 679.

The court need not wait for any adverse effects on the child to manifest themselves before the court can alter custody. *See, e.g., Perdue v. Perdue*, 76 N.C. App. 600, 334 S.E.2d 86 (1985). "It is neither 'necessary nor desirable to wait until the child is actually harmed to make a change' in custody." *Ramirez-Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679 (quoting *Domingues v. Johnson*, 323 Md. 486, 499, 593 A.2d 1133, 1139 (1991)). However, evidence of "speculation or conjecture that a detrimental change may take place sometime in the future" will not support a change in custody. *Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985).

Here, the father argues that the mother's proposed relocation after her remarriage presents a sufficient change of circumstances to justify a modification of the custody order. However, remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child. *See Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985). *See also Hassell v. Means*, 42 N.C. App. 524, 531, 257 S.E.2d 123, 127, *disc. rev. denied*, 298 N.C. 568, 261 S.E.2d 122 (1979). Similarly, a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child which justifies a modification of a custody decree. *See Gordon v. Gordon*, 46 N.C. App. 495, 500, 265 S.E.2d 425, 428 (1980).

In *Gordon v. Gordon*, 46 N.C. App. 495, 265 S.E.2d 425 (1980), the trial court ordered a change in primary custody of a child to the mother after concluding that there had been a substantial change in circumstances because the father and child had relocated. This Court vacated the trial court's order, stating:

> In the case *sub judice*, the only finding of change of circumstance is that the child has moved from his original home to "strange," i.e. unfamiliar neighborhoods. There are no findings that the moves proved disruptive or detrimental to the child's welfare; that the home and surrounding neighborhood in which the child presently lives differs from his original home, is inadequate, or has an adverse affect on the child's welfare or that the placement of the child in an unfamiliar neighborhood has had any impact on

> the child's adjustment. The mere fact that either parent changes his residence is not a substantial change of circumstance.

Id. at 500, 265 S.E.2d at 428.

Here, the trial court found that the proposed relocation would adversely affect the relationship between the father and his child. However, the court made no findings of fact indicating the effect of the remarriage and relocation on the child himself. The trial court's findings do not discuss the impact of the proposed move on the child.

Further, the trial court did not address the best interest question explicitly. "Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.' " *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C.G.S. § 50-13.2(a)). The welfare of the child is the "polar star" which guides the court's discretion in custody determinations. *See Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899.

The facts in this case are similar to those in *Griffith v. Griffith*, 240 N.C. 271, 81 S.E.2d 918 (1954). There, the custodial mother remarried and planned to move with her daughter to live with her new husband in New Jersey. In light of the proposed move, the trial court ordered that primary custody be awarded to the father. This Court reversed the trial court's order, concluding that the trial court had failed to properly evaluate the best interests of the child. The *Griffith* Court stated:

> [T]he court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so.

Id. at 275, 81 S.E.2d at 921. The *Griffith* Court considered cases from several other jurisdictions involving relocation and custody disputes. The Court stated:

> In these and other instances the question arises whether the person having custody of a child or to whom custody would other-

> wise be granted is to be tied down permanently to the state which awards custody. The result of the decisions is that where the custodian has a good reason for living in another state and such course is consistent with the welfare of the child, the court will permit such removal or grant custody to the nonresident . . . .

Id. at 276, 81 S.E.2d at 922. The trial court must make a comparison between the two applicants considering all factors that indicate which of the two is "best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being." *Id.* at 275, 81 S.E.2d at 921.

In evaluating the best interests of a child in a proposed relocation, the trial court may appropriately consider several factors including:

> [T]he advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Ramirez-Barker, 107 N.C. App. at 80, 418 S.E.2d at 680.

Here, the trial court found only that the proposed relocation would adversely affect the relationship between the father and his child. The trial court made no other findings about the effect of the proposed relocation on the child. We conclude that the facts found do not support the conclusions that there has been a substantial change in circumstances and that it is in the best interest of the child that the custody decree be amended. "[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby*, 272 N.C. at 238-39, 158 S.E.2d at 80. The order is vacated and remanded for detailed findings of fact on the issues of change of circumstance and best interests of the child.

[2] Next, we consider whether the trial judge erred in attempting to retain exclusive jurisdiction over this matter. In *Wolfe v. Wolfe*, 64 N.C. App. 249, 307 S.E.2d 400 (1983), *disc. review denied*, 310 N.C.

156, 311 S.E.2d 297 (1984), this Court held that the trial judge's efforts to retain exclusive jurisdiction in a child custody case were erroneous. Similarly, this Court recently held that the trial court erred in attempting to retain exclusive jurisdiction over future hearings in a determination of parental neglect case. *See In re McLean*, 135 N.C. App. 387, 521 S.E.2d 121 (1999). There, the Court noted "the legislature has not acted to grant authority to the trial court to retain jurisdiction in a domestic relations case." *Id.* at 399, 521 S.E.2d at 129. Accordingly, we conclude that the trial judge erred in attempting to retain jurisdiction over this custody matter.

Reversed and remanded.

Judges McGEE and HORTON concur.

IN THE MATTER OF: RODNEY McKOY, JUVENILE

IN THE MATTER OF: RONDELL McKOY, JUVENILE

No. COA99-691

(Filed 16 May 2000)

1. Juveniles— restitution—means to pay

The trial court erred by ordering juveniles to pay restitution for throwing rocks at a car where there was insufficient evidence that the juveniles had or could reasonably acquire the means to pay $539.50 each within twelve months.

2. Juveniles— restitution—parents' ability to pay

N.C.G.S. § 7A-649(2) does not authorize the juvenile court to consider the parents' ability to pay restitution when ordering juveniles to make restitution to the victim as a condition of probation.

3. Juveniles— delinquency—wanton and willful conduct

There was sufficient evidence in a juvenile proceeding to support findings that the juveniles acted wantonly and willfully in damaging a vehicle, thus supporting findings of delinquency.

IN RE McKOY

[138 N.C. App. 143 (2000)]

Appeal by respondent juveniles from adjudicatory orders entered 27 October 1998 and dispositional orders entered 26 January 1999 by Judge Franklin F. Lanier in Lee County District Court. Heard in the Court of Appeals 14 March 2000.

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

Tron D. Faulk for respondent-appellant Rodney McKoy; Yvonne K. Smith for respondent-appellant Rondell McKoy.

WALKER, Judge.

On 27 October 1998, Rodney McKoy, age 8, and Rondell McKoy, age 7, (collectively "the juveniles") were adjudicated delinquent for willfully and wantonly injuring the personal property of another in violation of N.C. Gen. Stat. § 14-160. After a dispositional hearing, the juveniles were placed on supervised probation for a period of twelve months with certain terms and conditions. One of the conditions was that probation would be renewed at the end of the twelve-month period if each juvenile had not paid $539.50 in restitution.

The State's evidence at the adjudicatory hearing tended to establish the following: On 6 August 1998, the juveniles were standing at the bus stop as Melissa Laird drove her 1989 Ford vehicle past them. Ms. Laird testified that she saw the two juveniles, who were standing with three other children at the bus stop, throw rocks toward her car. She then heard "pow, pow, pow" as the rocks hit her car. Ms. Laird immediately "slammed on [her] brakes," turned the car around, and saw the juveniles run behind a house. She provided information to the authorities, who located the juveniles. Ms. Laird further testified that the paint on her car was "chipped and scratched" and the windshield was "busted in three or four spots," resulting in approximately $1,000.00 in damage.

Milton Jackson, the juveniles' stepfather, testified on the juveniles' behalf, stating that he had questioned the juveniles regarding this incident and that they had both denied throwing rocks at the car. Mr. Jackson further testified that the juveniles are "very truthful" and "very disciplined." During the adjudicatory hearing, juvenile Rodney McKoy admitted throwing rocks to try "to hit the doggie" but denied hitting Ms. Laird's car with rocks. He further testified that someone named "Tyrone" hit the car with rocks. Juvenile Rondell McKoy testified that he did not pick up any rocks that day although his brother

did. He also stated that it was "Tyrone" who hit Ms. Laird's car with rocks, not his brother.

The juveniles contend that the juvenile court erred in: (1) ordering them each to pay $539.50 in restitution since it did not consider their best interests and needs as required by N.C. Gen. Stat. § 7A-646; (2) ordering them each to pay $539.50 in restitution where they do not have the means and cannot reasonably acquire the means to pay this amount; (3) considering the ability of the juveniles' parents to pay the restitution; and (4) in finding the juveniles were delinquent for committing injury to personal property since the evidence was insufficient to show the juveniles acted wantonly and willfully.

[1] We first address the juveniles' contentions that the juvenile court erred in ordering them each to pay $539.50 restitution since it did not consider their best interests and needs as required by N.C. Gen. Stat. § 7A-646 (1995) (repealed 1 July 1999) and since they were without the means to make such restitution within twelve months. The juveniles cite to *In re Berry*, 33 N.C. App. 356, 235 S.E.2d 278 (1977), in which two juveniles were adjudicated delinquent for willfully and wantonly damaging real property and ordered to pay restitution in the amount of $666.50 each as a condition of probation. On appeal, this Court stated:

> [A] requirement that a juvenile make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition.

Id. at 360, 235 S.E.2d at 280-281. After examining the record, this Court found that the juvenile court had failed to make any findings from which it could be "determined that such a condition is fair and reasonable, relates to the needs of the children, tends to promote the best interest of the children, or is in conformity with the avowed policy of the State in its relation to juveniles." Id. Thus, the record was insufficient to support the condition of probation requiring the juveniles to make restitution. *Id.*

The juveniles also cite to *In re Register*, 84 N.C. App. 336, 352 S.E.2d 889 (1987), a prior decision of this Court involving seventeen juveniles who had vandalized the victim's residence while she was away. In that case, only eight of the seventeen juveniles were selected for prosecution based on their or their parents' unwillingness or inability to pay $1,000.00 each in restitution to the victim. *Id.* On appeal, this Court stated:

> We endorse the discriminate and prudent use of restitution in juvenile cases as provided in G.S. 7A-649, but compensation of victims should never become the only or paramount concern in the administration of juvenile justice.

Id. at 339, 352 S.E.2d at 891. This Court found that the juvenile judge did not follow the provisions of the juvenile code set forth in N.C. Gen. Stat. § 7A-646 since there was "nothing in the record to indicate that the court heard and considered any evidence as to the most appropriate dispositional order in each case." *Id.* at 349-350, 352 S.E.2d at 896-897. Instead, the "overriding concern" of the juvenile court was "reimbursing the victim for her financial loss." *Id.* Thus, this Court held that the juvenile court erred in requiring the juveniles accused of vandalism to pay $1,000.00 each in restitution. *Id.*

Here, the record reveals that during the dispositional hearing, the juvenile judge was concerned that the parents of the juveniles had not taken responsibility for payment of the damages. The juvenile judge observed that he would extend probation until each juvenile reached eighteen years of age unless restitution was made. Although the dispositional order otherwise addresses the needs and best interest of each juvenile, the record does not reveal any findings which demonstrate that ordering each juvenile to pay $539.50 in restitution was in their best interest.

Furthermore, N.C. Gen. Stat. § 7A-649 provides that a judge may:

> (2) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile; . . . however, the judge shall not require the juvenile to make restitution if the juvenile satisfies the court that he does not have, and could not reasonably acquire, the means to make restitution.

N.C. Gen. Stat. § 7A-649(2) (1995) (repealed 1 July 1999); *See* N.C. Gen. Stat. § 7B-2506(4) (1999). Here, the juvenile judge determined that the juveniles, ages 7 and 8, were "not old enough" to participate in the Lee County restitution program. The juvenile judge then found:

> The only way that I can ever see any possibility of this lady getting her money, because of the age of these juveniles, and it's not going to be any time soon, is to put them on probation and just to keep extending it until the money is paid.

We note that on 1 October 1998, the Clerk of Superior Court determined that both juveniles were indigent, and counsel was appointed to represent them. *See In re Edwards*, 18 N.C. App. 469, 197 S.E.2d 87 (1973). Therefore, we conclude that there was insufficient evidence before the juvenile court that the juveniles had or could reasonably acquire the means to pay $539.50 each in restitution within twelve months, and thus, it was not in their best interest to require such. We do not suggest, however, that the juvenile court is prohibited from making an inquiry of a juvenile during the dispositional hearing in order to determine if the juvenile has the ability to make full or partial restitution within the twelve-month probationary period.

[2] The juveniles next contend that the juvenile court erred in considering their parents' ability or willingness to pay the restitution. In her recommendation to the juvenile court, the intake counselor recommended as a condition of probation for each juvenile that the parents be responsible to make restitution to the victim. While the dispositional orders make no reference to the parents' obligation to pay restitution, the juvenile judge's comments during the dispositional hearing indicate that he considered the parents' ability or willingness to make restitution in ordering the juveniles to pay $539.50 each as a condition of probation. The juveniles rely on *In re Register*, 84 N.C. App. 336, 350, 352 S.E.2d 889, 897 (1987), in which this Court held:

> [T]he limit of the parents' civil liability for damage 'maliciously or willfully' done to property by a juvenile pursuant to G.S. 1-538.1, is not the proper criteria for determining the punishment to be imposed upon that juvenile found to be delinquent under G.S. 7A-649.

The State argues that *In re Register* is distinguishable but fails to cite any authority to support its argument that the parents' ability to pay restitution can be considered in determining a juvenile's disposition.

We note that N.C. Gen. Stat. § 7A-649(2) (1995) (repealed 1 July 1999), set forth above, addresses only whether the juvenile has or could reasonably acquire the means to make restitution and does not address the parents' ability to pay. Furthermore, we also note that N.C. Gen. Stat. § 1-538.1 (1999) provides for parents to be held strictly liable for a victim's actual damages up to $2,000.00 where a minor maliciously or willfully injures such person or their property. In *Insurance Co. v. Faulkner*, 259 N.C. 317, 323, 130 S.E.2d 645, 650 (1963), our Supreme Court found:

> G.S. § 1-538.1, and similar statutes, appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. . . . Its rationale apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children.

Thus, we conclude that N.C. Gen. Stat. § 7A-649(2) does not authorize the juvenile court to consider the parents' ability to pay restitution when ordering the juveniles to make restitution to the victim as a condition of probation.

[3] The juveniles' last assignment of error is that the juvenile court erred in finding them delinquent for committing injury to property since there was insufficient evidence to show they acted "wantonly and willfully." "Ordinarily, wilful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law." *State v. Casey*, 60 N.C. App. at 414, 416-417, 299 S.E.2d 235, 237, *disc. review denied*, 308 N.C. 192, 302 S.E.2d 245 (1983). The word "willful" means "voluntary and intentional, but not necessarily malicious." BLACK'S LAW DICTIONARY 1593 (7th ed. 1999). "Conduct is wanton when [it is] in conscious and intentional disregard of and indifference to the rights and safety of others." *Casey*, 60 N.C. App. at 416-417, 299 S.E.2d at 237. After carefully reviewing the record, we conclude that there was sufficient evidence to support the juvenile court's findings that the juveniles acted "wantonly and willfully" in damaging Ms. Laird's vehicle, and thus support the findings of delinquency.

In summary, the dispositional orders in No. 98 J 92 and No. 98 J 93 are modified by vacating the special condition of probation requiring the juveniles to make restitution by the payment of $539.50 each. Except as specifically modified, the dispositional orders are affirmed.

Vacated in part and affirmed in part.

Judges GREENE and TIMMONS-GOODSON concur.

MARTHA KAY PRICE, PLAINTIFF v. JAMES ERIC BREEDLOVE, DEFENDANT

No. COA99-535

(Filed 16 May 2000)

1. **Child Support, Custody, and Visitation— visitation by grandparent—deceased mother—intact family—standing of grandparent**

The trial court did not err by granting defendant-father's Rule 12(b)(6) motion to dismiss an action by a grandmother seeking visitation with her grandchildren after her daughter was killed in an automobile accident. The children and defendant must be considered as living in an "intact family," and plaintiff thus has no standing to seek visitation with her grandchildren under N.C.G.S. § 50-13.1(a).

2. **Child Support, Custody, and Visitation— visitation by grandparent—parent deceased after custody order—subject matter jurisdiction**

The trial court properly concluded that it lacked subject matter jurisdiction over a claim for visitation by a grandmother under N.C.G.S. § 50-13.5(j) where it was undisputed that defendant-father was awarded legal custody of the children in a 1995 court order in a proceeding contested by plaintiff's daughter, now deceased, who was defendant's former wife and the mother of the children. The trial court's jurisdiction over the issues of visitation and custody terminated upon the death of plaintiff's daughter in 1997.

Appeal by plaintiff from order filed 29 December 1998 by Judge David K. Fox in Transylvania County District Court. Heard in the Court of Appeals 27 January 2000.

Olson, Smith, Jordan and Cox, P.A., by James S. Erwin, III, for plaintiff-appellant.

H. Paul Averette, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court's order allowing defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1999) (Rule 12(b)(6)). We affirm.

The uncontested pertinent facts and procedural history include the following: Defendant and plaintiff's daughter are the biological parents of minor children Travis and Joshua Breedlove (jointly, the children), born 14 September 1989 and 21 May 1991 respectively. On 12 January 1995, defendant was awarded custody of the children by court order following his separation and subsequent divorce from plaintiff's daughter. The children have lived with defendant since that date. In June of 1997, plaintiff's daughter was killed in an automobile accident.

On 14 October 1998, plaintiff instituted the instant action seeking visitation with the children as their grandmother. On 30 October 1998, defendant moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6), alleging she had failed to state a claim upon which relief might be granted. Following a hearing, the trial court allowed defendant's motion by order filed 29 December 1998 (the Order).

The Order contained the following pertinent findings of fact:

> 2. The Defendant is the biological father of [the] two minor children . . .; the Plaintiff is the maternal grandmother . . .; the biological mother of the minor children, who was divorced from the Defendant in 1997, died in an automobile accident in 1997.
>
> . . . .
>
> 4. From and since 1995, the minor children have lived with the Defendant. . . .
>
> 5. There is no other action pending relative to custody or otherwise between the parties at this time.

Based upon its factual findings, the trial court rendered the following conclusion of law:

> [P]ursuant to the Rule of Law enunciated in the case of *McIntyre v. McIntyre* . . . the Plaintiff, the grandmother herein, has no right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. [Additionally,] pursuant to the Rule of Law enunciated in *Fisher v. Gaydon* . . . the minor children and the Defendant are an "intact family unit[,]" [a]nd . . . that [the court] lacks subject matter jurisdiction. . . .

Plaintiff appeals.

[1] Plaintiff contends the trial court

> err[ed] in granting the defendant's motion to dismiss because *McIntyre v. McIntyre* does not require it and to the extent *Fisher v. Gaydon* does, it should be overruled.

In addition, plaintiff relies on N.C.G.S. § 50-13.1(a) (1999) and N.C.G.S. § 50-13.5(j) (1999).

In *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995), our Supreme Court acknowledged that G.S. § 50-13.1(a) allows a grandparent to "institute an action or proceeding for the custody" of their grandchild, G.S. § 50-13.1(a), but held such statute

> does not grant [grandparents] the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact,

McIntyre, 341 N.C. at 635, 461 S.E.2d at 750. Plaintiff maintains that *McIntyre*, read in context, defined an "intact family" as "two natural parents residing together with their children." In light of recent decisions of this Court, we cannot agree. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (where one panel of Court of Appeals "has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

In *Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000), this Court discussed the "intact family" requirement. In *Montgomery*, paternal grandparents sought visitation with their granddaughter, alleging she was not living in an "intact family." The plaintiffs' son, the child's biological father, had been killed in a highway collision. *Id.* at —, 524 S.E.2d at —. At the time of his death, he and his wife were living separate and apart and the child resided with her mother. *Id.* This Court upheld dismissal of the grandparents' action upon holding the child lived in an "intact family" as required by *McIntyre* and defined in *Fisher v. Gaydon*, 124 N.C. App. 442, 444-45, 477 S.E.2d 251, 252-53 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997). *Id.* at —, 524 S.E.2d at —.

In *Fisher*, this Court established that an " 'intact family' within the meaning of *McIntyre*" may exist where "a single parent [is] living with his or her child," *Fisher*, 124 N.C. App. at 445, 477 S.E.2d at 253, and is not limited to the circumstance where a child and both natural parents are living together, *id.*; *see Penland v. Harris*, 135 N.C. App.

359, —, 520 S.E.2d 105, 107 (1999) ("the term 'intact family' should certainly include a married natural parent, step-parent and child living in a single residence").

Under the foregoing precedent, the children and defendant in the case *sub judice* must be considered as living in an "intact family," and plaintiff thus has no standing to seek visitation with her grandchildren under G.S. § 50-13.1(a). *See McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749 (grandparents accorded no standing under G.S. § 50-13.1(a) to seek visitation where the "natural parents have legal custody of their children and are living with them as an intact family"), and *Fisher*, 124 N.C. App. at 445, 477 S.E.2d at 253 ("[t]he traditional two-parent model . . . is not the determinative factor qualifying a group of persons as a family . . . ; a single parent living with his or her child is an 'intact family' within the meaning of *McIntyre*").

[2] Plaintiff also contends she is afforded standing to seek visitation by G.S. § 50-13.5(j), and that *Fisher* should be overruled. As to the latter contention, we have noted above the decision of our Supreme Court limiting to that Court the authority to overrule decisions of a panel of this Court. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. As to plaintiff's assertion referencing G.S. § 50-13.5(j), she has cited no authority in support of her reliance thereon, *see* N.C.R. App. P. 28(b)(5) (assignments of error "in support of which no . . . authority [is] cited, will be taken as abandoned"), and her argument in any event fails under *McIntyre*.

G.S. § 50-13.5(j) provides:

> In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. § 50-13.7, the grandparents . . . are entitled to . . . visitation rights as the court . . . deems appropriate.

Interpreting this statutory provision, the *McIntyre* Court noted that although G.S. § 50-13.5(j) permits grandparents to seek visitation subsequent to an initial custody determination,

> the trial court retains jurisdiction of the issue of custody [only] *until the death of one of the parties* or the emancipation of the youngest child. (emphasis added).

McIntyre, 341 N.C. at 633, 461 S.E.2d at 748 (citations omitted); *see also Shoaf v. Shoaf*, 282 N.C. 287, 290, 192 S.E.2d 299, 302 (1972)

(quoting *Weddington v. Weddington*, 243 N.C. 702, 704, 92 S.E.2d 71, 73 (1956)) ("[a]fter separation, followed by action for divorce . . . authority to provide for the custody of children vests in the court in which the divorce proceeding is pending . . . 'so long as the action is pending and it is pending for this purpose until the death of one of the parties, or the youngest child of the marriage reaches the age of maturity' ").

It is undisputed herein that defendant was awarded legal custody of the children by a 1995 court order in a proceeding contested by plaintiff's daughter, the now-deceased former wife of defendant and the mother of the children. It is further uncontested that plaintiff's daughter died in 1997. Under the statutory interpretation of our Supreme Court in *McIntyre*, therefore, the trial court's jurisdiction over the issues of visitation and custody regarding the children herein terminated upon the death of plaintiff's daughter. *See McIntyre*, 341 N.C. at 633, 461 S.E.2d at 748 (court retains jurisdiction over issue of custody and visitation "until the death of one of the parties").

In sum, the trial court properly concluded it lacked subject matter jurisdiction over plaintiff's visitation claim, and the court did not err in allowing defendant's motion to dismiss said claim for failure to state a claim upon which relief might be granted. *See* G.S. § 1A-1, Rule 12(b)(6).

Affirmed.

Judges McGEE and HUNTER concur.

FIRST CITIZENS BANK & TRUST COMPANY, PLAINTIFF v. WILLIAM D. CANNON AND BARBARA V. SHAUT F/K/A BARBARA V. CANNON, DEFENDANTS

No. COA99-755

(Filed 16 May 2000)

1. Mortgages— foreclosure sale—purchase by lender—deficiency judgment—value of secured property

In a case where mortgaged property was purchased at a foreclosure sale by the lender, the trial court did not err by concluding defendant Cannon was not indebted to plaintiff after the foreclosure sale because defendant presented competent evidence under the N.C.G.S. § 45-21.36 defense that the property was worth

the amount of the debt secured by it, and the amount bid by plaintiff at the foreclosure sale was substantially less than its true value.

2. Judgments— default—deficiency action—good cause not shown

Although defendant Shaut alleged she was unaware that she was required to file an answer to plaintiff's complaint and thought she was entitled to rely on her former husband's defense of this deficiency action since it related to property jointly owned by them, the trial court did not abuse its discretion by failing to grant defendant Shaut's motion to set aside an entry of default almost six months after its entry because defendant failed to show good cause.

Appeal by defendant Shaut from an order entered 3 March 1998 by Judge Jay D. Hockenbury and from a judgment entered 2 November 1998 by Judge Louis B. Meyer, Jr., in Pitt County Superior Court. Appeal by plaintiff from judgment entered 5 February 1999 by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 30 March 2000.

Ward and Smith, P.A., by J. Michael Fields, for plaintiff appellant.

W. Gregory Duke for defendant appellant Barbara V. Shaut.

Mattox, Davis & Barnhill, P.A., by Ann H. Barnhill, for defendant appellee William D. Cannon.

HORTON, Judge.

On 5 May 1987, defendant William D. Cannon and his then wife, Barbara V. Cannon, now Barbara V. Shaut (Shaut), purchased certain real property in Pitt County for the sum of $185,000.00. They used the property as their residence and made certain improvements to the property. In May 1994, defendants refinanced the property through First Citizens Bank & Trust Company (plaintiff), securing a loan of $175,000.00 by a deed of trust on their property. Prior to making the May 1994 loan, plaintiff secured an appraisal on the property from James R. Stocks. Mr. Stocks appraised the Cannon property at $238,000.00.

Defendants defaulted on their obligation, and plaintiff instituted a foreclosure proceeding. In November 1996 the debt still owing to

plaintiff was $180,076.14. The real property was sold at a public sale held on 15 November 1996. Plaintiff made the high bid of $137,500.00 on the property. Plaintiff's bid was not increased, and was confirmed by the clerk of superior court on 26 November 1996. Plaintiff then sold the defendants' property on 8 April 1997 for $165,000.00. After giving defendants credit for the net amount realized at the sale, there was a deficiency of $29,406.21. Plaintiff filed this action on 13 May 1997 against both defendants for the principal amount of the deficit, interest, and attorney fees.

Defendant Shaut was personally served with summons and complaint, but neither filed an answer nor sought an extension of time in which to file an answer. An entry of default was made against her on 28 July 1997. In January 1998, Ms. Shaut moved to set aside the entry of default, but the court denied her motion. A default judgment was subsequently entered against Ms. Shaut for the full amount prayed for by plaintiff, with interest and attorney fees. Ms. Shaut appealed from the default judgment entered against her.

Defendant Cannon filed an answer denying liability to plaintiff, and pleading in defense that the property was worth the amount owed on it on the date of confirmation of the foreclosure sale. At a nonjury trial of the matter, the trial court found that defendant Cannon was not indebted to plaintiff in any amount and plaintiff appealed to this Court.

Plaintiff's Appeal

[1] Defendant Cannon pled N.C. Gen. Stat. § 45-21.36 (1999) in defense and offset of plaintiff's claim for a deficiency judgment against him. This statute provides in pertinent part that

> it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset . . . that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part . . . .

Id.

Mr. Cannon alleged in his answer that not only was the subject property fairly worth the amount owed on it at the time and place of

sale but also that plaintiff's bid on the property was substantially less than the true value of the property.

After a nonjury trial on the merits, the trial court found that the property in question was "fairly worth the amount of the debt secured by it at the time and place of the foreclosure sale. The Court further finds that the amount bid by the plaintiff at the foreclosure sale was substantially less than its true value." Based on that finding of fact, the trial court concluded that the plaintiff was not entitled to recover anything from defendant Cannon.

Plaintiff argues that the finding of fact made by the trial court regarding the value of the subject property on the date of the foreclosure sale was not supported by competent evidence. We disagree. Evidence was introduced that Mr. Stocks, who appraised the Cannon home in 1994, valued the property at $199,000.00 in July 1996, just four months prior to the public sale of the property. Pitt County tax appraisals for 1996 and 1997 were introduced into evidence without objection. Both tax appraisals, dated December of their respective years, valued the property in question at $204,710.00.

Plaintiff argues that the evidence of the 1996 tax appraisal was incompetent because it was dated one month following the foreclosure sale. While we agree that the crucial date is the date of the foreclosure sale, there is no evidence in this record that the value of the property changed between 15 November 1996 and 23 December 1996. We are aware that plaintiff introduced evidence through Mr. Hales, a realtor, which established a lower valuation of defendant's property on the date of the public sale. However, where the trial court sits as trier of fact, it may reject some of the evidence while accepting other evidence as it assesses the credibility of the witnesses. Moreover, the court will determine the weight to be given all competent evidence. *Riley v. Ken Wilson Ford, Inc.* 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993).

Although there was other evidence of value offered by plaintiff which might have supported a different finding, evidence offered by defendant Cannon was competent and supported the findings of fact made by the trial court. Accordingly, the judgment of the trial court is affirmed.

Defendant Shaut's Appeal

[2] Defendant Shaut contends that the trial court abused its discretion in failing to set aside the default entered against her on 28 July

1997. Rule 55(d) of the North Carolina Rules of Civil Procedure provides that "[f]or good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." Only the motion to set aside the entry of default is before us at this time. The courts of this state have previously held that a motion pursuant to this rule is "addressed to the sound discretion of the court." *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 108, 264 S.E.2d 395, 397 (1980). Whether "good cause" has been shown, considering the facts and circumstances of the case, is also within the discretion of the trial court. On appeal, the decision of the trial court will not be disturbed absent a clear abuse of that discretion. *Id.*

In *Britt*, the defendant's legal department received the suit papers on 7 June 1978 but misplaced them. The papers were not relocated until 12 July 1978, the day the default entry was made against it. The trial court held in its discretion that those circumstances did not constitute "good cause" to set aside the entry of default, and this Court upheld the trial court's decision. *Id.* By way of contrast, compare *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Services, Inc.*, 87 N.C. App. 606, 361 S.E.2d 895 (1987) to the situation in *Britt*. In *Automotive Equipment Distributors*, Judge (now, Justice) Orr, writing for this Court, set out the following principles which this Court must consider in reviewing the trial court's refusal to set aside an entry of default:

> (1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action.

Id. at 608, 361 S.E.2d at 896-97.

In *Automotive Equipment*, defendant was in communication with its attorney during the period for filing the answer, but its counsel did not file a responsive pleading due to a family medical emergency, and default was entered. Only five days thereafter, defendant moved through other counsel to set aside the entry of default and default judgment and the clerk allowed the motion. On appeal to the superior court, that court reinstated the entry of default. In reversing the refusal of the trial court to set aside the entry of default, we emphasized the diligent attention to its legal affairs defendant had demonstrated by employing counsel and consulting on several occasions with counsel about the case. We also noted plaintiff's failure to show prejudice and the injustice which would result from failing to

allow defendant to defend the case on its merits, and concluded that "justice would best be served by permitting defendant to try this case on its merits." *Id.* at 609, 361 S.E.2d at 897.

Here, defendant Shaut filed her motion to set aside the entry of default almost six months after its entry. She alleged that she "was unaware that she was required to file an Answer to the Plaintiff's complaint as she is not an attorney and has not been involved in civil litigation, other than the present domestic civil action." The trial court found that Shaut had not shown "good cause" to set aside the entry of default and denied defendant Shaut's motion. Although defendant Shaut argues that she thought she was entitled to rely on her former husband's defense of this deficiency action, since it related to property jointly owned by them, we cannot say on these facts that the decision of the learned trial court not to set aside the entry of default was unsupported by reason. The judgment against Ms. Shaut must be, and is,

Affirmed.

Judges WYNN and SMITH concur.

CORA LEE PAYNE WATSON, LEE VERNON PAYNE, CHARLES ODELL PAYNE, JR., AND CURLEY LLEWELLYN PAYNE, PLAINTIFFS v. SHARON LEE FRYE SMOKER, RONALD EDWARD McBRIDE, SUSAN LYNN McBRIDE CHURCH, AND GARY CHURCH, DEFENDANTS

No. COA99-913

(Filed 16 May 2000)

Wills— concurrent life estate and dower—ambiguous—presumption against intestacy

The trial court erred by ordering in a summary judgment that plaintiffs, the widow and children of testatrix's son, were the fee simple owners of property devised in a will where the will left to the testatrix's niece and the niece's children the tract of land on which the testatrix was living for the niece's natural life "in satisfaction of her dower." The will is ambiguous and subject to construction of the courts because the intent to provide the niece with a dower estate would be contrary to the granting of a con-

current life estate to the niece's children. Testatrix is held to have intended to devise her real property to her niece for her natural life and then to her children because the will did not have a residuary clause, so that a concurrent life estate with the children's interest terminating at the niece's death would result in an intestacy. There is a presumption of law against intestacy when a person makes a will.

Appeal by defendants from order filed 30 April 1999 by Judge Jeanie Reavis Houston in Wilkes County District Court. Heard in the Court of Appeals 25 April 2000.

Robert P. Laney for plaintiff-appellees.

Cecil Lee Porter for defendant-appellants.

GREENE, Judge.

Sharon Lee Frye Smoker, Ronald Edward McBride, Susan Lynn McBride Church, and Gary Church (collectively, Defendants) appeal the trial court's order granting summary judgment in favor of Cora Lee Payne Watson, Lee Vernon Payne, Charles Odell Payne, Jr., and Curley Llewellyn Payne (collectively, Plaintiffs) entered on 30 April 1999.[1]

On 28 October 1997, Plaintiffs filed a complaint and request for a declaratory judgment interpreting the will of Merica Canzada Payne (Testatrix). The will of Testatrix, probated on 22 December 1964, provides, in pertinent part, as follows:

> SECOND: I give and devise to my beloved niece, Carlene Payne McBride, and her children, namely: (Sharon Lee Frye [Smoker], Ronald Edward McBride and Susan Lynn McBride [Church], Their Mother, Carlene Payne McBride, my niece shall be the guardian of the children's part), the tract of land on which I now reside, Containing two and one-half acres, more or less, for her natural life, in satisfaction of her dower and third in all my lands. . . .

1. In its order granting Plaintiffs' motion for summary judgment, the trial court inadvertently omitted Curley Llewellyn Payne from the listing of the "Plaintiffs" and Gary Church from the listing of the "Defendants" in the caption of the "Order." Our review of the record does not disclose a dismissal for either of these two parties, and thus, we adopt the caption of the "Plaintiffs" and "Defendants" from their respective complaint and answer and the title page of the record, which include the names of Curley Llewellyn Payne and Gary Church, respectively.

Defendants, excluding Gary Church, are the children of Carlene Payne McBride (Carlene). Gary Church is the husband of Susan Lynn McBride Church. Carlene died on 17 October 1991. Cora Lee Payne Watson is the widow of Charles Payne, the son of Testatrix. Lee Vernon Payne, Charles Odell Payne, Jr., and Curley Llewellyn Payne are the children of Charles Payne and Cora Lee Payne Watson and the grandchildren of Testatrix.

The trial court, in a summary judgment, ordered "that . . . [P]laintiffs are the fee simple owners" of the two and one-half acres devised in the will.

The dispositive issues are (I) whether the language in the will is ambiguous, and if so, (II) whether a proper construction of the will places fee simple title in Carlene's children.

It is well established "that the primary object in interpreting a will is to give effect to the intention of the testator," *Misenheimer v. Misenheimer*, 312 N.C. 692, 696, 325 S.E.2d 195, 197 (1985), and this intent, where ascertained, will be given effect unless it violates some rule of law or is contrary to public policy, *Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983). A testator's intent is to be gathered from a consideration of the four corners of the will. *Sutton v. Quinerly; Sutton v. Craddock; Sutton v. Fields*, 231 N.C. 669, 679, 58 S.E.2d 709, 715 (1950). Where a testator's intent "is clearly expressed in plain and unambiguous language[,] there is no need to resort to the general rules of construction for an interpretation," because "the will is to be given effect according to its obvious intent." *Price v. Price*, 11 N.C. App. 657, 660, 182 S.E.2d 217, 219 (1971). Where a testator's intent is not clear and the will's terms are subject to more than one reasonable meaning, however, resort may be had to the courts for construction of the will. *Pittman*, 307 N.C. at 492, 299 S.E.2d at 211. "The authority and responsibility to interpret or construe a will rests solely on the court." *Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956).

I

In this case, the will devises the real property to Carlene and her children for the natural life of Carlene. Without more, this language indicates an intent for Carlene's children to have a life estate *pur autre vie* (for the life of) Carlene. In other words, Carlene and her children were to have a concurrent life estate in the property, with Carlene's life constituting the measuring life. This is the construction

urged by Plaintiffs. This type of estate has been recognized by our courts, *see Brown v. Brown*, 168 N.C. 4, 13, 84 S.E. 25, 29 (1915); *see also* 1 Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 5-2, at 84 (5th ed. 1999) [hereinafter 1 *Webster's Real Estate Law*], and generally arises when a parcel of land is conveyed or devised, for example, " '[t]o A for the life of B,' " 1 *Webster's Real Estate Law* § 5-2, at 84. The language in the will that Carlene was to serve as "the guardian of [her] children's part," which of course could occur only during Carlene's life, is consistent with a construction the children's interest was to terminate at Carlene's death.

The will also provides, however, the devise to Carlene is "in satisfaction of [Carlene's] dower" interest. Although Carlene was not entitled to a dower interest in her aunt's property,[2] the language in the will does suggest the Testatrix believed Carlene was entitled to such an interest and intended the will to satisfy that obligation. The devise of a concurrent life estate in property would not have satisfied a dower obligation. *See Sheppard v. Sykes*, 227 N.C. 606, 609, 44 S.E.2d 54, 56 (1947); *see also* 28 C.J.S. *Dower and Curtesy* § 64, at 147-48. The intention of Testatrix to provide Carlene with a dower estate would, thus, be contrary to the granting of concurrent life estates to Carlene's children and reasonably supports a construction that Testatrix intended Carlene to have a life estate in the property, with Carlene's children having the remainder interest. *See* 31 C.J.S *Estates* § 70, at 124 (1996) ("remainder is a remnant of an estate in land, depending on a particular prior estate, created at the same time and by the same instrument and limited to arise immediately on the determination of the prior estate and not in abridgement of it"). This is the construction urged by Defendants. Because the intent of the Testatrix is not clear and subject to two reasonable meanings, the will is ambiguous and subject to construction by the courts.

II

There is a presumption of law, under the general rules of will construction, against intestacy when a person makes a will, *see* 1 Norman Adrian Wiggins, *Wills and Administration of Estates in North Carolina* § 133, at 230; *see also Lesane v. Chandler*, 9 N.C.

2. The estate of dower was abolished by statute in 1960 in North Carolina. *See* N.C.G.S. § 29-4 (1999). In any event, when it did exist, it was a right, belonging only to the widow of the decedent, "to an estate for life in one-third of all the land in which the husband had an estate of inheritance during coverture." 2 Norman Adrian Wiggins, *Wills and Administration of Estates in North Carolina* § 194, at 2 (3d ed. 1993).

App. 33, 36, 175 S.E.2d 351, 353 (1970), which provides that when "a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property un[-]disposed of, the former construction will be adopted and the latter rejected," *Lesane*, 9 N.C. App. at 36, 175 S.E.2d at 353. A will should not, therefore, be construed in such a way that results in " 'partial intestacy . . . unless such intention appears clearly' " in the will, because " 'the courts . . . prefer any reasonable construction, or any construction which does not do violence to testator's language, to a construction which results in partial intestacy.' " *Holmes v. York*, 203 N.C. 709, 712, 166 S.E. 889, 890 (1932) (quoting 1 William Herbert Page, *Page on Wills* § 815, at 1383-84 (2d ed. 1926)).

The first reasonable construction, as urged by Plaintiffs, would result in Testatrix dying partially intestate. This is so, because, after Carlene's death, her children's (Defendants') interest in the property would end, *see* 1 *Webster's Real Estate Law* § 5-1, at 83 (life estate terminates upon the death of designated person), the property would revert back to the estate of Testatrix, *see* 31 C.J.S. *Estates* § 104, at 172 (reversion arises by operation of law whenever grantor has conveyed less than his whole estate), and the will does not have a residuary clause to dispose of the property. Whereas, the second reasonable construction, as urged by Defendants, would result in the complete disposition of the estate of Testatrix, because at Carlene's death, her children's remainder interest would become a present possessory estate in fee simple absolute.

Accordingly, we accept Defendants' proposed construction of the will and hold Testatrix intended to devise her real property to Carlene for her natural life and then to Carlene's children. Defendants, consequently, were vested at the death of Carlene with the fee simple ownership of the property described in the will. The judgment of the trial court is, therefore, reversed and remanded for the entry of a judgment declaring Defendants to be the owners of the property described in the will.

Reversed and remanded.

Judges McGEE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. GERALD ANDRAIN WHEELER

No. COA99-457

(Filed 16 May 2000)

Drugs— trafficking in cocaine—possession—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of trafficking in cocaine, based on the State's failure to prove defendant possessed the cocaine during a sting operation, because defendant's handling of the cocaine for the sole purpose of inspection before he decided not to buy it did not constitute possession within the meaning of N.C.G.S. § 90-95(h)(3), as defendant did not have the power and intent to control its disposition or use.

Judge WALKER concurring.

Appeal by defendant from judgment dated 4 November 1998 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 February 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

GREENE, Judge.

Gerald Andrain Wheeler (Defendant) appeals a jury verdict finding him guilty of trafficking in cocaine by possession of 400 grams or more of cocaine pursuant to N.C. Gen. Stat. § 90-95(h)(3).

The State's evidence at trial tended to show that on 9 October 1997, Sidney J. Lackey (Officer Lackey), an officer with the Vice and Narcotics Unit of the Charlotte-Mecklenburg Police Department, made arrangements with an informant to sell a kilo of cocaine for $20,000.00. Officer Lackey was scheduled to meet the informant at Wayne's Supermarket on North Graham Street. At approximately 5:00 p.m., Officer Lackey drove into the supermarket parking lot and saw the informant's vehicle parked in the lot. The informant and a man named Ronald Higgs (Higgs) were sitting in the front seat of the vehicle and Defendant was sitting in the back seat. After approaching the

vehicle, Officer Lackey opened its door, sat down in the back seat, and asked the occupants if "they were ready to deal." Officer Lackey testified that he heard Defendant answer " 'yes,' " and then Officer Lackey exited informant's vehicle and returned to his vehicle to get a kilo of cocaine which had been prepared by the Charlotte-Mecklenburg Police Department Crime Laboratory.

Officer Lackey put the package, which was wrapped in duct tape, under his shirt and went back to the informant's vehicle. After sitting down on the back seat next to Defendant, Officer Lackey handed the package to Defendant and asked him if he had a knife to use in opening the package. Defendant stated he did not have a knife and handed the package to Higgs, who was in the front seat. The informant started driving the vehicle around the block while Higgs opened the package with a can opener. Higgs tested the cocaine contained inside the package by tasting it. During this time, Officer Lackey asked Defendant where the money was located. Defendant pulled the money, which was packaged in two large sandwich bags, out of a bag sitting between his legs. After Higgs tested the cocaine, he told Officer Lackey they did not want the cocaine because the quality was not good and gave the package back to Officer Lackey. Officer Lackey stated he had more cocaine in his vehicle and that he would get the other package.

After leaving the informant's vehicle with the cocaine, Officer Lackey radioed the "take down" team to stop the informant's vehicle and detain the occupants. Police officers searched the vehicle and found the can opener which was used to open the package of cocaine and $20,000.00 in cash. Tony A. Aldridge, a chemist with the Charlotte-Mecklenburg Police Department Crime Laboratory, testified the package used in the "sting operation" contained 1,303.36 grams of cocaine.

At the close of the State's evidence, Defendant made a motion to dismiss the charges against him on the ground the evidence did not show Defendant possessed the cocaine, and the trial court denied the motion. Defendant did not present any evidence at trial.

The dispositive issue is whether the record contains substantial evidence Defendant possessed the cocaine used in the "sting operation."

Defendant argues the record does not contain substantial evidence Defendant possessed the cocaine, and we agree.

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 the defendant "possesse[d]" cocaine. N.C.G.S. § 90-95(h)(3) (1999). A defendant possesses cocaine within the meaning of section 90-95 when "he has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

In this case, the evidence shows Officer Lackey sat down next to Defendant in the back seat of the informant's vehicle and handed Defendant a package containing cocaine. Defendant then gave the package to Higgs, who was sitting in the front seat, and Higgs opened the package. After Higgs tested the cocaine by tasting it, he handed the package to Officer Lackey and stated they did not want to purchase the cocaine because the quality was not good. This evidence, viewed in the light most favorable to the State, shows Defendant and Higgs handled the cocaine for the sole purpose of inspecting it and after inspection they made a determination not to purchase the cocaine. Defendant's handling of the cocaine for inspection purposes does not constitute possession within the meaning of section 90-95(h)(3), as he did not have the power and intent to control its disposition or use. *See State v. Moose*, 101 N.C. App. 59, 65, 398 S.E.2d 898, 901 (1990) (party who placed his finger in cocaine and touched this substance to his lip did not have the power and intent to control the substance), *disc. review denied*, 328 N.C. 575, 403 S.E.2d 519 (1991); *United States v. Kitchen*, 57 F.3d 516, 524-25 (7th Cir. 1995) (when defendant inspected cocaine provided by an undercover police officer but did not agree to purchase the cocaine, defendant did not have the ability to control the cocaine and, therefore, did not possess the cocaine). Accordingly, the trial court's denial of Defendant's motion to dismiss the charge of trafficking in cocaine is reversed.

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge WALKER concurs with a separate opinion.

Judge WALKER concurring.

I concur in the majority opinion but write separately regarding the differentiation of inspection and possession. The evidence here indicates that after Officer Lackey sat down next to defendant in the back seat of the informant's vehicle, Officer Lackey handed the package of cocaine to defendant and asked if he had a knife to open the package. This comment by Officer Lackey indicates that he anticipated defendant's inspection of the cocaine and did not intend to relinquish control over the cocaine. Therefore, Officer Lackey, not defendant, had the power and intent to control the cocaine's disposition. Thus, the trial court erred in denying defendant's motion to dismiss since there was insufficient evidence that he possessed the cocaine under N.C. Gen. Stat. § 90-95(h)(3).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 MAY 2000

ALPHIN v. TART L.P. GAS CO. No. 99-780	Ind. Comm. (021806)	Affirmed in part, reversed in part, and remanded
EAST v. N.C. STATE UNIV. No. 99-816	Ind. Comm. (448691)	Affirmed
FLYNN v. FLYNN No. 99-5	Wilkes (96CVD2217)	Affirmed
GARDNER v. SMITH No. 99-897	Wilson (98CVS701)	Appeal Dismissed
HAMPTON v. BEECH BUGGIES AUTO SALES No. 99-176	Watauga (97CVD251)	Affirmed
HOLT v. FOOD LION, INC. No. 99-810	Cumberland (98CVS4775)	Affirmed
IN RE CARR No. 99-984	Burke (98J93) (98J94) (97J12) (97J13)	Affirmed
IN RE HORNER No. 99-191	Alamance (97J120)	Affirmed
KEMP v. KEMP No. 99-84-2	Guilford (94CVD6673)	Appeal Dismissed
STATE v. BALLARD No. 99-701	Brunswick (97CRS4510) (97CRS10697)	No Error
STATE v. BRANCH No. 99-679	Lenoir (98CRS2847) (98CRS8009)	No Error
STATE v. COOPER No. 99-339	Wake (97CRS096619) (97CRS096622)	No Error
STATE v. HODGE No. 99-397	Wake (98CRS38808) (98CRS39556)	No Error
STATE v. LUCAS No. 99-634	Wilson (97CRS16277) (98CRS3738)	No Error

STATE v. MONROE No. 99-714	Buncombe (98CRS54442)	No prejudicial error
STATE v. PINKLETON No. 99-497	Guilford (95CRS20695) (95CRS66940)	No Error
STATE v. WILLIAMS No. 99-218	Lenoir (96CRS10677)	No error in part, Vacated in part and Remanded
STATE v. WORTHEY No. 99-449	Mecklenburg (98CRS1444) (98CRS1445) (98CRS1446) (98CRS1447) (98CRS1448) (98CRS1449)	No Error
TRACEY v. ESTATE OF TRACEY No. 99-700	Rowan (97CVS2439)	Affirmed

STATE OF NORTH CAROLINA v. LARRY ROLANDO LINNEY

No. COA98-1565

(Filed 6 June 2000)

1. Embezzlement— indictment—identity of owner of property

An indictment for embezzlement was fatally defective where it alleged that defendant embezzled rental proceeds from an estate. An estate does not constitute a legal entity capable of owning property; the identity of the owner or person in possession should be named in the indictment with certainty to the end that another prosecution cannot be maintained for the same offense.

2. Perjury— 90-day estate inventory—misstatement of bank account value

The trial court did not err by denying defendant's motion to dismiss a charge of perjury arising from his listing of a guardianship bank account's value on a 90-day estate inventory. Defendant's misstatement was not a matter of making an incorrect statement or an honest mistake; he had misappropriated $10,000 and listed the account as containing $27,885 rather than the actual $17,885. This was a material statement which was intentionally false and which was made under oath.

3. Perjury— instructions—materiality of misstatement

The trial court erred in a perjury prosecution by giving instructions based on the pattern jury instructions, which resolved the issue of materiality for the jury and removed the question from their consideration. The language of the pattern jury instructions must yield to the holding in *United States v. Gaudin*, 515 U.S. 506, that the defendant had a constitutional right to have the jury decide materiality.

4. Constitutional Law— privilege against self-incrimination—Bar investigation

The trial court did not err in a perjury prosecution by admitting into evidence statements made by defendant to State Bar investigators of his own volition. Defendant was never warned that he could be disbarred if he failed to cooperate, he was not in custody, the statements were not extracted under the power of a subpoena, and the statements were not part of an answer to a formal inquiry or complaint. While an attorney should cooperate

with State Bar investigations, the choice of whether to cooperate or to invoke the Fifth Amendment privilege is still the attorney's; however, the privilege against self-incrimination is a personal one which must be claimed to be available. Defendant here did not invoke his Fifth Amendment rights until he reached criminal proceedings. Moreover, the Fifth Amendment privilege does not apply to production of records that an attorney is required by law to maintain.

5. Criminal Law— joinder of offenses—no prejudice

The trial court did not err by joining for trial 3 counts of embezzling and 3 counts of perjury against an attorney arising from a guardianship where defendant did not show that the offenses were so separate in time and place or so distinct in circumstances as to render a consolidation unjust, and did not show that consolidation prejudiced his ability to present a defense and receive a fair trial.

6. Evidence— expert testimony—particular violation of fiduciary standards—clerk of court

There was prejudicial error in an embezzlement and perjury prosecution against an attorney arising from a guardianship in the admission of testimony from the clerk and an assistant clerk as to whether an undocumented loan met the reasonable and prudent standard, whether the failure to list the loan as an asset on the guardian's report would constitute a breach of fiduciary duty, whether it would violate the law for the administrator of an estate to rent property without first obtaining permission from the clerk, and whether it would be illegal to deposit the proceeds into the administrator's personal account. Although not formally tendered as experts, the clerk and assistant clerk were properly considered as such; however, an expert may not testify that a particular legal conclusion or standard has or has not been met.

Appeal by defendant from judgment entered 18 September 1997 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 21 February 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General James C. Gulick, for the State.

David G. Belser for defendant-appellant.

EAGLES, Chief Judge.

Defendant was convicted of two counts of embezzlement and two counts of perjury at the 8 September 1997 criminal session of Buncombe County Superior Court.

The evidence presented at trial indicated that in September, 1992, defendant was appointed the guardian of the person and estate of Mrs. Georgiana Alexander, after Mrs. Alexander had been placed in a nursing home. Mrs. Alexander died on 29 June 1994.

In July, 1994, defendant organized a yard sale and sold Mrs. Alexander's household items at 15 Pine Grove Street, Mrs. Alexander's house. At trial, several witnesses testified that they bought items at this sale and paid defendant with both cash and checks for the items. Mrs. Alexander's granddaughter, Ms. Spencer, testified that she never received funds from the sale of these household items. Additionally, Mrs. Sharon Wedlaw testified that defendant rented 15 Pine Grove Street to her family in July, 1994. The Wedlaws paid their rent in checks made payable to defendant personally. Mrs. Alexander's granddaughter testified that she never gave defendant permission to rent out Mrs. Alexander's house.

The North Carolina State Bar investigated the activities of the defendant during 1995 and 1996. As part of this investigation, the defendant provided numerous bank records and summaries of his bank accounts to Mr. Donald Jones, a State Bar investigator. At trial, Mr. Jones testified that Wachovia Bank maintained a guardianship checking account in the name of Mrs. Alexander and administered by defendant. On 20 July 1993, defendant redeemed a $10,000 Wachovia certificate of deposit ("CD") in the name of Mrs. Alexander. Defendant did not deposit the proceeds of this CD into the guardianship checking account. Instead, the proceeds were deposited into the operating account of defendant's law practice.

Additionally, Mr. Jones testified that he had met with agents of the State Bureau of Investigations (S.B.I.) and that he had furnished the S.B.I. investigators copies of defendant's bank documents, including canceled checks, bank statements, and deposit slips from defendant's personal and business accounts. Mr. Jones also provided the S.B.I. with a complete analysis of defendant's bank accounts.

The defendant was indicted for three counts of embezzlement and three counts of perjury. The jury found the defendant guilty of

two counts of embezzlement and two counts of perjury. Defendant appeals.

[1] We first consider whether the trial court erred in denying the defendant's motion to dismiss the charge of embezzlement from the estate of Georgiana Alexander in 96 CRS 8149. Here, the defendant argues that there is a fatal variance between the evidence presented at trial and the indictment. An indictment for embezzlement must allege ownership of the property in a person, corporation or other legal entity capable of owning property. *See State v. Hughes*, 118 N.C. App. 573, 576, 455 S.E.2d 912, 914, *disc. review denied*, 340 N.C. 570, 460 S.E.2d 326 (1995). A defendant may only be convicted of the particular offense charged in the bill of indictment; the allegations in the indictment and proof presented at trial must correspond. *See State v. Rhome*, 120 N.C. App. 278, 298, 462 S.E.2d 656, 670 (1995). A variance between the evidence of ownership presented at trial and the ownership alleged in the indictment invalidates the indictment and requires that the judgment of conviction be vacated. *See State v. Vawter*, 33 N.C. App. 131, 136, 234 S.E.2d 438, 441, *disc. review denied*, 293 N.C. 257, 237 S.E.2d 539 (1977).

Here, the indictment charged that from 22 July 1994 through 2 September 1994, the defendant embezzled the proceeds of the rental of 15 Pine Grove Street. According to the indictment these proceeds belonged to "the estate of Georgiana Alexander." Mrs. Alexander died on 29 June 1994, leaving a will devising 15 Pine Grove Street to her son, George Alexander. Upon Ms. Alexander's death, the home became the property of her son. *See* N.C.G.S. § 28A-15-2. Any proceeds from the rental of the house belonged to George Alexander, and not the estate of Georgiana Alexander, as alleged in the indictment.

However, "[i]n an indictment for larceny the State is not limited to alleging ownership in the legal owner but may allege ownership in anyone else who has a special property interest recognized in law." *State v. Kornegay*, 313 N.C. 1, 27, 326 S.E.2d 881, 900 (1985) (citing *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976)). The same rule may properly be applied to indictments alleging embezzlement. *See Kornegay*, 313 N.C. at 27, 326 S.E.2d at 900. "It is sufficient if the person alleged in the indictment to be the owner has a special property interest, such as that of a bailee or a custodian, or otherwise has possession and control of it." *State v. Bost*, 55 N.C. App. 612, 616, 286 S.E.2d 632, 635, *disc. review denied*, 305 N.C. 588, 292 S.E.2d 572 (1982). Here, the State argues that an indictment which lists an estate as the owner is sufficient because the estate has a "special property

interest" in that an estate is entitled to seek to have realty sold or rents used to pay the debts of the estate. *See* N.C.G.S. §§ 28A-13-3(27), 28-17-1, and 28-17-11. Although the State's argument appears persuasive, we are bound by the holding of *State v. Jessup*, 279 N.C. 108, 181 S.E.2d 594 (1971).

In *State v. Jessup*, the defendant was indicted for stealing money from his father's estate. The indictment alleged larceny "of the goods, chattels and moneys of the estate of W. M. Jessup, deceased . . . ." The Supreme Court of North Carolina held that this indictment for larceny was fatally defective. In reaching this conclusion, the Court noted that "[t]he estate of a deceased person is not an agency for holding title to property. It is the property itself, to be administered by a personal representative commissioned by the court." *Id.* at 111, 181 S.E.2d at 597. According to the Court, the estate does not constitute a legal entity capable of owning property. Therefore, the Court reasoned, the defendant could be subject to repeated charges of theft from the "estate." The Court concluded that "the identity of the owner or the person in possession of the stolen property should be named in the indictment with certainty to the end that another prosecution cannot be maintained for the same offense." *Id.* at 114, 181 S.E.2d at 598.

This case is indistinguishable from *Jessup*. Accordingly, we conclude that the indictment for embezzlement in 96 CRS 8149 is fatally defective. Defendant's conviction in 96 CRS 8149 must be vacated.

[2] Next, we consider whether the trial court erred by denying defendant's motion to dismiss the charge of perjury in the 90-day inventory of the estate. Under N.C.G.S. § 28A-20-1:

> Every personal representative and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real and personal property of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk.

Here, the State charged defendant with committing perjury in the 90-day inventory of the estate by listing a false value of Mrs. Alexander's checking account. At trial, the State introduced the inventory, which listed, under the caption "Description of Personal Property," a Wachovia checking account with the number 56-6449441, and, under the caption "Value," the figure of $27,885. The document contained the following statement:

> I, the undersigned representative, being first duly sworn, say that to the best of my knowledge the following is a just, true and perfect inventory of all assets of the estate named above which have come into my hands or the hands of any person for me as personal representative of the estate.

The State showed that the checking account, at the time of the inventory, contained $17,885. The State asserted separately that the defendant embezzled $10,000 of Mrs. Alexander's money by depositing it into his law firm operating account.

The essential elements of perjury are "1) a false statement under oath, 2) made knowingly, wilfully and designedly, 3) made in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, and 4) made as to some matter material to the issue or point in question." *State v. Basden*, 110 N.C. App. 449, 453, 429 S.E.2d 740, 742 (1993). Here, the defendant contends that the statement he made in the 90-day inventory was (1) not a "false statement" within the definition of perjury; and (2) not material to the issue in question. We disagree.

Defendant asserts that the purpose of the 90-day inventory is to declare the fair market value of the assets of the estate at the time of the decedent's death in order to identify property for heirs and creditors to claim later. Defendant argues that the inventory itself does not include an assertion that the Wachovia checking account contained $27,885 on the date on which the document was signed and sworn. Rather, the defendant merely stated that the checking account was part of the inventory of the estate which had "come into his hands" as personal representative, and that the value of the account was $27,885. Additionally, defendant contends that even if the statement is construed as false, the statement was not material because the critical determination in an inventory is what is owned, not where it is kept.

Under North Carolina law, the executor or administrator of an estate is permitted to make honest errors in describing and noting the debts and the assets in a 90-day inventory. *See Grant v. Reese*, 94 N.C. 720 (1886) ("The executor or administrator may show . . . that he had made mistakes in noting the property properly, and its condition." *Id.* at 724.) However, an executor will not be permitted to misstate the value of an account to cover up the fact that he has misappropriated funds.

> The law requires such inventory to be *made under oath*, and it is the duty of an executor or administrator, incident to his office as such, to make proper inquiry as to the property—its nature and condition—with which he ought to be charged, and *it is presumed when he notes it in the inventory, that he describes it correctly* . . . .

Id. (emphasis added). Here, the defendant reported that the "value" of the checking account was $27,885. In reality, the checking account contained $17,885 and the defendant had misappropriated $10,000. Defendant's misstatement was not a matter of making an incorrect estimate or an honest mistake. Rather, it was a material statement which was intentionally false, made under oath. Accordingly, we conclude that the trial court did not err in denying defendant's motion to dismiss the charge of perjury in the 90-day inventory of the estate.

[3] Next, we consider whether the trial court erred in its jury instructions on perjury. The trial court based these instructions on the pattern jury instructions for perjury. N.C.P.I., Crim. 228.10. The defendant argues that the instructions essentially mandated that the jury find defendant's false statements to be material. Defendant asserts that the instructions denied defendant his constitutional right to have the jury determine each element of the offense charged.

On the perjury count 96 CRS 8146, the trial court instructed:

> For you to find [defendant] guilty of perjury . . . the State must prove five things beyond a reasonable doubt. First, . . . the Defendant made a statement in the 90-day inventory . . . . Second, . . . the Defendant was under oath. Third, . . . the statement was false. . . . Fourth, the State must prove that the statement made was material; that is, that it tended to mislead the probate court in regard to a significant issue of fact. The identification and value of assets were significant issues of fact in the 90-day inventory filed in the Estate of Georgiana Alexander. And fifth, . . . that the Defendant acted willfully and corruptly . . . .

In instructing on 96 CRS 8147, the trial court instructed the jury:

> In order for you to find him guilty of perjury, the State must prove five things beyond a reasonable doubt . . . . First, that the Defendant made a statement in the annual accounting . . . Second, . . . the Defendant was under oath. Third, . . . the statement was false . . . . Fourth, the State must prove beyond a reasonable doubt that the statement was material; that is, that it tended to

> mislead the probate court in regard to a significant issue of fact. Members of the Jury, the identification and value of assets and receipts are significant issues of fact in the annual accounting filed September 18, 1995 in the Estate of Georgiana Alexander. And fifth, . . . the Defendant acted willfully and corruptly . . . .

Defendant asserts that the trial judge, as part of his definition of materiality, told the jury that identification and value of assets were significant issues of fact, thereby resolving the question of materiality for the jury and removing the question from their consideration. We agree.

Under North Carolina law, the materiality of a false statement is an element of perjury. *See Basden*, 110 N.C. App. at 453, 429 S.E.2d at 742. In *State v. Wilson*, 30 N.C. App. 149, 226 S.E.2d 518 (1976), the trial court gave the jury similar perjury instructions to the ones given here. The trial court in *Wilson* gave these instructions:

> The State must prove that the testimony was material; that is, that it tended to mislead the jury in regard to a significant issue of fact. Whether Charles Austin Pearson on September 29, 1973, was attacked or assaulted by two men; that Charles Austin Pearson did not assault or attack anyone; and that Charles Austin Pearson did not go to the automobile of W. G. Morgan was (sic) significant issues of fact in the Charles Austin Pearson trial.

Id. at 154, 226 S.E.2d at 521. On appeal, Defendant Wilson made essentially the same argument that Defendant Linney makes here, contending that these instructions decided the issue of materiality for the jury. In *Wilson*, this Court rejected the defendant's argument, stating:

> The rule established in almost all jurisdictions in which the point has been in any way passed upon is that on a trial for perjury the question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury.

Id. at 154, 226 S.E.2d at 521 (citations omitted).

However, *Wilson* was decided well before *United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444 (1995). In *Gaudin*, the United States Supreme Court considered whether a defendant has a right to have the jury decide the materiality element of perjury. In *Gaudin*, the Supreme Court, relying on the Fifth and Sixth Amendments, said

that the Constitution "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 510, 132 L. Ed. 2d at 449. Accordingly, a unanimous Supreme Court held that Defendant Gaudin had the constitutional right to have the jury decide materiality in a prosecution for perjury. *See id.* at 523, 132 L. Ed. 2d at 458.

The *Wilson* Court, writing before *Gaudin*, held that the pattern jury instructions on perjury properly allowed the *judge* to decide the issue of materiality. To argue today that the same language in the pattern jury instructions allows the *jury* to decide the issue of materiality is untenable. The language of the pattern jury instructions must yield to the mandate of *Gaudin*. Accordingly, we conclude that the trial court erred in giving these instructions to the jury.

[4] Next, we consider whether the trial court erred in admitting evidence which the defendant had provided to the North Carolina State Bar as part of the Bar's investigation of defendant's fitness to practice law in North Carolina. Defendant provided numerous bank records to State Bar investigator Donald Jones. Mr. Jones in turn provided S.B.I. investigators with copies of these documents, along with his own analysis of defendant's bank accounts and information about his interviews with defendant. The defendant argues that he was forced to cooperate with the State Bar investigation or face disbarment. He asserts that the prosecutor's use of his statements to the Bar and the records he provided to the Bar violate his constitutional right to avoid self-incrimination under the Fifth Amendment. This is an issue of first impression before our Court.

First, we begin by analyzing whether the trial court improperly admitted evidence of defendant's statements to the State Bar. At trial, the presiding court ruled that statements made by the defendant to the Bar investigators were inadmissable. In so ruling, the trial court excluded "any revelations made by the defendant to this witness [Mr. Jones] or any other witness in furtherance of an investigation by the Bar Association for the alleged misconduct of the defendant as a lawyer." Later, however, the judge deviated from this ruling by allowing into evidence Mr. Jones' affidavit which contained statements made by defendant. Additionally, the trial court allowed Mr. Jones to testify on redirect examination about defendant's statements to him about the whereabouts of the proceeds of the $10,000 CD. This testimony was admitted in response to defendant's attempted impeachment of Mr. Jones on cross-examination. We con-

clude that the trial court did not err by allowing into evidence statements made by defendant to State Bar investigators as part of the Bar's investigation.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The Amendment protects an individual "against being involuntarily called as a witness against himself in a criminal prosecution . . . ." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L. Ed. 2d 274, 281 (1973). Further, the Amendment also allows an individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Id.* The Fifth Amendment's privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761, 16 L. Ed. 2d 908, 914 (1966). The self-incrimination clause of the Fifth Amendment has been incorporated in the Fourteenth Amendment and applies to states. *See Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964).

The defendant relies on *Garrity v. New Jersey*, 385 U.S. 493, 17 L. Ed. 2d 562 (1967) to support his argument that his constitutional rights were violated. In *Garrity*, the United States Supreme Court evaluated a case in which police officers were investigated by the Attorney General of New Jersey regarding improper treatment of traffic cases in municipal court. Before being questioned, each officer was warned (1) that anything he said might be used against him in a criminal proceeding later; (2) that he had the right to refuse to answer if the disclosure would tend to incriminate him; (3) but, if he refused to answer, he would be subject to dismissal. The officers were forced to choose between losing their employment with the state, or incriminating themselves by answering the questions. The officers chose to answer the questions. Some of their answers were then used to convict them in subsequent prosecutions.

The United States Supreme Court held that these statements were involuntary, because the officers were forced to choose "between the rock and the whirlpool." *Id.* at 498, 17 L. Ed. 2d at 566. The Court stated, "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits [the] use in subsequent criminal proceedings of statements obtained under threat of removal from office . . . ." *Id.* at 500, 17 L. Ed. 2d at 567.

The defendant further relies on *Debnam v. N.C. Dept. of Correction*, 334 N.C. 380, 432 S.E.2d 324 (1993) to support his argument. In *Debnam*, a Department of Corrections employee was threatened with dismissal for refusing to answer questions in an internal investigation. When the state employee asserted his privilege against self-incrimination, he was discharged. The Supreme Court of North Carolina evaluated the constitutionality of the discharge. The Court held that the discharge was constitutional, concluding that an individual's constitutional rights are endangered only by the combined risks of both compelling the individual to answer incriminating questions and compelling the individual to waive immunity from the use of those answers. *See id.* at 388, 432 S.E.2d at 330.

Here, the defendant asserts that both the *Garrity* case and the *Debnam* case are analogous to the case at bar. In particular, the defendant asserts that the statements he made to the State Bar investigators, like the statements in *Garrity* and *Debnam*, were compelled. We disagree. In *Garrity*, the police officers were specifically told that if they did not answer questions, they would be subject to dismissal. Similarly, in *Debnam*, the Department of Corrections employee was explicitly told that if he refused to answer questions in an investigation, he would be discharged. Here, Defendant Linney was never warned that he could be disbarred if he failed to cooperate with Mr. Jones.

Defendant attempts to rely on the North Carolina statutes which delineate the powers of the State Bar. Specifically, N.C.G.S. § 84-29 provides "the disciplinary hearing commission . . . shall have the power to subpoena and examine witnesses under oath, and to compel their attendance, and the production of books, papers and other documents or writings deemed by it necessary or material to the inquiry." In this case, defendant, acting of his own volition, made statements to Mr. Jones; the record does not indicate that these statements were extracted under the power of a subpoena. Defendant was not in custody at the time these statements were made. Additionally, defendant attempts to rely on N.C.G.S. § 84-28(b), which provides that:

> The following acts or omissions by a member of the North Carolina State Bar . . . shall constitute misconduct and shall be grounds for discipline . . . (3) . . . failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter . . . .

Here, Defendant Linney's statements to Mr. Jones in investigation interviews were not part of an answer to a formal inquiry or complaint. Unlike the statements in the *Garrity* and *Debnam* cases, the defendant's statements here were not compelled. Additionally, we note that both the *Garrity* case and the *Debnam* case are distinguishable from the case at bar because both those cases involve investigations of state employees. The defendant here is not a state employee, but an attorney who has been given the *privilege* of practicing law in this state and serving in a profession imbued with the public trust.

> [A] lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State. His responsibility to the State is to obey its laws and the rules of conduct that it has generally laid down as part of its licensing procedures.

Spevack v. Klein, 385 U.S. 511, 520, 17 L. Ed. 2d 574, 580 (1967) (Fortas J., concurring). As Judge Benjamin Cardozo wrote, "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but is equally essential afterwards. Whenever the condition is broken the privilege is lost." *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917) (internal citations omitted), *cert. denied*, 246 U.S. 661, 62 L. Ed. 927 (1918).

As an officer of the court, a lawyer should indeed cooperate with state bar investigations. "The very accusation of [misconduct by lawyers] understandably concerns the public and justifies formal investigation of it. When the accusations are met with stony silence, or worse, affirmative obstruction of inquiry into them, the result denigrates us all." *Contico International, Inc. v. Alvarez*, 910 S.W.2d 29, 44 (Tex. Ct. App. 1995), *overruled on other grounds*, 917 S.W.2d 787 (Tex. 1996). However, the choice of whether the defendant cooperates in the bar proceedings or invokes the Fifth Amendment privilege is still, of course, his to make. "The special responsibilities that [a lawyer] assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights." *Spevack*, 385 U.S. at 520, 17 L. Ed. 2d at 580 (Fortas J., concurring). The constitutional privilege against self-incrimination is the lawyer's, as it is any citizen's, and such privilege may be properly exercised. *See id.*

The United States Supreme Court has said that the privilege against self-incrimination is a personal one. To be available to a witness it must be claimed. *See Rogers v. United States*, 340 U.S. 367, 370-71, 95 L. Ed. 344, 348, *reh'g denied*, 341 U.S. 912, 95 L. Ed. 1348 (1951). *See also Board of Overseers of the Bar v. Dineen*, 481 A.2d 499, 503 (Me. 1984); *State v. Merski*, 437 A.2d 710, 716 (N.H. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655 (1982). Here, Defendant Linney was within his rights to assert his Fifth Amendment privilege against self-incrimination during the Bar's disciplinary proceedings. Instead, Defendant Linney made voluntary statements to a bar investigator and never invoked his Fifth Amendment rights until he reached the criminal proceedings. Accordingly, we conclude that the trial court did not err in admitting into evidence statements made by defendant to State Bar investigators as part of the Bar's investigation.

Further, we note that even if Defendant Linney had asserted his Fifth Amendment privilege during the bar proceedings, the protection would not extend to Defendant Linney's records. The Fifth Amendment privilege does not apply to production of records that an attorney is required by law to maintain. *See Shapiro v. United States*, 335 U.S. 1, 92 L. Ed. 1787, *reh'g denied*, 335 U.S. 836, 93 L. Ed. 388 (1948)). In *Shapiro v. United States*, the Supreme Court of the United States held that the compelled production of sales records by merchants did not violate the Fifth Amendment. Under the Emergency Price Control Act of 1942, licensed businesses were required to maintain records and make them available for inspection by administrators. The Court stated no Fifth Amendment protection attached to production of the "required records" which the "defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." *Id.* at 17-18, 92 L. Ed. at 1799 (quoting *Wilson v. United States*, 221 U.S. 361, 381, 55 L. Ed. 771, 779 (1911)). In *Baltimore Dept. of Social Servs. v. Bouknight*, 493 U.S. 549, 107 L. Ed. 2d 992 (1990), the United States Supreme Court stated "where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him." *Id.* at 558, 107 L. Ed. 2d at 1002 (quoting *Wilson*, 221 U.S. at 382, 55 L. Ed. at 780).

Here, the defendant was required to keep records of his trust account and other accounts available for inspection by the State Bar. Under the Rules and Regulations of the State Bar, Rule B.0128 states:

"the Chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records *required to be kept* relative to the handling of client funds and property by the Rules of Professional Conduct . . ." (emphasis added). Accordingly, we conclude that the trial court properly overruled defendant's objection to the admission of these records and the analysis based on them.

[5] Next, we consider whether the trial court erred in allowing the State's motion to join the offenses for trial. The State charged the defendant in separate bills of indictment with 3 counts of embezzling, and 3 counts of perjury. These counts included: (1) 21 July 1993—embezzling from Mrs. Alexander; (2) 15 July 1994 to 28 March 1995—embezzling from Mrs. Alexander's estate; (3) 22 July 1994 to 2 September 1994—embezzling from Mrs. Alexander's estate; (4) 27 March 1995—committing perjury by falsely reporting the property in the 90-day inventory; (5) 18 September 1995—committing perjury by falsely reporting the amount of property in the estate; (6) 10 May 1996—committing perjury by falsely reporting the amount of property in the estate. The trial court allowed the State's motion to join all the offenses for trial. The defendant argues that this was improper because there is no transactional connection between the offenses. The defendant asserts that the time interval between the offenses is too great, and that the offenses are factually distinct, involving different pieces of property, and different entities to whom defendant owed a fiduciary duty. We are not persuaded.

Under N.C.G.S. § 15A-926(a), "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or series of acts or transactions connected together or constituting parts of a single scheme or plan." In evaluating issues of joinder, "the court should consider the nature of the offenses to be joined and the commonality of facts." *State v. Breeze*, 130 N.C. App. 344, 354, 503 S.E.2d 141, 148, *disc. review denied*, 349 N.C. 532, 526 S.E.2d 471 (1998). The court must find that the consolidation does not prejudice the defendant by hindering his ability to present a defense and receive a fair trial. *See id.* The trial court's ruling on the joinder issue will not be disturbed on appeal absent an abuse of discretion. *See id.*

Here, the trial court concluded:

> [T]hat all of these allegations or charges could be considered a part of a common scheme or plan, albeit occurring on different

> dates ranging allegedly between July of '93 up through some time in 1996. They all involved alleged misappropriation, mishandling or misaccounting with regard to the estate of Mrs. Georgiana Alexander, with the exception of 8150, which has to do with embezzlement of money from her person; she then—at that time she was then living.

We conclude that the trial court did not abuse its discretion. In analyzing joinder questions, this Court considers whether, if the motion to sever had been allowed, evidence of the other offenses would have been admissible at each trial to show a common scheme or plan. *See State v. Cummings*, 103 N.C. App. 138, 141, 404 S.E.2d 496, 498 (1991). This Court has stated "prior cases have held that intervals of seven and ten years are not necessarily too remote to preclude the admission of prior bad acts." *State v. Blackwell*, 133 N.C. App. 31, 36, 514 S.E.2d 116, 120, *cert. denied*, — N.C. —, — S.E.2d — (1999). Further, the defendant has not shown that the offenses are so separate in time and place, or so distinct in circumstances as to render a consolidation unjust. Nor has the defendant shown how the consolidation has prejudiced his ability to present a defense and receive a fair trial. Accordingly, this assignment of error is overruled.

[6] Next, we consider whether the trial court erred in admitting opinion testimony. The defendant argues that the trial court improperly permitted non-expert witnesses to give legal opinions regarding defendant's actions. Over objection, Buncombe County Clerk of Superior Court Robert Christy was allowed to give his opinion regarding whether an undocumented loan out of a ward's estate met the "reasonable and prudent" standard under N.C.G.S. § 35A-1251. Mr. Christy further testified over objection that the failure to list such a loan as an asset on the guardian's report would constitute a breach of fiduciary duty.

Mr. Christy was not formally tendered as an expert witness. In North Carolina, "a nonexpert may not testify to the legal effect of a transaction or other fact." 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 182, at 611 (5th ed. 1998). However, whether or not a witness has been formally tendered as an expert is not controlling. In *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 515, 428 S.E.2d 238, 243 (1993), this Court stated, "[a]lthough these witnesses were not formally tendered nor recognized by the court as experts, the trial court by implication ruled that they were experts when, upon hearing their qualifications, the trial court permitted them to give expert testimony." Here, the evidence

indicated that Mr. Christy was a licensed attorney, and had served seven years as Assistant Clerk and seven years as Clerk of Superior Court. Mr. Christy had been involved in over three hundred prior incompetency guardianships.

> A witness is qualified to offer expert opinion testimony if it is shown that the witness is trained, skilled or experienced in the subject area in question. The decision to qualify a witness as an expert is within the discretion of the trial court, and will be reversed only if there is no evidence to support it.

Id. (internal citations omitted). Accordingly, we conclude that Mr. Christy may appropriately be considered an expert. However, under North Carolina law, even experts may not give testimony which purports to state whether a legal standard has been met. *See State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986).

Here, the question to which defendant objected was: "[I]f a prudent person were to invest or loan ten thousand dollars to the law practice of someone such as [defendant], would you expect that there would be some documents that would reflect that loan? . . . Under the reasonable and prudent manner requirement set out in the statute?" Additionally, the district attorney was permitted to ask Mr. Christy, "would it be a breach of fiduciary duty not to accurately reflect where her money is? . . . [in] [y]our opinion as clerk, judge of probate and someone who has handled many estates."

We conclude that the trial court erred in admitting Mr. Christy's testimony in response to these questions. "[U]nder the . . . rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific meaning not readily apparent to the witness." *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 586, 403 S.E.2d 483, 488 (1991) (quoting *Ledford*, 315 N.C. at 617, 340 S.E.2d at 321). According to the *HAJMM* Court, the admission of this testimony invades that province of the court to determine the applicable law and to instruct the jury as to that law. Further, "an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion." *Id.* at 587, 403 S.E.2d at 489. Additionally, the *HAJMM* Court specifically stated "the witness may not opine that a fiduciary relationship exists or has been breached. The trial judge should instruct the jury with regard to factors which give rise to the relationship." *Id.* at 588,

403 S.E.2d at 490. We conclude that the admission of this testimony was prejudicial error.

Next, we turn to the testimony of Assistant Clerk of Superior Court Elaine Hunter. Ms. Hunter had been in charge of the estates section of the Buncombe County clerk's office for nineteen years. Even though Assistant Clerk Hunter was not formally tendered as an expert, Ms. Hunter is, by virtue of her vast experience, an expert in the handling of decedents' estates. Ms. Hunter testified that it would violate the law for an administrator of an estate to rent property belonging to the estate without first obtaining permission from the clerk of court. She testified further that it would be illegal for an administrator to deposit the proceeds from such rentals into the administrator's personal account. Ms. Hunter's testimony addressed the legality of defendant's conduct. Whether defendant's actions were legal or not was the fundamental question the jury had to answer. *See, e.g., State v. Carr*, 196 N.C. 129, 132, 144 S.E. 698, 700 (1928). Although her testimony was admitted without objection, it was clearly prejudicial. We conclude that the trial court committed plain error in the admission of Ms. Hunter's testimony.

Because of our disposition of this issue, we need not address whether the trial court improperly admitted the opinion evidence of State Bar investigator Donald Jones.

Vacated in part, remanded in part.

Judges McGEE and HORTON concur.

STATE OF NORTH CAROLINA v. STEPHEN DAVID BROOKS

No. COA99-433

(Filed 6 June 2000)

1. Assault— deadly weapon—inflicting serious injury—separate charges—three bullet wounds

The trial court erred in denying defendant's motion to dismiss the second charge of assault with a deadly weapon inflicting serious injury because although the victim sustained three bullet wounds, there is no evidence of a distinct interruption in the original assault followed by a second assault.

2. Kidnapping— indictment—facilitating commission of a felony

The trial court committed plain error in allowing defendant to be convicted of first-degree kidnapping under the theory that defendant unlawfully restrained the victim and removed her from one place to another without her consent and for the purpose of facilitating the commission of a felony, because: (1) the victim willingly got into the van with defendant to run errands during her lunch hour and never tried to get away from defendant until after he shot her; (2) the indictment alleged only that defendant kidnapped the victim to facilitate the commission of a felony, N.C.G.S. § 14-39(a)(2); and (3) the evidence failed to reveal that defendant kidnapped the victim before he shot her, or that the victim was with defendant against her will before she was shot.

3. Constitutional Law— right to counsel—pro se representation

The trial court did not err by allowing a criminal defendant to proceed pro se because: (1) the trial court reviewed the waiver form and inquired of defendant each necessary element of the form, revealing that defendant knowingly, intelligently, and voluntarily elected to proceed pro se; (2) defendant understood the consequences of his waiver and exercised his own free will; (3) defendant's court-appointed attorney remained in the courtroom with defendant as standby counsel and made motions on defendant's behalf; and (4) defendant continued to confer with his court-appointed counsel, thus availing himself of counsel's expertise and experience.

4. Evidence— prior bad acts—relevancy

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury on his second wife by allowing the State to present evidence of defendant's prior bad acts through the testimony of defendant's first wife that defendant snuck into her residence during a time of marital separation, hid in her attic for seventeen hours, and then stabbed her numerous times while she slept, because: (1) the time between defendant's assault of his first wife and second wife was not so remote as to make his first wife's testimony inadmissible; (2) evidence was offered that defendant attacked both women during a period of marital discord, stating at different times that he would not allow them to leave him or to end their marriage to him; (3) defendant never denied stabbing his first wife or shooting his sec-

ond wife for those reasons; and (4) the evidence was not so remote in time as to be irrelevant, and was more probative than prejudicial to show defendant's motive, intent, preparation, plan, absence of mistake, and modus operandi. N.C.G.S. § 8C-1, Rules 403 and 404(b).

5. Appeal and Error— preservation of issues—order not in record

Defendant's argument concerning his motion for appropriate relief, which states that his arrest is illegal and he received ineffective assistance of counsel, is not properly before the Court of Appeals because there is no order in the record from which to appeal. N.C. R. App. P. 9(a).

Appeal by defendant from judgments entered 28 August 1998 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 February 2000.

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

Haakon Thorsen for defendant-appellant.

HUNTER, Judge.

Stephen David Brooks ("defendant") appeals the trial court's judgments against him for first degree kidnapping under N.C. Gen. Stat. § 14-39 (case no. 96CRS39268), and two charges of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) (case nos. 96CRS39269 and 96CRS39800). Having found merit in two of defendant's arguments, we reverse in part and find no error in part.

The facts pertinent to this appeal are as follows: Defendant and the victim, Ruth Meeks, were married in July 1993 and lived together as husband and wife until the following spring when Ms. Meeks learned that, at the time of their wedding ceremony, defendant was still married to another woman. Ms. Meeks requested defendant to move out of her residence; however, the two remained in contact. On the morning of 29 July 1996, defendant borrowed Ms. Meeks' van for a doctor's appointment, but later informed her the appointment was in the afternoon. Ms. Meeks allowed defendant to keep the van all day provided he agreed to pick her up from work at lunchtime and drive her to run some errands.

As planned, defendant picked Ms. Meeks up during her lunch hour and drove her to her brother's home. Ms. Meeks went inside, picked up $4,300.00 from her brother and, upon returning to the van, asked defendant to take her to the bank so that she could make a deposit. Approximately five minutes later, defendant yelled "bitch," to which Ms. Meeks looked up and defendant shot her. Ms. Meeks wrestled the gun away from defendant and threw it out of the passenger-side window. When defendant jumped out to get the gun, Ms. Meeks had intended to drive away. However, when Ms. Meeks realized the defendant had taken the keys with him, she got out of the van and began to run away. Not getting far, Ms. Meeks collapsed in the street. Defendant picked up Ms. Meeks and put her back into the van on the floor and drove off.

Ms. Meeks was shot three times. Evidence presented at trial left the question of whether defendant shot Ms. Meeks all three times at once—that is, before she threw the keys out of the window, or whether one or two of the shots were inflicted after she threw the keys out of the window. Shortly after defendant caught Ms. Meeks and put her onto the van floor, she fell unconscious. Ms. Meeks did not regain consciousness until several hours later—as it was becoming dark outside. Defendant was still driving her around in the van. Ms. Meeks testified that defendant finally parked the van, tied her up with duct tape and left her. He returned to the van several hours later and tied her up again (she had been able to get her hands free), then left again. The third time he returned to the van, defendant drove Ms. Meeks to a hospital in Charlotte. There he alerted emergency staff (by cellular phone) of Ms. Meeks' being shot, but he would not let them into the van to give Ms. Meeks medical attention. Instead, defendant locked the van doors, threw the keys outside, then shot himself. Both defendant and Ms. Meeks were rushed into surgery.

[1] Defendant has preserved six assignments of error; however, he argues only five. The first is that because the evidence was insufficient to show that two assaults were committed, the trial court committed reversible error in not allowing defendant's motion to dismiss the second assault at the close of the State's evidence. We are persuaded by defendant's argument.

In reviewing the trial court's denial of defendant's motion to dismiss, this Court must look to see whether

> the trial court . . . consider[ed] the evidence in the light most favorable to the State, [having] giv[en] the State the benefit

> of every reasonable inference which may be drawn. [However,] [t]he State is still "required to produce substantial evidence more than a scintilla to prove the allegations in the bill of indictment."

State v. Jarrell, 133 N.C. App. 264, 267, 515 S.E.2d 247, 250 (1999) (citations omitted) (quoting *State v. Overton*, 60 N.C. App. 1, 26, 298 S.E.2d 695, 710 (1982), *appeal dismissed and disc. review denied*, 307 N.C. 580, 299 S.E.2d 652-53 (1983)). Furthermore, "[i]t is immaterial whether the evidence is direct, circumstantial, or both." *State v. Bradley*, 65 N.C. App. 359, 362, 309 S.E.2d 510, 512 (1983). "[A] motion to dismiss is properly denied if there is substantial evidence of each essential element of the offense charged and that defendant committed the offense." *State v. Leonard*, 74 N.C. App. 443, 447, 328 S.E.2d 593, 595, *disc. review denied*, 314 N.C. 120, 332 S.E.2d 487 (1985). "Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Rhome*, 120 N.C. App. 278, 291, 462 S.E.2d 656, 665 (1995) (quoting *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987), citing *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981)).

Defendant is correct in stating that in order for him to be charged with two counts of assault with a deadly weapon, there must be two separate assaults. We agree with the trial court's instructions to the jury, that to find defendant guilty of two separate assaults, "there [must have been] a distinct interruption in the original assault followed by a second assault." In the case at bar, there is no evidence of such a distinction. Consequently, defendant's second assault should have been dismissed.

Ms. Meeks testified that she was first shot as defendant was driving away from her brother's house. She then testified that she wrestled with defendant and took the gun away from him and threw it out of the van's passenger window. Then as he carried her back to the van, defendant had the gun in his hand and she "figured" she was going to get shot again. However, Ms. Meeks fell unconscious soon after defendant put her onto the van floor. She was unclear as to when she received the other two bullet wounds.

It was defendant's position at trial that after he shot Ms. Meeks the first time, the gun went off twice more while she struggled to get the gun away from him. Therefore, he argues that the trial court should have accepted his version of when he shot Ms. Meeks because Ms. "Meeks'[] testimony does not support two assaults . . . [and there]

is no evidence the shots were not [sic] separated by any significant length of time." We agree.

In the case at bar, there was no doubt that Ms. Meeks sustained three bullet wounds. However, her testimony at trial left a gaping hole in answer to exactly *when* she sustained the last two wounds. Unlike cases where there is a contradiction in the parties' versions of what happened, thus making it proper for the issue to be submitted to the jury, *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), this is a case in which there was evidence presented by defendant with no contradicting evidence offered by the State. Ms. Meeks' testimony that at first she "could only see two wounds[] [but she] knew [she] had some somewhere else because he initially shot [her]" in a particular area of her body is heart-wrenching. However, we are not persuaded that her testimony rises to the level of being substantial enough to pose a contradiction to defendant's testimony of the events, being alone. The State offers no other evidence that the three shots were not simultaneous—"fail[ing] to prove an essential element of the crime charged. [Therefore,] [d]efendant's motion to dismiss was . . . improperly denied and defendant's conviction [for the second assault (case no. 96CRS39800)] must be reversed." *State v. Phipps*, 112 N.C. App. 626, 629, 436 S.E.2d 280, 282 (1993).

[2] Defendant's next assignment of error is that the trial court committed plain error in allowing him to be convicted of kidnapping under a theory not supported by the bill of indictment. Stating the bill of indictment alleged he had kidnapped Ms. Meeks "by unlawfully restraining her and removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony," defendant argues that since the only felony he committed happened *before* he restrained Ms. Meeks, the act did not conform to kidnapping under the theory outlined in the indictment. Instead, defendant argues, the only theory of kidnapping available to the State was that it was done "to facilitate [defendant's] flight" following the commission of a felony.

It is well established that where a defendant has failed to object at trial to the trial court's submission of a charge to the jury, appellate review of his argument may be sought only under the plain error standard. *State v. Odum*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983); *see also 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). Furthermore, the term plain error does not simply mean obvious or apparent error.

> In order to rise to the level of plain error, the error in the trial court's [actions] must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.

State v. Holden, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998). (We note that, in its argument before this Court, the State conceded that if the Court found defendant's second assault conviction to be error, then the kidnapping charge must also be held error.) We agree with defendant that the trial court committed plain error.

Our General Assembly has defined kidnapping in the following way:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint of removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree . . . . If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . .

N.C. Gen. Stat. § 14-39(a), (b) (1999).

It is undisputed that Ms. Meeks willingly got into the van with defendant to run errands during her lunch hour. Further, Ms. Meeks testified that she never tried to get away from defendant until after he shot her, when she got out of the van and tried to run but collapsed in the street. Therefore, it was then and only then that kidnapping became a viable charge against defendant, because it was only then that he had to take steps to "confine, restrain, [and] remove" Ms. Meeks from place to place *against her will*. N.C. Gen. Stat. § 14-39(a).

Our Supreme Court has long held that in order to properly indict a defendant for first degree kidnapping, the State must allege both the essential elements of kidnapping as provided in N.C. Gen. Stat. § 14-39(a) and at least one of the elements of first degree kidnapping listed in N.C. Gen. Stat. § 14-39(b). *State v. Ellis*, 90 N.C. App. 655, 369 S.E.2d 642 (1988). Furthermore, an indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977). *See also State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

One of the essential elements of kidnapping is that the State prove defendant either unlawfully confined, restrained, or removed Ms. Meeks from one place to another, *without her consent*. N.C. Gen. Stat. § 14-39(a). The indictment against defendant was limited to one of the alternative reasons listed in the statute as to why defendant had unlawfully confined, restrained or removed Ms. Meeks, the State having chosen to prove a kidnapping to "facilitat[e] the commission of a[] felony." N.C. Gen. Stat. § 14-39(a)(2). However, because we held in the earlier argument that the trial court incorrectly submitted the issue of whether defendant committed two separate assaults against Ms. Meeks; in order for the State to prove kidnapping as alleged in the indictment, the evidence at trial must have shown that defendant kidnapped Ms. Meeks *before* he shot her. There was no evidence at trial that before she was shot, Ms. Meeks was with the defendant against her will. Therefore, the State did not meet its burden of proof and we are required to reverse the kidnapping conviction (case no. 96CRS39268).

[3] Thirdly, defendant assigns error to the trial court's failure to conduct a sufficient inquiry before permitting defendant to proceed *pro se*. Defendant argues that because the trial court did not inform him of the maximum punishments, his convictions should be vacated and the case remanded for a new trial. We find this argument completely unpersuasive.

From the Sixth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, a criminal defendant obtains the right to the assistance of counsel. Furthermore, the United States Supreme Court has long ruled that part of that constitutional right is the right to refuse the assistance of counsel and to conduct one's own defense. In line with the Constitution's requirements, North Carolina law provides, in pertinent part, that a defendant may proceed in a trial without the assistance of counsel "only after the trial judge makes thorough inquiry and is satisfied that the defendant: . . . [c]omprehends the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242(3) (1999).

The record reflects that defendant was appointed counsel, who worked with defendant for more than a year. However, on the day his trial was to begin and after jury selection, defendant told the trial court he and his attorney had a difference of opinion as to upon what strategy his case should be pursued. Revealing a very lengthy discussion between the trial court and defendant, the record reflects that the trial court apprised defendant not only of his right to counsel—though not necessarily his right to "fire" counsel and have more appointed—but also of the possible consequences of his less-than-prudent decision. Nevertheless, stating that he had thirty years of paralegal experience, defendant insisted that the strategy issue was paramount.

> THE COURT: . . . First of all, I want you to understand there may be—there's often a misconception as to what the role of the lawyer is and what the role of the client is as far as decision making goes in the trial of the case.
>
> Once you obtain the assistance of counsel . . . there are certain decisions in the case that are best made by the lawyer. There are some decisions in the case that are absolutely the client's decision. . . .
>
> . . .
>
> But when we get into areas such as trial strategy, the questions of whether or not to call a particular witness, the question of whether or not to present a particular legal defense, the question of how to cross-examine a witness, what method to use, what theory of the case to present . . . those are matters of trial strategy . . . [and] generally are within the discretion of the lawyer.
>
> . . .

. . . [Y]ou do have the right to discharge your attorney at anytime and to represent yourself if that's what you wish to do.

Now, you do not necessarily have the right simply to fire Mr. Bender and say I want somebody else to represent me other than Mr. Bender.

. . .

I think you do understand what your options are as I explained to you. Any person has the right to represent himself . . . at anytime in a proceeding. That's not something that I recommend.

THE DEFENDANT: It's not something I want to particularly do.

THE COURT: Right. A lawyer can provide valuable assistance in a case. Representing yourself in a trial, particularly a criminal trial, makes about as much sense as somebody saying I don't need a doctor; I can remove my own appendix. . . .

THE DEFENDANT: In 1994 and respectively in 1990 . . . I was charged with assault—

I represented myself and I was found not guilty in both . . . .

So I've been through this before, Your Honor. So I'm not completely oblivious as to the consequences . . . . [T]his is a much more serious matter and I understand that. But I just want to let you know again, I do understand and I appreciate your admonition.

THE COURT: All right. Well, you [and Mr. Bender] take some time and talk about these issues and then let me hear from you when you're ready to give me some further information, and we'll go from there.

(WHEREUPON, . . . a recess was observed.)

THE DEFENDANT: I'd like to invoke my constitutional right and represent myself.

THE COURT: All right, sir. Now, in that regard, have you given careful consideration to what you're doing?

THE DEFENDANT: I believe I have, Judge.

THE COURT: Do you understand that you have a right to be represented by a lawyer in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that the case will be tried according to the Rules of Evidence and that I cannot give you advice about how to handle your defense or what questions to ask, what objections to make or any other aspect of the case? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you represent yourself in the case, which, of course, you have an absolute constitutional right to do, but if you represent yourself in the case, you will be held to the same standards of conduct as would any attorney appearing in the courtroom, which means your demeanor and your behavior must conform to the rules that would be expected of any lawyer appearing in this court?

THE DEFENDANT: Yes.

THE COURT: And so you do wish to discharge Mr. Bender and represent yourself in this matter?

THE DEFENDANT: Yes.

. . .

THE COURT: . . . Well, let me ask you this. Do you wish to have Mr. Bender remain in the courtroom through the balance of the trial?

THE DEFENDANT: Yes, if he wants to.

. . .

THE COURT: Generally I would have—in a case in which you're representing yourself, I would have someone here as stand-by counsel. Unless you have some objection to it, I would instruct Mr. Bender to remain here as stand-by counsel; that is, to be available for questions if you have any questions about the Rules of Evidence, about strategy or anything else, and to be available to take over the defense if you grow weary or if for any other reason you cannot proceed to defend yourself at some point in the course of the trial. That would be my instruction to him unless you object to that. Do you object?

THE DEFENDANT: No, I don't, Your Honor.

Checking that all requirements of the written waiver form were met, the trial judge continued:

> [THE COURT:] You do understand the nature of the charges against you; is that correct?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: You understand that you're charged with first degree kidnapping, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of felonious larceny?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: You understand what the possible punishments are for those?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you understand that you have a right to have counsel represent you; . . . ?
>
> And you understand and appreciate the effect of your choice to waive those rights and represent yourself in this matter?
>
> THE DEFENDANT: Yes, Your Honor.

It is unclear whether the trial judge required defendant to sign a written waiver. If so, that waiver is not part of the record before us. However, it is clear from the record that the trial judge reviewed the form, inquiring of defendant each necessary element of the form. "With nothing in the record to indicate otherwise, [*State v.] Warren*[, 82 N.C. App. 84, 345 S.E.2d 437 (1986)] requires us to presume that defendant knowingly, intelligently, and voluntarily elected to proceed *pro se*." *State v. Love*, 131 N.C. App. 350, 355, 507 S.E.2d 577, 581 (1998), *affirmed*, 350 N.C. 586, 516 S.E.2d 382 (1999).

Therefore, from the foregoing, we find defendant's waiver of counsel was knowing, intelligent and voluntary. Furthermore, the record clearly reflects that defendant is ". . . 'literate and competent, that he understood the consequences of his waiver, and that, in waving his right, he was voluntarily exercising his own free will.' " *Id.* at 354, 507 S.E.2d at 580 (quoting *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980)). Additionally, we note that although defendant chose to represent himself and conduct his own direct and cross-examinations, his court-appointed attorney, Mr. Bender, remained in the courtroom with defendant and made motions on defendant's

behalf. Furthermore, defendant continued to confer with Mr. Bender, thus availing himself of Mr. Bender's expertise and experience. Therefore, we find no error in the trial court's allowing defendant to continue *pro se*.

[4] Defendant's fourth assignment of error is that the trial court erred in allowing the State to present evidence of his prior bad acts. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), allows the admission of evidence of defendant's prior bad acts for the limited purpose of proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake . . . ." However, that evidence is not admissible either to prove that defendant acted in conformity therewith or to prove that defendant had the propensity or disposition to commit the offense with which he is now charged. *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999). Furthermore, that evidence is inadmissible if the probative value is far outweighed by undue prejudice. N.C.R. Evid. 403.

The State offered evidence, by way of defendant's former wife (Mrs. Brooks) testifying, that in 1979 defendant had—during a time of marital separation from her—snuck into his then-wife's residence, hidden in the attic for seventeen hours, and then stabbed her numerous times while she slept. The evidence also tended to show that defendant did not want that marriage to end, just as he did not want his marriage to Ms. Meeks to end. Following the State's *voir dire* and defendant's *voir dire* cross-examination of Mrs. Brooks, the trial judge listened carefully to defendant's objection that the testimony was more prejudicial than probative "because it only shows a propensity for violence. I never denied that I shot the victim in this particular case. . . . [That's] not been contested, [therefore,] it's highly prejudicial and it's inflammatory." Plainly laying out its thought processes, the trial court ruled:

> I have considered this evidence under rule 404(b), and in trying to determine the probative value of this evidence on the points of identity, plan and modus operandi. I've considered the point in time at which the alleged prior events occurred. I've considered any factual similarities between those alleged prior events and the events in question in this trial.
>
> With respect to the remoteness in time, I have considered, as I believe I am compelled to do, the testimony which is uncontra-

dicted that as a result of the alleged prior incident, the defendant was convicted and spent some eight to nine years in prison between that time and the time of the occurrence of the events being considered in this trial. And I find that the time frame is sufficiently relevant. It is not too remote in time so as to preclude it from being relevant on the issues involved in this case.

I find that the factual description of the events have a number of similarities with the events being tried in this particular case including, but no limited to, the fact that this involved an estranged spouse, it occurred some months after a marital separation, that it involved acts of significant violence resulting in serious injury to the victims, which included statements by the defendant that he would kill the victim, and which indeed resulted in serious injury to the victims, and in each case death did not result.

That the violent acts involved repeated wounds to the body of the victims; that in each case there occurred or at least there was involved a significant lapse of time during the carrying out of the acts; in the alleged prior act, a waiting period of approximately 17 hours during which time the defendant allegedly secreted himself in the attic of the victim's home, and in the case now under consideration an alleged lapse of some 22 hours between the time of the perpetration of the alleged assault and the time that the victim was released at Carolinas Medical Center for treatment.

Given those similarities, given the time frames involved, I find that the alleged prior acts are sufficiently similar so as to have probative value on the questions of modus operandi, identity and plan, as well as motive.

Next, I have considered the alleged prior acts under Rule 403 and I've conducted a weighing of the probative value of those alleged prior acts against the possibility of unfair prejudice, surprise, confusion of the jury, delay or waste of time in the trial of this matter, and I find that the likelihood of those factors is outweighed by the probative value of this evidence on these points that I've mentioned. And [sic] therefore have determined in my discretion that the evidence should be allowed and that it will be admitted.

Now, . . . a very important point in my consideration has been the extent to which this evidence might be offered or might tend

to show a propensity for violence, and, of course, the evidence may not be considered for that purpose. And I have specifically analyzed this evidence that's being offered and asked myself the question as to whether this evidence has probative value on the limited points on which I've specifically addressed, or is this merely propensity evidence.

And I find that the evidence does have probative value on those other points, as opposed to being evidence of the defendant's propensity for violence. And I plan to so instruct the jury in that regard . . . . It's certainly not admissible for that purpose.

Noting that it did so instruct the jury, we agree with the trial court, the evidence was not so remote in time as to be irrelevant or of more prejudicial than probative value to the defendant because it tended to show motive, intent, preparation, plan and the absence of mistake and *modus operandi*. *See State v. Cox*, 344 N.C. 184, 472 S.E.2d 760 (1996) (evidence of prior threats admissible to prove premeditation and deliberation—intent, preparation and plan); *State v. Penland*, 343 N.C. 634, 472 S.E.2d 734 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997) (defendant's actions against former girlfriend and those against victim were sufficiently similar so that the 10-year span between the crimes charged and the prior bad acts did not render the evidence too remote to be probative on the issue of common plan or scheme—*modus operandi*). All of these are proper purposes for admitting the evidence. *See State v. Dammons*, 128 N.C. App. 16, 493 S.E.2d 480 (1997).

We find *State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994) dispositive. In that case, the State charged defendant with the statutory rape of his youngest daughter A.J. (age 10 at the time) from his current marriage. Over defendant's objection that the prior bad acts were too remote, the trial court allowed testimony that defendant had raped both his daughters (B.L. and Toni) from a prior marriage, when they were but 9 or 10 years old. In reviewing the trial court's decision to allow the testimonies, this Court stated:

The remoteness factor [of 404(b) evidence] must be examined carefully to determine whether the plan or scheme of molestation was interrupted or ceased due to underlying circumstances, and then resumed in a continual fashion. For example, in *State v. Davis*, this Court determined that a ten-and-one-half-year period between the defendant's prior sexual misconduct and the crime for which he was tried was not so remote in time as to ren-

der the evidence inadmissible, since the defendant had been in prison for the majority of that time. *Davis*, 101 N.C. App. at 20, 398 S.E.2d at 650.

Here, the remoteness in time was due to defendant's having almost no access to the daughters of his first marriage following his divorce. Defendant divorced [his first wife] in 1975, and he seldom had contact with B.L. and Toni . . . thereafter. In July of 1975 defendant married A.J.'s mother. A.J. was not born until 16 April 1979, and did not reach a prepubescent age until several years later. One of the State's witnesses testified the defendant told her that when his daughters "got old enough to know about love," that "he was going to be the one to teach them." As in *Davis*, we find that circumstances prevented the defendant from carrying out his plan to sexually molest his daughters for an extended period of time, however, once the opportunity presented itself, defendant resumed the sexual abuse. Accordingly, we conclude that the remoteness in time in the present case does not make B.L.'s testimony regarding defendant's prior sexual abuse inadmissible.

Furthermore, the evidence was not violative of N.C.R. Evid. 403. Although the evidence was harmful to defendant's case, its probative value outweighed the possibility of unfair prejudice. We conclude the trial court did not err in admitting the evidence pursuant to Rules 404(b) and 403.

Jacob, 113 N.C. App. at 611-12, 439 S.E.2d at 815-16.

Likewise, in the case at bar, we find that the time between defendant's assault of his first wife and his second wife was not so remote as to make his first wife's testimony inadmissible. First, we note that defendant spent at least half of the seventeen years in prison serving time for the assault. Secondly, evidence was offered, which defendant did not contradict, that he attacked both women during a period of marital discord, stating at different times that he would not allow them to leave him or to end their marriage to him. Thirdly, defendant never denied stabbing his first wife or shooting his second wife for those reasons. Therefore, we hold that "circumstances prevented the defendant from carrying out his plan [and intent to keep his wives from divorcing him] for an extended period of time, however once the opportunity [or necessity] presented itself, defendant resumed [his initial intent]." *Id.* at 612, 439 S.E.2d at 815. We then hold the trial court committed no error in admitting the evidence.

[5] Defendant's final assignment of error regarding his motion for appropriate relief which states "that his arrest is illegal and he received ineffective assistance of counsel," is not properly before this Court. There is no order in the record from which to appeal. N.C.R. App. P. 9(a) (review is solely upon the record on appeal). Therefore, we do not address it.

Based on the foregoing, we reverse the trial court's judgment regarding defendant's convictions of a second assault (case no. 96CRS39268), and the accompanying kidnapping for the purpose of facilitating the commission of a felony (case no. 96CRS39800). We further find no error in defendant's conviction of the first assault (case no. 96CRS39269).

Reversed in part, no error in part.

Judges WYNN and MARTIN concur.

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

No. COA98-1330-2

(Filed 6 June 2000)

1. Employer and Employee— breach of loyalty—forming rival company

The trial court correctly granted summary judgment for defendant Menius but erred by granting summary judgment for defendant Camp on a breach of loyalty claim arising from defendants leaving plaintiff's employment and starting a rival company. Menius's activities while employed by plaintiff may be best described as mere preparations to compete, which is not a breach of the duty of loyalty; however, it appears from plaintiff's forecast of the evidence that defendant Camp went beyond merely preparing to compete.

2. Unfair Trade Practices— employee founding rival business—deceptive use of position of confidence

The trial court erred by granting summary judgment for defendant Camp on an unfair and deceptive trade practices claim

arising from defendants leaving plaintiff's employment and starting a rival business where plaintiff presented evidence that defendant Camp deceptively used a position of confidence to solicit the plaintiff's customers and compete with plaintiff while still in his employment, concealing his behavior from plaintiff. Under *Sara Lee Corp. v. Carter*, 351 N.C. 27, a defendant's employee status cannot shield the defendant from liability under Chapt. 75. The solicitation and procurement of commercial contracts comprise business activities "in or affecting commerce."

3. Unfair Trade Practices— employee founding rival business—conduct after leaving plaintiff's employment

The trial court correctly granted summary judgment for defendant Menius on an unfair and deceptive trade practice claim arising from defendants leaving plaintiff's employment and starting a rival business. Plaintiff showed that Menius formed a competing business, obtained financing for that business, and began to solicit plaintiff's clients after she left plaintiff's employment, conduct that does not amount to an unfair and deceptive trade practice on the facts presented.

4. Unfair Trade Practices— solicitation of rival's business—deceptive—employment relationship not a bar

The trial court erred by awarding summary judgment to defendant Millennium Communications Concepts, Inc. (MCC) on an unfair and deceptive trade practices claim arising from defendants Camp and Menius leaving plaintiff's employment and founding MCC. According to plaintiff's forecast of evidence, MCC acted through Camp in deceptively soliciting plaintiff's business. In light of *Sara Lee Corp. v. Carter*, 351 N.C. 27, Camp's employment relationship is no longer a bar to plaintiff's unfair and deceptive trade practice claim.

5. Appeal and Error— preservation of issues—appeal from order

Plaintiff preserved for appeal the issue of whether summary judgment was properly granted on a claim for interference with prospective advantage arising from two of plaintiff's employees leaving and starting a rival business where plaintiff failed to appeal from a ruling by one judge on a motion to dismiss interference with contractual and business relations claims, but did appeal from an order from another judge regarding the claim for interference with prospective advantage.

6. Wrongful Interference— interference with prospective advantage—employees founding rival business—continuing relationship—summary judgment

The trial court erroneously granted summary judgment for defendants on a claim for tortious interference with prospective advantage arising from defendants leaving plaintiff's employment and starting a rival business publishing employment magazines. Plaintiff presented a genuine issue of material fact as to whether the continuing relationship between a customer (KFI) and plaintiff would have persisted and whether defendant Camp's actions induced KFI to refrain from renewing its contract.

7. Wrongful Interference— interference with prospective advantage—employees founding rival business—right to compete

The trial court improperly granted summary judgment for defendant Camp but properly granted summary judgment for defendant Menius on a claim for interference with prospective advantage arising from defendants leaving plaintiff's employment to start a rival business. The argument that Camp had an unqualified right to compete ignores Camp's ongoing duty to plaintiff as general manager of plaintiff's company. Menius could freely compete because she did not act adversely to plaintiff's interests until after she left his employment.

8. Wrongful Interference— interference with prospective advantage—employees founding rival business—deceptive use of confidential relationship by business

The trial court erred by granting summary judgment for defendant MCC on a claim for interference with prospective advantage in an action arising from defendants Camp and Menius leaving plaintiff's employment and starting a rival business (MCC). Based on plaintiff's evidence, defendant MCC, acting through Camp, used a confidential relationship deceptively to entice plaintiff's customers away from plaintiff.

9. Conspiracy— civil—employees founding rival business

The trial court properly entered summary judgment for defendants on a civil conspiracy claim arising from defendants Camp and Menius leaving plaintiff's employment to start a rival business. Although there is no cause of action for civil conspiracy per se, an action does exist for wrongful acts committed by persons pursuant to a conspiracy. Here, plaintiff did not forecast evidence to support allegations of a common agreement and objective.

10. Damages— employees founding rival business—evidence not speculative

A plaintiff in an action which arose from employees beginning a rival business presented sufficient evidence of damages to survive a motion for summary judgment where an expert testified as to losses suffered as a result of defendant's conduct, basing her conclusion on revenues earned prior to the conduct of defendants and on evidence of anticipated revenues from the parties' tax returns and accounts receivable summaries. This evidence was not overly speculative.

On remand by order of the Supreme Court of North Carolina filed 16 February 2000 to reconsider the unanimous decision of the Court of Appeals, *Dalton v. Camp*, 135 N.C. App. 32, 519 S.E.2d 82 (1999) in light of the decision of the North Carolina Supreme Court in *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308, *reh'g denied*, 351 N.C. 191, — S.E.2d — (1999). Appeal by plaintiff from judgment entered 13 July 1998 by Judge H.W. Zimmerman, Jr. in Randolph County Superior Court. Originally heard in the Court of Appeals 16 August 1999. Heard on remand 17 April 2000.

Murchison, Taylor & Gibson, L.L.P., by Andrew K. McVey and Moser, Schmidly, Mason & Roose, by Stephen S. Schmidly for plaintiff-appellant.

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

EAGLES, Chief Judge.

This appeal arises out of a former employer's allegations of unfair competitive activity by employees and their new corporation. The Supreme Court has remanded this case for reconsideration in light of *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999). This opinion supercedes our earlier opinion reported at 135 N.C. App. 32, 519 S.E.2d 82 (1999) which is withdrawn.

Plaintiff Robert Earl Dalton d/b/a B. Dalton & Company engages in the business of selling advertisements and publishing employment magazines. In July of 1993, plaintiff obtained the rights to publish the employment magazine for Klaussner Furniture Industries, Inc. (KFI) for a three-year period. The agreement called for Klaussner to pay all print charges of $3,575.00 per issue. Plaintiff then hired defendant David Camp as his General Manager. Plaintiff gave Camp full respon-

sibility for the KFI publication. Plaintiff later acquired rights to publish several other employee magazines and gave full responsibility to Camp for those publications. Camp alleges that at the time of his initial employment, plaintiff promised that he would offer Camp an ownership interest in the company in the near future. In December of 1995, plaintiff hired defendant Nancy Menius. Both defendants were at-will employees and neither had "a covenant not to compete" with plaintiff.

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

On or about 15 January 1997, plaintiff and both defendant Menius and Camp entered discussions with KFI officials about renewing the publication agreement. Among the topics discussed was a price reduction that KFI expected to receive from plaintiff. Plaintiff said he would "get back to" KFI. Plaintiff alleges that the parties left this meeting with an understanding that the current publishing relationship would continue. Immediately following the meeting, Camp engaged in the first of a series of discussions with KFI's representative, Mark Walker. Plaintiff alleges that many of these discussions took place while Camp was at KFI's place of business in connection with his duties as plaintiff's general manager. Defendants respond that Walker initiated each conversation and that Camp never pressured Walker to do business with him.

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

resigned from plaintiff's employment and informed plaintiff of his activities. Subsequently, MCC obtained the business of several of plaintiff's other customers.

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

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

I. Breach of the Duty of Loyalty

[1] We first consider plaintiff's claims for breach of the duty of loyalty. One may create a confidential or fiduciary relationship with another by instilling a special confidence in him. *See Speck v. N.C. Dairy Foundation*, 311 N.C. 679, 685, 319 S.E.2d 139, 143 (1984) (*citing Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). The existence of such a relationship binds the individual to act with good faith and loyalty towards the one instilling confidence. *Id; Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 470, 500 S.E.2d 732, 736 (1998), *rev'd on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999). An employee must faithfully serve his employer and perform his duties with reasonable diligence, care, and attention. *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 453, 358 S.E.2d 107, 109 (1987). Where an employee deliberately acquires an interest

adverse to his employer, he is disloyal. *In Re Burris*, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965).

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

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

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

439 S.E.2d 797(1994); *In re Burris*, 263 N.C. at 795, 140 S.E.2d at 410. Therefore, summary judgment was improper.

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

II. Chapter 75 Unfair and Deceptive Trade Practices

[2] Plaintiff argues that he has presented a genuine question of material fact as to defendants' unfair and deceptive trade practices. We agree. Chapter 75 of the North Carolina General Statutes establishes a cause of action for unfair methods of competition or unfair or deceptive acts in or affecting commerce. N.C.G.S. § 75-1.1 (1999). Chapter 75 protects businesses as well as consumers. *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). Until recently, our Courts have held that the Unfair and Deceptive Trade Practices Act did not cover claims arising out of employer-employee relations. However, our Supreme Court has now dispelled that notion. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999).

The defendant in *Sara Lee* worked as a "Information Center Service Administrator" in Sara Lee's products division. *Sara Lee Corp.*, 351 N.C. at 29, 519 S.E.2d at 309. Defendant's job entailed the development and maintenance of vendor relationships to provide Sara Lee with the best pricing, availability and hardware support. *Id.* While employed, defendant developed four separate businesses through which he engaged in self-dealing by supplying Sara Lee with computer parts at an excessive cost. *Id.* Sara Lee brought suit alleging unfair and deceptive trade practices. *Id.* at 30, 519 S.E.2d at 310.

On appeal this Court held that the plaintiff could not hold the defendant liable for unfair and deceptive trade practices because the

claim arose out of an employment relationship. *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 500 S.E.2d 732 (1998), *rev'd on other grounds*, *Sara Lee Corp. v. Carter*, 351 N.C. 27, 508 S.E.2d 308 (1999). The Supreme Court reversed, reasoning that a defendant's employee status cannot shield the defendant from liability under Chapter 75. *Sara Lee Corp.*, 351 N.C. at 34, 519 S.E.2d at 312. In contrast to previous Court of Appeals decisions, the Supreme Court stated that a defendant may be liable under Chapter 75 despite his employment relationship with the plaintiff. *Id.* So long as the defendant has engaged in unfair and deceptive conduct, in or affecting commerce, to the plaintiff's detriment, the parties' employment relationship is irrelevant.

In *Dalton I*, we held that Chapter 75 does not cover claims that arise out of employer-employee relationships. Accordingly, we upheld the trial court's grant of summary judgment for defendant Camp. *Dalton*, 132 N.C. App. at 39, 519 S.E.2d at 87. We reasoned that the plaintiff's potential Chapter 75 action arose out of the parties' employment relationship. *Id.* In light of *Sara Lee*, we must reconsider whether the plaintiff has presented a genuine issue of material fact as to his Chapter 75 claim.

In order for plaintiff to prevail on a claim for unfair and 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 v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 9, 472 S.E.2d 358, 362 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997) (citation omitted). Viewing the evidence in the light most favorable to the nonmoving party, the plaintiff has demonstrated a genuine issue of material fact as to its Chapter 75 claim.

A practice is unfair when "it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 924 (1998) (citation omitted). A trade practice is deceptive if it "has the capacity or tendency to deceive." *Id.* However, the plaintiff does not have to show deliberate acts of deceit or bad faith. *Id.* Here, plaintiff has presented evidence that defendant Camp deceptively used a position of confidence to solicit the plaintiff's customers and compete with the plaintiff while still in his employment. Further, defendant Camp concealed his behavior from the plaintiff. If proved, these acts would amount to unfair and deceptive trade practices.

Next we must decide whether defendant Camp's activities were "in or affecting commerce." N.C.G.S. § 75-1.1(b) provides that "for purposes of this section, commerce includes all business activities however denominated." *See Sara Lee Corp.*, 351 N.C. at 32, 519 S.E.2d at 311. Further, our Supreme Court has explained that "business activities is a term that connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs such as the purchase and sale of goods or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). Here, the plaintiff's evidence shows that defendant Camp solicited plaintiff's customers and obtained their business. Camp conducted these transactions while on official business for the plaintiff. The solicitation and procurement of commercial contracts comprise business activities within the statutory definition. Based on this evidence, we hold that the conduct in question was "in or affecting commerce" and thus falls within the scope of Chapter 75.

Additionally, defendants claim that the plaintiff has not presented a genuine issue as to plaintiff's actual injury. In Section V of this opinion, we address the defendants' claim that plaintiff has failed to show any damages. We now adopt that reasoning here and hold that the plaintiff has presented a genuine issue of material fact as to his "actual injury" here. Accordingly, the trial court's grant of summary judgment for defendant Camp was error and we now reverse that ruling.

[3] We next consider the unfair and deceptive trade practice claim as to Menius. Here, we conclude that summary judgment was proper as to Menius. Whether a practice is unfair or deceptive depends on the facts of each case and the impact on the marketplace. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Here, plaintiff has shown that Menius formed a competing business, obtained financing for that business, and began to solicit plaintiff's clients after she left plaintiff's employment. We hold that this conduct does not amount to unfair and deceptive trade practices on the facts presented.

[4] Next, we must consider whether *Sara Lee* alters our holding as to defendant MCC. In *Dalton I*, we held that "MCC acted solely through Menius and Camp. Because the actions of Menius and Camp may not constitute an unfair and deceptive trade practice under the laws of this state, we conclude that MCC was also not liable." In light of *Sara Lee*, we modify that decision. Under *Sara lee*, a claim for unfair and

deceptive trade practices now lies even though the claim arose out of an employer/employee relationship. As discussed above, defendant Camp's employment relationship is no longer a bar to the plaintiff's unfair and deceptive trade practice claim. Since the Supreme Court has removed that limitation, plaintiff now has a claim against defendant MCC for unfair and deceptive trade practices. According to the plaintiff's forecast of evidence, defendant MCC acted through its agent defendant Camp in deceptively soliciting away the plaintiff's business. By using Camp in this fashion, defendant MCC may now be found liable to the plaintiff under Chapter 75. Thus, the trial court also erred in awarding summary judgment to defendant MCC on plaintiff's Chapter 75 claim.

III. Interference With Prospective Advantage

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

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

Here the depositions and pleadings have shown that KFI had a positive reaction to plaintiff's efforts with KFI's magazine. In his

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

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

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

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

647, 652 (1988); *Childress v. Ableles*, 240 N.C. 667, 84 S.E.2d 176 (1954). Therefore, summary judgment was proper.

[8] We also take this opportunity to reconsider our holding as to plaintiff's claim against defendant MCC. In *Dalton I*, we held that the trial court correctly granted summary judgment as to defendant MCC. *Id.* at 41, 519 S.E.2d at 87-88. We reasoned that defendant MCC "was never more than a competitor of plaintiff" and could freely solicit plaintiff's customers without penalty. *Id.* As long as a competitor solicits legally and does not gain an unfair advantage at the other's expense, it may seek to induce another party not to renew or enter a contract. *Owens*, 330 N.C. at 680, 412 S.E.2d at 644. Based on the plaintiff's evidence, defendant MCC acting through defendant Camp used a confidential relationship deceptively to entice plaintiff's customers away from the plaintiff. Defendant MCC sought to negotiate a contract with plaintiff's customers with the active participation of plaintiff's own employees. All the while, plaintiff had no knowledge of its employee Camp's actions. This deceptive conduct allowed MCC to gain an unfair advantage at the plaintiff's expense. Accordingly, we now reverse the trial court's grant of summary judgment as to defendant MCC and reinstate plaintiff's claim for prospective advantage against MCC.

IV. Conspiracy

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

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

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

V. Damages

[10] Defendants argue that plaintiff has not forecast evidence of a genuine issue as to his damages. In order to recover, plaintiff must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the damages with a reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 586, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Where a party has alleged business losses caused by intentional tortious conduct, the appropriate inquiry is whether the consequences were the natural and probable result of the defendants' conduct and not whether the consequences were within the parties' legal contemplation. *Steffan v. Meiselman*, 223 N.C. 154, 159, 25 S.E.2d 626, 629 (1943). As long as the evidence is not remote or speculative, evidence of anticipated profits is admissible to aid the jury in estimating the extent of the injury sustained and not as the measure of damages. *See id.* at 159, 25 S.E.2d at 629-30. Parties may show damages by proving the usual profits of a regularly established business prior to the tortious conduct. *Id.*

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

We now withdraw our earlier opinion in this action found at *Dalton v. Camp*, 135 N.C. App. 32, 519 S.E.2d 82 (1999).

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

Judges WALKER and McGEE concur.

STATE OF NORTH CAROLINA v. ANNA M. JACOBS MERRILL

No. COA99-274

(Filed 6 June 2000)

1. Conspiracy— criminal—sufficiency of evidence—passive cognizance

The trial court erred by denying defendant's motion to dismiss the charge of conspiracy to commit murder because: (1) mere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy since the conspirator must share the purpose of committing the felony; and (2) the evidence merely establishes a conversation in which defendant made no response to her brother's suggestions to murder the victim, defendant's departure for a camping trip the night of the victim's death, and defendant's assistance in concealing the crime.

2. Evidence— lay opinion—multiple personality disorder

Although the trial court erred by admitting the testimony of defendant's husband that defendant suffered from a multiple personality disorder since a lay witness may not express an opinion as to the existence or nonexistence of a disease or disorder when a person of ordinary experience, knowledge, or training cannot diagnose that disease, it was not prejudicial error in light of the other evidence properly admitted at trial showing defendant's guilt as an accessory after the fact. N.C.G.S. § 8C-1, Rule 701; N.C.G.S. § 15A-1443(a).

3. Evidence— hearsay—state of mind exception—motive

The testimony of defendant's brother concerning whether the victim forced defendant to have sex in order to visit her children was not hearsay because: (1) the testimony was not offered to

prove the truth of the matter asserted; (2) the testimony was introduced in an attempt to illustrate the brother's state of mind regarding the victim, and to show the brother's motive for killing the victim; and (3) ill-will between a defendant and a crime victim is generally relevant to show possible motive for the crime. N.C.G.S. § 8C-1, Rule 801(c).

4. Criminal Law— joinder of defendants—motion to sever— no abuse of discretion

The trial court did not abuse its discretion by granting the State's motion for joinder of defendant and her brother for trial and by denying defendant's motion to sever, even though defendant contends she was deprived of a fair trial based on the testimony of a clinical psychologist stating that defendant's brother was concerned for defendant's mental health and that the antagonism between the victim and the brother was increased by defendant's report that the victim forced her to have sex in order to get her children back, because: (1) defendant was neither tried nor convicted of murder, and the effect of the pertinent testimony is largely irrelevant to defendant's actual conviction as an accessory after the fact; (2) the testimony focused on developing the brother's state of mind, and any reference to defendant marginally effected defendant's own case; and (3) the State presented plenary evidence of defendant's guilt on the crime of accessory after the fact.

Appeal by defendant from judgment entered 4 September 1998 by Judge Zoro J. Guice, Jr. in Transylvania County Superior Court. Heard in the Court of Appeals 25 January 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles J. Murray, for the State.

Roy D. Neill for the defendant-appellant.

LEWIS, Judge.

Defendant Anna M. Jacobs Merrill was tried at the 24 August 1998 session of Transylvania County Superior Court for conspiracy to commit murder and accessory after the fact to the felony of murder. The jury returned a verdict of guilty on 4 September 1998. Defendant received consecutive sentences of 157 to 298 months for the conspiracy conviction and six to eight months for the accessory after the fact conviction.

Although defendant Anna M. Jacobs Merrill ("defendant") is the sole defendant in this appeal, she was tried jointly with defendant Frank Schlaepfer, who was convicted of first-degree murder and conspiracy to commit murder. Tim Merrill, defendant's husband, was indicted for conspiracy to commit murder and accessory after the fact to the felony of murder, but entered into a plea agreement with the State and did not stand trial.

The State's evidence tended to show the following. In February 1992, defendant married Shaun Lee Jacobs, the victim. Upon their divorce several years later, the victim received custody of their two children. In 1996, this custody arrangement was modified, allowing defendant custody of the children during the 1996-97 school year, and was subject to modification in May 1997. Custody and visitation rights were a source of tension between defendant and the victim after their divorce.

On 6 May 1997, defendant married Tim Merrill. The couple lived with Schlaepfer, defendant's brother, in Brevard, North Carolina, located in Transylvania County. At the time of his death, the victim was living in Fairview, North Carolina, located in Buncombe County.

On 28 May 1997, Detective Wayne Guffey of the Rutherford County Sheriff's Department received a missing persons report on the victim and began an investigation. Pursuant to this investigation, defendant was interviewed by several detectives on 4 June 1997. Following the interview, defendant directed detectives to a 55-gallon steel drum located down an embankment 30 to 50 feet from the road in Henderson County. Inside the drum, the detectives discovered the victim's body. John Butts, the Chief Medical Examiner for the State of North Carolina, testified that the victim's death occurred on or around 24 May 1997. Examination of the victim's body revealed three gunshot wounds, the fatal one located in the back of the victim's head and two others in the victim's foot.

On the evening of 23 May 1997, defendant, Tim Merrill and defendant's children went camping in Cherokee, at the Indian Creek Campground. They returned at around noon on 24 May, the next day. Upon their return, Schlaepfer informed defendant and Tim Merrill that Shaun Lee Jacobs had been killed at their residence that morning. Schlaepfer testified that Jacobs arrived at the residence at 8:30 a.m. to pick up the children and became angry when Schlaepfer told him they were not there. A fight ensued, during which Schlaepfer shot and killed Jacobs.

[1] Defendant first argues the trial court improperly denied defendant's motion to dismiss the charge of conspiracy to commit murder for insufficiency of the evidence. To withstand defendant's motion to dismiss, the State had to show substantial evidence as to each of the essential elements of the crime. *State v. Workman*, 309 N.C. 594, 598, 308 S.E.2d 264, 267 (1983). The trial court must consider all the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

The elements of conspiracy to commit murder are (1) defendant entered into an agreement with at least one other person; and (2) the agreement was for an unlawful purpose, here, to commit or assist in committing murder. *State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995). Defendant disputes that the State put forth substantial evidence establishing any such agreement between defendant and Schlaepfer.

As soon as the union of wills for the unlawful purpose is perfected, the crime of conspiracy is complete, *State v. Goldberg*, 261 N.C. 181, 202, 134 S.E.2d 334, 348, *cert. denied*, 377 U.S. 978, 12 L. Ed. 2d 747 (1964), and no overt act is required. *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993). The agreement may be established by direct or circumstantial evidence, which establishes either an express agreement or a "mutual, implied understanding." *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953).

The State asserts that the following conversation, where defendant, Tim Merrill and Schlaepfer were present, establishes an agreement to murder between defendant and Schlaepfer. According to the testimony of Tim Merrill, this exchange took place at their residence on either 13 or 14 May 1997, ten or eleven days before the victim's death:

A. Okay. Me and my wife were sitting in the kitchen table, and I was doing some paperwork on-the-job, because a bid for a job that I was going to try to get. [Defendant] was sitting beside me with a coloring book, and [Schlaepfer] was in the living room. He said that he had an idea how to take care of [the victim].

Q. Who was he talking to?

A. He was talking to [defendant].

Q. All right.

A. And [defendant] said, "How is that?" [Schlaepfer] said for him—for [defendant] to call [the victim] and tell him . . . to come over to the trailer, that [Tim Merrill and defendant] had separated and that when [the victim] came over, that [Schlaepfer] would take care of him. And [Schlaepfer] asked me if I cared . . . .

Q. What did you say?

A. I didn't care because I wasn't really paying attention—my mind was on my paperwork, and didn't really know what was coming out of my mouth when I said, "I don't care."

Q. Did [defendant] say anything after [Schlaepfer] made that statement?

A. No.

Q. About I will know how to take care of him?

A. No, sir.

Q. Was there any other conversation along those lines at that time, talking about [the victim] and how to take care of him?

A. No.

(4 Tr. at 129-130). The State also elicited testimony from Ned Whitmire, an agent with the State Bureau of Investigation, as to the same conversation:

A. Well, [Tim Merrill] . . . was working with his invoices that he had some job that he was planning to do or wanting to make a bid on. And that [Schlaepfer] was in the living room, and that he said that he had an idea of how to take care of the problem with [the victim]. That [Schlaepfer] knew that they, meaning [Tim Merrill and defendant], had gone to an attorney to talk about custody over these kids. And [defendant] was saying that she was not going to give up these kids, and he didn't want to give them up either.

Q. "He" being who?

A. [Tim Merrill.] And he indicated then, even if he, Tim Merrill, had to kill [the victim] himself, he wasn't going to give them

> up. He said that [Schlaepfer] had an idea, and [defendant] asked him what it was. [Schlaepfer] said for [defendant] to call [the victim] and tell him that they had separated and that she was upset and wanting [the victim] to come take her for a ride on his motorcycle. When [Schlaepfer] came to the house, [Tim Merrill and defendant] would be gone and he, [Schlaepfer], would kill [the victim]. And [Schlaepfer] said nothing else after he said that.

(7 Tr. at 39-40.) The State argues that defendant "discussed" plans to kill the victim in this conversation, which established an agreement to murder. There is no evidence that defendant responded in any way to Schlaepfer's proposed plan. Viewed in the light most favorable to the State, this conversation does not reveal that defendant assented at that time, either expressly or implicitly, to Schlaepfer's proposition. Absent some suggestion of assent, not even a mutual, implied understanding is established by this evidence.

While the State's direct evidence relevant to the existence of an agreement between defendant and Schlaepfer to murder the victim fails, an agreement or understanding for the purposes of conspiracy may be inferred from the conduct of the parties. *State v. Bell*, 338 N.C. 363, 393, 450 S.E.2d 710, 727 (1994). Such conduct may consist of a number of indefinite acts, each of which, standing alone, may have little weight, but, taken collectively, point unerringly to the existence of a conspiracy. *State v. Rannels*, 333 N.C. 644, 659, 430 S.E.2d 254, 262 (1993).

The State's evidence established that a telephone call was made to Jacobs' residence on 23 May 1997, the day before his death. It was established that a call made from defendant's residence to the victim's residence would be long distance. Tim Merrill testified he placed a block on the telephone in their residence, such that no long distance calls could be made from their telephone. Marshall Johnson, defendant's neighbor, testified that defendant, Tim Merrill and Schlaepfer had used his telephone to make long distance calls on several occasions. The phone jack they used when making these calls was located outside. The State introduced into evidence Johnson's telephone bill, which revealed a telephone call placed to the victim's residence on 23 May. Johnson testified he was not home when the call was made. The State presented no evidence as to the identity of the caller. Evidence that defendant placed the 23 May phone call may have supported a reasonable inference that defendant assisted in furthering Schlaepfer's plan. This could have provided a basis to

infer her taking part in a conspiracy. Without such evidence, there is no inference.

The State also points to the testimony of Charles Robinson, Schlaepfer's friend, establishing that Schleapfer arranged for defendant and Tim Merrill to borrow money to go camping on 23 May 1997. Robinson testified that he loaned defendant and Merrill ten dollars that evening, in accordance with Schlaepfer's request. The State contends this evidence establishes defendant's assent through furtherance of Schlaepfer's proposed plan. We disagree. Absent any evidence linking this arrangement to the proposed plan, it may be reasonably inferred only that Schlaepfer arranged for defendant and Tim Merrill to go camping.

If the State's evidence did establish that defendant borrowed this money in conjunction with Schlaepfer's proposed plan, without more, a reasonable inference would exist that defendant borrowed money from Robinson knowing that when she departed, Schlaepfer planned to kill the victim. This evidence, without any further participation by defendant, would still not allow us to infer her agreement to murder the victim. Mere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy. The conspirator must share the "purpose of committing [the] felony." Model Penal Code § 5.03 cmt. (2)(c)(I), at 407 (1962); *see also Bates v. People*, 498 P.2d 1136, 1138 (Colo. 1972); *Worden v. State Police Merit Board*, 174 N.E.2d 407, 407 (Ill. App. Ct. 1961); *State v. Mariano*, 934 P.2d 315, 317 (N.M. Ct. App. 1997). It is not sufficient that the actor only believe that the result would be produced, but did not consciously plan or desire to produce it.

The State points to other instances of defendant's conduct to establish a conspiracy to murder. This evidence includes defendant's expressions of her desire that the victim be dead. These comments, however, were made by defendant long before the conversation between defendant, Tim Merrill and Schlaepfer took place. None of defendant's expressions of this desire were introduced in relation to Schlaepfer's plan. The State also points to evidence establishing that defendant participated in efforts to hide the victim's body and personal belongings, and initially attempted to deceive law enforcement officers regarding the victim's disappearance. Although concealment of a crime is condemned by our law and may be strongly probative in some contexts, defendant's conduct relative to concealment here does not create a reasonable inference of her assent in Schlaepfer's plan. The evidence merely establishes the conversation on 13 or 14

May in which defendant made no response to Schlaepfer's suggestions, defendant's departure for Cherokee the night of the victim's death, and defendant's assistance in concealing the crime. Collectively, this evidence does not point, expressly or impliedly, to the existence of a conspiracy. We hold it was error for the trial court to deny defendant's motion to dismiss on the charge of conspiracy to murder. We therefore reverse defendant's conviction for conspiracy. We review defendant's remaining assignments of error as they effect defendant's conviction for accessory after the fact.

[2] Defendant next argues the trial court admitted testimony by Tim Merrill that defendant suffered from multiple personality disorder in violation of Rules of Evidence 701, 404 and 403. On cross-examination of Tim Merrill, Schlaepfer's attorney asked, "Isn't it true that [defendant] suffers from some sort of mental or multiple personalities disorder?" Tim Merrill responded affirmatively. (5 Tr. at 29.) Schlaepfer's counsel did not ask Tim Merrill any other questions regarding defendant's purported mental disorders. Rule 701 establishes the standard for a lay witness' testimony:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.R. Evid. 701.

We have long held that a lay witness who has had a reasonable opportunity to observe another is permitted to express an opinion on the issue of mental capacity, when relevant. *State v. Hammonds*, 290 N.C. 1, 5-6, 224 S.E.2d 595, 598 (1976). However, a lay witness may not express an opinion as to the existence or nonexistence of a disease or disorder, when that disease does not occur so commonly or have such readily recognizable symptoms as to be capable of diagnosis by persons of ordinary experience, knowledge or training. *State v. Davis*, 349 N.C. 1, 30, 506 S.E.2d 455, 471 (1998); *Sherrod v. Nash General Hospital, Inc.*, 126 N.C. App. 755, 763, 487 S.E.2d 151, 156 (1997). The question posed by Schlaepfer's attorney effectively called for Tim Merrill, a lay witness, to make a psychiatric diagnosis of defendant's mental condition. No foundation was laid to show that Tim Merrill had the expertise to make a diagnosis and no facts were elicited establishing the basis for such an assessment. While it may have been appropriate to ask about defendant's mental capacity if deemed

relevant, it was beyond Tim Merrill's ability as a lay witness to testify as to a specific psychiatric diagnosis of defendant having "multiple personalities."

Although it was error to admit this testimony, we hold it was not prejudicial in light of the other evidence properly admitted at trial. Again, we consider error solely as to defendant's conviction for accessory after the fact. Defendant must show that, absent the contested testimony by Tim Merrill, there is a reasonable possibility the jury would have reached a different result. N.C. Gen. Stat. § 15A-1443(a) (1999).

The State presented the testimony of several witnesses regarding defendant's assistance to Schlaepfer to conceal the murder. Officer Wayne Guffey of the Rutherford County Sheriff's Department and Detective Donald Cole of the Buncombe County Sheriff's Department testified that defendant led them to an isolated area where the body was located. Tim Merrill testified that he and defendant bought supplies used to hide the victim's body and helped destroy evidence of the crime. Tim Merrill also testified that defendant joined Schlaefer in moving the victim's body from their residence to another location. The State presented plenary evidence of defendant's guilt as an accessory after the fact. This evidence supercedes any effect the erroneously admitted question and answer could have produced. Because any error was harmless, we find it unnecessary to address defendant's contention that admission of this testimony violated Rules 404 and 403.

[3] Defendant next argues certain testimony by Schlaepfer was inadmissible as multiple hearsay. During cross-examination by the prosecution, Schlaepfer explained the relationship between defendant and the victim after their separation, including the tension surrounding custody of their children:

> Q. Did [defendant] tell you that [the victim] forced her to have sex on occasions when—in order to let her have the children—. . . for visitation?
>
> A. He wanted to get back with her. He done everything he could.
>
> Q. But didn't [defendant] tell you that [the victim] forced her to have sex with him in order to get her visitation?
>
> A. That was [defendant's ex-boyfriend] that told me that, when they went to Michigan . . . .

Q. This idea of somebody forcing themselves on [defendant], you didn't like that at all, did you?

A. I never thought anything about it. I mean, at that point, I just—

Q. That didn't remind you of what your father used to do years before?

(8 Tr. at 26-27.)

The definition of hearsay under Rule 802 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). 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). This testimony was not offered to prove the truth of the matter asserted; whether or not the victim actually forced defendant to have sex in order to visit her children was immaterial. Instead, this testimony was introduced in an attempt to illustrate Schlaepfer's state of mind regarding the victim, and tended to show motive. *State v. Robbins*, 275 N.C. 537, 547, 169 S.E.2d 858, 865 (1969). Ill will between a defendant and a crime victim is generally relevant to show possible motive for the crime. *State v. Greene*, 324 N.C. 1, 16, 376 S.E.2d 430, 439 (1989), *death sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

[4] In her last assignment of error, defendant contends the trial court erred in granting the State's motion for joinder of defendants for trial and in denying her motion to sever. N.C. Gen. Stat. § 15A-926(b)(2) provides in part:

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial: . . .
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

Clearly, defendant's case falls within the parameters of G.S. 15A-926(b)(2). "When joinder is permissible under the statute,

whether to sever trials or deny joinder is a question lodged within the discretion of the trial judge whose rulings will not be disturbed on appeal unless it is demonstrated that joinder deprived defendant of a fair trial." *State v. Ruffin*, 90 N.C. App. 712, 714, 370 S.E.2d 279, 280 (1988). Without a showing that joinder has deprived a defendant of a fair trial, the trial judge's discretionary ruling on the question will not be disturbed on appeal. *State v. Burton*, 119 N.C. App. 625, 630, 460 S.E.2d 181, 186 (1995).

Defendant contends she was deprived of a fair trial because of certain testimony by Dr. Stansbury, a clinical psychologist who testified as Schlaepfer's witness. In his testimony, Dr. Stansbury mentioned that Schlaepfer was concerned for defendant's mental health, and that "[t]he antagonism between [the victim] and [Schlaepfer] was increased by [defendant's] report that [the victim] forced her to have sex in order to get her children back." (8 Tr. at 149-50.)

Defendant contends that when viewed in light of Tim Merrill's testimony that defendant suffered from multiple personalities, the testimony of Dr. Stansbury unfairly suggested defendant was "mentally ill" and thus, had a motive to kill the victim. We first note that defendant was neither tried nor convicted of murder; thus, this purported effect is largely irrelevant to defendant's actual conviction as an accessory after the fact. We also note that Dr. Stansbury's testimony clearly focused on developing Schlaepfer's state of mind, and any reference to defendant therein marginally effected defendant's own case. Furthermore, when we consider this testimony in light of all of the other evidence in the case, as is required under G.S. 15A-927(c)(2), *Burton*, 119 N.C. App. at 630, 460 S.E.2d at 186, we again emphasize that the State presented plenary evidence of defendant's guilt on the crime of accessory after the fact. There was no error in the trial court's denial of defendant's motion to sever.

No prejudicial error as to defendant's conviction of accessory after the fact to the felony of murder.

Reversed as to defendant's conviction of conspiracy to commit murder.

Remanded for resentencing on the conviction of accessory after the fact to the felony of murder.

Judges GREENE and EDMUNDS concur.

STATE OF NORTH CAROLINA v. WILLIAM RASHAD LUCAS, DEFENDANT

No. COA99-24

(Filed 6 June 2000)

Aiding and Abetting— burglary—kidnapping—*Blankenship* rule—specific intent

Since the crimes with which defendant was charged occurred prior to the *Barnes* decision and *Blankenship* governs, the trial court committed reversible error by failing to include within its jury charge the substance of defendant's written instruction, requiring a showing of specific intent for the convictions of first-degree burglary and second-degree kidnapping, because: (1) defendant's conviction for a specific intent crime under an aiding and abetting theory would be improper unless the State proved beyond a reasonable doubt that he personally possessed the requisite mens rea to commit the specified crime; and (2) the trial court's use of the phrases "knowingly encouraged and/or aided" did not adequately convey the requisite specific intent concept as expressly requested by defendant in writing.

Appeal by defendant from judgments entered 24 February 1998 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 25 October 1999.

Attorney General Michael F. Easley, by Assistant Attorney General K.D. Sturgis, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Danielle M. Carman, for defendant-appellant.

JOHN, Judge.

Defendant appeals judgments entered upon convictions by a jury of second-degree kidnapping, first-degree burglary and possession of a weapon of mass destruction. We award a new trial as to the kidnapping and burglary offenses.

The State's evidence at trial tended to show the following: On 18 January 1997, Dale McLean (McLean), his girlfriend Gwendolyn Morrison (Morrison), his ten year old daughter Chasity, and his six

year old son Junior, were together at McLean's trailer home (the trailer) in Harnett County. At approximately 8:00 p.m., McLean heard a knock at the back door, looked out a window, and saw Jimmy Lawrence (Lawrence), Morrison's former boyfriend. Morrison stated she would "handle it," and exited the trailer to speak with Lawrence. Lawrence insisted that Morrison come with him and, upon her refusal, pointed a nine millimeter pistol at her. Morrison glanced around and observed defendant standing silently near the trailer with a sawed-off shotgun resting across his stomach. Morrison told Lawrence she "didn't want no trouble" and would get her clothes and leave with him.

Morrison thereupon entered the trailer, but Lawrence "busted his way" in as she closed the door and pushed past her. McLean, who had been in the bedroom, confronted Lawrence in the hallway. The latter pointed his pistol at McLean and pulled the trigger, but the weapon failed to discharge. On a second attempt, the gun fired and the shot struck McLean in the head. McLean fell to the floor and Lawrence continued to shoot at him from point-blank range.

When Lawrence ceased firing, Morrison noticed defendant "standing in the door," holding the sawed-off shotgun. Lawrence threatened Morrison, indicating he would kill her if she refused to accompany him, and "grabbed [her] by the arm and took [her] out to [his] truck." According to Morrison, defendant, who was driving, chastised Lawrence, asserting Lawrence "should have killed her too because she's going to tell it." The group transferred into defendant's automobile at the residence of Lawrence's father. Defendant then drove to a local hotel and waited in the vehicle with Morrison while Lawrence registered.

Shortly after the three entered the room secured by Lawrence, the latter asked defendant to obtain some clothes for Morrison. As defendant left to comply, Morrison noted defendant's sawed-off shotgun remained on a bed. Within forty-five minutes, defendant returned with clothes for Morrison and departed a second time. Lawrence then sexually assaulted Morrison. Eventually, Lawrence vacated the hotel in the company of his father. Morrison telephoned her cousin, who picked Morrison up, and then notified police.

In her testimony, Chasity identified defendant as the man she had seen with Lawrence on 18 January 1997. Chasity indicated defendant had carried a "long gun" and was standing "half-inside and half-outside the door" when Lawrence shot McLean. She also related that

both men were wearing black pants, black coats and black baseball hats.

Chasity stated she telephoned McLean's mother, Eloise Swann (Swann). Swann testified she went to the trailer following the call and that Chasity told her, "it was two men." In Chasity's statement to police at 9:20 p.m. on 18 January 1997, she reported that "the men came in and both had guns."

In a 3:30 p.m. statement to police on 19 January 1997, defendant initially maintained he had been riding around with a friend between 6:00 and 9:00 p.m. on the previous day. When Special Agent Sam Pennica told defendant Lawrence had implicated defendant, the latter modified his statement. Defendant then related he drove with Lawrence to an unfamiliar trailer on 18 January 1997, but that he "did not know . . . why Lawrence wanted to go to the trailer." Defendant insisted he possessed no weapon and was not aware Lawrence was carrying a gun. According to defendant, he stood near the trailer stairs while Lawrence entered and returned to the vehicle to wait for Lawrence upon hearing shots being fired. Defendant acknowledged that he drove Morrison and Lawrence to the home of Lawrence's father, but maintained he simply transported the pair to that location and thereafter spent the night at the residence of his girlfriend.

At trial, defendant testified that he rode with Lawrence in the latter's truck to pick up a female friend. He noticed Lawrence had a gun and placed his shotgun in the truck upon Lawrence's explanation that, "you never know. Anything can happen." Defendant stated he waited by the trailer steps while Lawrence entered and, upon hearing shots, looked into the doorway and saw Lawrence struggling with someone. Defendant thereupon ran to the truck and was soon joined by Morrison and Lawrence. Defendant complied with Lawrence's directive to drive to the home of Lawrence's father and change vehicles.

Lawrence then "begg[ed]" defendant to locate a hotel. Defendant did so and waited in the vehicle with Morrison while Lawrence registered. Defendant agreed to Lawrence's request that defendant hide the nine millimeter pistol, but insisted he did not know what had happened to his shotgun. Defendant further testified he left the hotel, but that Lawrence paged him within three minutes and requested that he obtain clothes for Morrison. Defendant borrowed some clothes from his girlfriend, brought them to the hotel and returned to her residence, where he hid the nine-millimeter pistol.

The jury returned verdicts of guilty of second-degree kidnapping and first-degree burglary upon the theory of aiding and abetting, as well as guilty of possession of a weapon of mass destruction. The trial court entered judgment 24 February 1998 and imposed the following consecutive sentences:

> 1) 97 CRS 1007—Possession of a weapon of mass destruction: minimum of 16 months and maximum of 20 months imprisonment;
>
> 2) 97 CRS 735—Second degree kidnapping: minimum of 85 months and maximum of 99 months, including a 60 month firearm penalty enhancement;
>
> 3) 97 CRS 1008—Burglary in first degree: minimum of 124 months and maximum of 146 months, including a 60 month firearm penalty enhancement.

Defendant appeals.

Initially, we note defendant has advanced in his appellate brief only six of his thirty-two specified assignments of error: twenty-one, twenty-two, twenty-three, twenty-six, twenty-seven and twenty-nine. Accordingly, we do not address defendant's remaining assignments of error. *See* N.C.R. App. P. 28(b)(5) (assignments of error not set forth in an appellant's brief are deemed abandoned).

In his first argument, defendant attacks the trial court's rejection of his request at trial for a jury instruction, pursuant to *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *overruled by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), and *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998), regarding specific intent relative to the charges of first degree burglary and second degree kidnapping. Defendant submitted in writing the following proposed jury instruction:

> That the defendant . . . intended to commit (the felony). That is he had the specific intent to (name elements of felony). It is not sufficient that the State prove that [Lawrence] intentionally committed (the felony); rather the State must prove beyond a reasonable doubt that [defendant] himself, had a specific intent to commit (the felony).

The trial court denied the request, and overruled defendant's objection to the following instruction:

> Now, as to aiding and abetting in the charge of burglary and first- or second-degree kidnapping, a person may be guilty of a crime although he 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. . . . [T]o find the Defendant guilty of another crime because of aiding and abetting the State must prove generally three elements beyond a reasonable doubt: First, that the crime was committed by . . . Lawrence. Second, that the Defendant knowingly encouraged or aided [Lawrence] to commit that crime. And third, that the Defendant's actions or statements caused or contributed to the commission of the crime by [Lawrence].
>
> [A]s to burglary by aiding and abetting I charge that if you find from the evidence beyond a reasonable doubt that . . . Lawrence committed burglary [which is defined as "the breaking and entering of the occupied dwelling house of another without his consent in the nighttime with the intent to commit a felony, and in this case the felony of murder,"] and that the Defendant was actually present at the time the crime was committed and that the Defendant knowingly encouraged or aided [Lawrence] to commit the crime and that in so doing the Defendant's actions or statements caused or contributed to the commission of the crime by [Lawrence], your duty would be to return a verdict of guilty of burglary by aiding and abetting.
>
> . . . .
>
> As to second-degree kidnapping [which is defined as the "unlawful confining, restraining or removal of a person from one place to another without the person's consent for the purpose of doing serious bodily harm or terrorizing that person"] by aiding and abetting, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date [Lawrence] committed second-degree kidnapping and that the Defendant was actually present at the time the crime was committed and that the Defendant knowingly encouraged and aided [Lawrence] to commit the crime and that in so doing the Defendant's actions or statements caused or contributed to the commission of the crime by [Lawrence].

It is well established that "[w]hen a defendant makes a timely written request for an instruction that is correct in law and supported by the evidence," *State v. Dodd*, 330 N.C. 747, 753, 412 S.E.2d 46, 49

(1992), the trial court is required to relate "the substance of that instruction," *id.*, and that failure to do so constitutes reversible error, *State v. Spicer*, 285 N.C. 274, 284, 204 S.E.2d 641, 647 (1974). However, when the trial court's charge "adequately convey[s] the substance of defendant's proper request[,] no further instructions [a]re necessary." *State v. Green*, 305 N.C. 463, 477, 290 S.E.2d 625, 633 (1982).

In *Blankenship*, our Supreme Court held that

> when an accused is charged with acting in concert in relation to a specific-intent crime, the prosecution must prove, [and there must be an instruction relating,] that each individual defendant possessed the requisite *mens rea* to commit the specified crime.

State v. Rivera, 350 N.C. 285, 292, 514 S.E.2d 720, 724 (1999) (citing *Blankenship*, 337 N.C. at 558, 447 S.E.2d at 736); *see Blankenship*, 337 N.C. at 558, 447 S.E.2d at 736 (jury instructions which failed to include requirement that each defendant prosecuted under acting in concert theory must have possessed the requisite intent to commit the charged specific intent crime deemed erroneous).

Our Supreme Court subsequently applied the *Blankenship* rule to the theory of aiding and abetting in *State v. Allen*, 339 N.C. 545, 558, 453 S.E.2d 150, 157 (jury instruction relating defendant "should have known" or had "reasonable grounds to believe" another was going to commit murder failed to satisfy *Blankenship* rule because it "d[id] not convey the concept of specific intent necessary for aiding and abetting a first-degree murder"), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 676, 483 S.E.2d 396, 413-14, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *see also State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980) ("distinction between aiding and abetting and acting in concert . . . is of little significance" (citations omitted)), and *State v. Roope*, 130 N.C. App. 356, 363-64, 503 S.E.2d 118, 124 (according to *Blankenship* rule, "[u]nder either an acting in concert or an aiding and abetting theory, joint participants in a crime can be convicted only where each participant has the requisite *mens rea* for that crime"), *disc. review denied*, 349 N.C. 374, 525 S.E.2d 189 (1998).

Although subsequently overruling *Blankenship* in *Barnes*, our Supreme Court specifically indicated its decision was not to be applied retrospectively. *Barnes*, 345 N.C. at 234, 481 S.E.2d at 72.

Because the crimes with which defendant was charged occurred 18 January 1997, prior to *Barnes*, *Blankenship* governs the case *sub judice*. *See State v. Barrow*, 350 N.C. 640, 648, 517 S.E.2d 374, 379 (1999) (*Blankenship* rule applies to crimes committed 21 January 1995 (after 9 September 1994 *Blankenship* decision but prior to 10 February 1997 *Barnes* decision)). Accordingly, defendant's conviction of a specific intent crime under an aiding and abetting theory would be improper unless the State proved beyond a reasonable doubt that he personally "possessed the requisite *mens rea* to commit the specified crime." *Rivera*, 350 N.C. at 292, 514 S.E.2d at 724.

Kidnapping and first degree burglary are specific intent crimes. *See State v. Surrett*, 109 N.C. App. 344, 348, 427 S.E.2d 124, 126 (1993) ("[k]idnapping is a specific intent crime" and State must prove defendant "unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute"), and *State v. Simpson*, 299 N.C. 377, 380, 261 S.E.2d 661, 663 (1980) ("[f]elonious intent is an essential element of [first degree] burglary which the State must allege and prove").

Defendant argues the trial court's aiding and abetting instructions were erroneous in failing to require that the jury find he possessed the specific criminal intent for commission of first degree burglary and second degree kidnapping. As *Blankenship* governs the instant case, *see Barrow*, 350 N.C. at 648, 517 S.E.2d at 379, and *Rivera*, 350 N.C. at 292, 514 S.E.2d at 724, we must agree.

To be convicted as an aider and abettor,

> one must . . . share the criminal intent with the principal, and render assistance or encouragement to him in the commission of the crime.

Allen, 339 N.C. at 558, 453 S.E.2d at 157 (citation omitted); *see Gaines*, 345 N.C. at 676, 483 S.E.2d at 413-14 (requirement of actual or constructive presence to prove crime under aiding and abetting theory abrogated).

Upon review of the challenged instructions *sub judice*, we conclude the trial court's use of the phrases "knowingly encouraged and[/or] aided" did not "adequately convey" the requisite specific intent concept as expressly requested by defendant in writing, *see Green*, 305 N.C. at 477, 290 S.E.2d at 633, and the trial court therefore committed reversible error in failing to relate the substance of defendant's requested instruction, *see Spicer*, 285 N.C. at 284, 204

S.E.2d at 647; *see also Blankenship*, 337 N.C. at 557-62, 447 S.E.2d at 734-38 (specific intent required to satisfy intent element of first-degree murder on acting in concert theory), and *Allen*, 339 N.C. at 558, 453 S.E.2d at 157 (instruction relating defendant "should have known" or had "reasonable grounds to believe" another was going to commit murder failed to satisfy *Blankenship* because it "d[id] not convey the concept of specific intent necessary for aiding and abetting a first-degree murder").

The State counters that the trial court's inclusion in its jury charge of the phrase "knowingly aided" was approved in *Allen* as having given rise to a "probable interpretation" by the jury that it was required to find "that defendant knowingly participated in the crime based on an intent to assist" the perpetrator in committing it. *Allen*, 339 N.C. at 558, 453 S.E.2d at 158. However, the defendant therein had failed to proffer any specific requested instruction nor did he object to the court's charge to the jury, thereby requiring plain error review on appeal of the entire jury charge to determine whether the "instructional error . . . had a probable impact on the jury's finding of guilt." *Id.* at 558, 453 S.E.2d at 157-58 (under plain error review, "[i]t is a rare case in which an improper instruction will justify reversal of a criminal conviction where no objection has been made in the trial court") (citations omitted).

By contrast, defendant in the case *sub judice* tendered written requested instructions delineating the requirement of specific intent for conviction based upon the theory of aiding and abetting, and interposed appropriate objections to the trial court's failure to so instruct the jury, thereby obviating plain error review. As opposed to a plain error analysis, our decision herein is governed by *Spicer*, wherein failure to relate the substance of "a timely written request for an instruction that is correct in law and supported by the evidence," *Dodd*, 330 N.C. at 753, 412 S.E.2d at 49, was held to constitute reversible error, *Spicer*, 285 N.C. at 284, 204 S.E.2d at 647.

In short, the trial court erred in failing to include within its charge to the jury the substance of defendant's properly requested instruction. *See id.*, and *Blankenship*, 337 N.C. at 557, 447 S.E.2d at 736 ("instructions permit[ting] defendant to be convicted of [first degree murder] when he himself did not inflict the fatal wounds, did not share a common purpose to murder . . . and had no specific intent to kill the victims when the fatal wounds were inflicted" constituted error).

In light of our holding awarding defendant a new trial on the charges of first degree burglary and second degree kidnapping, we decline to discuss defendant's remaining assignments of error.

New trial.

Chief Judge EAGLES and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. TERRY FRANKLIN LATHAN

No. COA99-411

(Filed 6 June 2000)

1. Evidence— hearsay—state of mind exception

The trial court did not err by admitting, under the state of mind exception to the hearsay rule, the testimony of several witnesses describing the victim's demeanor or attitude when she made statements prior to her death because: (1) the statement relating episodes where the victim was crying when she called one witness, and the statement that the victim appeared to be afraid when telling another witness that the victim had to be home on time or else defendant would "whip her ass," both described the victim's emotions; (2) the statement that the victim planned to leave defendant once the victim's son was out of school indicated the victim's state of mind prior to the murder; and (3) the statement concerning the victim's demeanor and change in personality when she discussed her recurrent beatings by defendant also falls within the ambit of Rule 803(3). N.C.G.S. § 8C-1, Rule 803(3).

2. Evidence— hearsay—state of mind exception—no prejudicial error

Although the trial court erred in admitting the hearsay testimony of four witnesses under the state of mind exception since their testimony was not accompanied by descriptions of the victim's emotions or mental state, but were instead only statements regarding past factual events, there was no prejudice since a different result in the case would not have been reached absent these improperly admitted statements. N.C.G.S. § 8C-1, Rule 803(3).

3. Homicide— second-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder because evidence presented at trial that defendant pointed the rifle at the victim or in her direction and fired was sufficient to establish that he intentionally committed an inherently dangerous act that proximately caused the victim's death in a reckless and wanton manner manifesting a mind utterly without regard for human life. N.C.G.S. § 14-17.

4. Homicide— second-degree murder—motion to dismiss—intent

Although defendant contends his motion to dismiss the charge of second-degree murder should have been granted since the trial court's instruction required the jury to find that defendant intentionally killed the victim, the instructions are irrelevant to the motion to dismiss because: (1) the trial court's decision to deny the motion preceded the final instructions to the jury; and (2) the trial court instructed according to the pattern jury instruction, and the "intent" to which the charge refers is the intent to do the act that results in the death.

Appeal by defendant from judgment entered 24 April 1998 by Judge Sanford Steelman in Richmond County Superior Court. Heard in the Court of Appeals 16 February 2000.

Michael F. Easley, Attorney General, by James C. Gulick, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

EDMUNDS, Judge.

Defendant Terry Franklin Lathan appeals his conviction of second-degree murder. We find no error.

At approximately 12:15 a.m. on 13 July 1996, the Hoffman Fire and Rescue unit received a call reporting a shooting. When volunteers arrived at the scene, defendant was standing beside his truck; his girlfriend, Lisa Barber, was dead inside the truck. When asked what happened, defendant stated: "I accidentally shot her. We were messing around with guns, and she reached for the barrel of the gun, and when

she pulled it the gun went off." The body was slumped over in the passenger side of the truck cab; it was wrapped in a quilt and had a single gunshot wound to the left breast area. Bruises consistent with attempted strangulation were found on her neck although other signs of strangulation were absent. The victim also was bruised about other parts of her body.

Defendant was indicted for first-degree murder. A jury returned a verdict of second-degree murder, and the trial court sentenced defendant to 141 to 179 months imprisonment.

I.

[1] Defendant contends the trial court erred by admitting hearsay evidence. Several witnesses testified as to statements the victim made prior to her death. After conducting a *voir dire* hearing and considering arguments of counsel, the trial court admitted the statements pursuant to the state of mind exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3) (1999). Defendant contends that the admission of these hearsay statements violated his Confrontation Clause rights as set forth in the Sixth and Fourteenth Amendments to the United States Constitution.

Under Rule 803(3), hearsay evidence may be admitted to show the declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." This exception permits the introduction of hearsay evidence that tends to "indicate the victim's mental condition by showing the victim's fears, feelings, impressions or experiences," so long as any prejudicial effect of such evidence is not outweighed by its probative value under N.C. Gen. Stat. § 8C-1, Rule 403 (1999). *State v. Walker*, 332 N.C. 520, 535, 422 S.E.2d 716, 725 (1992) (citations omitted). Our Supreme Court has stated that the underlying policy supporting Rule 803(3) is the " 'fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental or physical condition.' " *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (quoting 6 John H. Wigmore, *Evidence* § 1714 (James H. Chadbourn rev. 1976)).

To be admissible under Rule 803(3), the testimony also must be relevant. *See State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997). "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." *State v. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618

(1996) (citations omitted). A victim's state of mind also is relevant "if it relates directly to circumstances giving rise to a potential confrontation with the defendant." *State v. McLemore*, 343 N.C. 240, 246, 470 S.E.2d 2, 5 (1996) (citation omitted).

However, North Carolina courts have recognized limits to the reach of this hearsay exception. "Statements merely relating factual events do not fall within Rule 803(3) because, in contrast to statements of mental or physical condition, factual circumstances are provable by better evidence, such as the testimony of those who witnessed the events." *State v. Exum*, 128 N.C. App. 647, 654, 497 S.E.2d 98, 103 (1998) (citation omitted). Defendant contends that the challenged testimony provided by the following witnesses consists of inadmissible "recitation of fact" by the victim, rather than expression by the victim of her state of mind.

Nellie Stubbs

Nellie Stubbs, the victim's mother, testified that the victim had told her: (1) that the victim had to be home by a certain time, and if she was late, defendant "would be standing in the door waiting on her"; (2) that defendant opposed the victim's use of the Stubbs' vehicle; (3) that defendant opposed people coming to his house to visit the victim; and (4) that the victim had prepared to leave defendant, but that she had stayed with him after he apologized.

Rosalie Webb

Ms. Webb worked with the victim and had known the victim most of her adult life. Ms. Webb testified that the victim told her that defendant was "very, very jealous" of the victim.

Carolyn Rainwater

Ms. Rainwater was the wife of the victim's former stepfather. Ms. Rainwater offered testimony that three weeks prior to the victim's death, the victim visited the witness but had to hurry home. The victim told Ms. Rainwater that she had to be home when defendant arrived "or he'd whip her ass." The witness stated: "I could see the fear there that if she didn't go she was going to be in trouble." Ms. Rainwater also testified that defendant "was jealous."

Ollie Green

Ms. Green was a co-worker of the victim. She testified that one day the victim arrived at work with a mark on her face. When she

inquired as to how it happened, the victim told her that defendant and the victim had argued and that defendant had touched to her face a hot gun barrel.

Barbara Beachum

While school was in session, Ms. Beachum regularly babysat for the victim's son. Shortly after she began working for the victim, Ms. Beachum noticed bruises on the victim's face. When asked what caused the bruising, the victim responded that she and defendant "got into it." Later, Ms. Beachum noticed that the victim had a "busted lip." The victim explained this by saying, "that fool is at it again." At some point, Ms. Beachum asked the victim why she stayed with defendant. The victim responded: "He's not like that when he's not drinking." Additionally, Ms. Beachum testified that during one of her last visits with the victim, the victim spoke of leaving defendant and going to live with her brother.

Cathy Presley

Ms. Presley, another former co-worker of the victim, testified that the victim told her that defendant did not permit her to wear shorts to work. She also testified that although she never saw the victim come to work in shorts, the victim occasionally changed into shorts after she arrived at work and then changed back into pants prior to going home. Ms. Presley testified that the victim told her that "if she left him he would kill her." Additionally, when asked about bruises and a burn mark on her cheek, the victim told Ms. Presley that defendant caused them after becoming jealous of a man who made a pass at the victim.

James E. Stubbs

Mr. Stubbs was the victim's stepfather. While driving the victim to Fayetteville, he asked the victim if defendant beat her. She responded that defendant had slapped her and that when her son was out of school for the summer, she was going to leave defendant.

Robert Goins

Mr. Goins was the victim's supervisor at work. He testified to his conversation with the victim about her relationship with defendant. The victim mentioned being beaten by defendant. Mr. Goins also testified to the victim's demeanor during the conversation, saying that she was "[v]ery quiet, to herself," and she was "more introverted."

Statements that relate factual events, where those events tend to show the victim's state of mind at the time the statement is made, "are not excluded from the coverage of Rule 803(3) where the facts related 'serve . . . to demonstrate the basis for the [victim's] emotions.' " *Exum*, 128 N.C. App. at 654, 497 S.E.2d at 103 (alterations in original) (quoting *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997)). As this Court has stated:

> "In the first place, it is in the nature of things that statements shedding light on the speaker's state of mind usually allude to acts, events, or conditions in the world, in the sense of making some kind of direct or indirect claim about them. . . .
>
> In the second place, fact-laden statements are usually deliberate expressions of some state of mind. . . . [I]t does not take a rocket scientist . . . to understand that fact-laden statements are usually purposeful expressions of some state of mind, or to figure out that ordinary statements in ordinary settings usually carry ordinary meaning. In the end, most fact-laden statements intentionally convey something about state of mind, and if a statement conveys the mental state that the proponent seeks to prove, it fits the [federal rule 803(3)] exception."

Id. at 655, 497 S.E.2d at 103 (alterations in original) (quoting 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 438, at 417-18 (2d ed. 1994) (explaining the federal courts' broad reading of federal rule 803(3))).

A review of cases indicates that North Carolina appellate courts have recognized tacitly that statements in which a victim's state of mind is explicated by attendant facts may be admissible pursuant to Rule 803(3). *See State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999) (expression of concern about financial conditions and statement that marriage was troubled held admissible); *State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998) (testimony regarding voice-activated records and statements from victim indicating her intent to end the marriage reflected her state of mind; *but* testimony that bruise resulted from defendant throwing victim into wall held inadmissible as mere recitation of fact), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998) (statement that if victim left, defendant would kill her was "admissible to show the victim's fear at the time of the conversation with [witness] and to demonstrate the basis for her fear, namely, the threat to her life"); *Bishop*, 346 N.C. 365, 488 S.E.2d 769 (statements expressing the vic-

tim's concern about defendant's handling of her real estate transactions and her intent to document defendant's debt, to seek repayment, and to confront defendant about her concern that defendant had stolen from her "bore directly on the relationship between the victim and defendant at the time of the killing and were relevant to show a motive for the killing"); *State v. Lambert*, 341 N.C. 36, 460 S.E.2d 123 (1995) (victim's statements that his marriage "wasn't getting along like it should" and that he was leaving held admissible statements of victim's then-existing state of mind); *State v. Marecek*, 130 N.C. App. 303, 502 S.E.2d 634 (statements that defendant was having an affair, that he didn't touch victim anymore and they no longer had sexual relations, and that defendant had bought a life insurance policy held inadmissible hearsay), *disc. review denied*, 349 N.C. 532, 526 S.E.2d 473 (1998); *State v. Hayes*, 130 N.C. App. 154, 502 S.E.2d 853 (1998) (testimony regarding defendant's threats to kill victim, defendant's statement to victim that she would be the next "Nicole Simpson," and defendant's urinating on the kitchen floor and wiping victim's hair in the urine "shed light on her state of mind, her emotions and her physical condition"), *aff'd as modified in part, disc. review improvidently allowed in part*, 350 N.C. 79, 511 S.E.2d 302 (1999).

Thus, where a statement was made in isolation, unaccompanied by a description of emotion, courts have tended to find that hearsay testimony relating that statement falls outside the scope of Rule 803(3). Conversely, where the witness described the victim's demeanor or attitude when making the statement, the courts have tended to admit the testimony pursuant to 803(3).

Applying this principle to the case at bar, we observe that the challenged testimony of Ms. Webb, when viewed as a whole, described the victim's emotions by relating episodes where the victim was crying when she called her. Therefore, this testimony was properly admitted. Next, Ms. Rainwater's testimony also fits the pattern recognized by our courts. She stated that the victim appeared to be afraid when telling Ms. Rainwater that she had to be home on time or else defendant would "whip her ass." Mr. Stubbs' testimony that the victim planned to leave defendant once her son was out of school indicated the victim's state of mind prior to the murder. Similarly, Mr. Goins' testimony as to the victim's demeanor and change in personality when she discussed her recurrent beatings by defendant fell within the ambit of Rule 803(3).

[2] By contrast, the testimony of Ms. Stubbs, Ms. Green, Ms. Beachum, and Ms. Presley was inadmissible. Their testimony was unaccompanied by descriptions of the victim's emotions or mental state, but were instead only statements regarding past factual events. However, we see no prejudice to defendant. The trial court's failure to admit or exclude evidence will not be considered prejudicial unless the defendant can demonstrate with a reasonable possibility that "had the error not been committed, a different result would have been reached." *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997). No such showing has been made here, nor do we perceive any likelihood that a different verdict would have resulted had the improper testimony not been heard by the jury. There was sufficient evidence to support defendant's conviction without the improperly admitted statements. Defendant's assignments of error relating to admission of hearsay evidence are overruled.

II.

[3] Defendant also contends the trial court erred by denying his motion made at the conclusion of the State's case and renewed at the close of all evidence to dismiss the charge of second-degree murder. The law governing the trial court's evaluation of a motion to dismiss is well-defined:

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

State v. Huggins, 71 N.C. App. 63, 66, 321 S.E.2d 584, 586-87 (1984) (alterations in original) (quoting *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 235-36 (1983) (internal citations omitted)), *quoted in State v. Childers*, 131 N.C. App. 465, 471, 508 S.E.2d 323, 328 (1998). " 'Substantial evidence' is relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *Gary*, 348 N.C. at 522, 501 S.E.2d at 66 (citation omitted).

Second-degree murder is defined under N.C. Gen. Stat. § 14-17 (1999) as the " 'unlawful killing of a human being with malice, but without premeditation and deliberation.' " *State v. Mapp*, 45 N.C. App. 574, 579, 264 S.E.2d 348, 353 (1980) (quoting *State v. Duboise*, 279 N.C. 73, 81, 181 S.E.2d 393, 398 (1971) (citation omitted)). "[M]alice necessary to establish second-degree murder may be inferred from conduct evincing " 'recklessness of consequences' " or " 'a mind regardless of social duty and deliberately bent on mischief,' " such as manifests a total disregard for human life." *State v. Rich*, 132 N.C. App. 440, 452, 512 S.E.2d 441, 450 (1999) (quoting *State v. Wilkerson*, 295 N.C. 559, 578-79, 247 S.E.2d 905, 916 (1978) (quoting *State v. Wrenn*, 279 N.C. 676, 687, 185 S.E.2d 129, 135 (1971) (Sharp, J., dissenting))), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000). While intent to kill is not an essential element, *see State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983), the crime cannot exist without some intentional act in the chain of causation leading to death, *see Wilkerson*, 295 N.C. at 580, 247 S.E.2d at 917.

There was ample evidence that defendant and the victim were embroiled in a tempestuous relationship. Mr. Jessie Locklear testified for the State that defendant described the shooting to him. According to Mr. Locklear, defendant and the victim had words the night of the shooting, and she tried to leave him. Defendant followed her with a high-powered rifle and fired a shot at her legs to frighten her. They returned to the house and continued arguing. Defendant then pointed the rifle at the victim or in her direction and fired. He realized she was hit, but added that he had not intended to kill her. This evidence was sufficient to establish that by shooting at the victim or in her direction, defendant intentionally committed an inherently dangerous act that proximately caused the victim's death in a reckless and wanton manner manifesting a mind utterly without regard for human life. *See State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984). The trial court properly denied defendant's motion to dismiss.

[4] Defendant also contends his motion to dismiss should have been granted because the trial court's second-degree murder instruction required the jury to find that defendant intentionally killed the victim. This argument fails because the court's decision to deny defendant's motion to dismiss preceded the final instructions to the jury; therefore, the instructions are irrelevant to the earlier motion to dismiss. Moreover, we perceive no error in the instructions. The record reveals that the able trial judge instructed the jury in accordance with the pattern instruction for second-degree murder. In accordance with the pattern, the judge advised the jury in pertinent part:

> Second [d]egree [m]urder differs from first degree murder in that neither specific intent to kill, premeditation, nor deliberation are necessary elements. In order for you to find the defendant guilty of second degree murder the State must proof [sic] beyond a reasonable doubt that the defendant unlawfully, intentionally, and with malice killed the victim.

As noted in footnote nine to the pattern instruction, the "intent" to which this charge refers is the intent to do the act that results in the death. N.C.P.I., Crim. 206.13, fn. 9; *see State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980). The instruction was therefore correct. This assignment of error is overruled.

No error.

Judges LEWIS and JOHN concur.

MICHAEL DEMERY, EMPLOYEE, PLAINTIFF v. CONVERSE, INCORPORATED, EMPLOYER, GAB BUSINESS SERVICES, CARRIER, DEFENDANTS

No. COA99-592

(Filed 6 June 2000)

1. **Workers' Compensation— back injury—existing condition—compensability—medical testimony**

   The Industrial Commission did not err in a workers' compensation proceeding by concluding that plaintiff's back injury was compensable where defendants contended that the medical testimony upon which the conclusion rested was based upon an inaccurate medical history. The record is not replete with evidence that plaintiff had an existing degenerative back condition and the medical testimony that plaintiff's impairment was caused by his work-related injuries was in consideration of defendants' assertions as to a pre-existing condition.

2. **Workers' Compensation— disability—maximum medical improvement—inability to earn any wages—evidence insufficient**

   The Industrial Commission erred in a workers' compensation action by concluding that plaintiff was entitled to total and per-

manent disability benefits where plaintiff had no presumption of total disability because a Form 21 was not completed and plaintiff did not meet the burden of showing that he is totally disabled and unable to earn any of the wages he was receiving at the time of his injury in the same or any other employment. Findings that plaintiff is restricted in his work after reaching maximum medical improvement do not necessarily support the finding that he is totally disabled. A prior opinion in this case holding that plaintiff is not entitled to temporary total disability after reaching maximum medical improvement, but may receive permanent disability upon prove of entitlement, is the law of the case.

Appeal by defendants from an opinion and award entered 22 January 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 2000.

Huggins & Pounds, by Dallas M. Pounds, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendant-appellants.

The Law Offices of George W. Lennon, by Michael W. Ballance, and The Jernigan Law Firm, by Leonard T. Jernigan, Jr., for the North Carolina Academy of Trial Lawyers, amicus curiae.

HUNTER, Judge.

Converse, Incorporated ("Converse") and GAB Business Services (collectively "defendants") contend that the North Carolina Industrial Commission ("Industrial Commission") erred in its conclusion that Michael Demery ("plaintiff") sustained compensable injuries under the Workers' Compensation Act ("Act") on 19 April 1994 and 16 May 1994 and that as a result, he is permanently and totally disabled. We affirm in part and reverse in part.

The facts relevant to this appeal indicate that plaintiff began working for Converse in 1977 and was laid off in 1985. He returned to work for Converse in 1991 as a "last puller." "Lasts" are shoe molds, which plaintiff counted and placed in a buggy. A buggy of molds weighs approximately fifty pounds.

On 19 April 1994, plaintiff was unloading a buggy and picked up a basket of lasts and placed them on the floor. At the same time, plaintiff felt pain in the right side of his lower back near his belt line. Upon experiencing sharp pain in his back radiating down his right leg,

plaintiff reported the incident to his foreman, who referred him to the company nurse. The company nurse applied heat to plaintiff's back, and sent plaintiff home for the remainder of the day. Plaintiff consulted Doctor's Urgent Care in Lumberton, North Carolina on 21 April 1994 for tenderness in his lower back which had begun at work on 19 April 1994. Plaintiff was diagnosed with lumbar strain, provided medication, and told to return to work on light duty. Plaintiff returned to Doctor's Urgent Care on 25 and 29 April 1994, and returned to work with Converse on 3 May 1994 to his regular duties rather than light-duty work.

Plaintiff was picking up a basket of lasts on 16 May 1994 when he felt pain in the left side of his lower back with radiating pain down his left leg. Plaintiff reported his injury to his foreman, who directed him to the company nurse. Again, the company nurse applied heat to plaintiff's lower back.

Plaintiff was seen by the company nurse on 1 November 1994 complaining of back pain, which he reported had been continual since 19 April 1994. On 2 January 1995, plaintiff returned to work from his Christmas break and after a few hours, reported to his foreman that he could no longer stand his back pain. Plaintiff then left his work at Converse, never to return.

Plaintiff thereupon consulted Dr. Veda N. Thakur, who performed an MRI on plaintiff and diagnosed him with a central herniated disc at L4-L5 with left lateral recess encroachment at L4-L5 and a right neural foramen encroachment at L4-L5 and L5-S1. Plaintiff consulted Dr. James Rice of the Sandhills Orthopaedic Clinic on 21 February 1995. Dr. Rice performed a L4-5 diskectomy on plaintiff on 21 March 1995, and a repeat L4-5 diskectomy on 29 September 1995. Dr. Rice opined that plaintiff reached his maximum medical improvement on 4 September 1996, retaining a twenty percent (20%) permanent partial impairment to his back. Dr. Rice placed plaintiff on permanent work restrictions of frequent change of position, limited bending and stooping, and lifting of weights no greater than twenty-five pounds.

Plaintiff's workers' compensation claim was heard by a deputy commissioner on 22 May 1997, who awarded plaintiff temporary total disability from 2 January 1995 to 14 August 1996, permanent partial disability for 60 weeks beginning 14 August 1996, medical expenses, and twenty-five percent (25%) attorney's fees. Plaintiff appealed the deputy commissioner's opinion and award to the Full Industrial

Commission ("Full Commission"). The Full Commission entered an opinion and award on 3 February 1998 and plaintiff was granted temporary total disability from 2 January 1995 onward "as long as plaintiff remains temporarily totally disabled," and medical expenses. Defendants filed an appeal to this Court, which entered an opinion pursuant to Rule 30(e) on 18 August 1998, remanding the case to the Industrial Commission. That opinion provided, in pertinent part:

> During deposition, Dr. Rice testified that, "the injury sustained on April 19th and the injury on the 16th of May, either one of those could have been implicated in causing [plaintiff's back] problems"; and "it's more likely than not that those injuries caused the problems that he presented with his back[.]" However, the Commission failed to make any findings as to causation in its opinion and award. . . .
>
> . . .
>
> In sum, because the Commission failed to make findings as to causation between plaintiff's injuries and his employment with defendant Converse, and erred in awarding plaintiff temporary total disability benefits after he had reached maximum medical improvement, the opinion and award of the Full Commission is reversed. Therefore, this matter is remanded to the Commission for entry of findings and an award not inconsistent with this opinion.

On remand, the Full Commission filed a second opinion and award wherein it made the following findings of fact as to causation:

> 15. Dr. Rice has opined that plaintiff's back condition on 21 February 1996 was caused by the combined effects of his 19 April 1994 and 16 May 1994 work related injuries. Dr. Rice has also opined that plaintiff was incapable of returning to any gainful employment during his period of treatment from 21 February 1995 through 14 August 1996. Dr. Rice[']s[] opinions on these issues are accepted as credible and are accorded significant weight.
>
> 16. Plaintiff's back condition, which resulted in multiple surgeries, was caused by the combined effect of his 19 April 1994 injury by accident and his 16 May 1994 injury by accident.

The Full Commission concluded, in pertinent part:

2. On 19 April 1994, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer in the form of a specific traumatic incident. . . .

3. On 16 May 1994, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer in the form of a specific traumatic incident which resulted in the aggravation of his back condition. . . .

4. As a result of his 19 April 1994 and 16 May 1994 injuries by accident, plaintiff is entitled to have defendants pay temporary total disability compensation . . . from 2 January 1995 to 4 September 1996. . . .

. . .

7. As the result of his 19 April 1994 and 16 May 1994 injuries by accident and pursuant to the decision by the Court of Appeals in this matter, plaintiff is entitled to have defendants pay permanent and total disability compensation . . . for the period of 4 September 1996 and continuing for the remainder of his lifetime or until further Order of the Commission. . . .

The Full Commission also awarded plaintiff lifetime medical expenses incurred as a result of said injuries. Defendants appeal.

First, we note that on appellate review of an award of the Industrial Commission, its findings of fact are conclusive if supported by competent evidence; the legal conclusions drawn by the Commission from its findings of fact, however, are fully reviewable by the appellate courts. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982).

[1] In defendants' first assignment of error, they contend that the Full Commission erred in its conclusion that plaintiff's injuries from the 19 April 1994 and 16 May 1994 incidents are compensable under the Act. They contend that plaintiff had a pre-existing impairment to his back and any injury during his work was a temporary exacerbation of that condition. Defendants point out that the Full Commission's findings on plaintiff's injury were based solely on the testimony of Dr. Rice, whose opinion was based on an inaccurate medical history, and they direct this Court to the holding in *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 482 S.E.2d 20, *disc. review denied*, 346 N.C. 289, 487 S.E.2d 571 (1997).

In *Thacker*, the plaintiff had a history of back problems which had begun before his work-related injury. Although the treating physician stated that he could not determine if the work-related injury was the cause for plaintiff's surgery, the Full Commission awarded benefits. This Court held:

> Thus, the record is replete with medical evidence which suggests that plaintiff's cervical spondylosis was a degenerative condition that was expected to deteriorate over time ultimately resulting in surgery to remove the bone spurs causing the pain; that plaintiff had begun to experience increased pain several months prior to the accident; and that the accident did not aggravate his back condition and necessitate surgery, rather the progression of his back condition resulted in surgery. Moreover, the record is devoid of any medical evidence to establish the necessary causal relationship without conjecture and remote possibility. Therefore, since we find the competent evidence insufficient to support the Commission's findings and conclusion that plaintiff's accident aggravated his pre-existing back condition, we must reverse.

Thacker, 125 N.C. App. at 676, 482 S.E.2d at 23.

"[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). To establish the necessary causal relationship for the injury to be compensable under the Act, "the evidence must be such as to take the case out of the realm of conjecture and remote possibility." *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942).

Unlike *Thacker*, the present case is not replete with evidence that plaintiff had a degenerative back condition prior to the injuries in question. Defendants point to no specific evidence regarding a preexisting condition other than the fact that plaintiff sought treatment for back pain with a physician in March 1990 and had complained of and sought treatment for lower back pain with the company nurse several times before these injuries. Dr. Rice confirmed that it would not be unusual for a worker in plaintiff's job to complain of back pain to the company nurse on occasion over several years. Dr. Rice testified that plaintiff's prior visits "would indicate that he definitely had

pre-existing problems. It doesn't appear from these notes and what you're telling me that he had a long term of incapacitation with his back prior to [the 19 April injury]. . . ." "[M]ore likely than not, he's had [a] pre-existing disease that was aggravated by his injury." However, after being informed by defendants of plaintiff's history after 16 May 1994, Dr. Rice replied: "With the additional history given, it makes it more suspect of the—either the April or the May injury being the *sole cause* of his problems." (Emphasis added.) Additionally, Dr. Rice testified that plaintiff had no signs of sciatic irritation or nerve root impingement up to 2 May 1994. Dr. Rice's testimony does not indicate that his conclusion as to plaintiff's injury was based on an incorrect medical history. In consideration of defendants' assertions as to a pre-existing condition, Rice affirmatively stated that the plaintiff's impairment was caused by his work-related injuries. Competent evidence supports the Full Commission's findings and conclusions as to causation of plaintiff's injury. Moreover, we note that this Court has held that an employee was entitled to workers' compensation benefits when he suffered a compensable injury to his back due to a work-related injury which aggravated or accelerated employee's pre-existing, non-disabling, non-job-related condition. *Mitchell v. Fieldcrest Mills, Inc.*, 84 N.C. App. 661, 353 S.E.2d 638 (1987). Accordingly, defendants' first assignment of error is overruled.

[2] Defendants next contend that the Full Commission erred in concluding that plaintiff is entitled to total and permanent disability benefits. We agree.

While a presumption of total disability attaches when plaintiff and defendant file an Industrial Commission Form 21, entitled "Agreement for Compensation for Disability Pursuant to N.C. Gen. Stat. § 97-82," the record does not indicate that a Form 21 was filed in the present case. Therefore, plaintiff is entitled to no presumption, and has the burden of proving both the extent and degree of his disability before he is entitled to any disability compensation.

> Initially, the claimant must prove both the extent and the degree of his disability. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988). However, once the disability is proven, "there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watson*, 92 N.C. App. at 476, 374 S.E.2d at 485 *(quoting Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)). . . .

Brown v. S & N Communications, Inc., 124 N.C. App. 320, 329, 477 S.E.2d 197, 202 (1996).

In the present case, the Full Commission found that plaintiff had met the burden of showing total disability because he was incapable of earning the same wages as before the injury in the same or other employment, and his incapacity to earn wages was caused by a compensable injury. We disagree with the Full Commission's interpretation of total disability.

For the Industrial Commission to find that an employee is permanently and totally disabled, the employee must meet the burden of showing that he is *totally incapable* of earning wages.

> To receive compensation for a permanent total disability, an employee must show that she is "totally unable to 'earn wages which . . . [she] was receiving at the time [of injury] in the same or any other employment.' " *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall*, 102 N.C. App. at 730, 403 S.E.2d at 550). A reduction in wages resulting from a compensable injury will only support permanent partial disability and not a total disability. *See Tyndall*, 102 N.C. App. at 731, 403 S.E.2d at 551. . . .

Franklin v. Broyhill Furniture Industries, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). In the present case, the medical testimony provided that plaintiff has a twenty percent (20%) partial impairment to his back, and that he has permanent work restrictions of frequent change of position, limited bending and stooping, and lifting of weights no greater than twenty-five pounds. No evidence indicated plaintiff met the requirements of total loss of use of the back, or was permanently and totally disabled under N.C. Gen. Stat. § 97-31, which provides in pertinent part: "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability . . . ." N.C. Gen. Stat. § 97-31(17) (1999). Plaintiff's physician did not testify that he could not work, only that his work was restricted to certain limitations. That plaintiff was restricted in his work after he reached maximum medical improvement on 4 September 1996 does support the finding that plaintiff may be permanently disabled. "A finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any *permanent* disability . . . ." *Silver v. Roberts Welding Contractors*, 117 N.C. App. 707, 711, 453 S.E.2d 216, 219 (1995) (emphasis added) (citing

Watson v. Winston-Salem Transit Authority, 92 N.C. App. 473, 374 S.E.2d 483 (1988)).

> Temporary total disability is payable only "during the healing period." N.C.G.S. § 97-31 (1991); *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 329-30 (1985). The "healing period" ends when an employee reaches "maximum medical improvement." *Id.* Only when an employee has reached "maximum medical improvement" does the question of her entitlement to permanent disability arise.

Franklin, 123 N.C. App. at 204-05, 472 S.E.2d at 385. To the contrary, the findings that plaintiff is restricted in his work after reaching maximum medical improvement does not necessarily support the finding that he is *totally* disabled, as plaintiff did not present evidence that he cannot work in *any* capacity.

In the prior opinion of this Court in the present case, Judge Horton, speaking for the Court, stated in pertinent part:

> [T]he Commission erred in awarding plaintiff temporary total disability compensation after the date of maximum medical improvement. . . . *Once an employee has reached "maximum medical improvement," he may only be entitled to permanent disability benefits.* . . .
>
> Because the Commission found that plaintiff had reached "maximum medical improvement as of 4 September 1996," plaintiff is not entitled to temporary total disability after that date. Thus, the Commission's award of temporary total disability benefits after 4 September 1996 is error and is reversed. Significantly, however, the Commission found that plaintiff retained a 20% permanent partial impairment to his back, and therefore *plaintiff may be entitled to permanent partial disability.*

(Emphasis added.) Under Judge Horton's analysis, plaintiff may not receive temporary total disability after he has reached maximum medical improvement, but may receive permanent disability if he proves he is entitled to it. "According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) (citing *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974), and *NCNB v. Virginia Carolina Builders*, 307

N.C. 563, 299 S.E.2d 629 (1983)). Therefore, this Court's prior ruling that plaintiff is not entitled to temporary total disability after reaching maximum medical improvement is now the law of the case, and we do not address this issue as we are encouraged to do by the amicus brief submitted to the Court, which proposes that temporary total disability benefits may be awarded after a finding of maximum medical improvement.

Again, we note that because a Form 21 was not completed in the present case, plaintiff has no presumption of total disability. Our review of the record does not indicate that competent evidence supports the conclusion that plaintiff is totally disabled under the authority announced in *Franklin*. Plaintiff has not met the burden of showing, with competent evidence, that he is totally disabled and therefore unable to earn any of the wages he was receiving at the time of his injury in the same or any other employment. Plaintiff has the burden of showing he is disabled, either partially or totally, before the Industrial Commission may award him permanent disability pursuant to the prior order of this Court. Based on the foregoing, we hold that the award of total and permanent disability was in error. Accordingly, we reverse the opinion and award of the Full Commission on this issue and remand the matter for a determination of plaintiff's alleged permanent disability, if any, in accordance with Judge Horton's directive.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. GREGG BRYAN McALLISTER

No. COA99-510

(Filed 6 June 2000)

1. Constitutional Law— double jeopardy—convictions for second-degree murder and impaired driving—no violation

The trial court did not violate defendant's double jeopardy rights by sentencing him for second-degree murder under N.C.G.S. § 14-17 and impaired driving under N.C.G.S. § 20-138.1 because: (1) the legislature intended to create two separate

offenses, as evidenced by the fact that second-degree murder is controlled by structured sentencing while punishment for driving while impaired is not; (2) the Court of Appeals has previously allowed upheld convictions for second-degree murder and driving while impaired in the same trial; and (3) driving while impaired is not a lesser included offense of second-degree murder, and malice is not equated with driving while impaired.

2. Evidence— prior bad acts—driving while impaired—prior conviction—pending charge—malice

The trial court did not err in a prosecution for second-degree murder and driving while impaired by admitting evidence of defendant's prior conviction and pending charge for impaired driving because: (1) the 1991 conviction was probative of defendant's state of mind and to show malice; and (2) the pending 1997 driving while impaired case is admissible as evidence of malice to support a second-degree murder charge, and the trial court properly instructed that the 1997 incident pertained to a pending trial rather than a conviction. N.C.G.S. § 8C-1, Rule 404(b).

3. Homicide— second-degree murder—driving while impaired—sufficiency of evidence—malice

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder because: (1) the State need not show that defendant intended to kill in order to establish malice, but instead may meet its burden by showing that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result; and (2) the evidence reveals malice since defendant drove while impaired by alcohol and at a time when his license was in a state of permanent revocation, he was previously convicted in 1991 for driving while impaired, and he had a 1997 conviction for driving while impaired that was on appeal.

Appeal by defendant from judgment entered 16 September 1998 by Judge William C. Griffin, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 22 February 2000.

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

Angela H. Brown for defendant-appellant.

TIMMONS-GOODSON, Judge.

Gregg Bryan McAllister ("defendant") was indicted on charges of second degree murder, two counts of felonious hit and run, driving while license permanently revoked, and driving while impaired.

The State's evidence at trial tended to show the following. Tara Dooley ("the victim") was riding her bicycle on Masonboro Loop Road in New Hanover County at approximately 7:00 p.m. on 25 December 1997. Defendant struck the victim's bicycle with his 1978 Dodge pickup truck while he was traveling at a speed of approximately 35 to 40 miles per hour. The victim's neck was fractured on impact and she died instantly.

Eyewitness Robert A. Millis ("Millis") observed defendant weaving in his lane and driving erratically prior to swerving off the road. Millis heard the sound of "metal on metal" when the truck left the road. Defendant drove several blocks following the impact and then pulled the truck onto the side of the road and stopped. Millis passed defendant's truck and noted something was on the hood. Millis observed a slim man of average height wearing dark clothing and a scarf or bandana tied around his head walk in front of the truck. The man returned to the Dodge truck and drove away. Millis next observed the body of the victim on the side of the road where the truck had stopped. Millis followed the Dodge truck, obtained the license plate number, telephoned 911 for assistance, and returned to the scene to aid the victim. The Sheriff's Department, Emergency Medical Services, and the State Highway Patrol responded to the 911 call and attempted to revive the victim.

At approximately 8:00 p.m., after interviewing Millis, Trooper Moreau went to defendant's house. The Dodge truck was parked outside of the house and the engine was warm. Defendant's mother answered the door and stated that defendant had returned home at approximately 7:30 p.m. that evening. Defendant was asleep on the sofa, wearing dark clothing and a bandana on his head. Trooper Moreau asked defendant to talk with him and observed that defendant's eyes were red, he staggered, and he had an odor of alcohol. Defendant attempted to contact his attorney but his attorney was not accepting telephone calls. Defendant refused to submit to an Intoxilyzer test to determine his alcohol concentration. After obtaining warrants, a blood sample was taken from defendant which showed an alcohol concentration of 0.126, in excess of the 0.08 limit for automobile drivers. Samples of paint taken from the Dodge

pickup truck matched paint samples found on the victim's bicycle. Red paint consistent with the paint on the bicycle was found on the broken front license plate of the truck.

Defendant presented no evidence at trial.

The jury returned a verdict of guilty of second degree murder, felonious hit and run, driving while license permanently revoked, and driving while impaired. The second charge of felonious hit and run was dismissed before submission to the jury. After finding three aggravating factors and no mitigating factors, the trial court imposed an active sentence of a minimum of 251 months with the corresponding maximum of 311 months for second degree murder. Additionally, defendant received the following sentences to run consecutively to the second degree murder sentence: a minimum of eleven months with the corresponding maximum of fourteen months for felonious hit and run; 120 days for driving while license revoked; and twenty-four months for driving while impaired. Defendant appeals from the judgment imposed.

On appeal, defendant argues that the trial court erred in: (1) sentencing him for impaired driving and second degree murder in violation of his Fifth Amendment right to protection from Double Jeopardy; (2) admitting evidence of prior convictions for impaired driving; and (3) denying his motion to dismiss at the close of all the evidence.

[1] By his first assignment of error, defendant argues that his Fifth Amendment right to protection from Double Jeopardy was violated when he was punished twice for impaired driving because each element of that offense was necessary to prove the second degree murder offense and he was sentenced for both offenses. We cannot agree.

The Double Jeopardy Clause protects against multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). However, where the legislature unambiguously expresses its intent to proscribe and punish the same conduct under two separate statutes, the trial court may impose consecutive sentences in a single trial. *Id.* at 453, 340 S.E.2d at 708.

Double jeopardy bars additional punishment where the offenses have the same elements or when one offense is a lesser included offense of the other. *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975).

On the other hand, where each offense requires proof of an additional element not included in the other, the offenses are distinct and the defendant may be prosecuted and punished for each offense. *State v. Martin*, 47 N.C. App. 223, 231, 267 S.E.2d 35, 40, *disc. review denied*, 301 N.C. 238, 283 S.E.2d 134 (1980). "If . . . a single act constitutes an offense against two statutes and each statute requires proof of an additional fact which the other does not, the offenses are not the same in law and in fact and a defendant may be convicted and punished for both." *Id.*

The elements of second degree murder are:

1. Killing;

2. Another human being;

3. With malice.

N.C. Gen. Stat. § 14-17 (1999); *State v. McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (1993). The elements of impaired driving are:

1. Driving

2. A vehicle

3. On a highway, street, or public vehicular area:

   (a) While under the influence of an impairing substance; or

   (b) After consuming a sufficient quantity of alcohol that the person has an alcohol concentration of 0.08 or more at any relevant time after driving.

N.C. Gen. Stat. § 20-138.1 (1999).

In the present case, defendant argues that the legislature did not intend for consecutive sentences to be imposed for impaired driving and second degree murder in that they are based on the same evidence and are therefore the same offense. Specifically, defendant contends that the State relied on the same evidence to prove that defendant drove while impaired and that defendant had the requisite malice for second degree murder.

We disagree and believe that the legislature intended to create two separate offenses. We note that punishment for second degree murder is controlled by structured sentencing while punishment for driving while impaired is exempted from the structured sentencing provisions. Furthermore, in *McBride*, 109 N.C. App. 64, 425 S.E.2d

731, this Court found that the trial court did not err in sentencing the defendant to driving while impaired and second degree murder in the same trial. In *McBride*, sufficient evidence of malice existed in a second degree murder prosecution where, among other factors, the defendant drove while impaired after prior convictions for driving while impaired, and the defendant drove while his license was revoked.

In essence, defendant argues that driving while impaired is a lesser included offense of second degree murder. We are not persuaded that malice can be equated with driving while impaired. Indeed, there was evidence to support a finding of malice in the present case other than the fact that defendant was driving while impaired on 25 December 1997. Like the defendant in *McBride*, defendant's license had been revoked and defendant had been convicted of driving while impaired in the past. We conclude the trial court did not err in sentencing defendant for both impaired driving and second degree murder.

[2] By his second and third assignments of error, defendant challenges the trial court's ruling as to the admissibility of certain evidence. Specifically, defendant argues that the trial court erred in admitting evidence of a 1991 prior conviction for impaired driving because the conviction was too remote to be relevant evidence of defendant's state of mind; and a 1997 impaired driving conviction where the conviction was on appeal and a trial *de novo* had not yet been scheduled. We hold that the trial court did not err in admitting evidence of the two convictions.

According to Rule 404(b) of the North Carolina Rules of Evidence:

> 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) has been characterized as a rule of inclusion, such that evidence will only be excluded under the rule 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). The demonstration of malice is a proper purpose for admission of evidence of other crimes, wrongs, or acts by the defendant. *State v. Jones*, 133 N.C. App. 448, 516 S.E.2d 405 (1999).

The admission of evidence under Rule 404(b) is guided by the constraints of similarity and temporal proximity. *State. v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d. 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). "When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking[.]" *Id.*

Defendant was convicted in 1991 for driving while impaired. In the case at bar, defendant was charged with driving while impaired. Given that the offenses are identical, the 1991 conviction is probative of defendant's state of mind in the present case. Furthermore, prior convictions for driving while impaired which were over ten years old have been held admissible to show malice. *See, e.g., 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). In *Grice*, this Court noted that the trial court properly gave a limiting instruction regarding the purpose for which the evidence could be considered. Likewise, in the present case, the trial court correctly instructed the jury concerning the purpose for which the Rule 404(b) evidence could be used: "This evidence was received solely for the purpose of showing the state of mind or intent that is a necessary element of the offense charge [sic] in this case." We conclude that the trial court did not err in admitting evidence of the 1991 impaired driving conviction.

Regarding the 1997 impaired driving conviction, defendant argues that the trial court erred in admitting evidence of the conviction for the purpose of proving malice in a second degree murder prosecution where the conviction was on appeal and a trial *de novo* in Superior Court was not yet scheduled. Defendant reasons that because a conviction has not taken place, there is no valid evidence of his state of mind, and asserts that the only state of mind that may be imputed to defendant is an innocent one. We cannot agree.

Defendant concedes that a line of cases including *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992), supports the admission of the challenged evidence, but asks this Court to distinguish cases such as *Byers* from the case at bar on the basis that they involved prior

convictions or bad acts where the defendant had been found guilty. In contrast, defendant in the present case had not yet been tried.

However, this Court has previously rejected defendant's argument by holding that pending charges as well as prior convictions are admissible under Rule 404(b) as evidence of malice to support a second degree murder charge. *Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (holding that the trial court did not err in admitting evidence that the defendant had a pending charge for driving while impaired in order to show malice in a second degree murder prosecution); *see also Jones*, 133 N.C. App. 448, 516 S.E.2d 405 (holding that evidence of the defendant's pending driving while impaired charge was admissible in order to show malice in a first degree murder trial).

Where the State does not offer evidence of a pending charge to show defendant's propensity to drive while impaired, but to show the requisite mental state for a conviction of second degree murder, the trial court does not err by admitting such evidence. As in *Byers*, the trial court in the instant case admitted evidence of a pending driving while impaired charge for the limited purpose of proving malice, an element of second degree murder. We do not believe that the instant case is distinguishable from *Byers* on the ground that defendant in the instant case was convicted of driving while impaired, appealed, and was awaiting a trial *de novo*.

Finally, the merit of defendant's argument is further weakened because the trial court instructed the jury in the present case that the 1997 incident pertained to a pending trial rather than a conviction. The court's instruction clearly communicated that defendant had not been convicted and that the evidence was admitted for the limited purpose of showing state of mind or intent. We hold that the trial court did not err in admitting the 1997 impaired driving conviction.

[3] By his fourth assignment of error, defendant argues that the trial court erred in denying defendant's motion to dismiss at the close of all the evidence where there was insufficient evidence of malice in support of the second degree murder charge. We cannot agree.

In ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). A motion to dismiss must be denied where substantial evidence exists of each essen-

tial element of the crime charged and of the defendant's identity as the perpetrator. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Williams*, 127 N.C. App. 464, 467, 490 S.E.2d 583, 586 (1997) (citations omitted).

As previously stated, the elements of second degree murder are the killing of another human being with malice but without premeditation and deliberation. Sufficient evidence of malice exists to establish second degree murder where the defendant's acts show cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief, or manifest a total disregard for human life. *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). The State need not show that the defendant intended to kill in order to establish malice for second degree murder, but instead may meet its burden by showing that the defendant "had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *Rich*, 351 N.C. at 395, 527 S.E.2d at 304.

In the present case, defendant drove while impaired by alcohol and at a time when his license was in a state of permanent revocation. The uncontested evidence is that defendant drove his pickup truck erratically, swerved off the road, and struck the victim's bicycle while he was traveling at a speed of approximately 35 to 40 miles per hour. As a result of defendant's acts, the victim's neck was fractured and she died instantly. Furthermore, defendant was previously convicted of driving while impaired in 1991, and a 1997 conviction for driving while impaired was on appeal. Viewing the evidence in the light most favorable to the State, we hold that defendant's acts manifested recklessness of consequences and a total disregard for human life. As such, substantial evidence of malice existed in support of the second degree murder charge. We conclude that the trial court did not err in denying defendant's motion to dismiss at the close of all the evidence.

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

No error.

Judges GREENE and WALKER concur.

THOMAS LEON REID, SR. AND DORIS REID, PLAINTIFFS v. JOHN F. AYERS, III, TIMOTHY G. SELLERS AND DELANEY & SELLERS, PA, DEFENDANTS

No. COA99-790

(Filed 6 June 2000)

1. **Collateral Estoppel and Res Judicata— collateral estoppel—issue of first impression—unfair debt collection practices**

Although defendants assert that collateral estoppel bars plaintiffs' claim for unfair debt collection practices premised upon defendants having sought too much in attorney fees when plaintiffs never contested the amount of attorney fees recoverable in the first case, the Court of Appeals chose not to apply the doctrine in this situation because the issue is one of first impression.

2. **Consumer Protection— Debt Collection Act—state act—no action against attorneys**

Although plaintiffs' complaint met the three threshold requirements to state a claim under The North Carolina Debt Collection Act in Chapter 75, Article 2 of the General Statutes, this Act does not allow a cause of action against attorneys engaging in collecting debts on behalf of their clients because: (1) the three generalized requirements found in N.C.G.S. § 75-1.1 must also be met, and the "learned profession" exemption operates to invalidate plaintiffs' claim since defendants, a law firm and its attorneys, are members of a learned profession; and (2) the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role, but not when the attorney or law firm is engaged in the entrepreneurial aspects of legal practice that are geared more towards their own interests as opposed to the interests of their clients.

Appeal by plaintiffs from order entered 8 March 1999 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 March 2000.

Hewson Lapinel Owens, PA, by H.L. Owens, for plaintiff-appellants.

Dean & Gibson, L.L.P., by Barbara J. Dean and Rodney A. Dean, for defendant-appellees.

LEWIS, Judge.

This appeal involves a question of first impression in North Carolina. Specifically, we are called upon to address whether the North Carolina Debt Collection Act (NCDCA) contained within Chapter 75 of our General Statutes allows for a cause of action against attorneys engaged in collecting debts on behalf of their clients. We find that it does not and therefore affirm the trial court's order dismissing plaintiff's claim.

Plaintiffs are residents of a planned development community in Mecklenburg County known as Park Lake Recreation Association ("Park Lake"). Defendants serve as legal counsel for Park Lake. During 1995, plaintiffs became delinquent on certain assessments and association dues they owed to Park Lake. As of 30 November 1995, this delinquency amounted to $478. In attempting to collect the money owed their clients, defendants informed plaintiffs that they would also have to pay attorney's fees in the amount of $996 in order to fully satisfy their account. This was well in excess of the amount permitted under our statutes. *See* N.C. Gen. Stat. § 6-21.2(2) (1999) (limiting the amount of recoverable attorney's fees to 15% of the obligation owed); *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 757, 522 S.E.2d 317, 320 (1999) (applying this statutory limit in the context of homeowners' assessments). Nonetheless, a default judgment was eventually entered against plaintiffs, ordering them to pay the $478 delinquency plus $996 in attorney's fees. Plaintiffs eventually paid off the entire amount owed, but not before their home was foreclosed and they were forced to repurchase it for an additional $4000.

Plaintiffs thereafter filed this action, claiming that defendants engaged in unfair debt collection practices in violation of the NCDCA by attempting to collect attorney's fees well in excess of the amount legally permitted. Their complaint also alleged claims for infliction of emotional distress, fraud, and civil conspiracy. In an order entered 8 March 1999, the trial court dismissed all claims asserted against defendants pursuant to N.C.R. Civ. P. 12(b)(6). Plaintiffs have only appealed the dismissal of their unfair debt collection claim, and thus our review is limited to a consideration of the validity of that claim.

[1] At the outset, defendants claim this action is barred by principles of collateral estoppel. Specifically, they maintain that plaintiffs cannot now assert a claim for unfair debt collection practices premised upon defendants having sought too much in attorney's fees when

plaintiffs never contested the amount of attorney's fees recoverable in the first case. However, even if the formal requirements of collateral estoppel have all been satisfied here, *see generally King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973) (setting forth the four requirements), we choose not to apply the doctrine in this situation because the issue before us is one of first impression. *See generally Tar Landing Villas v. Town of Atlantic Beach*, 64 N.C. App. 239, 244, 307 S.E.2d 181, 185 (1983) ("When the issue [for purposes of collateral estoppel], however, as in this case, involves the scope and formulation of a law never before addressed by an appellate court in this State, we believe that our duty to develop the law outweighs the resulting burden on [defendants]."), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 296 (1984). Accordingly, we reject defendants' argument and proceed to the merits of this appeal.

[2] The North Carolina Debt Collection Act is contained in Chapter 75, Article 2 of our General Statutes. In it, our legislature has proscribed certain activities in the area of debt collection. N.C. Gen. Stat. §§ 75-51 to -55 (1999). But before a claim for unfair debt collection can be substantiated, three threshold determinations must be satisfied. First, the obligation owed must be a "debt"; second, the one owing the obligation must be a "consumer"; and third, the one trying to collect the obligation must be a "debt collector." N.C. Gen. Stat. § 75-50(1)-(3). Plaintiff's complaint satisfies all three here.

For purposes of the NCDCA, our legislature has defined "debt" as "any obligation owed or due or alleged to be owed or due from a consumer." N.C. Gen. Stat. § 75-50(2). We conclude that the homeowners' association dues and assessments in this case satisfy this definition. In arriving at this conclusion, we have found cases construing the parallel federal statute to be particularly instructive, though not binding.

Under the federal Fair Debt Collection Practices Act ("FDCPA"), "debt" is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C.A. § 1692a(5) (1998). The Third Circuit was the first to construe this definition. In *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), that court concluded that, to be a debt, there must be an actual extension of credit plus a deferred payment obligation, i.e. a "transaction in which a consumer is offered or extended the right to

acquire" money or property. *Id.* at 1168-69. Several courts thereafter used *Zimmerman*'s "extension of credit" requirement to conclude that condominium or homeowners' association dues and assessments are not debt because the unit owner is required to pay the dues and assessments up front, before the association provides services in return. *See, e.g., Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995) (condominium association fees); *Nance v. Petty, Livingston, Dawson, & Devening*, 881 F. Supp. 223 (W.D. Va. 1994) (homeowners' association dues); *see also Bryan v. Clayton*, 698 So. 2d 1236 (Fla. Dist. Ct. App. 1997) (holding that condominium association fees are not debt under Florida state law).

Zimmerman's extension of credit requirement, however, has come under sharp criticism. As the Seventh Circuit articulated:

> Because the statute's definition of a "debt" focuses on the transaction creating the obligation to pay, it would seem to make little difference under that definition that unit owners generally are required to pay their assessments first, before any goods are provided by the association.

Newman v. Boehm, Pearlstain & Bright, Ltd., 119 F.3d 477, 481 (7th Cir. 1997). The *Newman* court thus concluded that homeowners' association assessments are indeed debt under the federal act. *Id.* at 481-82. Since then, nearly every court, state or federal, that has considered the issue has concluded that association dues, assessments, and rent are properly classified as debt. *See, e.g., Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998); *Ladick v. Gemert*, 146 F.3d 1205 (10th Cir. 1998); *Garner v. Kansas*, No. 98-1274, 1999 WL 262100 (E.D. La. 1999); *Caron v. Charles E. Maxwell, P.C.*, 48 F. Supp. 2d 932 (D. Ariz. 1999); *Taylor v. Mount Oak Manor Homeowners Ass'n*, 11 F. Supp. 2d 753 (D. Md. 1998); *Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604 (S.D. Cal. 1997); *Loigman v. Kings Landing Condominium Ass'n*, 734 A.2d 367 (N.J. Super. Ct. Ch. Div. 1999). *But see Barstow Road Owners, Inc. v. Billing*, 687 N.Y.S.2d 845 (Dist. Ct. 1998) (holding that back rent is not debt under New York state law). We agree that an extension of credit requirement under our state act would be too restrictive for the purposes the act is designed to accomplish. Accordingly, we conclude that homeowners' association dues and assessments are debt within the meaning of the NCDCA.

The second threshold requirement under our act is that the one owing the obligation must be a "consumer." Our legislature has defined consumer as "any natural person who has incurred a debt or

alleged debt for personal, family, household or agricultural purposes." N.C. Gen. Stat. § 75-50(1) (1999). Plaintiffs here clearly meet this definition, as they have incurred these assessments for family or household purposes.

Finally, the NCDCA requires that the one trying to collect the obligation owed be a "debt collector," which is defined as "any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 70, Chapter 58 of the General Statutes [regarding collection agencies]." N.C. Gen. Stat. § 75-50(3). We point out that, in this regard, our state act is much broader than the federal counterpart. The federal definition of "debt collector" focuses on whether the *principal purpose* of the business is debt collection or whether debt collection is *regularly* done in that business. 15 U.S.C.A. § 1692a(6) (1998). In this regard, attorneys and law firms can be debt collectors for purposes of the FDCPA only if regularly engaged in that type of practice. *Heintz v. Jenkins*, 514 U.S. 291, 294, 131 L. Ed. 2d 395, 399 (1995). Because there is no regularity or primary purpose limitation in our act, we conclude that law firms and attorneys (such as defendants here) who attempt to collect debts on behalf of their clients are debt collectors under the NCDCA, regardless of how infrequently they perform that type of work. We thus conclude that plaintiffs' complaint has met all three threshold requirements.

Satisfaction of the threshold requirements of Article 2, however, does not end our inquiry. Article 2 only contains the specific requirements in the context of debt collection. After these are satisfied, a plaintiff's claim then must satisfy the more generalized requirements of all unfair or deceptive trade practice claims, which are contained in Article 1 (in particular, section 75-1.1). Although our legislature does not specifically state that Article 2 is subject to the more generalized requirements of section 75-1.1, we conclude that was their intent. The final section in Article 2 states:

> The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and G.S. 75-16, in private actions or actions instituted by the Attorney General, civil penalties in excess of two thousand dollars ($2,000) shall not be imposed, nor shall damages be trebled for any violation under this Article.

N.C. Gen. Stat. § 75-56 (1999). By specifically referencing the generalized proscription in section 75-1.1, we conclude the legislature intended that Article 2 be limited by the same requirements applicable to those proscriptions. Furthermore, had our legislature not intended for Article 2 to be governed by the generalized provisions of Article 1, it would not have needed to refer to Article 1's allowance for treble damages when limiting the remedy for Article 2 violations to $2000. Thus, we conclude that once the three threshold requirements in section 75-50 are satisfied, a claim for unfair debt collection practices must then meet the three generalized requirements found in section 75-1.1: (1) an unfair act (2) in or affecting commerce (3) proximately causing injury. *See First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

We need not address all three of these requirements, however, as we find the "in or affecting commerce" requirement to be dispositive here. Our legislature has defined this requirement in the following manner: " '[C]ommerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b) (1999). We conclude that the "learned profession" exemption provided for in the second half of this definition operates to invalidate plaintiffs' claim here.

In order for the learned profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Noel L. Allen, *North Carolina Unfair Business Practice* § 14-3(c) (1995) (citing 47 N.C. Op. Att'y Gen. 118, 119-20 (1977)). Second, the conduct in question must be a rendering of professional services. *Id.* With respect to the first part of the test, although our legislature does not specifically define what professions are considered "learned," we note that the practice of law has traditionally been considered a learned profession, as indeed it is. *Id.* § 14-3(b). Furthermore, this Court has recently applied the exemption in the context of a law firm. *Sharp v. Gailor*, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). Thus, we conclude that defendants, being a law firm and its attorneys, are members of a learned profession.

We conclude defendants meet the second part of the test as well because they were attempting to collect moneys that were owed to their clients. In doing so, they were rendering a professional service that is often carried out by law firms or attorneys. Plaintiffs attempt to distinguish debt collection from other aspects of an attorney's

work, such as drafting pleadings, negotiating settlements, and preparing contracts, arguing that only the latter should fall within the exemption. We disagree.

In *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901, *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982), this Court entertained a similar argument in the context of medical professionals. In that case, the hospital amended its by-laws to eliminate all staff privileges for podiatrists working at the hospital. *Id.* at 422-24, 293 S.E.2d at 907-08. Plaintiffs, two licensed podiatrists, then sued the hospital, alleging that the amendment came as the result of a conspiracy and other unfair or deceptive acts. *Id.* at 416, 293 S.E.2d at 903. In holding that the learned profession exemption applied, this Court concluded that the exemption could not be strictly separated along purely administrative versus purely medical lines. *Id.* at 446-47, 293 S.E.2d at 920-21. Rather, the crucial inquiry was whether the administrative functions were a necessary part of the medical services provided. *Id.* Because staff privileges are an important quality control component, the *Cameron* Court held that the grant or denial of those privileges was a necessary part of assuring quality medical services. *Id.* at 447, 293 S.E.2d at 921.

We feel the same type of analysis can be applied in the context of the practice of law. Debt collection, along with the collection of any attorney's fees incurred as a penalty, is a necessary part of the practice of debtor-creditor law. Because defendants were engaged in that very practice here, they were rendering a professional legal service. Accordingly, their acts fall within the learned profession exemption.

We point out that not all services performed by attorneys will fall within the exemption. Advertising is not an essential component to the rendering of legal services and thus would fall outside the exemption. *See* 47 N.C. Op. Att'y Gen. 118, 120 (1977) ("Advertising by an attorney is a practice apart from his actual performance of professional services. Indeed, it is not a professional practice at all, but rather a commercial one."). Likewise, the exemption would not encompass attorney price-fixing. *Id.* Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role. It would not apply when the attorney or law firm is engaged in the entrepreneurial aspects of legal practice that are geared more towards their own interests, as opposed to the interests of their clients. *See generally Short v. Demopolis*, 691 P.2d 163, 168

(Wash. 1984) (en banc) (espousing a demarcation between "the actual practice of law" and "the entrepreneurial aspects of legal practice"). Because we conclude that defendants fall within the learned profession exemption, we hold that plaintiffs' claim is legally insufficient.

In closing, we believe the tactics used by defendants in trying to collect these delinquent assessments were indefensible, whether done in ignorance of, or disdain for, the law. Our statutes clearly limited the amount of recoverable attorney's fees to $71.70 (15% of the $478 owed), thereby entitling defendants and their clients to a total recovery of $549.70. (We note that the provisions in newly-enacted Chapter 47F of our General Statutes are not applicable here.) Notwithstanding this statutory mandate, however, defendants refused to accept any payments less than $1374 from plaintiffs, two-and-a-half times that which was legally owed. These tactics, however wrongly employed here, do not constitute a legally valid claim under the North Carolina Debt Collection Act.

Affirmed.

Judges JOHN and EDMUNDS concur.

CHRYSLER FINANCIAL COMPANY L.L.C., SUCCESSOR BY MERGER TO CHRYSLER FINANCIAL CORPORATION, PLAINTIFF V. MURIEL K. OFFERMAN, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA99-823

(Filed 6 June 2000)

1. Taxation— privilege—dealing in installment paper—intent to profit immaterial

Although the trial court did not err by granting summary judgment for Chrysler Financial on a claim for refund of privilege taxes assessed against its wholesale financing business, Chrysler Financial was engaged in the business of dealing in installment paper under the plain meaning of N.C.G.S. § 105-83; it is immaterial whether Chrysler Financial's engagement in this business was intended for or resulted in making a profit.

2. Taxation— privilege—wholesale automobile financing—activity not in North Carolina

The trial court did not err by granting summary judgment for Chrysler Financial in an action for a refund of privilege taxes assessed against its wholesale financing business under N.C.G.S. § 105-83. The agreement with Chrysler Corporation to purchase installment paper was executed in Michigan and the buying and selling of the paper takes place entirely in Michigan. Other activities such as the perfection of a security interest in North Carolina do not arise in the course of the buying or selling of the credit sale agreement or have no relation to the buying or selling of the installment paper.

Appeal by defendant from order filed 19 February 1999 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 April 2000.

Bell, Davis & Pitt, P.A., by William Kearns Davis, Walter W. Pitt, Jr., and D. Anderson Carmen, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorneys General, Christopher E. Allen, Marilyn R. Mudge, and Kay Linn Miller Hobart, for the defendant-appellant.

GREENE, Judge.

Muriel K. Offerman, in her official capacity as the Secretary of the Department of Revenue of the State of North Carolina (the Department of Revenue) appeals an order filed 19 February 1999 granting summary judgment in favor of Chrysler Financial Company, L.L.C., Successor by Merger to Chrysler Financial Corporation (Chrysler Financial) and denying the Department of Revenue's motion for summary judgment.

The undisputed facts show that in 1984 Chrysler Financial, a Michigan limited liability company, began engaging in a procedure for providing automobile dealerships in North Carolina with wholesale financing (the Wholesale Finance Plan).[1] The procedure for receiving

1. In an affidavit dated 13 January 1999, R. J. Kippert, Jr. (Kippert), staff tax counsel for Chrysler Financial, stated the Wholesale Finance Plan was begun in 1984 for the purpose of Chrysler Corporation obtaining tax benefits available under the Internal Revenue Code. Kippert stated the structure of the Wholesale Finance Plan allows Chrysler Corporation to "defer recognition of the income for gain on the sale of a vehicle" for 40 days after the retail sale of the vehicle, rather than recognizing this gain when Chrysler Corporation receives payment from Chrysler Financial for the vehicle.

financing under the Wholesale Finance Plan begins when dealerships that want to finance the sale of Chrysler vehicles through Chrysler Financial apply for a line of credit with Chrysler Financial. Once a line of credit has been established, the dealership receives vehicles for retail sale from Chrysler Corporation, a Delaware corporation that manufactures vehicles in Michigan. Upon placement of a vehicle for shipment from Chrysler Corporation to the dealership, the dealership and Chrysler Corporation execute a credit sale agreement (installment paper). The credit sale agreement is executed by the dealership in Michigan through an attorney-in-fact, and the sale of the vehicle occurs in Michigan. Upon the execution of the credit sale agreement, the dealership obtains rights in the vehicle and Chrysler Corporation obtains a security interest in the vehicle and the dealership's inventory. Under the terms of the credit sale agreement, Chrysler Corporation has "the right of access to and inspection of the [v]ehicles and the right to examine [the dealership's] books and records, . . . [and the dealership] . . . certifies to [Chrysler Corporation] that all [v]ehicles and books and records shall be kept at the principal place of business of [the dealership]."

As part of the Wholesale Finance Plan, Chrysler Financial then enters into an "Agreement to Purchase Wholesale Credit Obligations" with Chrysler Corporation. Execution of this agreement takes place in Michigan and, pursuant to this agreement, Chrysler Corporation assigns to Chrysler Financial its rights under the credit sale agreement. Additionally, Chrysler Financial pays Chrysler Corporation 100% of the amount due for each vehicle under the credit sale agreement.

A financing statement naming Chrysler Corporation as the secured party and Chrysler Financial as the assignee is then filed in North Carolina pursuant to section 25-9-401 of the North Carolina Uniform Commercial Code. This filing perfects Chrysler Financial's security interest in the vehicles purchased from Chrysler Corporation and in the dealership's inventory. Upon the retail sale of a vehicle by the dealership, the dealership remits to Chrysler Financial 100% of the amount advanced by Chrysler Financial to Chrysler Corporation for the wholesale purchase of the vehicle. If the dealership fails to pay funds due under the credit sale agreement, Chrysler Financial has the right to enforce the payment of these funds through collection procedures in North Carolina.

On 30 July 1993, the Department of Revenue assessed Chrysler Financial taxes, interest, and penalties for transactions made under

its Wholesale Finance Plan with dealerships located in North Carolina, pursuant to N.C. Gen. Stat. § 105-83.[2] The 30 July 1993 assessments were for the following amounts: $3,156,823.00 for the period of 1 October 1986 through 30 September 1989, and $5,327,316.00 for the period of 1 October 1989 through 31 March 1993. Subsequent to the 30 July 1993 assessment, the Department of Revenue continued to assess Chrysler Financial taxes due based on the Wholesale Finance Plan, and on 28 July 1994, 6 September 1995, 19 October 1995, 4 January 1996, 15 April 1996, 15 July 1996, 10 October 1996, 17 January 1997, 10 April 1997, and July 2 1997, Chrysler Financial made payments to the Department of Revenue totaling $16,329,154.59 based on these assessments. Chrysler Financial made these payments under protest pursuant to N.C. Gen. Stat. § 105-267, and Chrysler Financial demanded a refund of each payment within thirty days of making the payment.[3]

On 12 September 1997, Chrysler Financial brought suit against the Department of Revenue, alleging a claim for refund of taxes in the amount of $16,329,154.59 on the ground "[a]ll taxes assessed by the Department of Revenue pursuant to N.C. Gen. Stat. § 105-83 and paid by Chrysler Financial which result from Chrysler Financial's wholesale financing business . . . were levied and assessed for an illegal or unauthorized purpose, or were invalid or excessive." The complaint alleged the following pertinent grounds for relief:

> b. Chrysler Financial is not engaged in the business of dealing in, buying, or discounting installment paper, notes, bonds, contracts, or evidences of debt in connection with its wholesale financing of automobiles within the meaning of N.C. Gen. Stat. § 105-83;
>
> c. Chrysler Financial's provision of wholesale financing is a direct loan to automobile dealers that takes the form of either a cash advance to the dealer or to Chrysler [Corporation] as the manufacturer of vehicles sold to dealers, both of which are done pursuant to existing loan and security agreements, and such activity is not within the scope of N.C. Gen. Stat. § 105-83;
>
> . . . .

2. N.C. Gen. Stat. § 105-83 was amended by Session Laws 1998-95, s.9, effective 1 July 1999. The taxes at issue in this case, however, were assessed prior to the effective date of the amendment.

3. The parties do not dispute Chrysler Financial engages in *retail* financing in North Carolina, is licensed pursuant to section 105-83 to conduct such retail financing, and has been assessed and has paid taxes under section 105-83 based on its retail financing business since 1967.

e. N.C. Gen. Stat. § 105-83 requires a taxpayer to obtain a license and pay a tax for the privilege of engaging in the business described therein in the State of North Carolina. By its terms, the statute requires that both the assignment of a receivable take place in North Carolina and that a lien be reserved or taken upon property located in North Carolina. In Chrysler Financial's wholesale financing business, neither the assignment of a receivable from Chrysler [Corporation] to Chrysler Financial nor the reservation or taking of a lien on any property occurs in North Carolina[.]

On 15 January 1999, Chrysler Financial filed a motion for summary judgment, and on 25 January 1999, the Department of Revenue filed a motion for summary judgment. In an order filed 19 February 1999, the trial court denied the Department of Revenue's motion for summary judgment and granted summary judgment in favor of Chrysler Financial in the amount of $14,784,559.29, plus 8% interest per annum.

The issues are whether: (I) Chrysler Financial is "engaged in the business of dealing in . . . installment paper" within the meaning of N.C. Gen. Stat. § 105-83 and, if so; (II) Chrysler Financial engaged in this business in the State of North Carolina within the meaning of N.C. Gen. Stat. § 105-83.

N.C. Gen. Stat. § 105-83 provides:

(a) Every person engaged in the business of dealing in, buying, or discounting installment paper . . . where at the time of or in connection with the execution of said instruments, a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the Secretary a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to obtaining a State license from the Secretary, each person subject to the tax levied in subsection (a) . . . shall pay a tax of two hundred and seventy-five thousandths of one percent (.275%) of the face value of these obligations.

N.C.G.S. § 105-83(a), (b) (1997). This statute creates a privilege tax which is assessed to taxpayers for the privilege of carrying on a particular business in North Carolina. N.C.G.S. § 105-33 (1999).

I

[1] Chrysler Financial argues it is not "engaged in the business of dealing in . . . installment paper" because it purchases credit sale agreements from Chrysler Corporation in order to provide dealerships with financing under the Wholesale Finance Plan and not for the purpose of making a profit. We disagree.

Section 105-83 does not define the phrase "dealing in . . . installment paper," and we must, therefore, ascertain the meaning of this phrase by looking to the plain meaning of the terms. *State v. Raines*, 319 N.C. 258, 262, 354 S.E.2d 486, 489 (1987). The plain meaning of "deal in" is "to engage in buying and selling some commodity." *New Webster's Dictionary and Thesaurus of the English Language* 247 (1992). "Dealing in . . . installment paper," therefore, means the buying and selling of installment paper, and a taxpayer may "deal in" installment paper regardless of whether such dealing is intended for or results in the taxpayer receiving a profit.

In this case, Chrysler Financial entered into the "Agreement to Purchase Wholesale Credit Obligations" from Chrysler Corporation. Upon execution of this Agreement, Chrysler Corporation assigned to Chrysler Financial its security interest in the installment paper representing the sale of the vehicles to the dealerships and Chrysler Financial paid Chrysler Corporation the amount due under the installment paper. Chrysler Financial is therefore "engaged in the business of dealing in . . . installment paper" under the plain meaning of section 105-83, and it is immaterial whether Chrysler Financial's engagement in this business was intended for or resulted in it making a profit.

II

[2] Chrysler Financial also argues that even if it does "engage in the business of dealing in . . . installment paper," it is not subject to a tax assessment under section 105-83 because section 105-83 taxes only the actual sale of the installment paper and this sale takes place entirely within Michigan. In contrast, the Department of Revenue argues section 105-83 applies not to the actual sale of the installment paper but to the entire range of activities involved in the business of engaging in such sales, and a tax may be assessed if "any part of the activity related to the prosecution of that business occurs in North Carolina." Specifically, the Department of Revenue contends Chrysler Financial engages in the following activities in North Carolina related

to the prosecution of the wholesale installment paper business: Chrysler Financial's security interest in the vehicles and inventories of the dealerships is perfected in North Carolina; Chrysler Financial may pursue collection of funds due under the credit sale agreement in North Carolina; the credit sale agreement provides Chrysler Financial with the right to inspect collateral and records located in North Carolina; dealerships in North Carolina use North Carolina funds to pay amounts due under the credit sale agreement; and Chrysler Financial engages in the dealing of installment paper based on retail business in North Carolina and is licensed pursuant to section 105-83 for that purpose.

Section 105-83 states "[e]very person engaged in the business of dealing in . . . installment paper . . . shall apply for and obtain from the Secretary of State a State license for the privilege of engaging in such business . . . *in this State*." N.C.G.S. § 105-83(a). Under the plain language of the statute, a tax is to be assessed for engaging in the business of dealing in installment paper in North Carolina. As noted above, "dealing in . . . installment paper" means the buying and selling of installment paper.

In an administrative rule interpreting section 105-83, the Department of Revenue has stated:

> G.S. 105-83 does not impose a tax on the business of dealing in, buying and/or discounting installment paper which is engaged in exclusively in a foreign state. When any of the activity *incident to such business* occurs in North Carolina, G.S. 105-83 applies. Such activities include the promotion and solicitation of such business by employees or agents within this State, whether or not the transfer of such paper is consummated in this State.

N.C. Admin. Code tit. 17, r. 4B.2905 (June 1998) (emphasis added). "[A]n administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation." *Pamlico Marine Co., Inc. v. N.C. Depart. of Natural Resources*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986). We agree Rule 4B.2905 is consistent with the meaning of section 105-83, and we therefore consider the application of this Rule to the facts of this case. It is clear under Rule 4B.2905 that a taxpayer must conduct *some* activity in North Carolina to be assessed a tax under section 105-83. Additionally, the activity required to assess a tax under section 105-83 is not limited to the actual transfer of the installment paper, but may be activity "incident to such business."

Nevertheless, because Rule 4B.2905 limits the application of section 105-83 to activities incident to the business of "dealing in . . . installment paper," the activities must be incident to the buying and selling of installment paper. An activity is "incident to" the buying and selling of installment paper if it "arise[s] in the course of" the buying and selling. *New Webster's Dictionary and Thesaurus of the English Language* 489 (1992). These incidental activities may include, but are not limited to, "the promotion and solicitation of such business." N.C. Admin. Code tit. 17, r. 4B.2905.

In this case, Chrysler Financial entered into an agreement with Chrysler Corporation to purchase installment paper, and this agreement was executed in Michigan. The buying and selling of this installment paper takes place entirely within Michigan; therefore, Chrysler Financial may not be assessed a tax under section 105-83 based directly on its purchase of installment paper. We must, therefore, determine whether Chrysler Financial conducted any activities in North Carolina incident to the buying and selling of the installment paper. Pursuant to the agreement to purchase the installment paper, Chrysler Corporation assigned to Chrysler Financial its security interest in vehicles owned by dealerships in North Carolina and those dealerships' inventories. This security interest was perfected by the filing of a financing statement in North Carolina, and these documents named Chrysler Financial as an assignee. The perfection of a security interest in North Carolina, however, does not arise in the course of the buying or selling of the credit sale agreement. Rather, this perfection of a security interest is an act separate and apart from the purchase of installment paper. Additionally, Chrysler Financial's right to inspect collateral under the credit sale agreement does not arise in the course of buying or selling the credit sale agreement, but is a contractual right Chrysler Financial obtains in Michigan when Chrysler Corporation assigns to Chrysler Financial the credit sale agreement. Similarly, enforcement of this contractual right in North Carolina by collection methods permitted in this State does not arise in the course of buying or selling the credit sale agreement. Further, the fact that dealerships in North Carolina use their funds to pay amounts due under the credit sale agreements has no relation to the buying or selling of the installment paper by Chrysler Financial, and Chrysler Financial's retail installment paper business in North Carolina has no relation to its wholesale installment paper business. Finally, the record contains no evidence Chrysler Financial engages in the promotion or solicitation of the buying or selling of installment paper in North Carolina. Chrysler Financial, therefore, was not sub-

ject to tax assessment under section 105-83 based on its purchase of installment paper from Chrysler Corporation.

Because we hold Chrysler Financial was not subject to tax assessment under section 105-83 for its wholesale installment paper business, we need not address the Department of Revenue's additional assignments of error. Accordingly, the trial court's order denying the Department of Revenue's motion for summary judgment and granting summary judgment in favor of Chrysler Financial is affirmed.

Affirmed.

Judges McGEE and EDMUNDS concur.

FARR ASSOCIATES, INC., PLAINTIFF v. DAVID S. BASKIN, DEFENDANT

Nos. COA99-883 and COA99-977

(Filed 6 June 2000)

Employer and Employee— non-compete agreement—client-based—unreasonable

The trial court correctly granted defendant's motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of an action arising from a non-compete agreement where the client-based territorial restriction and the five-year time limitation in the agreement were unreasonable. Although a five-year time restriction may be upheld, it must be considered with its geographical scope. Here, the physical scope of the territorial restriction is irrelevant, but the substitution of the client base is unreasonable because it prevents defendant from working for all of plaintiff's current or recent clients, regardless of location, so that he is precluded from working with a number of businesses in a large number of cities throughout the world. Considering the relatively small number of plaintiff's clients with whom defendant worked, the scope is extreme. Furthermore, the restriction is unduly vague.

Appeal by plaintiff from order entered 19 April 1999 by Judge Judson D. DeRamus and order entered 13 May 1999 by Judge Peter M.

McHugh in Guilford County Superior Court. Heard in the Court of Appeals 20 April 2000.

Constangy, Brooks & Smith, LLC, by W.R. Loftis, Jr. and Virginia A. Piekarski, for plaintiff-appellant.

Puryear and Lingle, P.L.L.C., by David B. Puryear, Jr. and Robert J. Lingle, for defendant-appellee.

WYNN, Judge.

In July 1996, David S. Baskin started working for Farr Associates, a behavioral science consulting firm based in High Point, North Carolina. Through about 461 client offices, Farr provides behavioral consulting services to individual clients, and conducts leadership and self-awareness seminars that are open to the public. Its largest client base is in North Carolina, but it also has offices in 41 other states and four foreign countries. Its clients are generally large businesses, often having multiple offices within a given state, province or country.

Farr provides its services through its employees called Consultants. Their work generally consists of providing behavioral science consulting to individual Farr clients and conducting leadership seminars developed by Farr that are open to the public at large. Consultants are usually trained by Farr, using a training system developed by Farr. However, Farr did not provide consulting training to Mr. Baskin because he had over 20 years of experience in the field, but he did receive some training as to the administration of Farr's leadership program.

When a Farr Consultant is assigned to work with a client, the Consultant works very closely with that client, gaining a full understanding of the client's business needs and cultivating close personal relationships with the client's principle representatives. Consultants achieve such a rapport with the client companies through their employment with Farr.

As part of his employment contract with Farr, Mr. Baskin signed a non-compete agreement, which provided the following:

> For the valuable consideration being provided to the Employee under this Agreement, the Employee covenants and agrees that during the term of this Agreement and for a period of three (3) years from the date the Employee's employment with the Company is terminated, regardless of whether such termination

is with or without cause, or is by mutual agreement, or is involuntary as to one of the parties hereto, the Employee will not directly or indirectly render to any current client or customer of the Company or to any client or customer who was a client or customer of the Company during the two (2) year period immediately preceding the termination date of the Employee's employment with the Company, services of any kind similar to the services previously or presently rendered for such client or customer.

Mr. Baskin worked for Farr for about two years, providing behavioral science consulting to eight clients. On 2 October 1998, Mr. Baskin gave written notice of his resignation to Farr, to be effective in two week's time. Upon leaving Farr, Mr. Baskin started the Baskin Group, Inc., which offers behavioral consulting services to interested businesses. He immediately began providing consulting services to J. A. Jones Construction Company, a client of Farr's since 1988 that had worked directly with Mr. Baskin while he worked for Farr. A few other Farr clients have also been in contact with Mr. Baskin, although the parties disagree as to whether Mr. Baskin solicited their business.

On 12 March 1999, Farr brought an action seeking to enforce the non-compete agreement against Mr. Baskin and also asserting a claim that Mr. Baskin breached his employment contract by not providing sufficient advance notice of his resignation. On 19 March 1999, Farr moved for injunctive relief to stop Mr. Baskin from violating the terms of the non-compete agreement. Mr. Baskin moved to dismiss Farr's complaint on the ground that it did not state a claim upon which relief could be granted. He also filed affidavits in opposition to Farr's motion for a preliminary injunction.

Superior Court Judge Judson D. DeRamus denied Farr's motion for injunctive relief, finding that Farr had failed to demonstrate a likelihood of success on the merits of the claim. Thereafter, Superior Court Judge Peter M. McHugh granted Mr. Baskin's motion to dismiss regarding the claim based on the non-compete agreement, but denied Mr. Baskin's motion with respect to the claim based on his failure to give adequate notice of his resignation. Farr appealed both orders to this Court. We consolidated the two appeals.

We first address Farr's argument that the trial court erroneously dismissed this action, since the dismissal of an action is subject to more stringent rules than the grant of an injunction. Farr argues that the trial court committed reversible error in partially granting Mr.

Baskin's motion to dismiss because Farr's complaint states on its face a claim for breach of an enforceable non-compete agreement.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief can be granted under some legal theory. *See Hobbs v. N.C. Dep't Hum. Res.*, 135 N.C. App. 412, 520 S.E.2d 595, 599 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted " 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' " *Id.* (citing *Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999)). As our Supreme Court has held, the "function of a motion to dismiss is to test the law of the claim, not the facts which support it." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979).

In the case at bar, the question is whether the non-compete agreement is enforceable as a matter of law. If not, then the trial court properly granted Mr. Baskin's motion to dismiss the claim.

Covenants not to compete between an employer and employee are "not viewed favorably in modern law." *Hartman v. W. H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994), *review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). To be enforceable, a covenant must meet five requirements—it must be (1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest of the employer. *Id.* at 311, 450 S.E.2d at 916. The reasonableness of a non-compete agreement is a matter of law for the court to decide. *See id.*

The record on appeal shows that the non-compete agreement meets two of the above requirements—it is in writing and is part of the employment contract. It also meets the third requirement because the promise of new employment is valuable consideration in support of a covenant not to compete. *See Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 869, 433 S.E.2d 811, 813 (1993). Our inquiry focuses on the last two requirements—whether the covenant is reasonable as to time and place, and whether it is designed to protect a legitimate business interest of the employer.

First we observe that the non-compete agreement in this case meets the requirement of being designed to protect Farr's legitimate

business interests. The protection of customer relations against misappropriation by a departing employee is well recognized as a legitimate interest of an employer. *See United Laboratories Inc. v. Kuykenall*, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988). Farr's work requires that its Consultants develop an intimate relationship with its clients. Because the clients grow to trust individual Farr employees, the clients may naturally want to continue that relationship even if the Consultant leaves Farr. However, should the Consultant maintain the relationship, Farr risks losing a customer. The danger of a departing employee "misappropriating" a client is indeed very real, since Farr's Consultants develop not only close relationships with Farr's clients, but gain knowledge of Farr's business practices too. Following *Kuykendall*, we hold that Farr's desire to keep its client base intact when its employees depart is a legitimate business interest.

However, we hold that the fourth part of the test from *Hartman*—the time and territory restriction—is unreasonable on its face and the non-compete agreement is therefore unenforceable.

In evaluating reasonableness as to time and territory restrictions, we must consider each element in tandem—the two requirements are not independent and unrelated. *See Hartman*, 117 N.C. App. at 311-12, 450 S.E.2d at 916. Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable. A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*. *See Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968).

We have previously held that time restrictions of a certain length are presumed unreasonable absent a showing of special circumstances. A five-year time restriction is the outer boundary which our courts have considered reasonable, and even so, five-year restrictions are not favored. *See, e.g., Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961) (holding a five-year restriction limited to one city was reasonable); *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 918 (holding that "only extreme conditions" will support a five-year non-compete agreement.) *Accord Engineering Assoc., Inc. v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966). Further, when a non-compete agreement reaches back to include clients of the employer during some period in the past, that look-back period must be added to the restrictive period to determine the real scope of the time limitation. *See Prof. Liab. Consultants, Inc. v. Todd*, 345 N.C.

176, 478 S.E.2d 201 (1996) (adopting dissenting opinion of Smith, J., in 122 N.C. App. 212, 468 S.E.2d 578 (1996)), *reh'ing denied*, 345 N.C. 355, 483 S.E.2d 175 (1997)).

In the case at bar, the covenant restricts Mr. Baskin from providing services to Farr's clients for a period of three years after leaving Farr. The restricted clients include those using Farr's services at the date of termination *and* any client served by Farr within the two years preceding termination. The real time restriction of the non-compete agreement is therefore five years—three years after the date of termination plus the two-year look-back period. Although a five-year time restriction may be upheld, we must consider the length of the restriction with its geographical scope in order to determine its reasonableness.

To prove that a geographic restriction in a non-compete provision is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. *See Todd*, 122 N.C. App. at 218, 468 S.E.2d at 582. The employer must show that the territory embraced by the covenant is no more than necessary to secure the protection of its business or good will. *See A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 404, 302 S.E.2d 753, 761 (1983). In addition, our Supreme Court has recognized the validity of geographic restrictions that are limited not by area, but by a client-based restriction. *See, e.g., Kuykendall, supra.*

Both parties present arguments as to why the physical scope of the territorial restriction is or is not reasonable. However, the *physical* scope of the restriction is irrelevant since Mr. Baskin is not prevented from working in any particular locale. Specifically, we reject Mr. Baskin's argument that the non-compete agreement is overly broad because it has no defined physical territorial limit at all. However, Farr's use of its client base as a substitute for a physical limitation works to achieve an unreasonable effect in its own way.

In *Hartman, supra*, we set forth a six-part test to determine whether the geographic scope of a covenant not to compete is reasonable. The six factors are: (1) the area or scope of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation. *See Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917. Although

we do not apply this test to the physical scope of the covenant, since it is not an issue, we do adapt the test as being applicable to assess the client-based restriction.

Farr has approximately 461 offices in 41 states and four foreign countries—Canada, Mexico, Israel, and The Netherlands. Many of Farr's clients have multiple offices within a given state, province or country. The covenant in question prevents Mr. Baskin from working for *all* of Farr's current or recent clients, regardless of where the client is located, whether he had any contact with them, or whether he even knew about them. Although Mr. Baskin is not prevented from working in any particular locale, he *is* precluded from working with a number of businesses in a large number of cities throughout the world. The scope of the covenant is extreme, considering that Mr. Baskin only worked with a relatively small number of Farr's clients.

We further note that the client-based restriction is unduly vague. The covenant does not define whether the term "client or customer" includes one-time attendees of a Farr workshop. And the covenant may extend to clients' offices that never contacted Farr. If Farr worked for a client in one city, but that client has offices in *other* cities, the non-compete agreement ostensibly prevents Mr. Baskin from working for that client in *any* of its offices, not merely the office with which Farr once worked. Both of these factors work to expand the reach of the covenant.

Although Mr. Baskin knows Farr's business practices, Farr's main concern is that the Consultant makes business contacts with Farr's clients—clients that may be lost when the Consultant leaves. Although Farr had a legitimate reason for wanting to prevent departing employees from misappropriating clients, the number of clients embraced by the covenant, as compared to the number of clients serviced by Mr. Baskin, is unreasonable.

We compare this case to *Hartman*, which held that where the primary concern is the employee's knowledge of the customers, "the territory should only be limited to areas in which the employee made contacts during the period of his employment." *Hartman*, 117 N.C. App. at 313, 450 S.E.2d at 917 (citation omitted). The geographic limitation of that case is analogous to the client-based limitation in the case at bar. The rule set forth in *Hartman* should apply with equal force here: a client-based limitation cannot extend beyond contacts made during the period of the employee's employment.

Farr relies on three cases in which our Supreme Court held that a client-based geographical restriction was reasonable. In two of those cases, the Supreme Court upheld client-based restrictions which included clients the employee had not personally serviced; however, we find that the scope of the restriction in the case at bar is much broader than the restrictions contemplated in those cases. In *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990), the Supreme Court upheld a non-compete agreement forbidding a former employee from soliciting its clients anywhere within North Carolina, despite the fact that the employee's contacts were limited to Wilmington. The sheer scope of the covenant in the case at bar makes it distinguishable from *Triangle Leasing*. In *Kuykendall, supra*, the Supreme Court upheld a client-based restriction limited to clients that the former employee either directly serviced, or those clients who were serviced by the employees working under the defendant. The scope of the prohibition was much smaller than in the case at bar, and was limited to clients that the former employee had intimate knowledge of. Finally in the third case, *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989), the Supreme Court upheld a client-based restriction limited to clients that the former employee had personally worked with. Again, the client-based restriction in that case is much more limited than in the case at bar.[1]

We hold that the scope of the client-based territorial restriction in the case at bar is unreasonable, thereby rendering the non-compete agreement unenforceable. In addition, since time and territory restrictions are two parts to one inquiry, we find that the five-year time limitation lends further support to our holding that this non-compete agreement is unreasonably broad and therefore unenforceable. The trial court properly dismissed Farr's claim that Mr. Baskin breached an enforceable non-compete agreement.

Having found for Mr. Baskin on the merits of Farr's non-compete claim, we further uphold the trial court's denial of Farr's motion for preliminary injunction.

Affirmed.

Judges HORTON and SMITH concur.

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1. In addition to the smaller scopes of the client-based restrictions, the time limitations in those cases were also much shorter than in the case at bar: two years, 18 months, and two years respectively.

BUNCOMBE COUNTY ON BEHALF OF YOLANDA Y. BLAIR, PLAINTIFF v. WILLIAM E. JACKSON, DEFENDANT

No. COA99-654

(Filed 6 June 2000)

1. **Child Support, Custody, and Visitation— support—guidelines—multiple children from multiple mothers**

The trial court did not err in concluding that the Child Support Guidelines apply to a situation where one individual might father multiple children from multiple mothers, because the Guidelines specifically provide adjusted gross income is to be computed by deducting from a party's gross income any child support actually made by a party under any pre-existing court order or separation agreement.

2. **Child Support, Custody, and Visitation— support—guidelines—credit to gross income—pre-existing court order or separation agreement**

Although the Child Support Guidelines provide that a party is entitled to a credit to gross income for any child support paid pursuant to a pre-existing court order or separation agreement, the trial court did not err in adjusting defendant's gross income for the amount of monies he actually paid under the 1996 orders for the benefit of children other than the children subject to the specific claim at issue because at the time of the simultaneous adjudication of multiple child support claims filed by different mothers against defendant father, the 1996 orders of child support were the only pre-existing orders of support.

3. **Child Support, Custody, and Visitation— support—guidelines—findings**

A child support order for five children amounting to 66% of defendant's gross income is reversed and remanded because the trial court does not reveal any findings as to whether the support set pursuant to the Guidelines would exceed, meet, or fail to meet the reasonable needs of the children, or whether support set pursuant to the Guidelines would be "unjust or inappropriate."

4. **Child Support, Custody, and Visitation— support—health insurance**

The trial court erred in ordering defendant father to carry health insurance for his minor children without first determining its availability at a reasonable cost. N.C.G.S. § 50-13.11(a1).

5. Child Support, Custody, and Visitation— support—increase—consent of parties

The trial court erred in a temporary memorandum order by increasing child support to $300 per month because although the order indicates on its face that it was entered on the basis of the consent of both parties, that consent does not appear in this record and there is no other basis to support the order.

Appeal by defendant from order dated 26 February 1999 by Judge Robert L. Harrell in Buncombe County District Court. Heard in the Court of Appeals 28 March 2000.

Buncombe County Child Support Enforcement Agency, by Susan E. Wilson, for plaintiff-appellee.

Ronald C. True for defendant-appellant.

GREENE, Judge.

William E. Jackson (Jackson) appeals from the trial court's order modifying a previous order of child support and increasing his child support obligation.

The record reveals Jackson is the father of five minor children born of three different mothers. All three mothers, Yolanda Yvette Blair (Blair), Sonya L. Searles (Searles), and Stephanie Renee Williams (Williams), in separate cases, sought child support by and through the IV-D Child Support Enforcement Agency for Buncombe County (Agency). Pursuant to those requests, the trial court, in 1996, ordered child support as follows: (1) for the two children born to Blair, $210.00 per month; (2) for the two children born to Williams, $135.00 per month; and (3) for the one child born to Searles, $90.00 per month.

On 7 December 1998, the Agency moved to modify Jackson's child support obligation in each of the three cases. On 6 January 1999, Jackson moved to deviate from the child support Guidelines,[1] because application of the Guidelines "for one case, will cause alter-

1. The applicable child support Guidelines were adopted by the Chief District Court Judges, pursuant to N.C. Gen. Stat. § 50-13.4(c1) (1999), effective 1 October 1998. *See* N.C. Child Support Guidelines, 2000 Special Supp. R-1 to -19 (eff. 1 October 1998) (amending N.C. Child Support Guidelines, 2000 Ann. R. (N.C.) 33-44 (eff. 1 October 1994)) [hereinafter Support Guidelines].

ations in the other cases, and upon altering another case, it will become an endless cycle."[2]

All three cases came on for hearing on 23 February 1999, having been consolidated. The parties stipulated there was a substantial change of circumstances and agreed Jackson had a monthly gross income of $1,678.43. The trial court set the child support in this case by utilizing the Guidelines. It determined Jackson's adjusted gross income ($1,453.43) by deducting his previously determined child support obligations[3] to Searles ($90.00) and Williams ($135.00) from his monthly gross income ($1,678.43-$225.00).[4] The trial court's order contains no findings as to the reasonable needs of the children for support or the relative abilities of each parent to provide child support.

Jackson's child support obligation was modified and increased to the sum of $470.00 per month in this case (Blair), to the sum of $355.00 per month in the Williams case, and to the sum of $262.00 per month in the Searles case. The total support in all three cases amounted to $1,087.00 or approximately 66% of Jackson's gross income.

The trial court's order also provided Jackson "shall[:]

> obtain medical insurance within 10 (ten) days of this court order or maintain medical insurance coverage for the child(ren) in this matter. Furnish [Blair] with the policy number for this coverage within 10 (ten) days from the date of this order."

There is no evidence in this record as to the cost of providing medical insurance or whether Jackson had access to group health insurance. After appealing the trial court's order, Jackson moved the trial court

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2. In his motion requesting deviation, Jackson asserted child support should be determined by "running the child support guidelines based on one (1) mother with five (5) children, and thereafter dividing the appropriate amount of support for five (5) children, by the five (5) and awarding each mother their pro rata share thereof." This is not an argument asserted on appeal, and, therefore, we do not address it.

3. The Guidelines provide "[t]he amount of child support payments actually made by a party under any pre-existing court order(s) or separation agreement(s) should be deducted from the party's gross income." Support Guidelines, 2000 Special Supp. at R-3.

4. The trial court set support in the Williams and Searles cases in the same manner. For example in the Williams case, the trial court determined Jackson's adjusted gross income ($1,378.43) by deducting his previously determined child support obligations to Searles ($90.00) and Blair ($210.00) from his monthly gross income ($1,678.43-$300.00).

to stay enforcement of the order pending appeal.[5] The motion was denied by the trial court, and this Court subsequently granted Jackson's writ of supersedeas to stay the orders pending this appeal.[6]

The issues are whether: (I) (A) the Guidelines apply to situations where a person fathers multiple children with multiple mothers; (B) pre-existing child support under the Guidelines has reference to child support orders entered in cases involving one father and multiple mothers with children; (C) the trial court entered findings necessary to reject Jackson's request for a deviation from the Guidelines; and (II) on this record, Jackson can be required to maintain health insurance for his five children.

I

Child Support

Child support is to be set in such amount "as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties." N.C.G.S. § 50-13.4(c) (1999). Child support set consistent with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support. *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991). The trial court "upon its own motion" or upon a timely request of a party may deviate from the Guidelines. Support Guidelines, 2000 Special Supp. at R-2; *Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740 (10 days written notice required). If deviation is requested, the trial court is required to follow a four-step process: (1) determine the presumptive child support amount under the Guidelines; (2) take evidence, if offered, as to the reasonable needs of the child and the abilities of the parents to provide support; (3) determine whether the presumptive support would meet or exceed the "reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappro-

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5. "[A]n order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal." N.C.G.S. § 50-13.4(f)(9) (1999).

6. "Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires." N.C.G.S. § 50-13.4(f)(9); N.C.R. App. P. 23 (authorizing appellate court to grant writ of supersedeas staying enforcement of trial court order).

priate"; and (4) following its determination that deviation is either warranted or unwarranted, enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would (or would not) meet the reasonable needs of the child or would (or would not) be "unjust or inappropriate."[7] N.C.G.S. § 50-13.4(c); *see Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999).

A

[1] Jackson first argues the Guidelines "never contemplated a situation wherein one individual might father multiple children from multiple mothers," and thus, the Guidelines should not apply in this case. We disagree. The Guidelines specifically provide adjusted gross income is to be computed by deducting from a party's gross income any child support "actually made by a party under any pre-existing court order(s) or separation agreement(s)." Support Guidelines, 2000 Special Supp. at R-3. Thus, the Guidelines contemplate a person may father children by several mothers.

B

[2] Jackson argues in the alternative the trial court erred in

> crediting pre-existing child support [for the Williams and Searles] children by using the support amounts from the 1996 Order and not the new amounts [set in 1999], inasmuch as should, for example, an increase be appropriate in the Blair case, then that new amount of support should be utilized in running the Guidelines in the Williams and Searles case[s]. Of course, the Guidelines would then need to be re-run in the Blair case, allowing for the change in numbers on pre-existing support . . . for the other children from the Williams and Searles cases, ad infinitum.

The Guidelines provide a party is entitled to a credit to his gross income for any child support paid pursuant to a "pre-existing" court order or separation agreement. *Id.* Although the Guidelines do not define "pre-existing," its plain meaning in the context of the

7. Although section 50-13.4(c) and the Guidelines require findings of fact only when the trial court deviates from the Guidelines, effective appellate review also requires findings to support a denial of a party's request for deviation. *See Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (findings of fact are required for appellate court to judge whether the order reflects a correct application of the law).

Guidelines allows a credit for any child support paid pursuant to a court order or separation agreement in existence prior to the setting of child support in the case presently before the trial court. *American Heritage College Dictionary* 1078 (3d ed. 1993) ("pre-exist" is defined as "[t]o exist beforehand").

In this case, there were multiple child support claims filed by different mothers against a common father and those claims were consolidated for hearing. Thus, at the time of the simultaneous adjudication of these child support claims, the 1996 orders of child support were the only pre-existing orders of support.[8] Jackson, therefore, was entitled to have his gross income adjusted for the amount of monies he actually paid under the 1996 orders for the benefit of children other than the children subject to the specific claim at issue.

C

[3] Jackson's final alternative argument is the trial court erred in failing to deviate from the Guidelines. Jackson claims a deviation is necessary, because the child support for all five children, set pursuant to the Guidelines, amounted to 66% of his gross income and, therefore, it is not just or appropriate.

The case must be reversed and remanded on this issue, as the order of the trial court does not reveal any findings as to whether the support set pursuant to the Guidelines would exceed, meet, or fail to meet the reasonable needs of the children, or whether support set pursuant to the Guidelines would be "unjust or inappropriate." On remand, the parties will be permitted to offer new evidence and any order entered must ensure that Jackson has "sufficient income to

8. Although the issue is not presented in this case, it does not appear a different result would be required even if the modification cases had not been consolidated for hearing but were heard separately at the same session of court. For example, child support is modified in case A, increasing the obligor parent's child support obligation. Sometime later in the same session of court, case B is called for trial and the father contends he should be given credit for the child support he is most recently obligated to pay in case A. A parent is, however, entitled to credit only for "payments actually made" pursuant to a previous child support order, Support Guidelines, 2000 Special Supp. at R-3, and as the most recent previous order had just been entered, it is unlikely the obligor parent would have yet made a payment.

If, however, case B was called for trial some months after child support was increased in case A and payments were being made pursuant to this modification order, the obligor parent, it appears, would be entitled to a credit for payments under the most recent order. Under this scenario, the child in case B could likely receive less support, under the Guidelines, than the child in case A because of the larger credit. Thus, under this scenario, application of the Guidelines would appear to be "unjust" and "inappropriate."

maintain a minimum standard of living based on the 1997 federal poverty level for one person."[9] Support Guidelines, 2000 Special Supp. at R-2.

II

Health Insurance

[4] Jackson argues the trial court committed reversible error in ordering him to carry health insurance for his minor children without first determining its availability at a reasonable cost. We agree.

N.C. Gen. Stat. § 50-13.11 provides, in pertinent part:

> (a) The court may order a parent of a minor child . . . to provide *medical support* for the child . . . . An order . . . for *medical support* for the child may require one or both parties to pay the medical, hospital, dental, or other health care related expenses.
>
> (a1) The court shall order the parent of a minor child . . . to maintain *health insurance* for the benefit of the child when *health insurance* is available at a reasonable cost. As used in this subsection, *health insurance* is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism.

N.C.G.S. § 50-13.11(a), (a1) (1999) (emphasis added).

Agency argues "medical support," within the meaning of section 50-13.11(a), includes health insurance, and thus, the trial court has the discretion to order a parent to provide health insurance pursuant to this subsection. Jackson argues health insurance can be ordered for a child only pursuant to section 50-13.11(a1), and thus, only upon a showing that "health insurance" is available at a reasonable cost. We agree with Jackson.

"[M]edical support" as referenced in subsection (a) is defined to include "medical, hospital, dental, or other health care related expenses." N.C.G.S. § 50-13.11(a). Although "other health care related expenses" is somewhat ambiguous and could be read to include

9. The 1997 federal poverty levels are found in the *Federal Register*. *See* Annual Update of HHS Poverty Guidelines, 62 Fed. Reg. 10,856-59 (1997). For example, the annual poverty level of a family unit of one person is $7,890.00 in the 48 contiguous states. *Id.* at 10,857.

health insurance, such a construction would be contrary to the clear intent of the legislature. By including a separate and specific provision on "health insurance," the legislature reveals its intent that "health insurance" be ordered only pursuant to subsection (a1). *See Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988) (where a statute deals with a particular situation in detail, while another deals with it in general and comprehensive terms, the particular statute will be construed as controlling). "[M]edical support," by definition, thus, does not include health insurance.

In this case, there is no evidence health insurance was available to Jackson at a "reasonable cost," was available to Jackson at his place of employment, or was otherwise available through some group insurance plan. N.C.G.S. § 50-13.11(a1) (health insurance is available at a reasonable cost if "employment related or other group health insurance"). Accordingly, the trial court had no authority to order Jackson to provide health insurance for the children. On remand, Agency should be given the opportunity to present evidence that health insurance is available to Jackson at a reasonable cost or otherwise request an order directing Jackson to provide "medical support" within the purview of subsection (a).

[5] Jackson finally contends a Temporary Memorandum Order entered on 15 January 1999, increasing child support to $300.00 per month, must be reversed. We agree. The Order indicates on its face it was entered on the basis of the consent of both parties, but that consent does not appear in this record and there is no other basis to support the Order. The 15 January 1999 Order is, thus, vacated.

Reversed in part, vacated in part, and remanded.

Judges McGEE and EDMUNDS concur.

DAVIS LAKE COMMUNITY ASSOCIATION, INC., PLAINTIFF v. WILLIAM FELDMANN AND AUDREY M. OSZUST, DEFENDANTS

No. COA99-639

(Filed 6 June 2000)

1. **Parties— motion to amend—joinder of counsel—no valid claim**

The trial court did not err in denying defendants' motion to amend in order to join plaintiff's counsel for purposes of defendants' counterclaims because defendants could not have asserted a valid claim against plaintiff's counsel under the North Carolina Debt Collection Act in the first place. N.C.G.S. § 1A-1, Rule 13(h).

2. **Consumer Protection— Debt Collection Act—federal act—homeowners' association**

The trial court properly dismissed defendants' unfair debt collection counterclaim against a homeowners' association under the federal Fair Debt Collection Practices Act because this Act only applies to those who regularly collect debts on behalf of others, and it does not apply to creditors trying to collect their own debts.

3. **Consumer Protection— Debt Collection Act—state act—action against homeowners' association**

The trial court erred in dismissing defendants' unfair debt collection counterclaim against a homeowners' association under the North Carolina Debt Collection Act because: (1) the three threshold requirements have been met since defendant-homeowners are consumers incurring an obligation for family or household purposes, homeowners' association dues and assessments are debts, and plaintiff-homeowners' association is a debt collector; and (2) the three generalized requirements of all unfair or deceptive trade practice claims under N.C.G.S. § 75-51 have been met since plaintiff represented that the amount needed to satisfy the obligation included attorney fees well in excess of the fifteen percent limit, plaintiff's collection of dues and assessments was a business activity in or affecting commerce, and defendants have alleged that plaintiff's actions have injured their credit reputations and caused them emotional distress.

4. **Costs— attorney fees—notice—prejudgment interest**

The trial court erred in granting summary judgment in favor of plaintiff for its claim for attorney fees because the forecast of

evidence does not establish whether plaintiff complied with the statutory notice requirement in N.C.G.S. § 6-21.2(5), and therefore, the trial court's grant of prejudgment interest is also improper until a determination is made as to whether the notice requirement had in fact been met.

Appeal by defendants from orders entered 5 February 1999 by Judge Margaret L. Sharpe in Mecklenburg County District Court. Heard in the Court of Appeals 13 March 2000.

Sellers, Hinshaw, Ayers, Dortch, Honeycutt & Lyons, P.A., by John F. Ayers, III and Timothy G. Sellers for plaintiff-appellee.

Dean & Gibson, L.L.P., by Rodney Dean, for plaintiff-appellee's counsel.

Hewson Lapinel Owens, PA, by H.L. Owens, for defendant-appellants.

LEWIS, Judge.

Plaintiff Davis Lake Community Association is a homeowners' association established for the purpose of maintaining a planned development community within Mecklenburg County. Defendants are residents who live in this planned community. This community is subject to certain restrictive covenants under which plaintiff is given the authority to collect quarterly assessments and other maintenance charges from all community residents. Defendants failed to pay these assessments for four consecutive quarters in 1996 and 1997. Plaintiff thereafter sent several demand letters to defendants, attempting to collect the $200.95 outstanding balance plus all attorney's fees incurred in trying to collect the delinquent assessments. Defendants tendered a check for $200.95, but this check was returned to them because it did not include payment for all attorney's fees alleged to be owed. Plaintiff then filed this action to collect the $200.95 in past-due assessments plus reasonable attorney's fees. Plaintiff's counsel filed an affidavit claiming their fees amounted to $2378.90 as of 28 October 1998, over ten times the amount of the outstanding balance.

Defendants thereafter filed a counterclaim for unfair debt collection practices in violation of both state and federal laws. Plaintiff subsequently filed a 12(b)(6) motion to dismiss these counterclaims and also filed a motion for summary judgment as to its own claims. Defendants later sought to amend their counterclaim in order to join

plaintiff's counsel as a required party to the counterclaims under Rule 13(h). The trial court addressed all three motions in a series of orders entered 5 February 1999. First, the trial court granted plaintiff's motion for summary judgment, ordering defendants to pay the $200.95 outstanding balance plus interest, together with attorney's fees in the amount of fifteen percent of this balance. Second, the court denied defendants' motion to amend their counterclaims in order to join plaintiff's counsel. Finally, the trial court granted plaintiff's motion to dismiss defendants' counterclaims. From these orders, defendants now appeal.

[1] We begin by addressing defendants' motion to amend in order to join plaintiff's counsel for purposes of their counterclaims. Rule 13(h) governs the joinder of parties necessary for the disposition of counterclaims and crossclaims. Specifically, Rule 13(h) states:

> When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in as defendants as provided in these rules.

N.C.R. Civ. P. 13(h). In a companion case also filed today, *Reid v. Ayers*, No. 99-790 (N.C. Ct. App. June 6, 2000), we have held that attorneys engaged in debt collection on behalf of their clients are exempt from the North Carolina Debt Collection Act. Accordingly, because defendants could not have asserted a valid claim against plaintiff's counsel in the first place, joinder of plaintiff's counsel was not "required for the granting of complete relief" as to defendants' counterclaim. Consequently, the trial court did not err in denying defendants' motion to amend.

[2] Next, we consider the propriety of defendants' unfair debt collection counterclaims against plaintiff. We emphasize that, in light of our holding as to the first issue, we are only dealing with defendants' claims against the homeowners' association.

The essence of defendants' counterclaims is that, in attempting to collect the outstanding balance, plaintiff purportedly deceived defendants by intentionally misrepresenting the amount of money needed to satisfy their outstanding obligation. Specifically, defendants point to plaintiff's various collection letters in which it attempted to collect attorney's fees well in excess of $2000. Because N.C. Gen. Stat. § 6-21.2(2) specifically limits the amount of attorney's fees

recoverable to fifteen percent of the outstanding debt, defendants assert plaintiff engaged in unfair debt collection practices by trying to collect more than that fifteen percent limit. Defendants have alleged claims under both state and federal law, and we will address each claim separately.

Defendants' claim under federal law was properly dismissed by the trial court. The Fair Debt Collection Practices Act (FDCPA), codified at 15 U.S.C. § 1692, proscribes certain enumerated activities by "debt collectors." Under the FDCPA, "debt collector" is defined as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due *another*.

15 U.S.C. § 1692a(6) (1998) (emphasis added). The FDCPA thus only applies to those who regularly collect debts on behalf of others; it does not apply to creditors trying to collect their own debts. *See Oldroyd v. Associates Consumer Discout Co.*, 863 F. Supp. 237, 241-42 (E.D. Pa. 1994); *Kizer v. Finance Am. Credit Corp.*, 454 F. Supp. 937, 939 (N.D. Miss. 1978); *Mendez v. Apple Bank*, 541 N.Y.S.2d 920, 923 (Civ. Ct. 1989). Because plaintiff was trying to collect unpaid assessments and charges due it directly, the FDCPA does not apply to plaintiff's acts.

[3] Under state law, however, we conclude that defendants have pled a valid claim. As we have stated in *Reid v. Ayers*, the North Carolina Debt Collection Act (NCDCA) contains three threshold requirements before a claim based upon alleged unfair debt collection practices may be considered. First, the party alleging the claim must be a "consumer." N.C. Gen. Stat. § 75-50(1) (1999). Defendants here, as homeowners within the Davis Lake Community Association, are indeed consumers because they have incurred an obligation (i.e. assessment fees) for family or household purposes. Second, the obligation incurred must be a "debt." N.C. Gen. Stat. § 75-50(2). We concluded in *Reid v. Ayers* that homeowners' association dues and assessments are "debts" within the meaning of the statute. Third, the party against whom the claim is alleged must be a "debt collector." N.C. Gen. Stat. § 75-50(3). Unlike the FDCPA, our state act does not limit the definition of debt collector only to those collecting debts on behalf of others; *any person* engaging in debt collection from a consumer falls within the statutory definition. *Id.* Under this plain language, plaintiff

here, as a homeowners' association trying to collect assessments owed to it, is a "debt collector."

Once these three threshold requirements are satisfied, *Reid v. Ayers* instructs us to next apply the more generalized requirements of all unfair or deceptive trade practice claims: (1) an unfair act (2) in or affecting commerce (3) proximately causing injury. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). Thus, the debt collector first must have committed an unfair or deceptive act. In the context of debt collection, these acts include the use of threats, coercion, harassment, unreasonable publications of the consumer's debt, deceptive representations, and unconscionable means. N.C. Gen. Stat. §§ 75-51 to -56. By alleging that plaintiff represented to them that the amount needed to satisfy their $200.95 obligation included attorney's fees well in excess of the fifteen percent limit, defendants have satisfied the unfair or deceptive act requirement.

Next, the debt collector's practices must be "in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a). "Commerce" includes "all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). In *Reid v. Ayers*, the alleged debt collector was a law firm, and thus we focused on the learned profession exemption within this definition. Here, however, the alleged debt collector is the homeowners' association itself. Accordingly, we focus only on the meaning of "business activities" under the statute. Our Supreme Court has clarified that "business activities" are those normal, day-to-day activities regularly conducted by the business and for which the business was organized. *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). According to the restrictive covenants entered into between the homeowners and the homeowners' association, plaintiff was organized for the purpose of creating and maintaining a planned development community. In order to do so, it was authorized to collect certain dues and assessments. Thus, one of plaintiff's regular, day-to-day activities was collecting dues and assessments. Because the allegedly unfair acts committed by plaintiff were directly connected with these dues-collecting activities, we conclude that the debt-collection practices of plaintiff were business activities in or affecting commerce.

The final generalized requirement is that the debt collector's unfair practices must have proximately caused injury to the con-

sumer. Defendants have satisfied this requirement by alleging that plaintiff's actions have injured their credit reputations and caused them emotional distress. Thus, defendants have satisfied all three threshold requirements and all three generalized requirements for substantiating a valid unfair debt-collection claim under the NCDCA. Accordingly, we reverse that part of the trial court's order dismissing this counterclaim.

We again emphasize that defendants only have a valid claim against plaintiff, not its counsel. Thus, in proceeding with their claim, defendants must focus on those alleged unfair debt collection practices employed exclusively by plaintiff. Any acts engaged in by plaintiff's counsel, even if cloaked in terms of a principal-agent relationship, fall within the learned profession exemption and thus outside the purview of the NCDCA.

[4] In their final assignment of error, defendants contest the trial court's entry of summary judgment against them. 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 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). We conclude that there are genuine issues of material fact with respect to plaintiff's claim for attorney's fees and thus vacate that portion of the trial court's summary judgment order. Specifically, the forecast of evidence produced by both parties does not establish whether plaintiff complied with the statutory notice requirement in N.C. Gen. Stat. § 6-21.2(5).

Before attorney's fees can be collected on a debt, our statutes require the creditor to notify the debtor in writing that "the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that [the debtor] has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees." N.C. Gen. Stat. § 6-21.2(5) (1999). Thus, the mere delinquency of a debt is not sufficient to trigger the award of attorney's fees under our statutes. Defendants must have been given written notice plus a five-day grace period to pay their outstanding balance. Plaintiff's forecast of evidence nowhere establishes that this requirement was satisfied. Absent evidence showing it did comply with this notice requirement, any award of attorney's fees is unauthorized. *McGinnis Point Owners Ass'n v. Joyner*, — N.C. App. —, —, 522 S.E.2d 317, 320 (1999).

In light of this, we further conclude that the trial court's award of pre-judgment interest was also improper. Defendants tendered a check for the $200.95 outstanding balance on 14 September 1997. Plaintiff refused this tender because the check did not also include payment of attorney's fees. But, as just stated, unless plaintiff first provided the requisite notice, it was not authorized to collect attorney's fees in the first place. Thus, to the extent that the trial court's award of pre-judgment interest represents interest accruing after the date of tender, that award must be vacated until a determination is made as to whether the notice requirement had in fact been met.

Affirmed in part, reversed in part, vacated in part, and remanded.

Judges JOHN and EDMUNDS concur.

SHOLAR BUSINESS ASSOCIATES, INC., D/B/A VR BUSINESS BROKERS, PLAINTIFF V. LEWIS E. DAVIS, JR., AND FITNESS TODAY OF WILMINGTON, INC., DEFENDANTS

No. COA99-688

(Filed 6 June 2000)

1. Arbitration— mistakes of law—motion to vacate denied

The trial court did not err by denying plaintiff's motion to vacate an arbitration award where plaintiff alleged that the arbitrator made mistakes of law but did not allege that the award was tainted by corruption, partiality, or abuse of power. An arbitrator is not bound by substantive law or rules of evidence.

2. Arbitration— rules—specified by contract

The trial court did not err by failing to vacate an arbitration award where plaintiff alleged that the arbitrator failed to rule on estoppel, election, and parol evidence issues and failed to make findings or conclusions. The interpretation of the terms of an arbitration agreement is governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted. Here, the parties entered into an agreement which provided for arbitration by the Commercial Arbitration Rules of the American Arbitration Association, which provide that the arbitrator is the judge of the relevance and materiality of the evi-

dence, do not require conformity to rules of evidence, and do not require findings of fact or conclusions of law. Furthermore, plaintiff failed to marshall any of the limited grounds upon which an arbitration award may be vacated. N.C.G.S. § 1-567.13.

3. Pleadings— Rule 11 sanctions—motion to vacate arbitration award

The trial court did not err by denying a motion for Rule 11(a) sanctions arising from a motion to vacate an arbitration award.

Appeal by plaintiff and defendants from judgment entered 3 March 1999 by Judge Mark Klass in Superior Court, Guilford County. Heard in the Court of Appeals 14 March 2000.

Harry G. Gordon for plaintiff-appellant/appellee.

Tuggle, Duggins & Meschan, P.A., by Denis E. Jacobson and Leonard A. Colonna, for defendants-appellees/appellants.

TIMMONS-GOODSON, Judge.

On 11 July 1997, Sholar Business Associates, Inc., d/b/a VR Business Brokers ("plaintiff"), filed suit in Superior Court, Guilford County seeking to recover a sales commission from Lewis E. Davis, Jr. and Fitness Today of Wilmington, Inc. ("defendants"). Plaintiff, a business broker, alleged that the parties entered into a Sole and Exclusive Listing Agreement ("Listing Agreement") and that defendants breached the Listing Agreement by unilaterally selling their business during the exclusive listing period. Plaintiff alleged claims for relief for breach of contract, fraudulent misrepresentation, conspiracy to defraud, intentional interference with contract, bulk transfer, fraudulent conveyance, breach of implied covenant of good faith and fair dealings, and unfair and deceptive trade practices.

On 6 August 1997, defendants filed a Motion to Compel Arbitration. Defendants' motion relied on language in the Listing Agreement which provided: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association[.]" On 9 September 1997, plaintiff signed a Stipulation to arbitrate which stated:

1. All causes of action which are currently pending by and between these parties in this lawsuit shall be settled by arbitra-

> tion in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
>
> . . . .
>
> 4. The parties agree that the Court will retain jurisdiction and may hear those matters, if any, which are not resolved through the arbitration process.

Plaintiff filed a formal Demand for Arbitration with the American Arbitration Association ("AAA").

During arbitration, defendants asserted as a defense that they were not bound by the Listing Agreement in that the Listing Agreement was not intended to be "sole and exclusive."

On 10 February 1998, the arbitrator, John S. Harrison, Esquire, rendered a decision that plaintiff "shall have and recover nothing on its claims" against defendants. Plaintiff requested a written explanation of the arbitrator's decision. The arbitrator declined to make any findings of fact, stating:

> [T]he AAA Commercial Arbitration Rules do not require written findings of fact or any explanation of the rationale for an award. Furthermore, for an arbitrator to provide such information voluntarily can open the door for unhappy parties to attempt to challenge an award, thus defeating arbitration's goals of speed and finality.

Plaintiff filed a Motion in the Cause and Application to Vacate Award of the Arbitrator. Defendants filed a Motion to Confirm Arbitration Award and for Sanctions against plaintiff and/or its attorney on the grounds that plaintiff's Motion to Vacate was groundless. In response, plaintiff filed a Motion in Opposition to defendants' Motion for Sanctions and a Motion for Attorney Fees.

The trial court granted defendants' Motion to Confirm Arbitration and denied plaintiff's Motion in the Cause and Application to Vacate Award of the Arbitrator. The motions of both parties for sanctions were denied. Plaintiff and defendants appeal.

On appeal, plaintiff argues that the trial court erred in denying its Motion to Vacate the Arbitration Award. By their only assignment of error, defendants argue that the trial court erred in denying their Motion for Sanctions.

I. PLAINTIFF'S ASSIGNMENTS OF ERROR

[1] Specifically, plaintiff argues that the award of the arbitrator should be vacated because: (1) the trial court and the arbitrator allowed defendants to demand their contract right to arbitration and then to assert, once in arbitration, that defendants were not parties to the contract or that the contract was not legally binding on the parties; and (2) the arbitrator admitted parol evidence to contradict a written contract. We cannot agree.

In North Carolina, public policy favors arbitration as a method of resolving disputes. *Miller v. Two State Construction Co.*, 118 N.C. App. 412, 416, 455 S.E.2d 678, 680 (1995). The advantages of arbitration include reduction of court congestion, speed, economy, finality, and an opportunity for the parties to choose the judges who resolve their disputes. *Crutchley v. Crutchley*, 306 N.C. 518, 523, 293 S.E.2d 793, 796 (1982).

Our Supreme Court has recognized that arbitration also poses disadvantages in that parties to arbitration enjoy limited appellate review, and have no recourse when an arbitrator makes a mistake. *Patton v. Garrett*, 116 N.C. 848, 858, 21 S.E. 679, 682 (1895). Because an arbitrator is not bound by substantive law or rules of evidence, an award may not be vacated merely because the arbitrator erred as to law or fact. *Crutchley*, 306 N.C. at 523, 293 S.E.2d at 797. Where an arbitrator makes such a mistake, "it is the misfortune of the party." *Patton*, 116 N.C. at 858, 21 S.E. at 682.

Appellate review of an arbitration award is limited. A court may only vacate such an award for the reasons enumerated in North Carolina General Statutes section 1-567.13. *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 492, 499 S.E.2d 801, 804 (1998). Pursuant to section 1-567.13, an award of arbitrators shall be vacated where:

> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy . . .; or

(5) There was no arbitration agreement . . . .

N.C. Gen. Stat. § 1-567.13 (1999).

In the case *sub judice*, plaintiff does not argue that his rights were prejudiced under any of the grounds enumerated in section 1-567.13. Plaintiff does not allege that the arbitration award was tainted by corruption, partiality, or abuse of power. Instead, plaintiff contends that the arbitrator made mistakes of law by: (1) allowing defendants to assert that they were not bound by the contract; and (2) admitting parol evidence. Because statutory and case law have determined that an arbitrator is not bound by substantive law or rules of evidence, N.C.G.S. § 1-567.13; *Crutchley*, 306 N.C. at 523, 293 S.E.2d at 797, we hold that the trial court did not err in denying plaintiff's Motion to Vacate the Arbitration Award.

[2] By its final assignment of error, plaintiff argues that the award of the arbitrator should be vacated because the arbitrator failed to rule on estoppel, election, and parol evidence issues, and failed to make findings of fact or conclusions of law. We cannot agree.

"The interpretation of the terms of an arbitration agreement are governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted." *Trafalgar House Construction v. MSL Enterprises, Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998). It is incumbent on the parties to delineate the form of the arbitration order. *See id.* at 256-57, 494 S.E.2d at 616.

In the case at bar, plaintiff and defendant entered into the Listing Agreement which provided that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association[.]" Under AAA Commercial Arbitration Rule 31, "[t]he arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary." Thus, the parties by agreement determined the rules by which arbitration would be conducted. The AAA Commercial Arbitration Rules do not require findings of fact or conclusions of law. In fact, plaintiff drafted the Listing Agreement which mandated that the AAA's Commercial Arbitration Rules would control, and cannot be heard to complain of any perceived shortcoming of those Rules.

Furthermore, we note that plaintiff has again failed to marshall any of the limited grounds upon which an arbitration award may be

vacated. See N.C.G.S. § 1-567.13. Indeed, plaintiff does not cite any authority in support of its argument that an award of arbitrator should be vacated where the arbitrator refused to make findings of fact or conclusions of law. We hold that the trial court did not err in failing to vacate the award of arbitrator where the arbitrator failed to rule on estoppel, election, and parol evidence issues and failed to make findings of fact or conclusions of law.

II. DEFENDANTS' ASSIGNMENT OF ERROR

[3] By their only assignment of error, defendants argue that the trial court erred in denying their Motion for Sanctions in that plaintiff's Motion to Vacate the arbitration award was not warranted by existing law, was in conflict with existing law, and did not advance a good faith argument for the extension, modification, or reversal of existing law. We cannot agree.

Rule 11(a) of the North Carolina Rules of Civil Procedure provides in pertinent part:

> 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) (1999).

The decision of the trial court to grant or deny a motion to impose sanctions is reviewable *de novo* as a legal issue. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). The reviewing court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment. *Id.* As a general rule, remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11. *McClerin v. R-M*

Industries, Inc., 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995). "However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper." *Id.*

In the present case, the trial court did not make any findings of fact or conclusions of law in support of its denial of defendants' Motion for Sanctions. However, after reviewing the entire record, we find no evidence to support an award of sanctions on any basis asserted by defendants. Therefore, we conclude that the trial court did not err in denying defendants' Motion for Sanctions.

For the reasons stated herein, we hold that plaintiff received a hearing free from prejudicial error and that the trial court did not err in denying defendants' motion for sanctions. Therefore, we affirm the rulings of the trial court.

Affirmed.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA, APPELLANT v. JAMES ROBERT BARKER; MARTIN FREDERICK BEAVER, III; GEORGE ALBERT DUGAY, III; RICHARD JOHN HARRIS; CYNTHIA MARIE HARRISON; HENRY W. HARRISON, IV; GLENN EUGENE HARVEY; JOHN DARRELL LATHAM; JEANETTE LYNNE SEILER; WENDELL MARK SEILER; KENNETH BARRY SMITH, APPELLEES

No. COA99-798

(Filed 6 June 2000)

Motor Vehicles— motorcycle safety helmets—failure to wear—standing to challenge approved type requirement

The trial court did not err by refusing to dismiss respondents' citations for failing to wear a safety helmet while riding a motorcycle where respondents were not wearing helmets of any type when cited. Even assuming that the statutory requirement that the helmet be of a type approved by the Commissioner of Motor Vehicles is vague, a person of reasonable intelligence would understand that a failure to wear some type of safety helmet would be prohibited. N.C.G.S. § 20-140.4(a).

Judge WYNN concurring.

Appeal by the State from order of dismissal entered 19 April 1999 by Judge Clifton W. Everett, Jr., in Craven County Superior Court. Heard in the Court of Appeals 27 April 2000.

On 12 September 1998, police cited respondents with failure to wear a safety helmet while operating or riding a motorcycle, in violation of N.C. Gen. Stat. § 20-140.4(a)(2) (1999). In district court, respondents were found to be in violation of the safety helmet statute, and appealed to the superior court. On 15 April 1999, respondents filed a motion to dismiss the charges against them on the grounds that N.C. Gen. Stat. § 20-140.4(a)(2) was unconstitutionally vague.

Both the respondents and the State introduced evidence at the hearing of defendants' motion to dismiss. The pertinent evidence may be summarized as follows. None of the respondents were wearing helmets of any type or description when cited for violations of the statute. Approximately three months before respondents were cited, counsel for respondents requested information from the North Carolina Division of Motor Vehicles (DMV) regarding motorcycle helmets. DMV mailed to counsel a brochure issued by the U.S. Department of Transportation (USDOT) regarding approved safety helmets. The brochure, which was included in the record on appeal, lists all motorcycle helmets tested in 1994 by the National Highway Safety Administration, and indicates whether the helmets meet federal safety standards. The brochure also includes a toll-free telephone number from which additional information on any individual helmet listed can be requested. The respondents also submitted the affidavit of Ms. Tamura Coffey dated 30 June 1998, in which Ms. Coffey averred that based on her inquiries to the Enforcement Section of DMV and her "own research . . . [she] found no regulation in the North Carolina Administrative Code other than N.C. Ad. Code §T19A:03D.0701 dealing with the adoption of safety standards for motor vehicle equipment." Ms. Coffey also alleged "there is no list of helmets approved by the [DMV] which is available for public inspection." The pertinent administrative code section provides, however, that anyone who wishes to know if a particular item of motor vehicle equipment has been approved by DMV may contact the Enforcement Section of DMV in Raleigh, North Carolina.

In response to further inquiry by respondents' counsel, the Enforcement Section of DMV informed counsel that a helmet which meets or exceeds the federal standard is an approved helmet in North Carolina, and that under federal regulations a DOT label must be

affixed to the center lower back of each approved helmet. The Enforcement Section also sent counsel another copy of the USDOT brochure, together with a copy of Federal Motor Vehicle Safety Standard Number 218, which outlines the federal safety standards for motorcycle helmets. On 19 April 1999 the trial court granted respondents' motion to dismiss, dismissed the charges against them, and the State appealed.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey R. Edwards, for the State.

Johnson & Donat, by Robert A. Donat, for respondent appellees.

HORTON, Judge.

The State contends that the trial court erred in granting respondents' motion to dismiss because respondents did not have standing to challenge the statute on grounds that it is unconstitutionally vague. We agree, and reverse the ruling of the trial court.

"It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 42 L. Ed. 2d 706, 713 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361, 100 L. Ed. 2d 372, 380 (1988). A statute is not vague as applied where it gives "clear notice that a reasonably ascertainable standard of conduct is mandated" and it "intelligibly forbids a definite course of conduct[.]" *United States v. Powell*, 423 U.S. 87, 92-93, 46 L. Ed. 2d 228, 234 (1975). *See also Mazurie*, 419 U.S. at 553, 42 L. Ed. 2d at 714 (statute is not impermissibly vague where it is sufficiently precise for a man of average intelligence to " 'reasonably understand that his contemplated conduct is proscribed.' " *Id.* (citation omitted)).

N.C. Gen. Stat. § 20-140.4(a) provides, in pertinent part, that

> (a) No person shall operate a motorcycle or moped upon a highway or public vehicular area:
>
> * * * *
>
> (2) Unless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles.

Id. A violation of this section is an infraction. N.C. Gen. Stat. § 20-140.4(c). The right of the State to impose, in the exercise of its police powers, such a requirement on motorcycle riders was settled by our Supreme Court more than three decades ago. *State v. Anderson*, 275 N.C. 168, 166 S.E.2d 49 (1969) (interpreting N.C. Gen. Stat. § 20-140.2(b), predecessor to § 20-140.4(a)(2)). Here, respondents do not deny that they were aware of the requirement that motorcyclists wear safety helmets. Indeed, a number of the respondents were in possession of safety helmets when cited with violation of this statute. Even assuming for the purpose of argument that the statutory requirement that a safety helmet be "of a type approved by the Commissioner" is vague, a person of reasonable intelligence would understand that a failure to wear some type of safety helmet would be prohibited under North Carolina law.

"A litigant who challenges a statute as unconstitutional must have standing. To have standing, he must be adversely affected by the statute." *In Re Jackson*, 60 N.C. App. 581, 584, 299 S.E.2d 677, 679 (1983). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 458 (1974). A statute which by its terms, or as authoritatively construed, applies without question to certain activities, but whose application to other behavior is uncertain, is not vague as applied to "hard-core" violators of the statute. *See Smith v. Goguen*, 415 U.S. 566, 577-78, 39 L. Ed. 2d 605, 614 (1974). In this case, a motorist would be adversely affected by the statute if he wore some type of safety helmet while operating a motorcycle and was nevertheless cited for violating the provisions of N.C. Gen. Stat. § 20-140.4(a)(2) for wearing a helmet not of a type approved by DMV. Because respondents were not wearing safety helmets *of any kind* when they were cited, they do not fall in the class of persons adversely affected by the statute and therefore lack standing to challenge the statute on constitutional grounds.

Other jurisdictions have confronted this issue and ruled in similar fashion. *See, for example, City of Kennewick v. Henricks*, 84 Wash. App. 323, 326, 927 P.2d 1143, 1145 (1996) (where statute required motorcycle riders to wear "protective helmets" and petitioners were wearing no helmets at the time of the citations, petitioners violated the "hard-core" provisions of the statute and lacked standing to claim vagueness as to the rules relating to acceptable types of helmets), *disc. review denied*, 131 Wash. 2d 1022, 937 P.2d 1102 (Wash. 1997).

The ruling of the trial court granting defendants' motion to dismiss is hereby

Reversed.

Judge SMITH concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring.

I join in the majority opinion. However, I write separately to point out that we determine today only that these defendants do not have standing to challenge the constitutionality of N.C. Gen. Stat. § 20-140.4 because they chose to wear no helmets at all. It follows that standing may be obtained by an individual who is charged with wearing a type of helmet that does not comply with the statute. Thus, the more challenging issue remains—is N.C. Gen. Stat. § 20-140.4 unconstitutionally vague because neither the Legislature nor the Commissioner for the Division of Motor Vehicles has clearly set forth what constitutes a helmet that meets the requirements of the statute?

North Carolina's motorcycle helmet statute requires the wearing of a safety helmet "of a type approved by the Commissioner" for the Division of Motor Vehicles. Although the State argues that the Commissioner has adopted the federal guidelines on helmet safety standards, questions remain as to whether the Commissioner formally adopted the standards; whether the Commissioner informally adopted the standards; and whether the public has received consistent information about the federal standards. An issue also remains as to whether the federal guidelines are sufficiently clear to avoid a challenge on the grounds of vagueness. Thus, in light of what appears to be inevitable further litigation on this issue, it may be prudent for either the Legislature or the Commissioner to examine whether the present application of N.C. Gen. Stat. § 20-140.4 clearly sets forth the types of helmets approved for riding a motorcycle in North Carolina.

CHRISTENBURY SURGERY CENTER, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, RESPONDENT

No. COA99-871

(Filed 6 June 2000)

1. **Administrative Law— certificate of need—standard of review by trial court**

The trial court applied the correct standards of review when considering a petitioner's contention that a declaratory agency ruling was affected by an error of law and was arbitrary and capricious in that the court applied a de novo standard to the contention that the ruling was affected by an error of law, and considered the agency record in determining that there was no rational basis for the ruling.

2. **Hospitals and Other Medical Facilities— ambulatory surgical facility—certificate of need—second site**

The trial court correctly reversed the Department of Health & Human Services' ruling requiring petitioner to obtain a new certificate of need before developing ambulatory surgical facilities at a second site within its service area. The relocation and expansion of a portion of petitioner's ambulatory surgical program to a second location within the service area for which petitioner already holds a certificate of need does not fall within the definition of a "new institutional health service" as contained in N.C.G.S. § 131E-176(16) and does not require a second certificate of need. The statutes governing licensure of ambulatory surgical facilities and those governing certificates of need for new institutional health services are independent provisions and petitioner is not required to obtain a separate certificate of need because it must obtain a separate license.

Appeal by respondent from decision entered 19 April 1999 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 26 April 2000.

Parker, Poe, Adams & Bernstein, L.L.P., by Renee J. Montgomery and Russell B. Killen, for petitioner-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Melissa L. Trippe, for respondent-appellant.

MARTIN, Judge.

Petitioner, Christenbury Surgical Center (the "Center"), is a licensed multi-specialty ambulatory surgical facility located at 449 North Wendover Road, Charlotte, North Carolina, and received a Certificate of Need to develop and operate a multi-specialty ambulatory surgical facility in 1992. On 6 October 1998, the Center filed a Request For Declaratory Ruling from the Division of Facility Services of the Department of Health and Human Services (the "Department") requesting a ruling that the Center "can operate in more than one location under one license and that the location of some of its operating rooms and ancillary space at a second site within its service area does not require a Certificate of Need." As applicable to this appeal, the Request for Declaratory Ruling required that the Department apply the provisions of G.S. Chapter 131E, Article 9 (Certificate of Need) to the following facts:

> Christenbury Surgery Center proposes to develop additional operating rooms, a recovery room, and necessary ancillary space by leasing space at a location in Charlotte different from the location of its main facility on North Wendover Drive in Charlotte. The use of this additional space at a different location is necessary because there is insufficient space on North Wendover Drive for the facility's needed expansion and relocation of the entire facility would be too expensive. . . .
>
> The additional space that The Center proposes to lease for use of its facility will be located in Charlotte and will be operated as part of Christenbury Surgery Center. The cost of expanding into this additional space will be less than $2 million and will not involve the acquisition of major medical equipment.
>
> The two locations will be operated as one ambulatory surgical center, with the same ownership and administration, policies and procedures, accounting system, and billing system. The administrator of the Center will be responsible for both locations, and employees at both locations will be employees of the Center. The roster of medical personnel having surgical and anesthesia privileges at the Center will be the same at both locations. The nursing department will be under the supervision of one director of nursing and at least one registered nurse will be at each location during the hours it is in operation. Each location will meet all requirements of 10 N.C.A.C. 3Q.1400, *et seq.* Regarding physical plant requirements. Both locations will provide the necessary

equipment and trained personnel to handle emergencies. The quality assurance committee for the facility will be the same at both locations.

The Department issued its Declaratory Ruling requiring the Center to obtain (1) a separate license for each location at which it offered an ambulatory surgical program, and (2) a certificate of need before it developed additional operating room, recovery room, and ancillary space at a second site within its service area. The Center petitioned for judicial review of the Department's Declaratory Ruling, contending the Department's ruling was contrary to law, in excess of its statutory authority, and arbitrary and capricious.

Upon review, the superior court affirmed the Department's ruling that the Center must obtain a separate license for each location at which it operates an ambulatory surgical program, but ruled that the Department had exceeded its statutory authority, had erred as a matter of law, and had acted arbitrarily and capriciously in ruling that the Center must obtain a certificate of need before it develops additional facilities at a second site within its service area. The superior court reversed the Department's Declaratory Ruling requiring the Center to obtain a new certificate of need before developing the second site. The Department appeals.

The only matter before this Court is the Department's ruling that the Center must obtain a new certificate of need before developing additional ambulatory surgical facilities at a second site within its service area. The Center has not appealed from the superior court's decision affirming the Department's ruling that it must obtain an additional license to operate the second site. For the reasons stated herein, we affirm the decision of the superior court and hold the Center is not required to obtain an additional certificate of need before developing additional operating room, recovery room, and necessary ancillary space at a second site within its service area.

[1] An appellate court's review of a superior court order regarding an administrative decision consists of examining the superior court order for errors of law; i.e. determining first whether the superior court utilized the appropriate scope of review and, second, whether it did so correctly. *In re Declaratory Ruling by North Carolina Com'r of Ins.*, 134 N.C. App. 22, 517 S.E.2d 134, *disc. review denied*, 351 N.C. 105, — S.E.2d — (1999) (citing *Act-Up Triangle v. Com'n for Health Service*, 345 N.C. 699, 483 S.E.2d 388 (1997)). The nature of

the error asserted by the party seeking review of the agency decision dictates the proper scope of review. If the party asserts the agency's decision was affected by a legal error, *de novo* review is required; if the party seeking review contends the agency decision was not supported by the evidence, or was arbitrary or capricious, the whole record test is applied. *Id.* Where the issue raised is one of statutory interpretation, the reviewing court is not bound by the agency's interpretation of the statute, although some deference is traditionally afforded the agency interpretation. *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

In this case, the Center alleged both that the Department's decision was affected by error of law, G.S. § 150B-51(b)(2)&(4), and that it was arbitrary and capricious, G.S. § 150B-51(b)(6). The superior court's decision indicated that the court applied a *de novo* standard of review in considering the Center's contention that the declaratory ruling was affected by error of law and was in excess of the Department's statutory authority, and that it considered the agency record in determining that there was no rational basis for the Department's ruling so that it was arbitrary and capricious. Thus, we conclude the superior court utilized the correct standards of review.

[2] Initially, we review the superior court's determination that the Department exceeded its statutory authority and erred as a matter of law when it declared that the Center would be required to obtain a new certificate of need to utilize additional space for an ambulatory surgical center at a second location within its service area. G.S. § 131E-178(a) provides, in pertinent part: "[n]o person shall offer or develop a **new institutional health service** without first obtaining a certificate of need from the Department . . . " (emphasis added). As relevant to this case, the term "new institutional health service" is defined by G.S. § 131E-176(16) to include "[t]he construction, development, or other establishment of a new health service facility," N.C. Gen. Stat. § 131-176(16)(a); "[t]he obligation by any person of a capital expenditure exceeding two million dollars ($2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service," N.C. Gen. Stat. § 131E-176(16)(b); and "[t]he acquisition by purchase, donation, lease, transfer, or comparable arrangement by any person of major medical equipment," N.C. Gen. Stat. § 131E-176(16)(p).

The relocation and expansion of a portion of its ambulatory surgical program to a second location within the service area for which

the Center already holds a certificate of need does not fall within the definition of a "new institutional health service" as contained in G.S. § 131E-176(16). The Center already operates an ambulatory surgical program at its principal location on North Wendover Road in Charlotte; the second site will continue to be operated as a part of the Center with the same ownership, administrative organization, and utilizing the same professional policies and personnel. As proposed by the Center in its Request for Declaratory Ruling, the development of the additional space would cost less than two million dollars and would not involve the acquisition of major medical equipment as defined by G.S. § 131E-176(14)(f). Thus, the Center's proposal is not a "new institutional health service" requiring a certificate of need, rather it is an expansion of an existing health service facility within the limitations permitted by the statutes which does not require a second certificate of need.

The Department contends, however, that the Ambulatory Surgical Facility Licensure Act, G.S. § 131E-145 *et seq.*, and the certificate of need statute, G.S. § 131E-175 *et seq.*, must be construed together. Thus, it contends, because the Center must obtain a separate license, pursuant to G.S. § 131E-147(d), to operate an ambulatory surgical facility at the second site, it must also obtain a separate certificate of need. We disagree. The statutes governing licensure of ambulatory surgical facilities and those governing certificates of need for new institutional health services are independent provisions; we find no provision in the certificate of need law which would indicate a legislative intent to make the requirement for a certificate of need dependent upon the requirement for a license. Indeed, the certificate of need law, as applicable to this case, requires a certificate of need for "new health services" or "health service facilities" as defined by G.S. § 131E-176(16), while the licensure statute requires licensure for "premises and persons." N.C. Gen. Stat. § 131E-147(d)&(e).

Therefore, we agree with the superior court that the Department exceeded its statutory authority and erred as a matter of law in ruling that the Center is required to obtain a separate certificate of need to develop additional operating rooms, a recovery room, and necessary ancillary space at a second site within the service area for which it already holds a certificate of need.

The superior court also determined that the Department's declaratory ruling "indicated a lack of fair and careful consideration" and was, therefore, arbitrary and capricious because it was directly

contrary to an earlier declaratory ruling by the Department in which it determined that a proposal by Forsyth Memorial Hospital to relocate a portion of its ambulatory surgical facility in Winston-Salem to a second site in Kernersville did not require an additional certificate of need. In view of our decision that the Department's declaratory ruling in this case was affected by error of law and in excess of its statutory authority, we need not determine whether such declaratory ruling was also arbitrary and capricious.

The decision of the superior court reversing the Department's declaratory ruling requiring the Center to obtain an additional certificate of need for the proposed expansion of its ambulatory surgical facility is affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

KIM R. MELTON, D.D.S., PLAINTIFF v. JOHN W. STAMM, D.D.S., DEFENDANT

No. COA99-417

(Filed 6 June 2000)

Pleadings— Rule 11 sanctions—delay of litigation—dismissal without prejudice—no abuse of discretion

The trial court did not abuse its discretion by dismissing a defamation action without prejudice but with an assessment of costs to plaintiff as a Rule 11 sanction for intentionally delaying litigation. Although defendant contended that the dismissal without prejudice effectively rewarded plaintiff's delay by allowing a year to recommence the action and nullified the statute of limitations defense, appellate review is limited to abuse of discretion. Dismissal with prejudice is available as a Rule 11 sanction but is not mandated.

Appeal by defendant from order entered 28 February 1999 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 11 January 2000.

Joyce L. Davis and Associates, by Joyce L. Davis and Laura J. Wetsch, for the plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton III, for the defendant-appellant.

LEWIS, Judge.

Plaintiff, acting *pro se*, brought a defamation action based on three letters, each written by defendant on 7 November 1996, 8 November 1996 and 23 June 1997. On 28 October 1997, ten days short of the expiration of the one-year statute of limitations on the first letter, plaintiff obtained an ex parte order extending the limitations period on the first two letters to 17 November 1997. On the same day, plaintiff timely caused summons to issue, but never delivered it to the sheriff for service. Thereafter, plaintiff caused six alias and pluries summonses to issue, on 17 November 1997, 22 January 1998, 23 April 1998, 8 July 1998, 1 October 1998 and 14 December 1998, none of which were delivered to the sheriff for service upon defendant. Each of the summons listed defendant's correct home and office addresses. On 26 January 1999, the defendant was served by mail. Defendant moved to dismiss the action pursuant to Rules 11(a), 12(b)(4), 12(b)(5) and 41(b) of the North Carolina Rules of Civil Procedure. On 11 February 1999, at the hearing on defendant's motion to dismiss, the court concluded "plaintiff intentionally delayed the litigation in violation of Rule 11(a)." Plaintiff's action was dismissed without prejudice pursuant to Rule 41(b), allowing plaintiff one year to commence a new action on the same claim, upon payment of costs. Defendant appeals, contesting the court's dismissal without prejudice.

Rule 41(b) provides that a defendant may move for dismissal of an action against him for failure of the plaintiff to prosecute or to comply with the Rules of Civil Procedure. N.C.R. Civ. P. 41(b). Generally, an involuntary dismissal under Rule 41(b) operates as an adjudication on the merits and ends the lawsuit. *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974). However, when the trial court specifically orders the dismissal to be without prejudice, as in this case, the dismissal is not an adjudication on the merits and plaintiff is allowed one year in which to re-file the action. N.C.R. Civ. P. 41(b).

Plaintiff has not cross-assigned error to the trial court's finding that plaintiff intentionally delayed litigation in violation of Rule 11(a), and it is binding on this Court. N.C.R. App. P. 10(d). Upon a violation

of Rule 11(a), some degree of sanction is mandatory. *Turner v. Duke University*, 91 N.C. App. 446, 449, 372 S.E.2d 320, 322 (1988), *rev'd on other grounds*, 325 N.C. 152, 381 S.E.2d 706 (1989). The trial court's decision of whether to impose mandatory sanctions under Rule 11(a) is reviewed de novo. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). However, our review concerns only the appropriateness of the sanction. Accordingly, the decision of which sanction to impose for violation of Rule 11(a), including involuntary dismissal, is exercised in the broad discretion of the trial court. *Id.* (appropriateness of sanctions reviewed for abuse of discretion); *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 439 (1985) (dismissal under Rule 41(b) reviewed for abuse of discretion). Thus, our review is limited to a determination of whether abuse appeared in the exercise of the trial court's discretion.

Defendant contends the trial court's dismissal without prejudice effectively rewarded plaintiff's delay by allowing a year to recommence the action, and effectively sanctioned defendant by nullifying his statute of limitations defense. Specifically, defendant argues a finding of intentional delay in violation of Rule 11(a) requires the trial court to dismiss plaintiff's action with prejudice. Thus, we must determine whether the trial court abused its discretion by dismissing this action without prejudice pursuant to Rule 41(b), based on its finding that Rule 11(a) was intentionally violated.

At the outset we note that in addition to dismissing the action without prejudice, the trial court assessed plaintiff costs of the action. Defendant's argument implies that the dismissal without prejudice effectively abrogated any penalty resulting from the court's imposition of costs. While our review focuses on whether the trial court was required to dismiss this action with prejudice, we emphasize that imposition of costs is one of many permissible sanctions under Rule 11(a). *Griffin v. Sweet*, —— N.C. App. ——, ——, 525 S.E.2d 504, 506 (2000).

Defendant contends *Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989), requires a trial court to dismiss an action with prejudice upon finding a violation of the Rules of Civil Procedure. We disagree. The plaintiff in *Smith* did not attempt to serve defendant for almost eight months after the complaint was filed. *Id.* at 317, 378 S.E.2d at 29. Based upon its finding that plaintiff willfully and intentionally violated Rule 4(a), the court dismissed plaintiff's action with prejudice. *Id.* The court held dismissal of an action with prejudice pursuant to Rule 41(b) is "an appropriate" remedy where the Rules of Civil

Procedure have been violated for the purpose of delay or gaining an unfair advantage. *Id.* at 318-19, 378 S.E.2d at 30. Although the holding in *Smith* illustrates that dismissal with prejudice pursuant to Rule 41(b) is available as a sanction for violating Rule 11(a), it does not mandate this sanction in any instance. In light of the trial court's broad discretion in determining the appropriate remedy, the court's recitation in *Smith* that a dismissal with prejudice is "appropriate" cannot serve as a basis for us to require dismissal with prejudice here. Based on this authority, we do not find the trial court abused its discretion. *See also Sellers v. High Point Mem. Hosp.*, 97 N.C. App. 299, 303, 388 S.E.2d 197, 199 (1990), (holding dismissal with prejudice proper where plaintiff intentionally delayed service of process in violation of Rule 4, but setting forth no requirement of dismissal with prejudice).

Defendant also contends that the instant case is controlled by *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986). Again, we are not persuaded, as *Estrada* is distinguishable. In *Estrada*, plaintiff filed a "bare bones" complaint the day before the applicable statute of limitations expired. *Id.* at 319, 341 S.E.2d at 539. Two minutes after filing the complaint, plaintiff filed a notice of dismissal purporting to voluntarily dismiss the action without prejudice, pursuant to Rule 41(a)(1). *Id.* No attempt was made to serve the summons, complaint or notice of dismissal on defendant—plaintiff filed the action merely to toll the statute of limitations for one year. *Id.* at 320, 341 S.E.2d at 540. Because the plaintiff gained a year in voluntarily dismissing the action, the next day plaintiff's counsel was able to file a new complaint without violating the statute of limitations. The trial court dismissed this second action with prejudice. *Id.* at 321, 341 S.E.2d at 540. The Court of Appeals reversed, allowing plaintiff to recommence the action within one year. The Supreme Court, however, held that dismissal with prejudice was required because plaintiff had no intention of actually prosecuting the first filed action. Instead, his sole purpose in filing the first action was to toll the statute of limitations and gain another year in which to re-file the claim. His action thus amounted to a "sham and false" pleading, thereby mandating dismissal with prejudice. *Id.* at 323-24, 341 S.E.2d at 542.

Defendant argues the rule from *Estrada* should apply to dismissals under Rule 41(b). We disagree. The plaintiff in *Estrada* had no intention of prosecuting the first filed action, and in addition, took advantage of its automatic right to an involuntary dismissal pursuant to Rule 41(a)(1). Under Rule 41(a)(1), before the plaintiff rests his

case, he is entitled to one voluntary dismissal upon mere provision of notice, without order of the court. Under Rule 41(b), however, a motion to dismiss must be made by defendant, and the trial court must necessarily review that motion. Thus, Rule 41(b) offers its own protection against flagrant violations of our Rules of Civil Procedure. Because of these differences in the applicable rules, given our standard of review, we will not extend the rule from *Estrada* requiring dismissal with prejudice to this case. As such, we find no abuse of discretion by the trial court based on the rule espoused in *Estrada*.

Although we view the plaintiff's practices less than exemplary, *see, e.g., Robinson v. Parker*, 124 N.C. App. 164, 476 S.E.2d 406 (1996), we reemphasize that our review is limited to finding an abuse of discretion. Until our Supreme Court either sets forth a rule mandating involuntary dismissal for abuses such as the one here or alters the applicable standard of review, we do not find the trial court abused its discretion by dismissing this action without prejudice, while assessing the costs to plaintiff.

Affirmed.

Judges GREENE and EDMUNDS concur.

Q.C. MEARES, JR., AS AN HEIR AT LAW OF MARY JANE MEARES, DECEASED, PLAINTIFF V. WARREN JERNIGAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARY JANE MEARES, DEFENDANT

No. COA99-869

(Filed 6 June 2000)

Estate Administration— qualification—willful misconduct

In this declaratory judgment action where plaintiff sought a determination that defendant has forfeited any right to inherit from decedent or to administer her estate based on abandonment, the trial court did not err in granting summary judgment in favor of defendant because plaintiff cannot produce evidence to support the essential element of willful conduct.

Appeal by plaintiff from order entered 4 March 1999 by Judge William C. Gore, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 10 May 2000.

Lee & Lee, by Junius B. Lee, III, for plaintiff-appellant.

Williamson & Walton, L.L.P., by C. Greg Williamson, for defendant-appellee.

MARTIN, Judge.

Plaintiff, the son of Mary Jane Meares, deceased, brought this action seeking a declaratory judgment that defendant has forfeited any right to inherit from Mary Jane Meares or to administer her estate. Plaintiff alleged that defendant, who was married to Mary Jane Meares at the time of her death on 30 January 1998, had actually and constructively abandoned Mary Jane Meares and that defendant had intentionally or negligently "hastened and brought about her death." Defendant filed an answer in which he denied the allegations of the complaint.

Subsequently, defendant moved for summary judgment, supported by his own affidavit, the affidavits of his two nieces, and an affidavit of Mary Jane Meares' sister. The affidavits, briefly summarized, tended to show that defendant and Mary Jane Meares had been close friends during their school days in the 1930s and 1940s. When defendant returned from service in World War II, Mary Jane Meares had married. Her husband died in 1988 and she and defendant renewed their friendship. They were married on 14 August 1991. Both were insulin dependent diabetics, but both were physically able and mentally competent to care for themselves and their residence until Christmas Day 1997, when Mary Jane became ill. Defendant took her to a hospital on 26 December 1997, where she was examined and released to return home. She did not improve and, a few days later, Mary Jane was admitted to the hospital. Defendant was told that she had suffered a series of strokes, and she became unable to speak. Defendant stayed with her at the hospital nearly constantly. Her condition did not improve and, in January 1998, defendant arranged for her to be admitted to a rehabilitation center in Florence, South Carolina. On the day after Mary Jane's admission to the rehabilitation center, defendant became ill and was hospitalized for several days. After his release from the hospital, he stayed at the home of his niece and was physically unable to visit Mary Jane on a regular basis. After she was hospitalized for the last time in Florence, he visited her on 28 January 1998, two days before her death.

Plaintiff responded with his own affidavit and with an affidavit of his wife. Their affidavits tended to show that on Christmas Day, 1997,

Mary Jane Meares was disoriented, unable to walk without assistance, and "very nearly comatose," but that defendant refused to permit plaintiff to take her to a doctor. On 30 December 1997, plaintiff and his wife attempted to talk to Mary Jane, but defendant refused to permit them to do so. The following day, plaintiff and his wife went to the residence where Mary Jane lived with the defendant, found the house filthy and roach infested, and observed Mary Jane sitting in her own feces and urine, with food particles on her face and clothing. Defendant was present, but had made no attempt to care for Mary Jane. Plaintiff and his wife insisted that defendant take Mary Jane to a physician, who admitted her to the hospital. On or about 10 January 1998, defendant removed his belongings from the marital home and began living with his niece in South Carolina. Neither plaintiff nor his wife ever saw defendant visit Mary Jane at the rehabilitation center, and he visited her only once, briefly, during her final hospitalization.

The record reflects that plaintiff stipulated to the entry of summary judgment dismissing his claim for relief. The trial court granted summary judgment in favor of defendant as to plaintiff's first claim for relief. Plaintiff appeals.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c). The evidence, and all reasonable inferences which may be drawn from it, must be considered in the light most favorable to the party opposing the motion. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 348 S.E.2d 772 (1986). The moving party has the burden of showing the absence of a triable issue and may do so by showing that an essential element of the opposing party's claim is nonexistent, or that the opposing party cannot produce evidence to support an essential element of the claim. *Pine Knoll Association, Inc. v. Cardon*, 126 N.C. App. 155, 484 S.E.2d 446, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 26 (1997).

G.S. § 31A-1 provides, *inter alia:*

> (a) The following persons shall lose the rights specified in subsection (b) of this section:
>
> . . .

(3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death;

. . .

(b) The rights lost as specified in subsection (a) of this section shall be as follows:

. . .

(1) All rights of intestate succession in the estate of the other spouse . . . .

The overriding policy behind this act is that no one should benefit from his own wrongdoing, G.S. § 31A-15, but the wrongful conduct must be more than negligent. See *Wilson v. Miller*, 20 N.C. App. 156, 160, 201 S.E.2d 55, 58 (1973) ("negligence is not one of the grounds for forfeiture of marital rights as set out in G.S. § 31A-1."). Wilful abandonment, like the other conduct constituting grounds for the forfeiture of spousal rights under G.S. § 31A-1, requires an intentional act.

> [O]ne spouse abandons the other, . . . , where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. . . . One spouse may abandon the other without physically leaving the home . . . . The constructive abandonment by the defaulting spouse may consist of affirmative acts of cruelty or of a wilful failure [to provide support] (citations omitted).

Powell v. Powell, 25 N.C. App. 695, 699, 214 S.E.2d 808, 811 (1975).

Even taking plaintiff's affidavits as true, and viewing all of the other evidence in the light most favorable to him, there is no evidence sufficient to support a finding of wilful abandonment of Mary Jane Meares by defendant. There is no evidence of any intent by defendant to cease, and not renew, his cohabitation with Mary Jane Meares, nor is there evidence of affirmative acts of cruelty by him or his wilful failure to provide for her. To the contrary, all of the evidence regarding the relationship between the spouses showed that defendant had every intent to continue with the marital relationship, and that any failure to care for, or cohabit with, Mary Jane Meares was due to the advanced age and deteriorating health of both spouses. Thus, plaintiff cannot produce evidence to support the essential element of wilful

conduct necessary to make out a case of abandonment and summary judgment was properly granted in favor of defendant.

Affirmed.

Judges WYNN and SMITH concur.

DAVIS LAKE COMMUNITY ASSOCIATION, INC., PLAINTIFF v. WILLIAM FELDMANN AND AUDREY M. OSZUST, DEFENDANTS

No. COA99-640

(Filed 6 June 2000)

Pleadings— Rule 11 sanctions—frivolous motion

The trial court did not err in assessing $400 in sanctions under N.C.G.S. § 1A-1, Rule 11(a) against defendants' counsel, based on defendants' filing of a frivolous N.C.G.S. § 1A-1, Rule 13(h) motion to join plaintiff's counsel as a party, because defense counsel was essentially attempting to refile the same counterclaims against plaintiff's counsel when those claims had already been dismissed.

Appeal by defendants from order entered 14 January 1999 by Judge David S. Cayer in Mecklenburg County District Court. Heard in the Court of Appeals 13 March 2000.

Sellers, Hinshaw, Ayers, Dortch, Honeycutt & Lyons, P.A., by John F. Ayers, III and Timothy G. Sellers for plaintiff-appellee.

Dean & Gibson, L.L.P., by Rodney Dean, for plaintiff-appellee's counsel.

Hewson Lapinel Owens, PA, by H.L. Owens, for defendant-appellants.

LEWIS, Judge.

The sole issue in this appeal is whether the trial court erred in assessing $400 in sanctions against defendants' counsel for violations of N.C.R. Civ. P. 11(a). We summarily conclude the trial court properly awarded sanctions and thus affirm its order.

This action commenced when plaintiff filed a complaint against defendants, seeking unpaid homeowners' assessments. Defendants eventually filed counterclaims against plaintiff and, although never officially made a party, plaintiff's counsel as well. In an order entered 16 October 1998, the trial court dismissed all of defendants' counterclaims (including those asserted against plaintiff's counsel) pursuant to N.C.R. Civ. P. 12(b)(6). Notwithstanding this order, defendants thereafter tried again to assert the same claims against plaintiff's counsel by filing a Rule 13(h) motion to join them as a party. The trial court denied that motion and then imposed sanctions against defense counsel based upon the fact that the counterclaims had already been dismissed and were thus barred by *res judicata*.

Rule 11(a) allows sanctions against attorneys who file pleadings or motions that are, among other things, asserted for an improper purpose or not warranted by existing law. Both grounds apply here. Rule 13(h) permits the joinder of any non-party whose presence is "required for the granting of complete relief in the determination of a counterclaim." Through its Rule 13(h) motion, defense counsel attempted to join plaintiff's counsel as a party. Under the plain wording of the rule, however, a counterclaim must first exist, thereby making joinder necessary. Here there was no such counterclaim, as all counterclaims were dismissed in the court's 16 October 1998 order.

Moreover, although couched in terms of Rule 13(h), defense counsel's motion was essentially an attempt to refile the same counterclaims against plaintiff's counsel that had just been dismissed. Because the trial court did not specify otherwise, its dismissal of those counterclaims pursuant to Rule 12(b)(6) operated as an adjudication on the merits and thus barred defense counsel from reasserting the same counterclaims later. *Dawson v. Allstate Insurance Co.*, 106 N.C. App. 691, 692, 417 S.E.2d 841, 842 (1992). Accordingly, defense counsel's Rule 13(h) motion was completely frivolous and not warranted by existing law, or a valid effort to change it.

The record in this case and the two companion cases filed today involving defense counsel include myriad motions and filings, many of which are unnecessary and/or frivolous. Through these motions and filings, defense counsel has wasted much of our courts' time and resources, all for appeals involving relatively small sums of money. We therefore not only affirm the trial court's imposition of sanctions; we wholeheartedly applaud it.

Affirmed.

Judges JOHN and EDMUNDS concur.

GUILFORD COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT OFFICE, EX REL. CHRISTIE G. GRAY, PLAINTIFF-APPELLANT v. KENNETH L. SHEPHERD, DEFENDANT-APPELLEE

No. COA99-583

(Filed 6 June 2000)

Child Support, Custody, and Visitation— support—wage withholding—current and past-due amounts

The trial court erred by directing that child support payments received through wage withholding be prorated between an order for current support and one for past-due support where the amounts withheld had not been sufficient to fully pay the amounts due under both orders. Priority must be given to the order for current support under the clear legislative mandate of N.C.G.S. § 110-136.7.

Appeal by plaintiff from an order entered 12 March 1999 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 9 May 2000.

Guilford County Attorney's Office, by J. Edwin Pons and Angela F. Liverman for plaintiff appellant.

No brief for defendant appellee.

HORTON, Judge.

On 19 March 1997, Kenneth L. Shepherd (defendant) was ordered in this case (96 CVD 5163) to pay $157.00 each two weeks as current support for his two minor children. On 25 February 1999, defendant appeared before the district court pursuant to an order to show cause. The trial court found at that hearing that defendant was employed and was paying child support through wage withholding, but that defendant had a total arrears of $6,521.36 as of the date of hearing. The trial court also found that defendant was ordered in another case (85 CVD 5839) to pay the sum of $278.40 per month

towards a total child support arrearage of $11,553.83, and was also paying under wage withholding in that case. Because the amounts withheld from defendant's pay had not been sufficient to fully pay the amounts due under both orders, most of the payments received from defendant's employer have been credited to current support. The trial court felt that that was "not fair to the arrears only case," and ordered that "all payments received shall be prorated and distributed as they are paid between this case [96 CVD 5163] and the Defendant's other case (85 CVD 5839). The Order to Show Cause is continued to May 25, 1999 to confirm that the payments are being prorated." Plaintiff appeals from the order directing that payments made by defendant be prorated, and we reverse the order of the trial court.

N.C. Gen. Stat. § 110-136.7 (1999) provides that

> [w]hen an obligor is subject to more than one withholding for child support, withholding for current child support shall have priority over past-due support.

The order of the trial court, while well-intentioned, violates the express terms of the statute, as the order in 96 CVD 5163 is one for current support, and the order in 85 CVD 5839 requires payments only towards past-due support. The trial court erred in directing that payments received through wage withholding be prorated. Priority must be given to the order for current support under the clear legislative mandate.

The order of the trial court is reversed, and the case remanded for entry of an order consistent with the provisions of N.C. Gen. Stat. § 110-136.7.

Reversed and remanded.

Judges GREENE and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 JUNE 2000

BUNCOMBE COUNTY ex rel. SEARLES v. JACKSON No. 99-656	Buncombe (92CVD474)	Reversed in part, vacated in part, and remanded
BUNCOMBE COUNTY ex rel. WILLIAMS v. JACKSON No. 99-655	Buncombe (89CVD2330)	Reversed in part, vacated in part, and remanded
CANTRELL v. SPOMER No. 99-451	Transylvania (97CVS289)	Reversed and remanded
CITY OF HAMLET v. CARING CTR. OF RICHMOND COUNTY, INC. No. 99-1022	Richmond (96CVS900)	Reversed and remanded for a new trial
CUNNINGHAM v. BOYD No. 99-699	Gaston (98CVS2838)	Affirmed in part, vacated in part, and remanded
EASTER v. CVS PHARMACY, INC. No. 99-789	Surry (97CVS1218)	Affirmed
FLOREK v. BORROR REALTY CO. No. 99-895	Wake (95CVS06691)	Affirmed
FRANKLIN v. BROYHILL FURN. INDUS. No. 99-557	Ind. Comm. (213523)	Vacated and remanded
GRIER v. AMERICAN & FOREIGN INS. CO. No. 99-1105	Wilson (99CVS172)	Affirmed
GUILFORD COUNTY ex rel. NEAL v. SHEPHERD No. 99-584	Guilford (85CVD5839)	Reversed and remanded
GUILFORD COUNTY ex rel. PEOPLES v. WOODS No. 99-585	Guilford (88CVD3815)	Reversed
HADDOCK v. DUVAL No. 99-662	Jones (98CVS68)	Affirmed
IN RE EVANS No. 99-1000	Buncombe (97J247) (97J248)	Affirmed
IN RE GOODRICH No. 99-611	Buncombe (96J210)	Vacated in part; affirmed in part

JOLLY v. JOLLY No. 99-112	Iredell (95CVD618)	Affirmed
LASCO v. MECKLENBURG COUNTY No. 99-899	Ind. Comm. (501443)	Reversed
LUTZ v. NVR No. 99-863	Mecklenburg (97CVS10390)	Affirmed
McINTYRE v. FORSYTH COUNTY DSS No. 99-1093	Wake (96CVS9615)	Affirmed
N.C. A&T STATE UNIV. v. BROWNE No. 99-746	Wake (98CVS5515)	Vacated and remanded
SISKO v. PRITCHETT No. 99-967	Caldwell (97CVS241)	Affirmed
SPRING GROVE ASSOCS. v. TOWN OF CONNELLY SPRINGS No. 99-893	Burke (97CVS185)	Affirmed
STATE v. ALSTON No. 98-1553	Durham (96CRS6421) (96CRS6422)	No Error
STATE v. BARNES No. 99-1279	Wilson (98CRS926) (97CRS12575) (97CRS13572) (96CRS15678)	Affirmed and remanded
STATE v. BIANCHINI No. 99-1227	Mecklenburg (98CRS19018) (98CRS19019)	No Error
STATE v. BYRD No. 99-1257	Forsyth (99CRS5980) (99CRS17795)	New trial in part; no error in part. Remanded for resentencing.
STATE v. COSTON No. 99-707	Lenoir (98CRS2746) (98CRS2747) (98CRS2748)	No error in part, vacated in part, remanded for correction of judgment in part.
STATE v. CRABTREE No. 99-576	Rowan (97CRS3157)	No prejudicial error
STATE v. DAWSON No. 99-1268	Craven (97CRS8887)	No prejudicial error

STATE v. DUBOSE No. 99-1197	Forsyth (98CRS27915) (98CRS27916)	No error
STATE v. FIEDLER No. 99-745	Pasquotank (97CRS5041) (97CRS5043)	No error
STATE v. GUARINO No. 99-779	Pasquotank (97CRS632)	No error
STATE v. HORNE No. 99-1364	Davidson (99CRS6329) (98CRS2438) (98CRS2637)	Affirmed
STATE v. JACKSON No. 99-1374	Mecklenburg (98CRS25389) (98CRS25391)	No error
STATE v. JOHNSON No. 99-1004	Davidson (98CRS7434) (98CRS7435)	No error
STATE v. McALLISTER No. 99-1343	Columbus (98CRS6888)	No error
STATE v. ROBERTS No. 99-1205	Guilford (98CRS82274) (98CRS82275) (98CRS82276)	No error
STATE v. WHITE No. 99-725	Davidson (98CRS7431) (98CRS7432)	No error
STATE v. WOODLEY No. 99-225	Currituck (98CRS1143)	New trial

DEPARTMENT OF TRANSPORTATION PLAINTIFF v. JOE C. ROWE AND WIFE, SHARON B. ROWE; HOWARD L. PRUITT, JR., AND WIFE, GEORGIA PRUITT; ROBERT W. ADAMS, TRUSTEE; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY AND HUSBAND, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL AND HUSBAND, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (FORMERLY APPALACHIAN POSTER ADVERTISING COMPANY, INC.), LESSEE; AND FLORENCE BOWMAN BOLICK, DEFENDANTS

No. COA97-1470

(Filed 20 June 2000)

1. Eminent Domain— condemnation for highways—size of taking—no common plan or scheme—no unity of use

The trial court erred in finding that tracts C and D were part of the area affected by the condemnation proceeding for highway purposes involving tracts A and B because: (1) the tracts were not being held for development under a common plan or scheme, and the best and highest use of tracts C and D remained economic development after the taking; and (2) no unity of use exists since defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken.

2. Eminent Domain— condemnation for highways—just compensation—fair market value of remainder tract—setoff with general benefits—unconstitutional

Although the "special benefits" rule under N.C.G.S. § 136-112(1) is constitutionally sound, the provision allowing the fair market value of the remainder tract of land to be set off with any "general benefits" resulting from the utilization of the part taken for highway purposes violates the constitutional requirement of providing just compensation in condemnation proceedings because: (1) the general provision charges the property owner with a cost for those benefits that the public also enjoys without being subjected to any similar charge; and (2) the property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he has actually lost.

3. Eminent Domain— condemnation for highways—equal protection—general benefits—unconstitutional statute

Since there is no compelling governmental interest to allow property owners who have part of a tract of land condemned for

highway purposes to be denied just compensation received by other property owners also subjected to condemnation proceedings, N.C.G.S. § 136-112(1) violates the equal protection clause because: (1) a property owner will receive just compensation if the taking is imposed under N.C.G.S. § 40A-64, even though the same property owner is not entitled to just compensation if the imposed taking is under N.C.G.S. § 136-112(1) since the condemnor in the latter statute is the Department of Transportation; and (2) a property owner who has a whole tract of land condemned under N.C.G.S. § 136-112(2) receives just compensation, while a property owner who has only a part of a tract condemned for highway purposes does not receive just compensation since subsection 2 of that statute does not require a consideration of the general benefits resulting from the condemnation.

Judge HORTON dissenting in part.

Appeal by defendants from judgment entered by Judge J. Marlene Hyatt on 17 June 1997 in Superior Court, Catawba County and orders entered by Judge James L. Baker, Jr., on 8 May 1997 and 16 May 1997 in Superior Court, Catawba County. Heard in Court of Appeals 27 August 1998. On 20 October 1998, the Court of Appeals issued a unanimous decision, 131 N.C. App. 206, 505 S.E.2d 911 (1998), holding in pertinent part that defendants Rowe and Pruitt did not file a timely appeal of preliminary orders entered by Judge Baker following a hearing under N.C. Gen. Stat. § 136-108, but finding error in the admission of evidence which required a new trial in the case. Under N.C. Gen. Stat. § 7A-31 (1999), the Supreme Court granted discretionary review of this Court's decision on the issue of timeliness of the appeal by defendants Rowe and Pruitt from the interlocutory orders entered on 8 May 1997 and 16 May 1997, and held that "the interlocutory orders entered did not affect a substantial right of defendants and that defendants were not required to immediately appeal the trial court's orders." The case was remanded to this Court for a determination of the issues raised by the appeal from the interlocutory orders.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.

Lewis & Daggett, P.A., by Michael J. Lewis, and Bell, Davis & Pitt, PA, by Stephen M. Russell, for defendants-appellants.

WYNN, Judge.

On 26 June 1995, the North Carolina Department of Transportation brought a declaration of taking action in Superior Court, Catawba County condemning 11.411 acres of the 18.123 acres of land belonging to Joe C. Rowe and his wife, Sharon B. Rowe, and Howard L. Pruitt, Jr., and his wife, Georgia M. Pruitt. However, because the Department of Transportation concluded that the benefits to the defendants' remaining 6.712 acres of property outweighed any loss to the defendants due to the taking, it did not make a deposit of estimated compensation for the 11.411 acres of taken property.

The defendants answered alleging that the "special or general benefits" provision of the condemnation statute, N.C. Gen. Stat. § 136-112(1) (1999), denied them equal protection in violation of the North Carolina and United States Constitutions. The defendants also challenged the Department of Transportation's claim that all of the defendants' remaining tracts of land should be considered in comparing the benefits of the taking to the defendants' resulting loss.

The trial court conducted a pretrial hearing under N.C. Gen. Stat. § 136-108 to settle issues other than the amount of damages. The evidence showed that after the taking the defendants were left with four small tracts of land identified as tracts A, B, C, and D, totaling 6.712 acres. Before the taking, tract A connected to the easternmost part of the property taken by the Department of Transportation and tract B connected at the westernmost part of the taken property. A 70 foot strip of land owned by the City of Hickory separated tract B from tracts C and D. A 60 foot strip of land owned by the City of Hickory separated tracts C and D from each other. The evidence showed that the City of Hickory intended to construct streets on the 60 and 70 foot strips; but, no streets had been constructed on the strips as of the date of the taking.

The trial court determined that the defendants' four remaining tracts had "physical unity" with the condemned property and were therefore, affected by the taking. The trial court also rejected the defendants' claim that the condemnation statute, N.C.G.S. § 136-112(1), was unconstitutional.

Following the preliminary hearing, the matter of just compensation was tried before a jury in the Superior Court, Catawba County. At trial, the trial court instructed the jury that it could consider any special and general benefits to the defendants' property which was not

taken, including tracts C and D. The jury returned a verdict concluding that the defendants were not entitled to any compensation for the involuntary taking of their 11.411 acres because the increased value of the remaining four tracts offset the loss of the taken property.

From the trial court's judgment consistent with the jury's verdict, the defendants appeal contending that: (I) the trial court erred in including tracts C and D in the area affected, thereby treating all of the defendants' property as a "unified tract" and (II) N.C.G.S. § 136-112(1), which allows a deduction from just compensation for "special or general benefits" resulting from the taking, is unconstitutional on its face and as applied to these defendants.

I. AREA AFFECTED BY THE TAKING

[1] The defendants first contend that the trial court erred in including tracts C and D in the area affected by the condemnation proceeding. In support, they argue that tracts C and D have neither physical unity nor unity of use with the land taken by the Department of Transportation.

In most cases, the landowner is the party who seeks to add additional property to the area affected by a condemnation taking of his property in an attempt to increase his damages. *See e.g., City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 451 S.E.2d 358 (1994). But in this case, it is the condemning authority—the Department of Transportation—which seeks to: (1) include tracts C and D in the area affected by the taking and (2) show that tracts C and D are benefitted by the taking to the extent that the Department of Transportation may avoid paying the landowner defendants any compensation whatsoever for the condemned 11.411 acres.

The determination of whether there is a unity of lands in a condemnation proceeding must be based on the facts of each case. The factors which are usually emphasized in such a determination include "unity of ownership, physical unity and unity of use." *Barnes v. North Carolina State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224-25 (1959). Although unity of use is given great weight, the tracts claimed as a single tract "must be owned by the same party or parties." *Id.* at 384, 109 S.E.2d at 225.

In this case, the parties stipulated that there was unity of ownership as to all tracts, including tracts C and D. The parties also agreed that a strip of land owned by the City of Hickory separates tracts C

and D and that another strip of land owned by the City of Hickory separates tracts C and B.

In general, parcels of land must be contiguous to constitute a single tract for the purpose of determining severance damages and benefits. *Id.* "Contiguous" means "[t]ouching at a point or along a boundary." Black's Law Dictionary, p. 315 (7th Ed. 1999). "But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit." *Barnes*, 250 N.C. at 385, 109 S.E.2d at 225.

> It is generally held that parcels of land separated by an established city street, in use by the public, are separate and independent as a matter of law. "When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated." Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines, and undeveloped streets and alleys are not sufficient alone to destroy the unity of land. "If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered actually contiguous and so as a single parcel or tract." 6 A.L.R.2d 1200, sec. 2.

Id.

In this case, the defendants did not retain any interest in the strips of land deeded to the City of Hickory for streets, thereby tending to support a finding that there was no physical unity between tracts C and D and the tracts identified as A and B. Even assuming there was physical unity between the aforementioned tracts, lands will not normally be considered to constitute a single tract for the purpose of determining severance damages and benefits unless there is unity of use.

In *Barnes*, our Supreme Court set out the common law test for unity of use, holding that:

> "there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used." The unifying use must be a *present* use. A mere intended use cannot be given effect.

Id. at 385, 109 S.E.2d at 225 (citation omitted).

Applying this rule in *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982), our Court held that all of the tracts making up a family-owned cattle farm was property affected by the taking of a portion of the property although the farm was divided by two roads and a railway. This Court found "that with a single exception the property was devoted to the single use of cattle farming." *Id.* at 524-25, 281 S.E.2d at 672. But our Court in *Tickle* did exclude one of the parcels from the area affected because that parcel was not used for farming. *See id.* at 527, 281 S.E.2d at 674.

Our General Assembly codified the *Barnes* rule in 1981 providing that "all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." N.C. Gen. Stat. § 40A-67; *see also Dept. of Transportation v. Nelson Co.*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 451 (1997) (holding that a partially completed office park being constructed as part of a master development plan met the unity of use requirement). It follows that where the uses of the tracts in question are independent of the portion which is taken rather than a part of the integrated economic unit, the tracts cannot be included as part of the area affected by the taking. *See N.C. Dept. of Transportation v. Kaplan*, 80 N.C. App. 401, 343 S.E.2d 182 (holding that two tracts were not unified because on the date of the taking neither tract was necessary to the "use and enjoyment" of the other tract), *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).

At the time of the taking in this case, the landowners held the four remaining tracts for commercial development. However, the tracts were not being held for "development under a common plan or scheme," as in *Yarbrough*, and the best and highest use of tracts C and D remained economic development after the taking. Because the defendants' use and enjoyment of tracts C and D were not related to

their use of tracts A and B, nor related to or affected by the area taken, no unity of use exists in this case. We, therefore, conclude that the trial court erred in finding that tracts C and D were part of the area affected by the taking.

II. CONSTITUTIONALITY OF N.C.G.S § 136-112(1)

The defendants next challenge the constitutionality of the provision allowing the fair market value of the remainder tract of land to be set off with any "special or general benefits resulting from the utilization of the part taken for highway purposes" under N.C.G.S. § 136-112(1). They contend that allowing a setoff for "general benefits" resulting from the taking violates the property owners' rights to (A) just compensation and (B) equal protection by depriving them of the just compensation received by other property owners also subjected to condemnation proceedings. We address each argument separately.

A. JUST COMPENSATION

"The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state." *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 389 (1969). But this "right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise." *Id.* That right, however, "is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *Id.* at 334, 167 S.E.2d at 388.

Under N.C. Gen. Stat. § 136-18 (1999), our General Assembly delegated to the Department of Transportation the right to condemn private property for the establishment and maintenance of public highways. N.C.G.S. § 136-112 sets out the method for determining "just compensation" for owners of property condemned for highway purposes. Under that statute, the method used to determine just compensation when only a part of a tract of land is taken for the construction of highways is

> the difference between the fair market value of the entire tract immediately prior to taking and the fair market value of the remainder immediately after 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(1). The statutory term "special benefits" refers to those benefits which arise from the peculiar relation of the land in question to the public improvement, while the term "general benefits" refers to those benefits which accrue to the public at large by reason of increased community prosperity resulting from the project. *See Kirkman v. State Highway Commission*, 257 N.C. 428, 433, 126 S.E.2d 107, 112 (1962), *Dept. of Transportation v. McDarris*, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

Although the General Assembly may enact a statute to determine the amount of just compensation to be given to landowners of condemned property, a statutory provision that transgresses the authority vested in the legislature by the Constitution empowers the judiciary to declare the act unconstitutional. *See Glenn v. Board of Education*, 210 N.C. 525, 529, 187 S.E. 781, 784 (1936) (stating that "[i]t is well settled in this State that the courts have the power, and it is their duty, in proper cases to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case"); *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E.2d 546, 552 (1953) (holding that the courts have a duty when it is clear a statute transgresses the authority vested in the legislature by the Constitution to declare the act unconstitutional).

Indeed, our Supreme Court has addressed many issues arising from the language of N.C.G.S. § 136-112(1). *See Kirkman*, 257 N.C. at 432, 126 S.E.2d at 111; *Highway Commission v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954); *Robinson v. State Highway Commission*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Williams v. Highway Commission*, 252 N.C. 514, 114 S.E.2d 340 (1960); *Templeton v. State Highway Commission*, 254 N.C. 337, 118 S.E.2d 918 (1961). But our Supreme Court has never addressed the issue presented in this appeal—whether the provision allowing *special* and *general* benefits to set off the fair market value of the remaining part of a tract of land under N.C.G.S. § 136-112(1) violates the constitutional requirement of providing just compensation in condemnation proceedings. Since the parties now bring this issue of first impression to this Court, we begin our consideration of this issue by looking at the just compensation methods employed by other jurisdictions to guide us in our determination.

1. RULES IN OTHER JURISDICTIONS ON THE USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

The general rule in partial takings cases is that "special benefits" may be used to set off damages to the remaining property, but not to offset the compensation due for the property taken. *See* 3 Nichols on Eminent Domain, § 8A.03, pp. 8A-46. In fact, jurisdictions[1] following the general rule have held that "a statute which authorizes the payment of any sum that is less than the market value of the land actually taken is unconstitutional." *See id.* at pp. 8A-48.

For instance, in *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972), the Idaho Supreme Court held that under Idaho's eminent domain statute, benefits which may accrue to the property remaining from a taking may not be considered, except as a setoff against the damages that have accrued to the remaining property as a result of the taking. The Idaho Court recognized that the tendency has been away from the rule that special benefits can be set off from the entire compensation. Instead, the Idaho Court reasoned that the development of the rule that the land taken, at least, must be paid for in money without consideration of benefits to the remaining land is,

> 'undoubtedly explained by the fact that the propensity of many American communities to be over-sanguine in regard to the beneficial results of projected public improvements had resulted in the taking of much valuable private property for which the owner never received any compensation other than anticipated benefits which never accrued.'

Id. at 401 (quoting 3 Nichols on Eminent Domain (Rev. 3d. ed.) § 8.6206(1) p. 97).

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1. *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972); *Chiesa v. State*, 43 A.D.2d 359, 360-61 (N.Y. 1974); *William Natural Gas Co. v. Perkins*, 952 P.2d 483 (Okla. 1997) (holding that in a partial taking case in which condemnor is taking only part of condemnee's property, an increase in the value of remaining property may be offset against any injury to the remaining property, but an increase in the value of the remaining property may not be offset against the value of property that was taken); *State Dep't of Highways v. Stegemann*, 269 So.2d 480 (La. 1972) (holding that a landowner is entitled to demand at least the fair market value of the property taken in money from an expropriating authority, even though he may be damaged to a lesser extent by the taking); *State Highway Comm'n v. Hooper*, 488 P.2d 421 (Or. 1971) (holding that special benefits to the remainder as a result of a partial taking may be used only to reduce any damages claimed to the remainder and cannot be used to reduce the fair market value of the land actually taken); *State v. Carpenter*, 89 S.W.2d 979 (Tex. Comm'n App. 1936) (holding that where a portion of land is taken by condemnation, damages to the remainder can be offset by benefits allowed by the law).

Likewise, in *Chiesa v. New York*, 43 A.D.2d 359 (N.Y. App. Div. 1974), the New York Appellate Court held that it would be unconstitutional to allow any benefits to the claimant's remaining lands from the State's appropriation of a portion of the claimant's property to be used as an offset against the award for direct damages for the property taken. In reaching this holding, the New York Court determined that the "application of a rule permitting a setoff against direct damages for enhancement to the remainder would be an unconstitutionally discriminate exercise of taxing power in favor of a neighboring owner who suffers no loss of land, but benefits by the public improvement which led to the taking." *Id.* at 360. The New York Court found that just compensation

> means fair and adequate monetary compensation for land actually taken, regardless of any benefits which may be conferred upon the remainder due to the direct taking. . . .

Id.

Notwithstanding the general rule, the United States Supreme Court, along with a number of other jurisdictions, has held that in partial takings cases, setting off the value of the remaining part of the land with "special benefits" resulting from the purpose for which a portion of the tract of land was taken does not violate a property owner's right to just compensation.[2] According to the Supreme Court, "[j]ust compensation means a compensation that would be just in regard to the public, as well as in regard to the individual." *Bauman v. Ross*, 167 U.S. 548, 570, 42 L. Ed. 270, 281 (1897). Moreover, the "just compensation required by the Constitution to be made to the [property] owner is to be measured by the loss caused to him by the appropriation." *Id.* at 574, 42 L. Ed. at 283. Therefore, the property owner "is entitled to receive the value of what he has been deprived of, and no more." *Id.*

> Consequently, when only part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the com-

2. *See Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. 270 (1897); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960) (holding that when the taking is by a municipal corporation, special benefits may be set off, even from the value of the land taken); *State v. Midkiff*, 516 P.2d 1250 (Haw. 1973) (holding that in non-highway taking cases, special benefits may be set off against the value of the part taken and severance damages); *Collins v. State Highway Comm'n*, 66 P.2d 409 (An. 1973) (holding that when a municipal corporation acquires property for a highway purpose, special benefits may be setoff from the value of the land taken and damages); *State v. Ward*, 252 P.2d 279 (Wa. 1953) (holding that when the taking is by a state or municipal corporation, benefits may be set off from the value of the property taken and damages).

> pensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.

Id.

In contrast to the general rule's application to "special benefits", most jurisdictions[3] hold that "general benefits" may not be used to set off damages "because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of improvement and who shares in the increased value without any pecuniary loss." Nichols, § 8A.03, pp. 8A-47.

> Arguably the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since he is singled out and deprived of a share in the increased prosperity of his fellow citizens merely because the public happens to want a portion of his land. The condemnee pays in taxation for his share of general benefits, just as other members of the public, and therefore is entitled to receive his fair portion of general advantages brought about by a public improvement.

However, the United States Supreme Court left the determination as to whether using *general* benefits as a setoff deprives a property owner of just compensation to the states. In fact, the Court stated that:

> we are unable to say that [the property owner] suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

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3. *See e.g.*, *Phoenix Title & Trust Co. v. State of Arizona ex rel. Herman*, 425 P.2d 434 (Ariz. 1967); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960); *Denver Joint Stock Land Bank v. Bd. of County Comm'rs of Elbert County*, 98 P.2d 283 (Colo. 1940); *Schwartz v. City of New London*, 120 A.2d 84 (Conn. Com. Pl. 1955); *Acierno v. State of Delaware*, 643 A.2d 1328 (Del. Supr. 1994); *City of Wichita v. May's Co. Inc.*, 510 P.2d 184 (Kan. 1973); *Louisiana Power & Light Co. v. Lasseigne*, 240 So.2d 707 (La. 1970); *Amory v. Commonwealth*, 72 N.E.2d 549 (Mass. 1947); *State Highway Comm'n v. Vorhof-Duenke Co.*, 366 S.W.2d 329 (Mo. 1963); *Frank v. State, Dep't of Roads*, 129 N.W.2d 522 (Neb. 1964); *State Highway Comm'n v. Bailey*, 319 P.2d 906 (Or. 1957); *State v. Davis*, 140 S.W.2d 861 (Tex. Civ. App. 1940), *disapproved by State v. Meyer*, 403 S.W.2d 366 (Tex. 1966); *State Highway Comm'n v. Rollins*, 471 P.2d 324 (Wyo. 1970).

McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918); *see McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931) (stating that "the United States Supreme Court leaves the question to the states, with assurance that, if the Constitution and laws of the state permit a deduction of general benefits, it will not violate the Fifth and Fourteenth Amendments to the United States Constitution").

Accordingly, some states[4] do not follow the majority rule; rather, these states allow both *special* and *general* benefits to set off either the severance damages or the value of the land of the property taken. *See* Nichols, § 8A.03, pp. 8A-47.

2. THE EFFECT OF NORTH CAROLINA'S USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

In North Carolina, N.C.G.S. § 136-112(1) permits both *special* and *general* benefits to set off the value of the land taken for highway purposes. Most recently, this Court in *Department of Transportation v. Mahaffey*, 2000 WL 390133 137 N.C. App. 511, 528 S.E.2d 381 (2000) in construing *Bauman*, 167 U.S. at 574, 42 L. Ed. 2d at 283, stated that:

> [a]s we are unable to discern any material difference before the *Bauman* court and section 136-112, we hold section 136-112 does not violate the federal Due Process Clause.

Mahaffey, 137 N.C. App. at 517, 528 S.E.2d at 385.

In *Bauman*, the United States Supreme Court upheld a federal statute which provided that in estimating damages for the taking of any land, the jury should take into consideration the benefit to the owner by enhancing the value of the remainder of his land. *Bauman*, 167 U.S. at 548, 42 L. Ed. 2d at 270. The statute in *Bauman*—unlike N.C.G.S. § 136-112(1)—also provided for an assessment of one-half the cost of any improvement upon the adjacent property and directed that, in case any sum had been deducted for benefits from the award for land taken, allowance for the deduction should be made in determining the amount of the assessment. *Id.*

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4. *See e.g.*, *State ex rel. State Highway Comm'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 417 P.2d 68 (N.M. 1966) (holding that the benefit of construction of a highway which enhances the value of a remainder of a tract of land is to be included in the determination of the value of the land after the taking); *Smith v. City of Greenville*, 92 S.E.2d 639 (S.C. 1956) (holding that the benefits to the residue of a landowner's land from the construction of a street should be appied against the value of the land actually taken).

The United States Supreme Court limited its decision in *Bauman* by its later pronouncement in *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156. In *McCoy*, the Supreme Court held that states have the discretion of determining whether using *general* benefits as a setoff deprives a property owner of just compensation. *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156. Thus, since we only addressed the applicability of *Bauman* in *Mahaffey*, we left undetermined the question of whether using *general* benefits as a setoff constitutes just compensation.

And, we again reiterate the holding of *Mahaffey* that the "special benefits" rule of N.C.G.S. § 136-112(1) is constitutionally sound. In comparing that provision with the various methods employed by other jurisdictions in calculating just compensation, we find that our statutory rule allowing "special benefits" to affect the value of the remaining tract of land does not violate the constitutional requirement of providing just compensation in condemnation proceedings. Indeed, since any resulting "special benefits" are uniquely enjoyed by the property condemned, assessing a cost through a setoff is constitutionally permissible and has been consistently approved by the United States Supreme Court, along with a number of other jurisdictions.[5] *See Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112.

Moreover, given the legislature's discretion in determining just compensation, without a clear indication that a different result must exist, the legislature's enactment of the statute's provision for "special benefits" must be upheld. *See Glenn*, 210 N.C. at 525, 187 S.E. at 781; *Wilson*, 238 N.C. at 23, 76 S.E.2d at 552. For a different result to be reached, such a determination would have to made by our legislature, not this Court. *See id.*

[2] However, we reach a different conclusion as to our "general benefits" rule under N.C.G.S. § 136-112(1), which allows the *general* benefits to affect the value of the remaining property. Since "general benefits" are those benefits which accrue to the general public as a result of the condemnation of certain property for public purposes, that provision of the statute charges the property owner with a cost for those benefits that the public also enjoys without being subjected to any similar charge. *See McDarris*, 62 N.C. App. at 55, 302 S.E.2d at 277. In effect, the property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he has actually lost. *See* Nichols,

5. *See* note 2, *supra*.

§ 8A.03, pp. 8A-49 ("Forcing the condemnee not only to give up a portion of his land, but also to receive nothing for it places a disproportionate share of the cost of the public improvement on his shoulders."). He is placed in a position where he is being required to carry the undue burden of paying an additional cost not paid by the public merely because his property has been taken for public purposes.

To emphasize the undue burden placed upon a property owner subjected to the provisions of N.C.G.S. § 136-112(1), consider the following hypothetical case: Farmer Jones owns 20 acres of land with a fair market value of $50,000.00. Through eminent domain, the government condemns 15 acres of Farmer Jones' property for highway purposes. In computing just compensation under N.C.G.S. § 136-112(1), the government determines that the value of the surrounding property and the remaining 5 acres has so greatly increased in value as a result of the new highway that Farmer Jones should get nothing for the 15 acres that it took from him. Farmer Jones' sacrifice of 15 acres of his land for the surrounding land owner and the public illustrates how a pure economic analysis can fail to import fairness and due process in condemnation damage determination. It further shows that the "cost and benefit" result of computing just compensation under N.C.G.S. § 136-112(1) fails to consider the private involuntary taking of land for public good. Should the government decide who will get the *full* benefit of his land at the *expense* of others? Surely the results under our statute suggest that had the government taken another landowner's land, then Farmer Jones would have enjoyed the increased valuation of his entire 20 acre tract.

Likewise, in this case the Department of Transportation condemned 11.411 acres of the defendants' 18.123 acres of property. In return, the defendants received no compensation for their taken property because the accrued benefits resulting from the roadway caused the fair market value of the remaining 6.712 acres to equal or exceed the fair market of the whole tract of land before the taking.

In essence, by allowing general benefits to set off the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee while providing a windfall to the public. We agree with the rule in most jurisdictions that a statute, such as N.C.G.S. § 136-112(1), allowing *general* benefits to be used as a setoff is unconstitutional.[6] Accordingly, we hold that the provision

6. *See* note 3, *supra*.

regarding *general* benefits under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirement of providing just compensation in condemnation proceedings.

B. EQUAL PROTECTION

[3] Alternatively, the defendants contend that N.C.G.S. § 136-112(1) violates the equal protection rights of the property owners who have part of a tract of land condemned for highway purposes because they are denied the just compensation received by other property owners also subjected to condemnation proceedings. We agree.

In addressing a claim that the Equal Protection Clause has been violated, the courts employ a two-tiered analysis. *See In re Consolidated Appeals of Certain Timber Companies from the Denial of Use Value Assessment and Taxation by Certain Counties*, 98 N.C. App. 412, 419, 391 S.E.2d 503, 507 (1990).

The upper tier is employed

> [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right . . . or when a governmental classification distinguishes between persons in terms of any right, upon some 'suspect' basis . . . .

Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (citations omitted). This tier, calling for strict scrutiny, "requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest." *Id.*

The lower tier is employed "[w]hen an equal protection claim does not involve a 'suspect class' or a fundamental right . . . ." *Id.* "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Id.*

In the present case, the defendants support their equal protection claim by comparing the method of determining just compensation under subsection (1) of N.C.G.S. § 136-112 with the methods of determining just compensation when: (1) part of a tract of land is condemned under Chapter 40A of the General Statutes and (2) a whole tract of land is condemned for highway purposes under subsection (2) of N.C.G.S. § 136-112.

Because just compensation—the basis of the classification in the present case—is a fundamental right protected under both the federal and state constitutions, we employ strict scrutiny in analyzing the defendants' equal protection claim. *See* U.S. Const. amend. V; N.C. Const. Art. I § 19.

As stated, N.C.G.S. § 136-112(1)'s provision allowing the general benefits to be used as a setoff violates the property owners' rights to just compensation for the property taking. However, a similar setoff is not imposed upon a property owner subjected to a taking under N.C. Gen. Stat. § 40A-64(b). In fact, this statute provides that for partial takings cases, the method for determining just compensation is

> the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

N.C.G.S. § 40A-64(b) (1999).

Therefore, a property owner will receive just compensation if the taking is imposed under N.C.G.S. § 40A-64(b), even though the same property owner is not entitled to compensation which is just if the imposed taking is under N.C.G.S. § 136-112(1). Both statutes involve partial takings cases with the difference being who is the condemnor. Under the former statute, the condemnor is an entity other than the Department of Transportation, while the Department of Transportation is the condemnor under the latter statute.

Hence the classification between N.C.G.S. § 40A-64(b) and N.C.G.S. § 136-112(1) is based on whether the taking is for highway purposes. Because there is no compelling governmental interest to support this classification, we must find that a property owner's equal protection rights are violated by allowing such a classification to exist.

Also, we find that a property owner's equal protection rights are violated by the distinction in the compensation method under subsection (1) of N.C.G.S. § 136-112 and the compensation method under subsection (2) of N.C.G.S. § 136-112. Subsection (2) of the statute, like N.C.G.S. § 40A-64(b), does not require a consideration of the general benefits resulting from the condemnation. In particular, N.C.G.S. § 136-112(2) provides that:

> [w]here the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking.

N.C.G.S. § 136-112(2).

Thus, a property owner who has a whole tract of land condemned for highway purposes under N.C.G.S. § 136-112(2) receives just compensation, while a property owner who has only a part of a tract of land condemned for highway purposes does not receive just compensation. The result of the classification is that a property owner who has only a part of a tract of land condemned for highway purposes, as opposed to a whole tract of land condemned for the same purpose, is being penalized for not having his whole tract condemned. No compelling governmental interest exists to support such a penalty. Therefore, the provision allowing *general* benefits to be used as a setoff under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirements of equal protection under the law.

Finding N.C.G.S. § 136-112(1) to be violative of both the constitutional requirement of just compensation and the constitutional requirement of equal protection, we hold that the trial court erred in concluding "that the defendants . . . failed to present sufficient evidence to support the constitutional issues raised and the relief requested." For the reasons set out in our prior opinion filed herein, and because of the errors stated herein, there must be a

New trial.

Judge HUNTER concurs.

Judge HORTON dissents in part in a separate opinion.

Judge HORTON dissenting in part.

I concur in that portion of the majority opinion which holds that the trial court erred in finding that tracts C and D were part of the area affected by the taking of defendants' property. I respectfully dissent, however, from that portion of the majority opinion holding that N.C. Gen. Stat. § 136-112(1) violates "both the constitutional requirement of just compensation and the constitutional requirement of equal protection . . . ."

I.

With regards to the constitutionality of N.C. Gen. Stat. § 136-112(1), most of the arguments now advanced by the defendants were not made in the trial court and are not properly before us on this 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). In their "Answer, Motions and Counterclaim," defendants allege as a First Defense "[t]hat N.C. Gen. Stat. § 136-112(1), insofar as it provides that the measure of damage be determined 'with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes,' " denies the defendants just compensation in violation of Article I, Section 19, of the North Carolina Constitution ("law of the land" provision); Amendment V to the United States Constitution ("just compensation" provision); and Amendment XIV to the United States Constitution ("equal protection" and "due process of law" provisions).

At a pretrial hearing pursuant to N.C. Gen. Stat. § 136-108, the defendants argued there were two bases for their constitutional challenge to N.C. Gen. Stat. § 136-112(1). Defendants first made an equal protection argument, contending that just compensation for a partial taking of property is calculated under two different statutory schemes: one for property owners whose lands were condemned by the Department of Transportation (DOT) pursuant to the provisions of Chapter 136, and the other for property owners whose lands were condemned by private and local public condemnors pursuant to the provisions of Chapter 40A of the General Statutes. In determining the issue of damages under the provisions of N.C. Gen. Stat. § 136-112(1), the finder of fact is to consider "general and special benefits" to the portion of the lands not taken, while under N.C. Gen. Stat. § 40A-64(b) no such consideration is mandated. Defendants argued to the trial court that since the measure of compensation was different depending on the identity of the condemning authority, landowners whose property was condemned were treated differently and thus deprived of equal protection. Defendants also stated prior to their argument on this point that their "constitutional attack on the benefits portion of Chapter 136 . . . *is based very simply on this premise* . . . ." (Emphasis added.)

The second argument made by defendants was that DOT acted arbitrarily and capriciously in failing to offer any compensation to defendants, treating these defendants in a different manner than other nearby landowners—such as Martin Marietta—who had been

paid compensation by DOT. That contention was properly overruled by the trial court due to an absence of evidence of arbitrariness or caprice by DOT, and is not before us at this time.

Further, two of defendants' Assignments of Error relate to the constitutional question raised by defendants. They are:

3. The Trial Court's denial of Defendants' constitutional defenses on the grounds that G.S. 136-12(1) [sic] violates the equal protection provisions of the United States and North Carolina Constitutions.

4. The Trial Court's allowing the Jury to consider the benefit to Defendants' property in making its determination as to damages recoverable by the Defendants for the taking in that this violated Defendants' rights to equal protection under the United States and North Carolina Constitutions.

Even according a generous interpretation to the Assignments of Error, it is obvious that defendants have not preserved and brought forward a constitutional challenge based on a due process argument. Further, a unanimous panel of this Court has recently squarely rejected such an argument in *Dept. of Transportation v. Mahaffey*, 137 N.C. App. 511, 528 S.E.2d 381 (2000) ("[S]ection 136-112 does not violate the federal Due Process Clause. It, therefore, follows our state constitution 'law of the land' clause is not violated.")

At most, then, defendants have brought forward (1) the equal protection argument they advanced below centering on the different measures of damages for landowners whose property is taken under Chapter 136 and those whose property is taken under Chapter 40A; and (2) an argument that the trial court erred in allowing the jury to consider the "special and general benefits" to defendants' property in determining damages. Thus, much of the majority opinion deals with questions of constitutional law which are not properly before us, and declares section 136-112(1) unconstitutional based on theories not advanced before the trial court. "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

II.

The constitutional issue which is properly before us is whether the equal protection provisions of the Constitutions of the United

States and the State of North Carolina are violated by the different damages schemes found in sections 136-112(1) and 40A-64(b).

A sovereign state has the inherent power to take the property of its citizens for public use. The exercise of that power is limited, however, by constitutional guarantees of due process and payment of "just compensation" for the property taken. *State v. Club Properties*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). In Chapter 136 of our General Statutes, our General Assembly confers the right of eminent domain on DOT, and sets out the method for determining just compensation for the property taken. N.C. Gen. Stat. § 136-103, *et seq.* Where an entire tract is taken, the measure of damages is "the fair market value of the property at the time of taking." N.C. Gen. Stat. § 136-112(2) (1999). Where only a portion of a tract is taken, as in the case before us,

> the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, *with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.*

N.C. Gen. Stat. § 136-112(1) (1999) (emphasis added). The burden of proof on the existence and amount of such special or general benefits is on DOT. *Board of Transportation v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980). Defendants here contend that allowing the jury to consider the benefits to the remainder of their property affected by the taking violates their right to equal protection under the law. Defendants stress that where property is condemned by a private condemnor or a local public condemnor pursuant to the provisions of Chapter 40A of the General Statutes, a different method of determining damages is mandated. N.C. Gen. Stat. § 40A-64(b) provides that

> [i]f there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

Our Supreme Court set out in *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980), the traditional two-

tiered "scheme of analysis when an equal protection claim is made." *Id.* at 10, 269 S.E.2d at 149. First,

> [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.

Id. at 11, 269 S.E.2d at 149 (citations omitted). I do not find evidence here that the defendants are members of a class which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Id.* Nor do I find an infringement of the defendants' constitutionally guaranteed right to just compensation for property taken for a public purpose. "Just compensation" is not defined in either our Constitution or that of the United States, but is left to the sound discretion of state legislatures. Our General Assembly has set out in N.C. Gen. Stat. § 136-112 the method for determining just compensation where property is taken by DOT.

Moving then to the second tier of the analysis, the question becomes whether N.C. Gen. Stat. § 136-112 bears a rational relationship to a legitimate governmental purpose. "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

Clearly, the construction and maintenance of a statewide system of roads is a legitimate public purpose. In the course of development of roads throughout the state, it is inevitable that some privately held property must be taken for public purposes. Our General Assembly has granted the power of eminent domain to DOT. N.C. Gen. Stat. § 136-18 (1999). In the interest of fairness and in satisfaction of constitutional guarantees that just compensation be paid to a citizen whose property is taken for public purposes, the General Assembly has set out in N.C. Gen. Stat. § 136-112 the measure of damages for such taking. All citizens whose property is taken by DOT have their damages measured by the same standard. I find here no

evidence that defendants have been treated in a different manner than other members of the class of persons affected by condemnation of a part of their property for highway purposes. After careful consideration of defendants' arguments and contentions, I cannot find any evidence of a violation of their constitutional rights to equal protection, and find support for my opinion in the prior decisions of our Supreme Court.

It has long been settled in North Carolina that it is within the power of the General Assembly to provide that, when only a portion of the landowner's property is taken in a condemnation action, the trier of fact is to consider both special and general benefits to the remainder of the landowner's property in determining the amount of just compensation to be paid him. *Miller v. Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *Wade v. Highway Com.*, 188 N.C. 210, 124 S.E. 193 (1924); *Elks v. Comrs.*, 179 N.C. 241, 102 S.E. 414 (1920); *Bailey v. Highway Commission*, 214 N.C. 278, 199 S.E. 25 (1938).

In *Miller*, our Supreme Court upheld the validity of an Act of our General Assembly providing that both general and special benefits must be considered in assessing landowners' damages arising from a condemnation of a portion of their property by the City of Asheville. "The Legislature, in conferring upon the corporation [City of Asheville] the exercise of the right of eminent domain, can *in its discretion* require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages." *Miller*, 112 N.C. at 768, 16 S.E. at 764 (emphasis added). Where the legislature made no such provision, however, the "old" rule applied, and only special damages could be deducted. In *R.R. v. Platt Land*, 133 N.C. 266, 45 S.E. 589 (1903), after tracing the history of the rule, Justice Connor stated that "*in the absence of any express language to the contrary*, only special benefits can be deducted from the compensation or damages assessed against the corporation [Southport, Wilmington and Durham Railroad Company]." *Id.* at 274, 45 S.E. at 592.

In *Elks*, Chief Justice Clark, who authored the opinion in *Miller*, again cited the holding of the Supreme Court in *Miller* that the legislature could "authorize the deduction of general as well as special benefits from the damages assessed, but holding that if the statute does not so provide, only the special benefits will be deducted." *Elks*, 179 N.C. at 247, 102 S.E. at 417.

In 1923, the General Assembly amended the statutes setting out the measure of damages in condemnations brought by the State Highway Commission, to provide that both "general and special benefits shall be assessed as off-sets against damages . . . ." Public Laws 1923, Chapter 160, sec. 6. Our Supreme Court, citing *Miller* with approval, upheld the validity of the change and its application to pending litigation in *Wade*, 188 N.C. 210, 124 S.E. 193. The Supreme Court remanded *Wade* to the trial court for a new trial on damages because the trial court only charged the jury to consider the special benefits accruing to the landowner, and did not include the general benefits to the landowner's remaining property. *Id.* Again, in *Bailey v. Highway Commission*, the Supreme Court remanded for a new trial because the trial court did not charge the jury to consider the general benefits to the landowner's remaining property as an offset against the amount of compensation. 214 N.C. 278, 279, 199 S.E. 25, 26 (1938). *See also Kirkman v. Highway Commission*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962), and the cases cited therein.

Thus, it appears that for more than a century, our Supreme Court has upheld the doctrine of *Miller v. Asheville* and the power of the General Assembly to provide that damages in a condemnation case may be offset by special benefits, general benefits, or both special and general benefits. In the exercise of its discretion, the General Assembly has provided for a different measure of damages where property is taken by private condemnors and local public condemnors under the provisions of Chapter 40A. N.C. Gen. Stat. § 40A-64(b). By contrast, where property is taken by DOT, as here, the jury is to take into account both special and general benefits in determining the issue of damages. N.C. Gen. Stat. § 136-112(1). I do not believe that any equal protection violation arises because of the distinction between the measure of damages in the two statutes. As Chief Justice Clark explained in *Elks*:

> The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but *where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general.*

Elks, 179 N.C. at 245, 102 S.E. at 416-17 (emphasis added).

I am aware that our sister states have enacted a wide variety of statutory schemes with regard to the measure of damages in condemnation cases, and that many of them do not provide for an offset for special and general benefits against property which remains after a taking. *See* 3 Nichols on Eminent Domain, § 8A.03, pp. 8A-26 to 8A-29. However, as our Supreme Court has consistently held, that decision is for our legislature, not for this Court. "All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right." *Miller*, 112 N.C. at 768, 16 S.E. at 764.

A statute is presumed to be constitutional, so one who challenges its constitutionality has the burden of establishing it. *State v. Johnson*, 124 N.C. App. 462, 474, 478 S.E.2d 16, 23 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). I agree with the trial court, which concluded after a hearing "that the defendants have failed to present sufficient evidence to support the constitutional issues raised and the relief requested."

III.

In their fourth Assignment of Error, defendants argue that the trial court erred in allowing the jury to consider the benefits to their property in determining damages. Although I find no constitutional infirmity in our statutory scheme for measuring damages in a Chapter 136 condemnation action, I also note that defendants did not object to the jury charge of the trial court relating to calculation of damages. Prior to submission of the case to the jury, the trial court held a charge conference and explained to counsel that it would be using section 835.12 of the Pattern Jury Instructions, "which is the eminent domain, partial taking by the DOT and I will include the benefit portion of that charge." Defendants did not object to the use of the pattern instruction, and asked only that the trial court use section 101.25 on expert witnesses, and section 101.30, dealing with interested witnesses.

The trial court then charged the jury, among other things, that in determining defendants' damages it might consider "any general or special benefits resulting from the utilization of the part [of the property] taken for public use." After completion of the charge, the trial court asked counsel in the absence of the jury whether they had objections, changes, additions, or deletions to the charge. Counsel for

the defendants answered that they did not. It appears that defendants cannot now assign error to any portion of the jury charge, particularly to those portions in which the trial court instructed the jury on the measure of damages. N.C.R. App. P. 10(2).

While I agree that the defendants are entitled to a new trial for reasons set out in our prior opinion in this case, and in Section I of the majority opinion, I dissent from that portion of the majority opinion which would declare N.C. Gen. Stat. § 136-112(1) unconstitutional for reasons not properly before us. In any event, we are not justified in declaring invalid this enactment of our legislature, its unconstitutionality not being "plainly and clearly the case." *Glenn v. Board of Education of Mitchell County, et. al.*, 210 N.C. 525, 187 S.E. 781 (1936).

PETER M. BICKET, RICHARD L. VON TACKY, WILLIAM T. BURGESS, R.J. RICHARDSON, ROY C. HACKLEY, JR., COLEMAN ROMAIN, LOUIS G. CREVELING, WILLIAM E. GENTNER, ELMER L. NICHOLSON, RICHARD A. PETTY, TOM BROOKS, AND WARREN I. KNOUFF, PLAINTIFFS V. McLEAN SECURITIES, INC., PURCELL CO., INC., (FORMERLY DIAMONDHEAD CORPORATION), PINEHURST, INCORPORATED, PINEHURST COUNTRY CLUB, INC., VICTOR PALMIERI AND COMPANY INCORPORATED, HOWARD C. MORGAN, TRUSTEE, STEVEN K. BAKER, TRUSTEE, B. CHARLES MILNER, TRUSTEE, CITIBANK, N.A., CHASE MANHATTAN BANK, N.A., THE FIRST NATIONAL BANK OF CHICAGO, FIRST PENNSYLVANIA BANK, N.A., FIRST NATIONAL STATE BANK, N.A., CROCKER NATIONAL BANK, AND WACHOVIA BANK AND TRUST COMPANY, N.A., DEFENDANTS

No COA99-737

(Filed 20 June 2000)

1. Judgments— law of the case—prior declaratory judgment

A remanded declaratory judgment arising from a dispute between the owners of Pinehurst Country Club and its members was remanded again with instructions to delete all language from the declaratory judgment that purported to give class protection to any person who received membership by transfer after 1 October 1980. In the first opinion, the Court of Appeals held that only those members who possessed membership as of 1 October 1980 were entitled to class protection.

2. Judgments— consent—interpretation—findings

A remanded declaratory judgment arising from a dispute over membership privileges for the Pinehurst Country Club was again remanded for inclusion of a specified corrected paragraph where the trial court found that a paragraph of a consent judgment in the original action prohibited increasing initiation fees above the amount charged in 1982. The trial court should have made findings as to what the parties in 1980 intended to occur if Pinehurst, Incorporated ceased to exist. Because the court's findings indicating that the parties wished to keep the fees low is not supported by competent evidence and because several of the trial court's other findings suggest that the parties did not intend to restrict fee setting to Pinehurst, Incorporated, the court's conclusion that only Pinehurst, Incorporated could set the initiation fee is not supported by its findings of fact.

3. Judgments— consent—construction

The trial court on remand of a declaratory judgment construing a consent judgment between the members of Pinehurst Country Club and the owner of the club correctly removed a sentence which was a limitation on the Board of Directors' power to approve or disapprove membership requests, as required on the first remand. The court also correctly deleted from the declaratory judgment a paragraph dealing with the continued existence of amenities because the provisions of the original consent judgment were unambiguous.

4. Judgments— law of the case—remanded declaratory judgment—construction of consent judgment

The trial court did not err on remand of a declaratory judgment action to construe a consent judgment between the members of Pinehurst Country Club and the owners of the club by not determining whether a new class of membership had been established. However, the declaratory judgment was remanded for modification to delete restrictions that new classes of membership must have substantially different rights, privileges, and obligations.

5. Judgments— consent—remand—findings—reaffirmation

A trial court on remand correctly interpreted the term "Resort Guests" in a dispute between Pinehurst Country Club members and the owner of the club where the court, after hearing evidence and making findings of fact, reaffirmed its earlier

findings. The court's findings of fact are supported by competent evidence and support the court's conclusions.

6. Appeal and Error— remand—issue not raised on first appeal

The trial court did not err on remand of a declaratory judgment action arising from a dispute between the members of the Pinehurst Country Club and the owner of the club by not ruling on an issue which was not raised in the first appeal and which was controlled by language upheld elsewhere in this opinion.

Appeal by defendant Resorts of Pinehurst, Incorporated (now known as Pinehurst, Inc.) and plaintiffs from Order Modifying Declaratory Judgment entered 21 April 1999 by Judge F. Fetzer Mills in Moore County Superior Court. Heard in the Court of Appeals 16 February 2000.

Kitchin, Neal, Webb, Webb & Futrell, P.A., by Henry L. Kitchin and Stephan R. Futrell, for plaintiff-appellees/appellants.

Van Camp, Hayes & Meacham, P.A., by James R. Van Camp and Michael J. Newman, Brown, McCarroll & Oaks Hartline, by Jackson D. Wilson II, and Smith, Helms, Mullis & Moore, L.L.P., by James G. Exum, Jr., for defendant-appellant/appellee Pinehurst, Inc.

EDMUNDS, Judge.

This case is the continuation of a long-running dispute between members of Pinehurst Country Club and various owners of the club. In the late 1970s, Diamondhead Corporation (Diamondhead) purchased Pinehurst, Incorporated, which owned all of the public properties in the Village of Pinehurst, large undeveloped acreages, golf courses, and other recreational facilities. As a result of its purchase of Pinehurst, Incorporated, Diamondhead came into ownership of Pinehurst Country Club, Inc., which operated Pinehurst Country Club. Diamondhead developed and sold residential lots to buyers, who in turn could join Pinehurst Country Club upon approval of Pinehurst Country Club, Inc. When a disagreement arose between members of Pinehurst Country Club and Diamondhead as to certain membership privileges, the members filed a class action lawsuit to obtain a declaration of their membership rights. The class action ended when the parties agreed to a Final Consent Judgment on 19 December 1980.

In 1982, Pinehurst, Incorporated, the owner of Pinehurst Country Club, merged into Diamondhead's affiliated corporation, Purcell Co., Inc. Purcell Co., Inc. immediately transferred all assets and stock of Pinehurst Country Club to Pinehurst Inc. As a result of these transactions, Pinehurst, Incorporated no longer existed as a legal entity as of that date.

Diamondhead also owned and operated a resort hotel and associated villas, condominiums, and conference center known as Pinehurst Hotel and Country Club, later called Pinehurst Resort and Country Club. In 1984, defendant Resorts of Pinehurst, Inc., purchased Pinehurst Resort and Country Club and succeeded to the interests of the original owner-defendants. Resorts of Pinehurst, Inc., changed its name in 1998 to Pinehurst, Inc., which is not to be confused with Pinehurst, Incorporated or with Pinehurst Inc., the immediate successor of Pinehurst, Incorporated.

Around 1990, a dispute arose between Resorts of Pinehurst, Inc., and members of the Pinehurst Country Club over certain provisions of the 1980 Final Consent Judgment. The parties filed an action for declaratory judgment asking the trial court to construe contested sections of the Final Consent Judgment. The trial court issued its judgment on 28 December 1994, and both parties appealed. This Court affirmed in part, reversed in part, and remanded the case to the trial court to take action consistent with its directives for interpreting the Final Consent Judgment. *See Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 478 S.E.2d 518 (1996) (hereinafter *Bicket I*), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997). The trial court accordingly issued an "Order Modifying Declaratory Judgment" on 21 April 1999. Both parties appeal from that modifying order.

I. Defendant's Appeal

A. Final Consent Judgment—Protected Class

[1] Defendant first contends the trial court failed to comply with our holding in *Bicket I*. One of the issues this Court addressed in *Bicket I* concerned identifying those members who fell under the protection of the 1980 Final Consent Judgment. The 1994 Declaratory Judgment issued by the trial court stated:

> The rights and privileges of each subclass of membership referred to and described in paragraph 6 of the Final Consent Judgment are not limited to Pinehurst Country Club members as individuals. Those rights are extended to each subclass of mem-

bership described in the Final Consent Judgment and are intended to include, and do include any membership that was in existence as of the entry of the Final Consent Judgment, *or which has come into existence within the various enumerated subclasses since the entry of the Final Consent Judgment.*

. . . Any membership that was in existence at the time of the Final Consent Judgment, or that has been sold, transferred, or approved after the Final Consent Judgment, wether [sic] by direct purchase or transfer in any one of the subclasses of membership enumerated in paragraph 6 of the Final Consent Judgment, is entitled to the protections set out in the Final Consent Judgment.

(Emphasis added.)

In *Bicket I*, defendant assigned as error the "trial court's conclusion that members who joined the Pinehurst Country Club after the entry of the Final Consent Judgment are within the class protected by that agreement." *Id.* at 562, 478 S.E.2d at 526. In addressing this assignment of error, we held that the Final Consent Judgment

limits the class to those holding membership as of 1 October 1980. The trial court, however, extended the protections of the Final Consent Judgment not only to those within the classes of membership as of the entry of that judgment, but also to those memberships which have come into existence since the Final Consent Judgment.

Id. Therefore, we remanded the case for modification of the Declaratory Judgment "to limit the protections of the Final Consent Judgment to only those holding membership as of 1 October 1980." *Id.*

Upon remand, the trial court in its Order Modifying Declaratory Judgment struck the language from the original Declaratory Judgment that purported to extend protection to any memberships that came into existence after 1 October 1980 and limited protection to "those holding membership in Pinehurst Country Club, Inc. as of 1 October 1980." However, the trial court also modified the judgment as follows:

It is further ordered, that the second sentence of the fourth paragraph of Section "1 PROTECTED CLASS"[] is modified and rewritten to state: "Any membership that was in existence as of October 1, 1980, and has been transferred after the Final Consent

> Judgment in any one of the subclasses enumerated in Paragraph 6 of the Final Consent Judgment is entitled to the protection set out in the Final Consent Judgment."
>
> It is further [o]rdered that the sixth paragraph of Section "1 PROTECTED CLASS" is hereby modified and rewritten to state as follows: "The classification of those memberships listed in Paaragraph [sic] 6(a),(b),(c),(d), and (f) that were in existence as of October 1, 1980 are protected by the terms of the Final Consent Judgment regardless of whether transferred before or after October 1, 1980."

Defendant contends that the trial court's Order Modifying Declaratory Judgment does not comply with our mandate because the quoted provisions extend class protection to memberships that were in existence before 1 October 1980 and have been transferred to new persons after 1 October 1980. Plaintiffs respond that *Bicket I* did not address the transfer of memberships, and consequently the portion of the Declaratory Judgment dealing with that issue is the law of the case.

Upon a close review of the record and our opinion in *Bicket I*, we conclude that this Court did address the issue of transferred memberships in *Bicket I*. In a section titled "Protected Class," the Declaratory Judgment considered the question of who was protected. Although this section did not distinguish between those in the protected class in terms of how they became members, it did acknowledge that membership might result from sale, transfer, or other means. Therefore, the issues of membership in the protected class and the means of obtaining that membership were intertwined when first brought before this Court. The record reveals that both parties' briefs for *Bicket I* addressed the issue of whether memberships in existence before 1 October 1980 but transferred after 1 October 1980 were in the protected class. Therefore, we agree with defendant that in *Bicket I* we reached the issue as to whether those who obtained membership after 1 October 1980 are members of the protected class and held that only those members who possessed a membership as of 1 October 1980 were entitled to class protection. We further conclude that this holding was intended to eliminate all language from the Declaratory Judgment that offered protection to those who obtained memberships by means of transfer after 1 October 1980.

Because we ruled on this issue in *Bicket I*, we do not now attempt a reinterpretation of the Consent Judgment. "Once an appellate court

has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (citations omitted).

> "As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal."

Transportation, Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (citations omitted). The trial court erred by not fully modifying the Declaratory Judgment in accordance with the mandate of this Court. Therefore, we remand this issue to the trial court with instructions to delete all language from the Declaratory Judgment that purports to give class protection to any person who received membership by transfer after 1 October 1980.

B. Final Consent Judgment—Paragraph 6

[2] Defendant's second contention is that the trial court erred in finding that Paragraph 6(h) of the Final Consent Judgment prohibits defendant from increasing initiation fees for membership at Pinehurst Country Club above $3,000, the amount "Pinehurst, Incorporated" charged to property purchasers in 1982. Paragraph 6(h) of the Final Consent Judgment reads:

> (h) Whenever the term "transfer fee" is used herein, the amount of the transfer fee shall not exceed thirty percent of the then current initiation fee for the applicable class of membership transferred. (In the case of a Resident membership, "current initiation fee" refers to the amount then being charged to property purchasers from Pinehurst, Incorporated.)

A transfer fee is charged to a purchaser who buys property in the Village of Pinehurst from a selling member and also receives a transferred membership from the selling member. Because of the relationship between initiation fees and transfer fees, an issue arose as to whether the initiation fee could be increased. The trial court's Declaratory Judgment interpreted Paragraph 6(h) to mean that the

"current initiation fee" was the initiation fee charged to the last person who purchased property from Pinehurst, Incorporated, which went out of existence in 1982. Because the initiation fee charged to the last purchaser of property from Pinehurst, Incorporated before it ceased to exist was $3,000, the trial court determined the only allowable transfer fee to be $900.

On appeal, we held in *Bicket I* that the "cessation of Pinehurst, Incorporated" made Paragraph 6(h) ambiguous. *Bicket I*, 124 N.C. App. at 559, 478 S.E.2d at 524. Because the trial court had not made findings as to the parties' original intent and had based its conclusions " 'upon the language . . . of the Final Consent Judgment, and in consideration of the evidence presented,' " we remanded this issue for appropriate findings of fact, authorizing the trial court to consider parol evidence in ascertaining the original parties' intent as to the meaning of the paragraph. *Id.* (alteration in original). In its Order Modifying Declaratory Judgment, the trial court made twenty-two findings of fact and again concluded that the transfer fee was $900. Pursuant to our mandate in *Bicket I*, the trial court on remand should have made findings of fact as to what the parties, in 1980, intended to occur if Pinehurst, Incorporated ceased to exist. Instead, the trial court focused on (1) whether the omission in Paragraph 6(h) of language pertaining to "successors and assigns" of Pinehurst, Incorporated was deliberate or accidental, and (2) what the parties intended regarding the general level of fees, i.e., whether they should be generally high or low.

The scope of our review of the trial court's findings is (1) whether there is competent evidence in the record to support the findings of fact and (2) whether these findings justify the court's legal conclusions. *See Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475 (1981). Paragraph 5 of the Final Consent Judgment states that plaintiffs' "rights are not subject to alteration by the defendants Diamondhead Corporation, Pinehurst, Incorporated, Pinehurst Country Club, Inc., or any of their parent corporations, *subsidiary corporations, successors, or assigns*." (Emphasis added.) Similarly, Paragraph 7 sets out members' rights to use "the facilities and properties of Pinehurst, Incorporated, and its subsidiaries, so long as said properties and facilities are operated and maintained by Pinehurst, Incorporated, its parent corporations, *subsidiary corporations, successors, or assigns* . . . ." (Emphasis added.)

Plaintiffs contend and the trial court held that because language relating to successors or assigns did not also appear in Paragraph

6(h), the parties did not intend for successors or assigns of Pinehurst, Incorporated to have the capability to increase transfer fees. However, not every section in the Final Consent Judgment explicitly provided that powers granted to Pinehurst, Incorporated would be held by its successors or assigns. A separate section of Paragraph 7 also contains language pertaining to fees for the use of certain facilities:

> Such fees (other than dues) are subject to change at any time, in the discretion of the defendant Pinehurst, Incorporated.
>
> The use of the above facilities and properties [excluding the use of the Members Private Clubhouse except as set out in subparagraph (h) above] may be extended by Pinehurst, Incorporated to future purchasers of property from or through Pinehurst, Incorporated, its subsidiaries and affiliates . . . upon such terms and conditions as Pinehurst, Incorporated shall determine.

(Brackets in original.) Despite the absence of "successor or assigns" language in this section, we believe it inconceivable that control of the fees and facility usage described in the quoted section died with Pinehurst, Incorporated in 1982. Consequently, explicit "successor or assigns" language is not required as a condition precedent to a finding that particular rights and duties assigned to Pinehurst, Incorporated in the Final Consent Judgment continued after that entity ceased to exist in 1982. Therefore, the absence of "successor or assigns" language in Paragraph 6(h) of the Final Consent Judgment does not mandate a finding that initiation and transfer fees were frozen at the time of Pinehurst, Incorporated's dissolution and could not be changed by a successor organization.

This interpretation of Paragraph 6(h) as allowing successors to Pinehurst, Incorporated to change initiation fees is reinforced by an examination of the original parties' course of conduct after the Final Consent Judgment was signed.

> In ascertaining the parties' intent, courts may consider the language, subject matter and purpose of the contract, as well as the situation of the parties at the time, and may even read into a contract such implied provisions as may be necessary to effect the parties' intent. Courts also must give consideration to evidence of the parties' own interpretation of the contract prior to the controversy.

Investment Trust v. Belk-Tyler, 56 N.C. App. 363, 367, 289 S.E.2d 145, 148 (1982) (internal citation omitted). "In contract law, where the language presents a question of doubtful meaning and the parties to a contract have, practically or otherwise, interpreted the contract, the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam*." *Davison v. Duke University*, 282 N.C. 676, 713-14, 194 S.E.2d 761, 784 (1973) (citations omitted). We focus on the behavior of plaintiffs because, due to the changes in ownership, the instant corporate defendant is not the same entity that agreed to the Final Consent Judgment.

When Pinehurst, Incorporated ceased to exist in 1982, the initiation fee was $3,000 and the transfer fee was $900. All assets of Pinehurst Country Club were transferred to Pinehurst Inc., which ran the club from 1982-1984. In 1983, Pinehurst Inc. updated the Pinehurst Country Club's "Rules and Regulations" to reflect that the initiation fee for a resident member was $5,000, making the transfer fee $1,500. The document further states that "[t]hese rules and regulations . . . [w]here relevant, are subject to the provisions of the Final Consent Judgment in Bicket et al. vs. McLean Securities, Inc., et al." Mr. Roy C. Hackley signed the "Rules and Regulations" as the President of Pinehurst Country Club. According to the record, Mr. Hackley was a member of the protected class, was one of the "primary persons representing the plaintiffs and the membership" when the Final Consent Judgment was signed, and had "worked long and hard hours" to insure that the members' rights in the Final Consent Judgment were protected in his role as Chairman of the members' Standby Committee responsible for "oversee[ing] the Consent Agreement." There is no evidence that any member or representative of plaintiffs' class objected to the increased initiation and transfer fees.

In 1984, defendant purchased Pinehurst Country Club. Since that time, the initiation fee has risen to $15,000, making the transfer fee $4,500. Although the parties dispute details pertaining to increases after 1984, we need not address these details. The fact that plaintiffs did not protest the increase reflected in the 1983 Rules and Regulations, after Pinehurst, Incorporated went out of existence, satisfies us that the original parties intended that successors to Pinehurst, Incorporated would be able to control initiation and transfer fees.

Having concluded that neither the terms of the Final Consent Judgment nor the conduct of the parties precludes the successors of

Pinehurst, Incorporated from changing initiation fees, we now turn to the trial court's examination of the parties' intent as to the general level of the fees. Finding number fourteen of the Order Modifying Declaratory Judgment reads: "The parties to the Final Consent Judgment intended to control the size of the transfer fee charged for transferring a membership from one member to another, so that the resort owner could not effectively prohibit transfers of memberships by raising transfer or initiation fees." Defendant contends, and we agree, that no evidence in the record supports the trial court's finding. Although Foster Fludine, a member of the Defense Committee formed after the parties agreed to the Final Consent Judgment, testified that he thought the language meant that no entity other than Pinehurst, Incorporated could set the fees, he did not become a member of the club until approximately 1984 and offered no testimony as to the intent in 1980 of the original parties.

While the Final Consent Judgment states that the transfer fee is limited to thirty percent of the initiation fee, indicating that the size of the transfer fee is controlled in some manner, there is no evidence that the parties intended to control the transfer fee "so that the resort owner could not effectively prohibit transfers of memberships by raising transfer or initiation fees." The trial court's finding implies that the parties in 1980 intended for fees to remain low, so that memberships could be transferred freely. However, the proper inquiry for the trial court was not whether fees were to be "high" or "low," but whether any entity other than Pinehurst, Incorporated could set the fees at issue.

The trial court found in finding number one that Pinehurst, Incorporated was "experiencing a severe financial crisis" at the time the Final Consent Judgment was entered. In finding number five, the trial court found that this crisis "led the plaintiff[s] . . . to seek ways to prevent the sale of large blocks of memberships without dues or fees, simply in order [for Pinehurst, Incorporated] to create cash flow." The trial court continued, noting plaintiffs' concern that selling large blocks of memberships would

> overwhelm the ability of Pinehurst Country Club's facilities to accommodate members['] needs. Thus, the parties did not intend to base determination of the "current initiation fee" on membership initiation charges or fees that prevail at other country clubs, nor on economic conditions or on market variables that were not listed in the Final Consent Judgment. *They sought to control the*

demands on club facilities by tying the transfer fee to the initiation fee charged to the owner of the lots in the Village of Pinehurst.

(Emphasis added.)

To prevent such large-scale sale of memberships, logic dictates that the parties would keep initiation and transfer fees high to discourage promiscuous selling, and in fact, testimony in the record reflects that members wanted to set *minimum* initiation fees below which Pinehurst, Incorporated could not offer memberships. Neither the witnesses nor Paragraph 6(h) of the Final Consent Judgment indicates that the parties had any interest in controlling the *maximum* initiation or transfer fees.

Not only does finding number five indicate the parties' intent to keep fees relatively high, it also demonstrates the parties' intent to tie the transfer fee perpetually to the initiation fee "charged to the owner of the lots in the Village of Pinehurst." Under Paragraph 6(g) of the Final Consent Judgment, only landowners in the Village may become "Resident" members. Thus, an initiation fee may be charged only to new property owners in the Village who wish to become members. The only way to maintain fees at a level such that large-scale fluctuations in membership would not occur and overwhelm the club's facilities would be to allow the entity in charge of memberships to raise the initiation fee if necessary.

Consequently, the trial court's ultimate conclusion—that only Pinehurst, Incorporated could set the initiation fee—is antithetical to the court's finding of fact number five. In granting the power to "control the demands on club facilities," which includes the power to raise fees and thus lower demand, the parties also must have intended that entities other than the now-defunct Pinehurst, Incorporated would be able to set the fees in the future. Because the trial court's finding of fact indicating that the parties wished to keep the fees low is not supported by competent evidence, and because several of the trial court's other findings suggest that the parties did not intend to restrict fee-setting to Pinehurst, Incorporated, we find that the trial court's conclusion of law on this issue is not supported by its findings of fact.

The trial court's properly supported findings, in conjunction with the parties' course of conduct, lead directly to the conclusion that the parties intended to allow the alteration of the initiation fee regardless

of whether Pinehurst, Incorporated continued to exist. We therefore reverse the decision of the trial court and remand for entry of corrected judgment. *See Hofler v. Hill and Hofler v. Hill*, 311 N.C. 325, 329, 317 S.E.2d 670, 673 (1984) (holding conclusion of law fully reviewable on appeal and may be reversed if erroneous); *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (explaining appellate court not bound by inferences or conclusions trial court draws from findings of fact). The trial court is ordered to replace Paragraph 3 of its 28 December 1994 Declaratory Judgment with the following paragraph:

> 3. TRANSFER
>
> An "initiation fee" is the charge for the purchase of a membership directly from Pinehurst Country Club, Inc. A "transfer fee" is the charge for the transfer of a membership from one member to another. "Current initiation fee," as used in Paragraph 6(h) in the Final Consent Judgment, as applicable to Resident Members, means that initiation fee charged by the entity owning Pinehurst Country Club, Inc., at the time of the application to purchase a membership.
>
> The Court hereby further finds from the evidence and the Final Consent Judgment that a "Life" membership carries a $10,000.00 initiation fee; that a "Charter" membership carries a $5,000.00 initiation fee plus such increases as are allowed by the Consumer Price Index language in Paragraph 6(i) of the Final Consent Judgment; that the initiation fee for "Founder" membership is $3,000.00 plus such increases as are allowed by the Consumer Price Index language in Paragraph 6(i) of the Final Consent Judgment; and that the initiation fee for "Resident" class memberships (Full, Active, and Inactive) shall be set by the entity owning Pinehurst Country Club, Inc.

II. Plaintiffs' Appeal

A. Approval of Board of Directors

[3] Plaintiffs contend that the trial court erred in deleting the entire second paragraph of the 1994 Declaratory Judgment titled "Approval of Board of Directors." This paragraph dealt with the Board of Directors' approval of applicants for membership. Plaintiffs argue that the trial court should not have deleted the last sentence of the paragraph, which read:

> This approval or disapproval of the Board of Directors shall be based on the standards of reputation, good moral standards, and creditworthiness previously established in the Rules and Regulations of Pinehurst Country Club, Inc., and shall not be based on arbitrary considerations or policy decisions forestalling an individual membership application, or acceptance, or precluding, or denying approval as to any subclass as a group.

We held in *Bicket I*:

> Unlike the trial court's interpretation, the express and unambiguous language of the Final Consent Judgment contains no limitation on the Board's approval or disapproval. . . . Accordingly, we remand this issue to the trial court for modification of the Declaratory Judgment to delete the limitation on the Board's approval or disapproval of individual requests for membership in each of the subclasses of membership set out in paragraph 6 of the Final Consent Judgment.

Bicket I, 124 N.C. App. at 559-60, 478 S.E.2d at 525. The language that plaintiffs now claim was removed erroneously is a limitation on the Board's power to approve or disapprove membership requests. Therefore, the trial court correctly deleted this sentence.

[4] Plaintiffs next argue that the trial court erred in deleting Paragraph 7 of the Declaratory Judgment. This paragraph, entitled "Obligation to Insure Continued Existence of Amenities," addressed defendant's responsibility to maintain properties and facilities listed in the Final Consent Judgment. In *Bicket I*, we found that the trial court's interpretation of this paragraph was "unnecessary because the beginning provisions of paragraph 7 of the Final Consent Judgment are unambiguous." *Id.* at 557, 478 S.E.2d at 523. Holding that the plain language of the Final Consent Judgment controlled, we remanded "to the trial court for modification of the Declaratory Judgment consistent with this opinion." *Id.* Upon remand, the trial court focused on our holding that the provisions of the Final Consent Judgment were unambiguous and, in its Order Modifying Declaratory Judgment, deleted Paragraph 7 in its entirety. Upon review of the Declaratory Judgment, we agree with the trial court that Paragraph 7 is unnecessary. The trial court was correct in striking this paragraph; this assignment of error is overruled.

B. Additional Classes of Membership

Plaintiffs next contend the trial court erred in failing to determine whether a new class of membership had been established. However,

this issue was resolved in *Bicket I*. The Final Consent Judgment permitted Pinehurst Country Club, Inc. to establish additional classes of membership. In 1985, a "two tier" category of membership was created. In the 1994 Declaratory Judgment, the trial court found that "[a] new class of membership . . . cannot be created without properly notifying those individuals or classes of memberships whose rights will be affected by the creation of the new class of membership." On appeal, we disagreed and "remand[ed] for further modification of the Declaratory Judgment . . . to eliminate the requirement that all classes of membership affected by the creation of a new class be notified in writing prior to its creation." *Id.* at 560, 478 S.E.2d at 525.

In addition, the trial court found in its 1994 Declaratory Judgment that defendant did not comply with the Final Consent Judgment in establishing its "two tier" class of membership because this new class did not have "substantially different rights and privileges and obligations from those classes of membership set forth in paragraph 6 of the Final Consent Judgment." On appeal, we disagreed and held: "These qualifications are beyond the scope of the express and unambiguous language of the provision in question. We therefore remand this issue for modification of the Declaratory Judgment to delete the restrictions that new classes of membership must have substantially different rights, privileges and obligations . . . ." *Id.* On remand, the trial court entered its Order Modifying Declaratory Judgment, which complied with our instructions as to this issue. Because we addressed and resolved this issue in *Bicket I*, that decision is "the law of the case." *N.C.N.B.*, 307 N.C. at 566, 299 S.E.2d at 631 (citations omitted). This assignment of error is overruled.

C. "Resort Guest"

[5] Plaintiffs next contend the trial court erred in its interpretation of the term "Resort Guest." In the 1994 Declaratory Judgment, the trial court determined that "Resort Guest" as used in the Final Consent Judgment meant "any guest of the owner of the Pinehurst Country Club regardless of whether that guest is a paying customer at the Pinehurst Hotel." On appeal, we found the term "Resort Guest" to be ambiguous and remanded to the trial court for consideration of parol evidence and resulting findings of fact.

After hearing evidence and making findings of fact on remand, the trial court reaffirmed its earlier finding that "Resort Guests" do not have to be customers of the Pinehurst Hotel. These findings are based on the conduct of the owners of Pinehurst Country Club before

and after the Final Consent Judgment. "[T]he findings of fact entered by a trial court are conclusive on appeal if they are supported by any competent evidence, even though there may be evidence in the record to support contrary findings . . . ." *Auto Supply v. Vick*, 303 N.C. 30, 37, 277 S.E.2d 360, 365 (1981) (citations omitted). There is competent evidence in the record that, both before and after 1980, the owners of Pinehurst Country Club permitted guests of various hotels in the Pinehurst area to play on its golf courses using tee times reserved for resort guests. Because the trial court's findings of fact are supported by competent evidence and they support the trial court's conclusions of law, we affirm the trial court's ruling. This assignment of error is overruled.

D. Associate Member Program

[6] In their last assignment of error, plaintiffs allege that the trial court failed to rule on the Associate Members program. Resorts of Pinehurst's parent company, Club Corp. International, participated in an Associate Members program, which allowed participating members to play at Pinehurst Country Club. There is no indication in *Bicket I* that this issue was appealed. We have also examined the briefs submitted to the Court in *Bicket I* and find no argument on this issue. However, we believe the trial court's interpretation of "Resort Guest" controls this issue. As we held above, resort guests do not have to stay at the Pinehurst Hotel in order to play golf there. This assignment of error is overruled.

Defendant's appeal—reversed with instructions.

Plaintiffs' appeal—affirmed.

Judges LEWIS and JOHN concur.

APRIL HANSEN, EMPLOYEE, PLAINTIFF v. CRYSTAL FORD-MERCURY, INC., EMPLOYER; PENNSYLVANIA NATIONAL INSURANCE COMPANY, CARRIER, DEFENDANTS AND BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, MEDICAL REIMBURSEMENT CLAIMANT

No. COA99-574

(Filed 20 June 2000)

Workers' Compensation— compromise settlement agreement—health insurer not included—real party in interest—settlement void

A compromise settlement agreement in a workers' compensation case was void where a health insurer which had filed a claim for reimbursement did not consent to the settlement. In a case of first impression, the Court of Appeals held that the Industrial Commission had subject matter jurisdiction over the claim because a health insurer may intervene as a real party in interest when it alleges that it has paid medical expenses due to an employee's compensable injury and is entitled to reimbursement and liability is disputed by the employer. A compromise settlement agreement can only be approved when all parties consent; of course, nothing prohibits an employee and employer from including the health insurer in the clincher.

Appeal by Blue Cross and Blue Shield of North Carolina from orders entered 22 January 1999, 3 February 1999 and 16 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 February 2000.

Taft, Taft and Haigler, P.A., by Alden B. Cole, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr. and Dawn M. Dillon, for defendant-appellees Crystal Ford-Mercury, Inc. and Pennsylvania National Insurance Company.

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

HUNTER, Judge.

Appellant Blue Cross and Blue Shield of North Carolina ("BCBS") appeals orders of the North Carolina Industrial Commission ("Industrial Commission") wherein it approved a compromise settlement agreement between April Hansen ("plaintiff") her employer,

Crystal Ford-Mercury, Inc. ("employer"), and its workers' compensation carrier, Pennsylvania National Insurance Company ("carrier"), without addressing whether or not plaintiff's injury was compensable under the North Carolina Workers' Compensation Act ("Act"). BCBS had filed a claim in the matter, contending that it was entitled to reimbursement for medical costs it paid due to plaintiff's alleged compensable injury. The Full Industrial Commission ("Full Commission") did not rule on BCBS's claim, inferring that it did not have jurisdiction to do so. We reverse on the basis that the Industrial Commission has jurisdiction over BCBS's claim, and therefore the subject compromise settlement is void because all interested parties did not consent to it.

The record indicates that plaintiff filed a workers' compensation claim alleging a workplace injury on 24 July 1996, when plaintiff allegedly came down a ladder and twisted her right knee as she stepped on the floor. On 7 August 1996, carrier denied plaintiff's claim for "fail[ing] to cooperate" with their requests for medical records. On 26 August 1996, carrier sent plaintiff a letter denying that her injury was compensable due to carrier's review of plaintiff's medical records and the revelation that plaintiff had suffered prior problems with the injured knee. Carrier recommended that plaintiff submit her claim to BCBS, plaintiff's health insurer through her employer's group health insurance plan. BCBS subsequently paid $12,229.78 for treatment of plaintiff's injured knee from 26 July 1996 to 30 October 1996. BCBS's coverage of plaintiff apparently ended with her departure from employment with employer in the fall of 1996. BCBS learned of plaintiff's workers' compensation claim as to the injury in September 1997. On 29 September 1997, BCBS entered a Form 33 "Request that Claim be Assigned for Hearing" in plaintiff's case, requesting that it be reimbursed for its costs because employer and carrier (collectively "defendants") were liable for plaintiff's alleged compensable injury. On 24 November 1997, on Industrial Commission Form 33R, "Response to Request that Claim be Assigned for Hearing," defendants stated that "compensability has been denied," and made the following notations under "Defendant Agrees to the Following," in pertinent part:

> Subject to Act Admitted
> Employment Relationship Admitted
> Insurance Coverage Admitted
> Date of Injury 7/24/96 alleged
> Injury by accident Denied
> Arising out of and in the course of employment Denied

Industrial Commission Deputy Commissioner Mary Moore Hoag entered an order on 10 December 1997 allowing BCBS to serve requests for admissions to defendants, and ordering defendants to serve responses on or before 15 December 1997. Those requests asked for carrier's admission that the medical services for plaintiff in question were necessary due to the condition of plaintiff's right knee on and/or after 24 July 1996, the date of the accident. Defendants never answered the requests, and carrier defended on the grounds that plaintiff's injury was not an "injury by accident" as contemplated by the Act.

A "compromise settlement agreement" or "clincher" per Industrial Commission Rule 502, and a proposed order, were submitted to the Industrial Commission on 18 December 1997. They provided that without admitting liability, but upon payment of $15,000.00 and certain medical expenses to plaintiff, the Industrial Commission would discharge defendants from further liability under the Act. On 30 March 1998, the deputy commissioner denied defendants' and plaintiff's 18 December 1997 joint motion to strike the discovery orders and approve a compromise settlement agreement releasing defendants from all liability without reimbursing BCBS, stating: "I can not [sic], in good conscience, approve a Compromise Settlement Agreement in this action which does not provide for reimbursement to [BCBS]." Defendants and plaintiff appealed to the Full Commission.

The Full Commission entered an order on 22 January 1999 approving the compromise settlement agreement and releasing defendants from liability for plaintiff's injuries. The Full Commission vacated all prior discovery orders, and approved the compromise settlement agreement, stating in pertinent part:

> Because it appears to the Commission that the liability of defendants for the unpaid medical expenses is legitimately in dispute, an injustice would result if defendants must undertake to pay these expenses prior to approval of this agreement as the case would not then reach a settlement. Therefore, the Commission exercises its discretion pursuant to Industrial Commission Rules 502(2)(b) and 801 to waive the obligation, if any, of defendants to pay all unpaid medical expenses as a part of this agreement.

Industrial Commission Rule 502, which the Full Commission cites for authority, states in pertinent part:

(2) No compromise agreement will be approved unless it contains the following language or its equivalent:

(a) Where liability is admitted, that the employer or carrier/administrator undertakes to pay all medical expenses to the date of the agreement.

(b) *Where liability is denied, that the employer or carrier/administrator undertakes to pay all unpaid medical expenses to the date of the agreement. However, where application of this Rule shall work an injustice, it may be waived in the discretion of the Industrial Commission.*

Workers' Comp. R. of N.C. Indus. Comm'n 502(2), (a), (b), 2000 Ann. R. 723 (Lexis) (emphasis added). Likewise, Rule 801 provides that the Industrial Commission Rules may be waived in the "interest of justice." Workers' Comp. R. of N.C. Indus. Comm'n 801, 2000 Ann. R. 733 (Lexis). The 22 January 1999 order was amended by order of 3 February 1999 to correct a clerical error. BCBS made a motion for reconsideration, asking that the order be amended by discharging defendants' liability only as to plaintiff's claims, not those of BCBS. This motion was denied by order of 16 February 1999. BCBS appeals.

First, BCBS contends that the Full Commission erred by failing to hear and determine its claim for reimbursement because the Industrial Commission is the only body with jurisdiction to hear and determine issues regarding the compensability of allegedly work-related injuries.

First, we note that our review of claims under the Act is limited. The North Carolina Supreme Court has stated that " 'the findings of fact made by the Commission are conclusive on appeal, . . . when supported by competent evidence[] . . . even though the record may support a contrary finding of fact.' " *Inscoe v. Industries, Inc.*, 292 N.C. 210, 215, 232 S.E.2d 449, 452 (1977) (quoting *Rice v. Chair Co.*, 238 N.C. 121, 124, 76 S.E.2d 311, 313 (1953)). When the Court of Appeals reviews a decision of the full Commission, its inquiry is limited to: (1) whether there is competent evidence to support the Commission's findings of fact; and, (2) whether the findings of fact support the conclusions of law and decision of the Commission. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). Conclusions of law by the Industrial Commission 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. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

While we normally review findings of fact and conclusions of law by the Full Commission based on the foregoing precedent, the order which has been appealed in the present case is a "clincher," or compromise settlement agreement, and as such, contained neither. Pursuant to N.C. Gen. Stat. §§ 97-17 and 97-82, "[t]he Commission recognizes, . . . two forms of voluntary settlements, namely, the compensation agreement in uncontested cases, and the *compromise or 'clincher' agreement in contested or disputed cases.*" *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 430, 444 S.E.2d 191, 193 (1994) (emphasis added). The Full Commission did not consider BCBS's claim for reimbursement due to a compensable injury, but stated:

> [T]his Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is raised in the compromise settlement agreement executed by the parties in this action.

The Full Commission made no findings of fact or conclusions of law to support the inference that it did not have jurisdiction over BCBS's claim, and this was error. As we have noted, our review is usually limited to whether their findings are supported by competent evidence. However, jurisdictional facts found by the Industrial ". . . 'Commission, though supported by competent evidence, are *not* binding on this Court.' " *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (emphasis added) (quoting *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990)). Because this Court may make independent findings with respect to jurisdictional facts, we shall address the issue of whether or not the Industrial Commission has jurisdiction over BCBS's claim.

"The Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute." *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966) (citation omitted). Under our General Statutes:

> All questions arising under [the Act] if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided.

N.C. Gen. Stat. § 97-91 (1999). Therefore, if a question arising under the Act is not settled by agreement of all parties, the Commission

shall make a determination on this issue. The question on which BCBS's claim is based, *i.e.*, whether or not plaintiff's injury is compensable, is a question arising under the Act. Therefore, if BCBS were found to be a party to plaintiff's claim, the "clincher" in question would obviously be void, since BCBS did not consent and all interested parties must consent to a compromise agreement.

> (3) No compromise agreement will be considered unless the following additional requirements are met:
>
> . . .
>
> (b) Parties and all attorneys of record must have signed the agreement.

Workers' Comp. R. of N.C. Indus. Comm'n 502(3), (b), 2000 Ann. R. 723 (Lexis). Consequently, we must determine if BCBS, as plaintiff's health insurer, is a party to plaintiff's workers' compensation case due to the fact that it filed a claim for reimbursement in the case.

Whether a health insurer may intervene in a workers' compensation claim for reimbursement appears to be an issue of first impression in this state. As to the parties in any suit:

> Only a "real party in interest" has the legal right to maintain a cause of action. *Crowell v. Chapman*, 306 N.C. 540, 293 S.E.2d 767 (1982). In order to qualify as a real party in interest, a party must have some interest in the subject matter of the litigation and not merely an interest in the action. *Parnell v. Insurance Co.*, 263 N.C. 445, 449, 139 S.E.2d 723, 726 (1965). In other words, "[a] real party in interest is a party who is benefitted or injured by the judgment in the case." *Id.* at 448, 139 S.E.2d at 726 (quoting *Rental Co. v. Justice*, 211 N.C. 54, 55, 188 S.E. 609, 610 (1936)). . . .

U.S. Fidelity and Guaranty Co. v. Scott, 124 N.C. App. 224, 226, 476 S.E.2d 404, 406 (1996), *cert. denied*, 346 N.C. 185, 486 S.E.2d 220 (1997). The general consensus of workers' compensation statutes is that:

> a health or accident insurer may intervene in workers' compensation proceedings to recover benefits paid when the recipient of the insurance proceeds is the party seeking compensation benefits. Among the reasons given by the courts . . . are that the insurer has a direct interest in the outcome of the litigation in that it may gain or lose depending on the outcome, and that to deny

> the right to intervene would cause the insured to be unjustly enriched. The courts also point out that it is more efficient and inexpensive to determine all relevant issues in one proceeding rather than compelling the insurer to pursue an independent action against the insured for reimbursement.

Francis M. Dougherty, J.D., Annotation, *Right of Health or Accident Insurer to Intervene in Workers' Compensation Proceeding to Recover Benefits Previously Paid to Claimant or Beneficiary*, 38 A.L.R.4th 355, 356 (1985). Also:

> An agency charged with administration of a workers' compensation act generally has jurisdiction to pass upon questions relating to a workers' compensation insurance policy when such rulings are necessary or ancillary to the determination of an injured workers' rights under the act. But where such determinations are not material to determination of a worker's right to benefits, the view has been expressed that a court of law, rather than an administrative tribunal charged with resolving workers' compensation claims, is the proper forum for a dispute over insurance coverage between an employer and an insurer, or between two or more insurers. Under some workers' compensation statutes, however, the commission has been granted exclusive original jurisdiction of all questions relating to compensation insurance, including reimbursements among insurance carriers.

82 Am. Jur. 2d *Workers' Compensation* § 486 (1992) (footnotes omitted). Thus, the intervention of a health insurer in a workers' compensation claim, when it has a direct interest in the case, encourages judicial economy, prevents unjust enrichment, and avoids duplicative litigation.

While the North Carolina Supreme Court has not considered the issue of intervention by a health insurer in a workers' compensation case, it has held that the jurisdiction of the Industrial Commission, under N.C. Gen. Stat. § 97-91,

> is not limited . . . solely to questions arising out of an employer-employee relationship or in the determination of rights asserted by or on behalf of an injured employee. *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E.2d 354, did not so hold. On the contrary the North Carolina Supreme Court has held in *Worley v. Pipes*, 229 N.C. 465, 50 S.E.2d 504, and in *Matros v. Owen*, 229 N.C. 472, 50 S.E.2d 509, that the sole remedy of a physician to recover for

> services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the Act, with right of appeal to the courts for review, and that this remedy is exclusive. These decisions are equally applicable to charges for hospital services rendered to employees in Workmen's Compensation cases.

Wake County Hospital v. Industrial Comm., 8 N.C. App. 259, 261, 174 S.E.2d 292, 293 (1970), *overruled on other grounds by Charlotte-Mecklenburg Hospital Authority v. Industrial Comm.*, 336 N.C. 200, 211, 443 S.E.2d 716, 723 (1994). In accord with this reasoning, our Supreme Court has held that the Industrial Commission has jurisdiction to consider a Veterans Administration claim for medical treatment furnished to an indigent veteran for injuries resulting from an industrial accident, and to order the claim paid as part of the employer's liability under the Act. *Marshall v. Poultry Ranch*, 268 N.C. 223, 150 S.E.2d 423 (1966). Also, in a more recent case, this Court considered whether the Industrial Commission had subject matter jurisdiction over intervening claims by a health care provider for payment of medical services provided to an injured employee, when the expenses had not been paid by plaintiff's Medicaid insurance, and the Industrial Commission had previously ordered that the employer pay reasonable and necessary expenses for the employee's compensable injury. In holding that the Industrial Commission did have jurisdiction, this Court pointed out:

> The General Assembly intended that the Commission have continuing jurisdiction of all proceedings begun before it. "[I]t is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985). Furthermore, this Court has recognized that "the Commission's continuing jurisdiction over its judgments includes the power to supervise and enforce them." *Hieb v. Howell's Child Care Center*, 123 N.C. App. 61, 68, 472 S.E.2d 208, 212, *disc. review denied*, 345 N.C. 179, 479 S.E.2d 204 (1996). The Workers' Compensation Act bestows on the Commission the authority to approve medical fees.
>
> . . .
>
> [I]n this case, plaintiff is seeking enforcement of the Commission's earlier order awarding him reasonable and neces-

> sary medical expenses after a dispute arose over what expenses defendants must pay. G.S. 97-90 enables the Commission to approve medical expenses. The fact that the Commission was also required to interpret state and federal statutes is irrelevant. Accordingly, because the Commission was acting within its statutory mandate, we hold that it had subject matter jurisdiction to hear and decide these issues.

Pearson v. C. P. Buckner Steel Erection Co., 126 N.C. App. 745, 747-48, 486 S.E.2d 723, 725-26 (1997), *affirmed in part and reversed in part*, 348 N.C. 239, 498 S.E.2d 818 (1998) (citations omitted). The Supreme Court affirmed this Court's ruling, stating:

> We believe that the Commission's "supervisory power over its judgments," [*Hogan v. Cone Mills Corp.*, 315 N.C. 127,] 140, 337 S.E.2d [447,] 485 [(1985),] includes the authority to enter orders to enforce those judgments. The authority to set and approve medical fees is granted to the Commission by statute. Having found that defendants are liable for plaintiff's reasonable and necessary medical expenses, the Commission retains jurisdiction over the case to determine which expenses must be paid and in what amount.

Pearson, 348 N.C. at 242, 498 S.E.2d at 820 (citation omitted). While the Full Commission did not order defendants to pay plaintiff's unpaid medical expenses in the present case, as it had in *Pearson*, the holding in *Pearson* indicates that the Industrial Commission has jurisdiction over all claims in a proceeding begun before it, including intervening claims for payment for services by a medical provider.

Similarly, the Third Circuit Court of Appeals in *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3rd Cir. 1978), held that a health insurer "providing coverage for non-occupational injuries and illnesses may intervene in proceedings under the Longshoremen's and Harbor Workers' [Compensation] Act . . . and recover amounts paid out for injuries or illnesses that are found to be work-related." *Id.* at 53 (citation omitted). The Court reasoned:

> [The insurer's] claim for reimbursement is derived from the same nucleus of operative facts as [claimant's] claim for compensation. A finding that a claimant's injuries are work-related is, in operative effect, a finding that payments should not have been made under a policy covering non-occupational injuries. Deciding reimbursement claims at the same time as compensation claims

> avoids essentially duplicative litigation thus reducing the expenditure of time and money by the parties and the courts. Facilitating reimbursement of improperly paid benefits also encourages insurance companies . . . to make swift payment of legitimate claims. Thus on the basis of these policy considerations and the close factual relationship between reimbursement and compensation claims, we hold that claims for reimbursement are questions in respect of compensation claims and may therefore be decided in the same proceedings in which the compensation claims are decided.

Id. at 54. This holding is instructive as "[t]he North Carolina Workmen's Compensation Act seems to have been taken in the main from the Longshoremen's Act." *Kellams v. Metal Products*, 248 N.C. 199, 202, 102 S.E.2d 841, 844 (1958). As with the North Carolina Workers' Compensation Act, that statute "does not explicitly provide procedures for intervention" by general health insurers. *Aetna*, 578 F.2d at 55.

As to litigation between two insurers involving a workers' compensation claim, the Court of Appeals of Virginia, in *Hartford Fire Insurance Co. v. Tucker*, 3 Va. App. 116, 348 S.E.2d 416 (1986), held that the Virginia Industrial Commission did not have jurisdiction over such matter, *unless* the litigation affected the employee's right to recover:

> Generally, the Commission's jurisdiction is limited to those issues which are directly or necessarily related to the right of an employee to compensation for a work-related injury. . . .
>
> . . .
>
> Questions between the insurer and the employer or another insurer do not "arise under" the Act *except insofar as they affect the rights of an injured employee.* When the rights of the claimant are not at stake, the Act clearly leaves the litigants to their common law remedies, with the pleading requirements, broader discovery and the more stringent rules of evidence not applicable under the Act. . . .

Hartford, 3 Va. App. at 120-21, 348 S.E.2d at 418-19 (emphasis added) (citations omitted). Under this reasoning, BCBS's claim falls under the jurisdiction of the Industrial Commission because resolution of its claim requires a determination of compensability, which affects plaintiff's right to recover under the Act. We note that this affect

could be either beneficial or detrimental to plaintiff's ability to recover benefits. However, based on the foregoing authority, our review indicates that such affect is in accord with the purpose of the Act as it affects a compromise settlement agreement.

A compromise settlement agreement, when liability is questionable, is not always preferable for the employee or employer:

> [I]t is often argued that to permit compromises will enable claimants to get at least something in the many controversial cases where there is serious doubt whether fundamental conditions of liability can be established. But again it must be stressed that the objective of the legislation is not to see how much money can be transferred to workers as a class; it is to ensure that those with truly compensable claims get full compensation. If there is doubt about the conpensability of the claim, the solution is not to send the claimant away half-compensated, but to let the Compensation Board decide the issue. That is the Board's job.

8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 82.42 (1999) (footnotes omitted). While a compromise settlement agreement may be in accordance with the purpose of the Act, which is "not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers," *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citing *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966)), we recognize that

> when liability itself is in dispute, there are only two correct decisions possible under the Act: full liability or nonliability; a partial payment must, therefore, be either an overpayment or an underpayment . . . [nevertheless] the compromise devise . . . may forestall tedious and expensive litigation.

8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 82.43 (1999) (footnote omitted). Therefore, while a determination of compensability under the Act may have caused more litigation, this determination nevertheless would have ensured that plaintiff did not receive an overpayment or underpayment in the present case. Such a result protects and encourages the rights of both an employee and employer under the Act, and the rights of an employee's health insurer.

Defendants contend that this Court held "that a health insurance carrier may bring a subrogation claim against a workers' compensa-

tion insurance carrier in superior court after the Industrial Commission has determined that the . . . carrier is liable for the claim" in *Nationwide Mut. Ins. Co. v. American Mutual Liability Ins. Co.*, 89 N.C. App. 299, 365 S.E.2d 677 (1988). To the contrary, our review of that case indicates that in *Nationwide*, the insurer of the employer's truck sought reimbursement from the workers' compensation carrier in superior court for monies allegedly paid on behalf of an employee after the Industrial Commission had determined that the injury was compensable under the Act. This Court never considered the issue of subject matter jurisdiction. It ruled that the truck insurer was not an intermeddling volunteer and was thus entitled to recover monies from the workers' compensation carrier, and that for statute of limitations purposes, the insurer's subrogation action accrued on the date the Industrial Commission determined that the workers' compensation carrier should pay the employee for his injuries. *Id.*

We note that should BCBS seek a remedy in superior court, as defendants urge, such claim would be meritless because BCBS is only entitled to reimbursement if plaintiff's injury was compensable under the Act, and the Industrial Commission, who chose not to rule, has exclusive jurisdiction on that issue. Therefore, if we were to uphold the Full Commission's order in the present case, an employer or carrier could avoid costs by denying a claim while the employee is receiving medical treatment, and subsequently entering into a clincher agreement which does not reimburse the employee's health insurer. In such case, if the injury were in fact compensable under the Act, the employer would be unjustly enriched to the detriment of the health insurer.

While a determination of compensability prior to the entry of a clincher may result in the plaintiff receiving nothing if the injury were not found to be compensable, such result would prevent an overpayment to the employee and would be fair to the employer. Also, the health insurer would have no right to reimbursement. Thus, all parties would be treated fairly under the Act. Of course, nothing prohibits an employee and employer from working out a settlement with the health insurer and including it in the clincher.

Based on the foregoing precedent, we hold that a health insurer may intervene as a real party in interest in a workers' compensation proceeding when it alleges that it has paid medical expenses due to an employee's compensable injury and is entitled to reimbursement, and liability is disputed by the employer. Thus, the Industrial Commission had subject matter jurisdiction over the claim of BCBS,

which was a real party in interest when the compromise settlement agreement was approved by the Industrial Commission. Because a compromise settlement agreement can only be approved when all parties consent, and BCBS did not consent in the present case, we hold that the compromise settlement agreement in question is void. We therefore reverse and remand this case to the Full Commission, which shall conduct further proceedings consistent with this opinion. Due to our holding, we need not reach BCBS's additional assignments of error.

Reversed and remanded.

Judges WYNN and MARTIN concur.

MARIE T. FORMYDUVAL, ADMINISTRATRIX OF THE ESTATE OF HARTWELL B. FORMYDUVAL, PLAINTIFF v. DAVID G. BUNN, M.D., DEFENDANT

No. COA99-961

(Filed 20 June 2000)

Medical Malpractice— expert witness—standard of care—general practitioner

The trial court did not err in a medical malpractice action by ruling that plaintiff's expert witnesses were not qualified to testify as to the applicable standard of care, resulting in a proper directed verdict for defendant, where defendant was a general practitioner and all three of plaintiff's witnesses were specialists as that term is used in the statute. N.C.G.S. § 8C-1, Rule 702 requires that an expert witness against a general practitioner must be a general practitioner; doctors who are either board certified in a specialty, who hold themselves out to be specialists, or who limit their practice to a specific field of medicine are properly deemed specialists.

Appeal by plaintiff from orders entered 14 April 1999 by Judge Abraham Penn Jones in Columbus County Superior Court. Heard in the Court of Appeals 27 April 2000.

Britt & Britt, P.L.L.C., by William S. Britt, for plaintiff-appellant.

Walker, Clark & Allen, L.L.P., by Robert D. Walker, Jr. and O. Drew Grice, Jr., for defendant-appellee.

SMITH, Judge.

Plaintiff Marie T. FormyDuval, administratrix of the estate of Hartwell B. FormyDuval (decedent), appeals from the trial court's orders (1) prohibiting her expert witnesses from testifying as to the applicable standard of care and (2) dismissing her wrongful death claim against defendant. We affirm.

Defendant is a physician practicing as a general practitioner in Whiteville, North Carolina, whose medical training included four years of medical school and a one year internship. Decedent first became a patient of defendant in 1976. On 26 August 1993, decedent, complaining of red spots on his legs and ankles and blue spots on his forearms and legs, was seen by defendant in defendant's office. It appears from the record that defendant drew blood from decedent and sent the blood sample to a lab in Burlington for analysis.

Plaintiff alleges the analysis of the blood sample was returned to defendant's office Friday, 27 August 1993, but that defendant did not inform decedent or plaintiff of the results of the analysis until 31 August 1993. On that date, decedent returned for a scheduled follow-up visit with defendant, at which defendant diagnosed decedent with thrombocytopenia purpura. Defendant alleges he implored decedent to be hospitalized to treat his condition, but decedent refused hospitalization.

Plaintiff called defendant after decedent's appointment, and alleges she was not informed of defendant's recommendation that decedent be hospitalized. On 2 September 1993, decedent complained of a severe headache and blurry vision, and was taken to defendant's office by plaintiff. Defendant advised plaintiff to immediately take decedent to the emergency room. Decedent died at the hospital 3 September 1993.

Plaintiff originally filed suit against defendant in 1995, but took a voluntary dismissal of that action and subsequently refiled on 19 August 1997. *See* N.C.G.S. § 1A-1, Rule 41(a) (1999). Plaintiff's refiled action alleged, *inter alia*, defendant "failed to properly refer [decedent] to specialists," should have "taken a more aggressive approach

to [decedent's] treatment, including hospitalization," and upon receiving the blood test results, "should have called [d]ecedent . . . and insisted that he go to the hospital." Defendant answered 28 August 1997 denying his negligence and asserting decedent's contributory negligence in bar of plaintiff's claims.

Trial began 12 April 1999. After hearing opening statements from both parties, the trial court heard argument regarding whether the expert medical witnesses plaintiff wished to call at trial, Dr. Lloyd McCaskill (Dr. McCaskill), Dr. Douglass Hammer (Dr. Hammer), and Dr. Eugene Paschold (Dr. Paschold), were qualified to testify against defendant pursuant to N.C.G.S. § 8C-1, Rule 702(c) (1999) (Rule 702). The parties also conducted a *voir dire* examination of Dr. McCaskill. The trial court then ruled, pursuant to defendant's Motion to Exclude Testimony of Expert Witnesses, that plaintiff's experts were not qualified to testify as to the applicable standard of care. Plaintiff thereupon rested her case, and defendant's subsequent motion for directed verdict was granted by the trial court. The sole issue on appeal is whether plaintiff's witnesses were properly disqualified.

Rule 702 governs the admissibility of expert testimony. Prior to 1996, Rule 702 stated:

> 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.

Rule 702 was amended in 1995, with the amendments effective 1 January 1996 and applicable to all cases filed on or after that date. *See* 1995 N.C. Sess. Laws ch. 309, § 1. The parties concede that the amended version of the Rule applies to the instant action, which was refiled 19 August 1997. We assume without deciding that the parties are correct, and thus apply Rule 702, as amended, to the case *sub judice*.

The amended rule retains the language quoted above and adds several provisions relating specifically to expert witnesses testifying to the appropriate standard of care in medical malpractice actions. *See Andrews v. Carr*, 135 N.C. App. 463, 469, 521 S.E.2d 269, 273 (1999), *disc. review denied*, 351 N.C. 471, —— S.E.2d —— (2000). Rule 702(b)(1) governs expert testimony on the "appropriate standard of health care" offered against or on behalf of a "specialist," while Rule

702(c) governs such testimony offered against or on behalf of a "general practitioner:"

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
>
> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
>
> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
>
> b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

Both parties agree that (1) defendant in this case is a "general practitioner," such that Rule 702(c) governs the instant action; and, (2) none of plaintiff's proffered witnesses were engaged in instruction of students in the year preceding August 1993, such that section (c)(2) is inapplicable. Thus, to testify against defendant as to the applicable standard of care, plaintiff's experts must have, in the year preceding August 1993, (1) devoted a majority of their "professional time" (2) to "active clinical practice" (3) as a "general practitioner." Rule 702(c)(1). All three statutory requirements must be met in order to testify.

"[O]rdinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge." *State v. Underwood*, 134 N.C. App. 533, 541, 518 S.E.2d 231, 238 (1999), *cert. allowed*, 351 N.C. 368, —— S.E.2d —— (2000). However, where an appeal presents questions of statutory interpretation, full review is appropriate, and a trial court's conclusions of law are reviewable *de novo*. *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 480, 500 S.E.2d 439, 442, *disc. review denied*, 349 N.C. 231, 515 S.E.2d 705 (1998).

De novo review is appropriate in the instant case, as plaintiff contends the trial court's decision was based on an incorrect "reading and construction of Rule 702," specifically the trial court's interpretation of the terms "clinical practice" and "general practitioner."[1] *See id.*; *see also Trapp v. Maccioli*, 129 N.C. App. 237, 239, 497 S.E.2d 708, 710, *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998) (whether medical malpractice plaintiff could reasonably expect witness who reviewed complaint to qualify as expert witness under Rule 702(b), as required by N.C.R. Civ. P. 9(j), is question of law subject to *de novo* review). Accordingly, this Court must determine

(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.

1. We would not reach a different result herein if we were to apply the abuse of discretion standard.

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Plaintiff herein did not assign error to the trial court's findings of fact. Thus, we presume the findings are supported by sufficient evidence, and they are binding on appeal. *Steadman v. Pinetops*, 251 N.C. 509, 514-15, 112 S.E.2d 102, 106 (1960).

The starting point for our analysis of the issues raised by plaintiff is Rule 702 itself. The "cardinal principle" of statutory construction "is to ensure accomplishment of the legislative intent." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, —— U.S. ——, 143 L. Ed. 2d 671 (1999).

> To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish.

Brown v. Flowe, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998). Words not defined in the statute "are given their plain meaning so long as it is reasonable to do so." *Polaroid Corp.*, 349 N.C. at 297, 507 S.E.2d at 290.

We begin with an analysis of sections (b) and (c). Rule 702(b) is a default provision, applicable to all medical malpractice actions except those against "general practitioners," as provided in section (c). Pursuant to section (b)(1), if the defendant in a medical malpractice action is a specialist practicing in the area of his or her specialty, then any expert witness testifying as to the standard of care applicable to the defendant must also be a specialist; similarly, if the defendant is a general practitioner practicing in that area of medicine, the expert witness must be a general practitioner. Rule 702(c).

Portions of section (b) and (c) at first glance appear to overlap. By its terms, Rule 702(b) applies to all medical malpractice actions against any "health care provider." *See* N.C.G.S. § 90-21.11 (1999). Section (b)(2)(a) requires expert witnesses to have engaged in "active clinical practice of the same health profession" as the defendant, or, if the defendant is a specialist, in "active clinical practice of the same specialty" as the defendant. The first part of section (b)(2)(a), which applies to non-specialists only, thus could be construed to overlap with section (c), which contains a similar provision regarding "active clinical practice as a general practitioner," if the term "general practitioner" is equated with a non-specialist.

However, it appears the intent of the legislature was to limit the applicability of section (c) to physicians, as section (c)(2) refers

specifically to instruction of students "in the general practice of medicine." *See* N.C.G.S. § 90-18 (1999) (defining the "practice of medicine" to exclude the practice of, *inter alia*, dentistry, pharmacy, optometry, chiropractic, and nursing); *cf.* G.S. § 90-21.11 (defining health care provider as one who, *inter alia*, practices dentistry, pharmacy, optometry, chiropractic, or nursing). This interpretation avoids any potential redundancy. *See, e.g., State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998) (statute must be construed, if possible, to give meaning to all its provisions).

Thus, we interpret the statute to apply as follows: health care providers other than physicians are governed exclusively by section (b). Section (c) applies only to physicians who are "general practitioners," while section (b) applies only to physicians who are "specialists."

The terms "general practitioner" and "specialist" are not defined in Rule 702. We thus look to the "plain meaning" of these terms. *Polaroid Corp.*, 349 N.C. at 297, 507 S.E.2d at 290. Dictionaries may be used to determine the plain meaning of words. *Hunter v. Kennedy*, 128 N.C. App. 84, 86, 493 S.E.2d 327, 328 (1997).

"General practitioner" is variously defined as a physician "who does not limit his practice to a specialty," Webster's Third New International Dictionary 945 (1966), a "physician whose practice covers a variety of medical problems in patients of all ages," American Heritage College Dictionary 567 (3d ed. 1997), and a "physician who does not hold specialty qualifications, and who does not restrict his practice to any particular field of medicine," Vergil N. Slee, Debora A. Slee, & H. Joachim Schmidt, *Health Care Terms* 476 (3d ed. 1996) (hereinafter *Health Care Terms*).

"Specialist" is defined as a "physician whose practice is limited to a particular branch of medicine or surgery, esp. one certified by a board of physicians." American Heritage College Dictionary 1307; *see also* 5 J.E. Schmidt, Attorney's Dictionary of Medicine S-219 (1999) (defining specialist as a "medical practitioner who limits his practice to certain diseases . . .; a person who is a diplomate of one of the specialty boards"). Board certification in a speciality area of medicine is voluntary, and is available to physicians who, after graduating from medical school, complete a residency of at least three years, pass a written examination in the specialty, and in some cases, practice full-time in the specialty for an additional period of time following completion of the residency. *See* 1 American Board of Medical Specialties,

The Official ABMS Directory of Board Certified Medical Specialists xxi (32d ed. 1999); *see also* American Medical Association, *Physician Characteristics and Distribution in the U.S.* 5-6 (2000) (hereinafter *Physician Characteristics*). A licensed physician may practice in any specialty area, however, regardless of certification. *Physician Characteristics* at 6.

Our case law indicates that a physician who "holds himself out as a specialist" must be regarded as a specialist, even though not board certified in that specialty. *See Wall v. Stout*, 310 N.C. 184, 195, 311 S.E.2d 571, 578 (1984) (where defendant held himself out to be board-certified specialist in family practice, such defendant "is required to bring to the care of his patients more than the average degree of skill possessed by general practitioners"); *see also Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 569 (1966) (physician "who holds himself out as specialist" must be held to higher standard than general practitioner); *Dunn v. Nundkumar*, 463 N.W.2d 435, 436-37 (Mich. Ct. App. 1990) (board certification not required to be "specialist;" physician who limits practice to obstetrics and gynecology is specialist in that field).

We thus hold that a doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a "specialist" for purposes of Rule 702. Actions by the legislature prior to passage of the amended Rule 702 support this interpretation. *See Utilities Com. v. Coach Co.*, 233 N.C. 119, 123, 63 S.E.2d 113, 117 (1951) (construing statute by reference to prior version of enacted bill). Several versions of House Bill 730, the bill that ultimately resulted in the amendment to Rule 702, were submitted to the House Select Committee on Tort Reform and the Senate Judiciary I Committee. In at least four of these preliminary drafts of the bill, section (b), governing specialists, separated specialists into two groups. For example, proposed committee substitute PCS6142 provided:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must specialize in the

> same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified or otherwise certified by a specialty health care group, the expert witness must be a specialist who is similarly certified in that specialty . . . .

This version of the bill indicates the legislature considered specialists to be of two categories: specialists who are board certified, and specialists who are not board certified. The final, adopted version of section (b) does not contain this division. Though the legislative history does not reveal the reason the division was removed, several committee members did express discomfort with the board certification language. *See* 26 April 1995 *Minutes of the House Select Comm. on Tort Reform*. One committee member specifically "questioned the reasoning for having to be board certified in order to be an expert witness." *Id.*

Regardless, had the legislature wished to limit the term "specialists" to only those physicians who are board certified, it had the language before it to do so. By removing the more restrictive category of "board certified" specialists from the statute, we believe the legislature expressed its intent that the term "specialist" include a broader category of physicians than only those who are board certified.[2]

We further believe that the legislature intended the term "specialist" to include a physician who is either board certified in a specialty or who holds himself out as a specialist or limits his practice to a specialty. This definition is dispositive of the case *sub judice*, and it is thus unnecessary for us to outline the contours of the term "general practitioner." We hold that all three of plaintiff's witnesses are specialists as that term is used in the statute. Thus, they are all disqualified from testifying against defendant pursuant to Rule 702(c). The trial court found as a fact, and plaintiff does not dispute, that Dr. Paschold is board certified in oncology, while Dr. Hammer is board certified in emergency medicine and family practice. By virtue of their board certifications, both doctors are specialists and thus may not testify against defendant, a general practitioner.

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2. Though not at issue in the case herein, it appears the legislature also intended that board certified specialists would be able to testify against or on behalf of non-board certified specialists, and vice versa, with the restriction that the witness must "[s]pecialize in the same specialty" as the defendant, Rule 702(b)(1)(a), or "[s]pecialize in a similar specialty which includes . . . the performance of the procedure that is the subject of the complaint," Rule 702(b)(1)(b).

Plaintiff argues that because Dr. Paschold and Dr. Hammer are "more qualified than defendant" they should be able to testify against him. Such interpretation of Rule 702 is completely contrary to the intent of the statute. The language of the statute is unambiguous: only general practitioners are allowed to testify against general practitioners. Specialists, who are more qualified than general practitioners, may testify only against other specialists. This interpretation is consistent with N.C.G.S. § 90-21.12 (1999), which requires that the plaintiff in a medical malpractice action prove by the greater weight of the evidence that the care of the health care provider at issue "was not in accordance with the standards of practice among members of the same health care profession *with similar training and experience.*" G.S. § 90-21.12 (emphasis added).

As stated by another court, this rule

> is designed to protect the defendant from being compared with the higher standard of care required from one who holds himself out as an expert in the field.

Moore v. Foster, 292 N.W.2d 535, 538 (Mich. Ct. App. 1980), *rev'd on other grounds*, 302 N.W.2d 146 (Mich. 1980); *see also* 19 April 1995 *Minutes of the House Select Comm. on Tort Reform* (sponsor of House Bill 730 noting that purpose of amendment to N.C.R. Civ. P. 9 is to insure that malpractice actions are "reviewed by qualified practitioners of a competence similar to" defendant of suit).

Plaintiff's third expert witness, Dr. McCaskill, is not board certified in any specialty. However, the trial court found, and again plaintiff does not dispute, that Dr. McCaskill has been "work[ing] on a full-time basis since 1973 as Chief of Emergency Medicine at Scotland Memorial Hospital and as an emergency department physician." Evidence was also introduced that Dr. McCaskill works part-time at a general medical clinic in Maxton, North Carolina. Further, plaintiff introduced evidence that Dr. McCaskill, when reporting to the North Carolina Medical Board, lists his primary specialty as "emergency medicine." We thus hold that Dr. McCaskill is a specialist in emergency medicine, in that he holds himself out to be such a specialist and largely limits his practice to that specialty.

Plaintiff contends Dr. McCaskill is a general practitioner because he has similar training to defendant and his work in the emergency room is sufficiently similar to that of a general practitioner. While it

appears that Dr. McCaskill's initial medical training was similar to defendant's, in that both completed medical school and a one year internship, we cannot agree that practicing in an emergency room equates to "[a]ctive clinical practice *as* a general practitioner." Rule 702(c)(1) (emphasis added). As the trial court found, Dr. McCaskill during the course of his practice has access to "laboratory resources, nursing personnel, active staff physicians, [and] intensive care support," resources which defendant in this case, and arguably most general practitioners, do not have. Further, emergency medicine is a specialty recognized by the American Board of Medical Specialties, thus indicating that the practice of emergency medicine itself is a specialized field.

It is also questionable whether Dr. McCaskill devoted the majority of his professional time during the year preceding the incident in question to the "active clinical practice" of medicine as required by Rule 702(c)(1). Clinical is defined as "based on or pertaining to actual experience in the observation and treatment of patients." 2 J.E. Schmidt, Attorney's Dictionary of Medicine C-310 (1999).

On *voir dire*, Dr. McCaskill testified that some of his duties as Chief of Emergency Medicine at Scotland Memorial were administrative in nature. Plaintiff's brief to this Court indicates that Dr. McCaskill spent only seven and one-half hours per week dealing "hands on [with] patients" at Scotland Memorial, and an additional five hours per week admitting patients seen at the Maxton clinic. This amounts to at most thirteen hours per week out of what plaintiff admits is Dr. McCaskill's normal forty-five to sixty hour work week. When asked on *voir dire* if he would agree "that in the year preceding August of 1993 you did not devote the majority of your time as a general practitioner," Dr. McCaskill answered, "That's true." However, the trial court did not make findings of fact on this issue, and our decision herein does not rest on this point.

To reiterate, we hold the trial court properly disqualified plaintiff's expert witnesses. As plaintiff tendered no other expert witness to testify on the standard of care applicable to defendant, the trial court also properly granted defendant's motion for directed verdict. *See Lowery v. Newton*, 52 N.C. App. 234, 237, 239, 278 S.E.2d 566, 570, 571 (directed verdict proper if plaintiff does not offer evidence on standard of care; standard of care in medical malpractice action must be established by expert witness), *disc. review denied*, 303 N.C. 711 (1981).

In closing, we are mindful of plaintiff's contention that there are virtually no general practitioners still practicing who could testify against each other, such that general practitioners "will be free to treat their patients negligently without having to worry about the consequences of any medical malpractice litigation." Without passing on the merits of this contention,[3] we do observe that the record on appeal is silent as to whether plaintiff sought to avail herself of Rule 702(e), which provides:

> Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

For the reasons stated herein, the trial court is

Affirmed.

Judges WYNN and HORTON concur.

STATE OF NORTH CAROLINA v. ELIZABETH MAGDELENE CLARK, A/K/A, ROBIN GOSNELL

No. COA99-646

(Filed 20 June 2000)

1. Evidence— expert testimony—contradictions—resolved by jury

Although a testifying witness did not use the same terms as contained in her autopsy report's finding of no "tonsillar herniation," the trial court did not err in a first-degree murder case by failing to intervene when the witness testified that the cause of

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3. While there were no physicians in Columbus County in 1998 that identified themselves as general practitioners, there were thirty-one such physicians practicing in an eleven county region including and surrounding Columbus County. *See* N.C. Health Professions Data System, *N.C. Health Professions 1998 Data Book* 39, 138 (1998).

the minor victim's death was blunt force injury to the head because: (1) defendant did not object to or move to strike this testimony; and (2) any contradiction in the witness's testimony and her autopsy report was to be considered and resolved by the jury.

2. Jury— juror contact with victim's family—no further inquiry by trial court

The trial court did not abuse its discretion in a first-degree murder case by failing to conduct a further inquiry into a juror's possible contact with a member of the victim's family because: (1) the juror did not state any contact had taken place in violation of the trial court's instructions since the only information was that the juror attended church with a member of the victim's family; and (2) defendant did not object to the trial court's ruling or its failure to inquire further into the matter.

3. Evidence— photographs and slides—extent of victim's injuries

The trial court did not abuse its discretion in a first-degree murder case by admitting photographs and slides of the minor victim at the time of his death because: (1) the extent and cause of the minor victim's numerous injuries, as well as his cause of death, were directly at issue and not stipulated to by defendant; (2) the State had the burden of proving that the child's injuries were inflicted by defendant and were not the result of accidents; (3) the trial court conducted a voir dire examination of the photographs and slides before they were admitted and screened them for repetition; (4) the slides were projected onto a screen away from defendant; (5) the trial court gave limiting instructions that the photographs and slides were to be used only for illustrating and explaining the testimony of witnesses; and (6) none of the photographs were distributed to the jury.

4. Criminal Law— motion to poll jury—waiver

The trial court did not err in a first-degree murder case by failing to offer defendant an opportunity to poll the jury after the guilty verdicts were entered and in denying defendant's motion to poll the jury the next morning, because a defendant waives his right to poll the jury under N.C.G.S. § 15A-1238 once the jury leaves the courtroom after the verdict is returned, and defendant did not move to poll the jury prior to the recess.

5. Criminal Law— requested instructions—accident

The trial court did not err in a first-degree murder case by denying defendant's request for a jury instruction on the issue of an "accident" because: (1) if the jury believed defendant's argument, she would have been acquitted of the charges; and (2) the trial court's instruction on second-degree murder revealed that the State must prove beyond a reasonable doubt that the minor victim's injuries were inflicted intentionally and not by accident or misadventure.

6. Homicide— first-degree murder—battered child—sufficiency of evidence

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss because the State's circumstantial evidence was sufficient to reveal that the minor victim was a battered child who died as a result of injuries inflicted by defendant.

7. Evidence— prior bad acts—child abuse—intent

The trial court did not err in a first-degree murder case by admitting testimony of defendant's prior bad acts regarding her treatment of the minor victim because: (1) past instances of mistreatment are admissible to show intent in a child abuse case; (2) defendant's treatment of the minor victim was relevant to the charge of felony child abuse; and (3) defendant has failed to establish that the admission of this evidence was manifestly unsupported by reason.

Appeal by defendant from judgment entered 5 August 1998 by Judge Howard E. Manning, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 29 March 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert J. Blum, for the State.

Nancy R. Gaines for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first degree murder upon perpetration of a felony, i.e. felonius child abuse, and was sentenced to life imprisonment without parole. The State's evidence tended to show the following:

The victim, Budde Lee Clark, born on 27 November 1990, was the son of Warren LeGrande Clark, a/k/a Lee Clark, and Pam Bradshaw,

who were not married. In April 1994, Lee Clark married the defendant, Elizabeth Magdelene Clark, a/k/a Robin Gosnell. Lee Clark, the defendant, and her two sons from a previous marriage, Christian Pittman and Sammy Bringle, lived together. Lee Clark obtained custody of Budde in March 1995, and Budde lived in their home from then until the time of his death on 31 January 1997.

Lee Clark testified that during this time he occasionally saw Budde with injuries to his nose, arm, foot, face and backside. Clark testified that defendant always had an explanation as to how the injuries occurred. Further, Clark testified that the day before the victim died, he observed defendant whipping Budde with a belt and he took the belt away from her. However, the defendant retrieved the belt and hit Budde several more times. Clark then saw red marks and bruises on Budde's legs.

The following morning, 31 January 1997, as Clark was leaving for work, he noticed a bruise on Budde's forehead that was not there the night before. Around 9 a.m., Clark called the defendant and asked her what happened to Budde's head. She explained that Budde had been injured while "playing Power Rangers."

Later that day, Budde was found in the bathtub lying on his side in approximately eight inches of water. Defendant's son, Sammy Bringle, found Budde, lifted him out of the tub, and called for his mother. Defendant attempted CPR and Sammy called 911. Emergency Medical Services was unable to revive Budde and he was pronounced dead on arrival at the Rowan Regional Medical Center. Clark further testified that he saw Budde's body at the hospital and saw "big bruises on his head," and that some of the bruises were not there when he left for work that morning.

Dr. Karen Chancellor, associate chief medical examiner for North Carolina, performed the autopsy and testified that a "blunt force injury of the head" was the cause of death. Dr. Chancellor identified approximately thirteen discrete injuries to the head, but could not identify which blow or blows to the head would have been fatal. She testified there were numerous injuries present on every part of his body, as well as evidence of blunt force trauma to the head, back, chest, arms, and legs. Also, there was evidence of two healing rib fractures. She also testified that Budde's injuries were consistent with battered child syndrome. Dr. Chancellor used autopsy photographs and slides to illustrate her testimony. Some of the slides were projected onto a screen for the jury to view.

Pam Bradshaw testified that prior to living with defendant, Budde was a very outgoing and rambunctious child, but that she had not observed him jumping off bunk beds or injuring his head jumping off furniture. She also testified that Budde was more quiet and timid after he began living with defendant and Lee Clark.

Dr. Marcia Herman-Giddens, an expert in the investigation and analysis of the circumstances of child fatalities, testified that a month before Lee Clark and defendant obtained custody of Budde, he was in the 75th percentile on a children's growth chart, and at the time of his death he had dropped to the 5th percentile. Her examination of the autopsy report revealed "muscle wasting," whereby a child suffers from malnutrition to the point where his muscle tissue begins to deteriorate. Dr. Herman-Giddens further testified that Budde evidenced a "failure to thrive," which is common in abusive and neglectful situations.

Phyllis Reep, a registered nurse, observed Budde's body in the emergency room. She testified there were numerous bruises and abrasions on his head and body and a large raised bluish hematoma near the center of his forehead. Photographs taken of Budde in the emergency room were used by Ms. Reep to illustrate her testimony.

Lisa Grass, the defendant's sister-in-law, testified how the defendant treated Budde. She stated that the defendant "talked hateful" to Budde "most of the time." Jaime Pittman, the defendant's daughter-in-law, also testified about defendant's treatment of Budde. Ms. Pittman lived with defendant and Lee Clark for a period of time and witnessed the defendant striking Budde with her hands and fist and kicking him. Additionally, she observed bruises on Budde and his being punished frequently by defendant. In her opinion, the reason he was treated so harshly was because he was not the defendant's biological son. Ms. Pittman also testified that she contacted the Department of Social Services about this, but that she did not personally intervene when the defendant was hitting Budde out of her fear of the defendant.

The defendant testified that Budde was a very active and rambunctious child who often injured himself while playing. She related how Budde would occasionally injure his head by "flipping" off of the bunk beds and that all of the bruises on his body were the result of accidents. She admitted that she spanked Budde with a belt, but that she did not spank him on the night prior to his death. Further, on the day of Budde's death, she ran water for him to take a bath and then went to use the phone and check her phone messages. She stated she

was not in the bathroom when Budde got in the tub. When her son Sammy came and told her that something was wrong with Budde, she ran to the bathroom and discovered Budde's body laying beside the bathtub. While Sammy called 911, she attempted to clear his air passages since she thought Budde had drowned. Defendant denied hurting or injuring Budde in any way that would have caused his death. Prior to his bath that morning, Budde acted like he did not feel well.

Christian Pittman, defendant's son, testified that Budde was very rambunctious and suffered bruises from climbing on bunk beds and jumping on a trampoline. Pittman testified he never observed defendant slap Budde's head or kick him, but that she did spank Budde for breaking her rules.

[1] Defendant first argues the State erred when it failed to correct false witness testimony offered by Dr. Chancellor when it contrasted with her written autopsy report. Dr. Chancellor's autopsy report stated there was "no evidence of uncal, cingulate or tonsillar herniation." However, defendant claims Dr. Chancellor's testimony described the victim's cause of death as "tonsillar herniation," although she never used the term in her testimony.

A prosecutor's presentation of known false evidence, allowed to go uncorrected, is a violation of a defendant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 1221-22 (1959); *State v. Williams*, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995). The State has a duty to correct any false evidence which in any reasonable likelihood could affect the jury's decision. *Id.* However, if the evidence is inconsistent or contradictory, rather than a knowing falsehood, such contradictions in the State's evidence are for the jury to consider and resolve. *State v. Edwards*, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988); *State v. Joyce*, 104 N.C. App. 558, 565, 410 S.E.2d 516, 520 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992).

Dr. Chancellor testified that the cause of Budde's death was blunt force injury of the head. She described the specific mechanism of death, although she did not use the same terms as contained in her autopsy report's finding of no "tonsillar herniation." Defendant did not object to or move to strike this testimony. Any contradiction in her testimony and her autopsy report was to be considered and resolved by the jury and this argument is without merit.

[2] Next, defendant argues the trial court erred in failing to conduct an inquiry into Juror #7's possible contact with a member of the vic-

tim's family. During the morning recess after Pam Bradshaw's testimony, the following exchange took place outside the presence of the other jurors:

THE COURT: Bill. Rick. Nancy [first names of counsel for State and defendant]. This is Mr. Childers?

JUROR # 7: Yes, sir.

THE COURT: If you'll speak up so she can get it.

JUROR # 7: Okay. I just found out that I go to church with [Pam Bradshaw's] uncle and I didn't know if that was—

THE COURT: Thanks for telling me. But that doesn't disqualify you.

JUROR # 7: Okay.

THE COURT: Thanks for letting us know.

JUROR # 7: All right. I just didn't want—

THE COURT: I appreciate it.

JUROR # 7: —you to find out later.

THE COURT: That's right. No problem. Thank you, sir.

JUROR # 7: Yes, sir.

The trial court did not conduct any further inquiry. Previously during the jury *voir dire*, Juror #7 stated that he attended high school with Pam Bradshaw 12 years earlier.

Whether alleged misconduct has affected the impartiality of a particular juror is a discretionary determination for the trial court. *See State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984), *disc. review denied*, 313 N.C. 335, 327 S.E.2d 897 (1985). Misconduct must be determined by the facts and circumstances of each case. *Id.* The trial court has the responsibility to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant. *See State v. Williams*, 330 N.C. 579, 583, 411 S.E.2d 814, 817 (1992).

Here, there was no allegation of misconduct. Juror #7 did not state that any contact had taken place in violation of the trial

court's instructions. The only information brought to the trial court's attention was that Juror #7 attended church with Pam Bradshaw's uncle.

While the better practice is for the trial court to conduct a full *voir dire* hearing to ascertain the particular circumstances of the situation, *see State v. Selph*, 33 N.C. App. 157, 161, 234 S.E.2d 453, 456 (1977), under the circumstances of this case, the trial court did not abuse its discretion in failing to inquire further as to whether Juror #7 may have violated its instructions. We note that the defendant did not object to the trial court's ruling or its failure to inquire further into the matter.

[3] Next, defendant contends the trial court erred in admitting photographs and slides which were not accurate representations of the victim at the time of his death, were duplicative in nature, and were projected onto a screen "many times life size." Defendant relies on *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), for the proposition that the trial court erred in allowing all of these photographs into evidence.

Photographs of the victim's body may be used to illustrate testimony as to the cause of death. *State v. Cummings*, 332 N.C. 487, 503, 422 S.E.2d 692, 701 (1992). 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. *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988). 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 is within the trial court's discretion under a totality of the circumstances analysis. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 526. Abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Id.* Additionally:

> 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.

Hennis, 323 N.C. at 285, 372 S.E.2d at 527 (internal citations omitted). Our Supreme 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)).

In *Hennis*, the defendant was convicted of three counts of first degree murder. The trial court admitted thirty-five autopsy and crime scene photographs and the duplicate slides were projected onto a screen just above the defendant's head. *Hennis*, 323 N.C. at 282, 372 S.E.2d at 525. Defendant stipulated to the victims' cause of death. *Id.* at 283, 372 S.E.2d at 526. The thirty-five 8x10 photographs were distributed to the jury, one at a time, and were unaccompanied without further testimony. *Id.* Many slides with repetitive content were admitted. *Id.* at 286, 372 S.E.2d at 527. Our Supreme Court held that the trial court prejudicially erred in admitting the photographs and slides. *Id.* at 287, 372 S.E.2d at 528.

The extent and cause of Budde's numerous injuries, as well as his cause of death, were directly at issue and not stipulated to by the defendant. To establish child abuse and murder, the State had the burden of proving that these injuries were inflicted by defendant and were not the result of accidents. The trial court conducted a *voir dire* examination of the photographs and slides before they were admitted and screened the photographs and slides for repetition, as did Dr. Chancellor. Approximately five were removed for repetitive content. Twenty slides were projected onto a screen which the record reveals was away from the defendant. Dr. Chancellor's testimony focused on the severity and timing of each of the numerous head and body injuries inflicted upon Budde. Additionally, she testified that the photographs and slides were accurate portrayals of Budde's body at the time she conducted the autopsy, which was the morning after Budde died, and that the photographs and slides would be helpful in illustrating her testimony. The trial court gave limiting instructions that the photographs and slides were to be used only for illustrating and explaining the testimony of witnesses. None of these photographs were distributed to the jury. Our review of the photographs and

slides confirms that the trial court did not err in admitting them into evidence.

[4] Next, defendant argues the trial court erred in failing to offer her an opportunity to poll the jury after the guilty verdicts were entered and in denying her motion to poll the jury the next morning.

Under N.C. Gen. Stat. § 15A-1238, "Upon motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled." N.C. Gen. Stat. § 15A-1238 (1999). In *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991), our Supreme Court held that the defendant waived his right to poll the jury, where the jury returned guilty verdicts and was given a thirty-minute recess and instructed not to discuss the case among themselves or with any other persons. The defendant did not move to poll the jury prior to the recess. *Id.* at 197, 400 S.E.2d at 402. The trial court denied the motion since the motion was not timely. Our Supreme Court, in holding that the jury had been "dispersed" within the meaning of N.C. Gen. Stat. § 15A-1238, stated that "once a juror leaves the courtroom after the verdict is returned and goes into the streets, despite her best efforts to shield herself, she still can be affected by improper outside influences." *Id.* at 198, 400 S.E.2d at 402.

Here, the jury returned its verdict at approximately 5:10 p.m. on 5 August 1998. Defendant did not request that the jury be polled. The trial court excused the jury for the day with instructions that the jurors refrain from discussing the case with anyone. The following morning, defendant requested a polling of the jury, which the trial court denied. Finding *Black* controlling, defendant's assignment of error is without merit.

[5] Next, the defendant contends the trial court erred in denying defendant's request for a jury instruction on the issue of accident.

In *State v. Willoughby*, 58 N.C. App. 746, 294 S.E.2d 407, *disc. review denied*, 307 N.C. 129, 297 S.E.2d 403 (1982), this Court held that jury instructions on accident were not required where the defendant's version of the story would, if believed by the jury, have resulted in his being found not guilty of second degree murder. In *Willoughby*, the defendant and the victim were swimming together and the victim died of drowning. *Id.* at 747, 294 S.E.2d at 408. The defendant was convicted of second degree murder, but argued that he did not touch the victim and was entitled to a jury instruction on accident. *Id.* This Court held:

> We do not believe the court should have charged on accident. If [the victim] died as a result of an accidental drowning, it was an accident with which the defendant had nothing to do. The jury accepted the version of the incident in accordance with the State's evidence. This evidence showed the defendant committed murder. If the jury had accepted the defendant's version of the event, the jury should have found the defendant not guilty under the charge given to them by the court. It was not necessary for the court to charge on accident.

Id. at 748, 294 S.E.2d at 408.

The defendant argued that Budde was a rambunctious child who often injured himself through roughhousing and "flipping" off of bunk beds, and that all of his bruises and injuries were accidental. If the jury believed defendant's argument, then she would have been acquitted of the charges.

Furthermore, in its instruction on second degree murder, the trial court charged the jury that the State must prove beyond a reasonable doubt that Budde's injuries were "inflicted intentionally and not by accident or misadventure."

Based upon *Willoughby* and the jury instructions for second degree murder, the trial court did not err in denying defendant's request for an instruction on accident.

[6] Next, defendant argues the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence and again at the close of all evidence.

On a defendant's motion to dismiss for insufficiency of the evidence, the trial court must consider "whether there is substantial evidence of each essential element of the offense[s] charged, or of a lesser included offense of that charged." *State v. Robbins*, 309 N.C. 771, 774, 309 S.E.2d 188, 190 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference. *State v. Wright*, 127 N.C. App. 592, 596-97, 492 S.E.2d 365, 368 (1997), *disc. review denied*, 347 N.C. 584, 502 S.E.2d 616 (1998). Further, if the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion even though the evidence may also support

reasonable inferences of the defendant's innocence. *Id.* at 597, 492 S.E.2d at 368.

Here, the State's evidence showed that Budde was a battered child and died as a result of injuries inflicted by the defendant. Although the State's case centered around circumstantial evidence, taken in the light most favorable to the State, it was sufficient to withstand the defendant's motions to dismiss.

[7] Next, defendant argues the trial court erred in admitting testimony of prior bad acts of the defendant regarding her treatment of Budde. Defendant contends the testimony concerning her discipline of Budde, the manner in which she spoke to Budde, along with testimony describing defendant as a "pushy person," was improperly admitted.

Character evidence may be admissible for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). The list of permissible purposes is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. *See State v. Hipps*, 348 N.C. 377, 404, 501 S.E.2d 625, 641 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). Even if admissible under Rule 404(b), the probative value of evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under Rule 403. *See State v. Everhardt*, 96 N.C. App. 1, 18, 384 S.E.2d 562, 572 (1989), *affirmed*, 326 N.C. 777, 392 S.E.2d 391 (1990). The determination to exclude evidence on these grounds is left to the sound discretion of the trial court. *See State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986); *State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676 (citation omitted), *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998). Our courts have consistently held that past incidents of mistreatment are admissible to show intent in a child abuse case. *See State v. Hitchcock*, 75 N.C. App. 65, 69-70, 330 S.E.2d 237, 240, *disc. review denied*, 314 N.C. 334, 333 S.E.2d 493 (1985); *State v. Vega*, 40 N.C. App. 326, 331, 253 S.E.2d 94, 97, *disc. review denied*, 297 N.C. 457, 256 S.E.2d 809, *cert. denied*, 444 U.S. 968, 62 L. Ed. 2d 382 (1979).

Here, since the defendant was charged with felony child abuse, her treatment of Budde was at issue and thus relevant. *See State v. West*, 103 N.C. App. 1, 9-10, 404 S.E.2d 191, 197-98 (1991) (stating that evidence of the way defendant had treated the child in the past was relevant where defendant was convicted of involuntary manslaughter and non-felonious child abuse). The defendant has failed to establish that the trial court's decision to admit this evidence was manifestly unsupported by reason and thus her assignment of error is overruled.

We have carefully examined defendant's remaining assignment of error and find it to be without merit. In sum, defendant received a fair trial free from prejudicial error.

No error.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. KENNETH RAY BLUE

No. COA99-323

(Filed 20 June 2000)

1. Homicide— second-degree murder—shaken baby syndrome—malice—sufficiency of evidence

The trial court erred in denying defendant's motion to dismiss the charge of second-degree murder in a shaken baby syndrome case based on a failure to show malice, because: (1) a defendant's shaking a baby and the baby's death by shaken baby syndrome are not the sole determinants of whether the State has produced sufficient evidence of malice; (2) the evidence did not show the infant victim was shaken violently or vigorously, nor that she vomited, had bruises to the brain, suffered hemorrhaging in her lungs, or had multiple external injuries; (3) the facts do not show a particular animosity and wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind utterly regardless of social duty and deliberately bent on mischief; and (4) the evidence is sufficient only to raise a suspicion or conjecture of malice.

2. Criminal Law— instructions—burden of proof—correct charge—fundamental right

Although the trial court's erroneous reference in a second-degree murder case to the greater weight of the evidence in the jury instructions on circumstantial evidence appears among nearly twenty references to the correct burden of proof of guilt beyond a reasonable doubt, the Court of Appeals emphasizes that a correct charge is a fundamental right of every accused.

Appeal by defendant from judgment entered 16 December 1998 by Judge Robert P. Johnston in Gaston County Superior Court. Heard in the Court of Appeals 27 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant.

McGEE, Judge.

The State's evidence at trial tended to show that: Kenneth Ray Blue (defendant) resided in a mobile home in Gaston County with his girlfriend, Amanda Conner (Ms. Conner), their eighteen-month-old daughter, Jaylenn, and Ms. Conner's two-month-old daughter, Alexis, who had a different father. Defendant worked as a plumber's assistant while Ms. Conner supervised the children at home during the day. Ms. Conner worked at a grocery store at night, while defendant stayed home with the children. Jaylenn was a normal, healthy child, but Alexis was relatively small, underdeveloped, and weak, weighing only ten pounds. Alexis had difficulty holding her head upright, would frequently spit up her food, and was colicky.

Ms. Conner testified that on 19 February 1998 she went to work at 5:15 p.m., leaving defendant at home with the children. When she returned home shortly before 11:00 p.m., defendant was lying on the couch watching television. Defendant told Ms. Conner that Alexis had eaten and spit up before he put her to bed at 8:00 or 9:00 p.m. Ms. Conner looked at Alexis in her bassinet, saw she looked normal, and went to bed with defendant. Ms. Conner testified, "I can remember seeing her cheeks and she looked normal." After lying in bed for approximately fifteen minutes, Ms. Conner got up to turn off the television and then returned to bed. A few minutes later, Ms. Conner got up again to go to the bathroom and heard Alexis make a grunting

sound, which Ms. Conner had heard many times before and typically signaled that Alexis would awaken soon. Both times Ms. Conner got up, defendant asked her where she was going, which she said he normally did not ask. In her statement to the police, Ms. Conner described defendant as "paranoid and jumpy" when he asked where she was going.

Ms. Conner testified that defendant woke her up the next morning and told her "we're running late." Defendant had already dressed Jaylenn, which Ms. Conner said was unusual because on prior occasions defendant had insisted that Ms. Conner dress Jaylenn. Ms. Conner went to the bassinet to feed Alexis. Ms. Conner picked Alexis up and the baby felt hard and cold. Ms. Conner screamed defendant's name, and he also screamed out. He said they should call the police.

Defendant, Ms. Conner, and Jaylenn rode to a nearby convenience store to make the call because they did not have a telephone at home. Ms. Conner watched defendant make the call while she and Jaylenn sat in the car. Ms. Conner testified that as they were returning home, defendant said they had to do CPR and that "they are going to blame us for this." She told him "we didn't do nothing wrong" and that she "thought it was SIDS." They asked a neighbor to give Alexis CPR, and when the neighbor's girlfriend volunteered, defendant took her to Alexis. Ms. Conner did not enter the house because she "couldn't handle seeing [her] baby like that." The police and a rescue team arrived within five to ten minutes. As the ambulance left for the hospital, the family followed in their car. The emergency medical technicians determined that Alexis was beyond resuscitation and discontinued CPR on the way to the hospital.

Ms. Conner testified defendant asked her if she was going to request an autopsy. The police officer who responded to the call described defendant as "nervous" in that he straightened up the living room and did not pay much attention to the child. The emergency medical technician testified that defendant appeared nervous and distraught.

Dr. Peter Wittenberg, who performed an autopsy on Alexis, testified that many small blood vessels on the surface of the brain were torn and bleeding, but that larger blood vessels were not torn. Blood from the small vessels had produced a thin coating on the surface of the brain and a slight hemorrhage in the right eye. The bleeding caused increased pressure on the brain, leading to swelling and

death. According to Dr. Wittenberg, there were no other internal or external injuries to Alexis's body, and specifically her ribs were not bruised or fractured. He also indicated there were no external head injuries and the skull was not fractured. He could not pinpoint the child's time of death. Dr. Wittenberg concluded the cause of Alexis's death was "shaken baby syndrome." Dr. Wittenberg testified that he could not say how much shaking had occurred, but that the shaking could not have been light.

In his initial statement to police prior to the autopsy, defendant stated that on the previous evening he had put Alexis to bed around 9:00 p.m. and that "[e]verything was fine."

> Alexis ate. I changed her. My girlfriend got home from work around 11:00 P.M. Before I went to bed I checked on both girls. Alexis was on her back at 11:00 when I checked on her. I laid her on her stomach when I put her to bed. When I checked on Alexis at 11:00 P.M. she was asleep. She was moving around as she slept. My girlfriend and I went to bed shortly after 11:00.

Defendant made a second statement to police after the autopsy by Dr. Wittenberg showed Alexis died from shaken baby syndrome. The interview was conducted by Steve Myers, a detective with the Gaston County Police Department, and Sergeant Dean Henderson, who wrote the statement signed by defendant. Detective Myers testified that on the night before Alexis was found dead, defendant "advised he became frustrated [with Alexis's crying] and started shaking Alexis but he didn't realize that he was shaking her that hard." Detective Myers stated that defendant said he "had begun bouncing the child on his knee and he was concentrating on a TV show also that he was watching." Detective Myers also stated that defendant said that "she started crying louder and louder and he picked her up, cupped her up under the arms and chest . . . holding her up . . . barely off his leg, and that he was shaking her trying to get her to stop crying."

In response to a question from Detective Myers about whether defendant was supporting the baby's neck, defendant "stated that he might have had his fingers, his middle fingers, up on the neck." Detective Myers testified that "I did ask him could he have been shaking the baby frontwards and backwards, too, and he said that's possible." Detective Myers added that defendant said Alexis "started whimpering and [defendant] gave her a bottle, fed her three ounces of formula, and that he held her until about 8:30 or 9:00 p.m. and then

took her to the bassinet and put her in bed." The end of defendant's statement read:

> I didn't realize that me shaking her the way I did caused the damage to her. I apologize for what happened, for shaking her. I had no intention of hurting her. I feel like I must have used more force that I thought I did. I feel like I really got frustrated and really didn't realize the force I was using.

Ms. Conner testified that defendant loved both Alexis and Jaylenn equally, treated them equally, and never abused or mistreated either child. She also told police that defendant "is good to both my children and never loses his temper with them. He has not been abusive to either of my children." She said she would not have tolerated mistreatment of her children, and stated nothing unusual happened on 19 February 1998, the last day Alexis was alive. Ms. Conner also testified that doctors had advised her to position Alexis across the knee, "sort of bounce her" and "pat her butt" to stop her from crying, which normally soothed Alexis. She stated that Alexis was "real weak" and "didn't develop like most children do." Alexis was "much weaker than Jaylenn had been . . . and wasn't strong enough to hold her head up." She stated that she and defendant cooperated in the investigation and gave voluntary statements to the officers.

Defendant moved to dismiss the charge of second degree murder at the close of the State's evidence, which was denied. Defendant presented no evidence at trial. He again moved to dismiss the charge of second degree murder at the close of all evidence, which was denied by the trial court. The trial court instructed the jury on second degree murder and involuntary manslaughter. Defendant was convicted of second degree murder and sentenced to a minimum term of 125 months and a maximum term of 159 months in prison. Defendant appeals.

[1] Defendant first argues that his second degree murder conviction must be vacated for insufficient evidence of malice. At trial, defendant moved to dismiss the charge of second degree murder for insufficient evidence.

> It is well-settled that when considering a motion to dismiss for the insufficiency of the evidence, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. The motion to dismiss must be denied if the evidence,

> when viewed in the light most favorable to the State, permits 'a rational jury to find the existence of each element of the charged crime beyond a reasonable doubt.'

State v. Chavis, 134 N.C. App. 546, 553, 518 S.E.2d 241, 247 (1999) (citations omitted). "The test for appellate review of a trial court's granting [or denying] of a motion for a new trial due to insufficiency of the evidence [is] simply whether the record affirmatively demonstrates an abuse of discretion by the trial court in doing so." *In Re Buck*, 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999).

Second degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963). Malice is an essential element of second degree murder. *State v. Lang*, 309 N.C. 512, 524, 308 S.E.2d 317, 323 (1983). Our Supreme Court has recognized three types of malice in homicide cases:

> [I]n our law of homicide there are at least 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 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) (citations omitted). The State argues that the second kind of malice was present in this case, that defendant acted "with recklessness of the consequences of his actions" and in such a way as to indicate a total disregard for human life. The State does not refer to any facts from the case supporting this argument in its brief.

This kind of malice has been more specifically described by our Supreme Court in *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978) as "comprehend[ing] not only particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.' " *Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916. In *State*

v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000), our Court characterized the *Wilkerson* description as a list of "examples, any one of which may provide the malice necessary to convict a defendant of second-degree murder." *Rich*, 132 N.C. App. at 446, 512 S.E.2d at 446 (upholding jury instructions permitting malice to be found if any one descriptive phrase in *Wilkerson* applied to the defendant).

On appeal to our Supreme Court, the defendant in *Rich* argued "if this Court allows the six traditional descriptive words and phrases defining malice to be read in the disjunctive, then it is possible for a jury to convict a defendant of second-degree murder based [only] on a finding of 'recklessness of consequences.' " *State v. Rich*, 351 N.C. 386, 393, 527 S.E.2d 299, 303 (2000). According to the defendant, "this would effectively lower the culpability level required to convict a defendant of second-degree murder since 'recklessness of the consequences' is a level of culpability usually associated with negligence." *Id.* Our Supreme Court in *Rich* disagreed, noting that "the distinction between 'recklessness' indicative of murder and 'recklessness' associated with manslaughter 'is one of degree rather than kind.' " *Id.* (citation omitted). The *Rich* Court stated that "[b]ecause the trial court's instructions, in their entirety, conveyed the level of recklessness required for second-degree murder, we cannot conclude that the jury could have confused such a high degree of recklessness with mere culpable negligence." *Id.*

Thus, our Supreme Court in *Rich* did not alter the traditional meaning of malice, but rather affirmed our Court's holding that any one term or phrase in the *Wilkerson* description is itself adequate to describe malice. Furthermore, the phrase "recklessness of consequences" continues to require a high degree of recklessness to prove malice, and according to *Rich*, this high degree is adequately conveyed when "recklessness of consequences" appears within the context of all the other terms and phrases comprising the *Wilkerson* description. Hence, in the case before us we describe malice with the familiar language from *Wilkerson*, keeping in mind that the terms and phrases of the description are meant to be disjunctive, yet also understanding that the phrase "recklessness of consequences" denotes the high degree of recklessness required for murder as opposed to the lesser degree required for manslaughter.

To support defendant's conviction of second degree murder, " '[s]ubstantial evidence must be introduced tending to prove the essential elements of the crime charged and that defendant was

the perpetrator.' " *State v. Elliott*, 344 N.C. 242, 266-67, 475 S.E.2d 202, 212 (1996) (citation omitted), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). Substantial evidence, as required for a denial of a motion to dismiss on the ground of insufficient evidence, is such relevant evidence as a reasonable mind might find sufficient to support a conclusion. *State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, — S.E.2d — (1999).

> If, however, when the evidence is so considered it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. This is true even though the suspicion aroused by the evidence is strong.

State v. Malloy, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citations omitted).

Our question is whether the facts taken in the light most favorable to the State constitute substantial evidence of malice on the part of defendant, or instead merely "raise a suspicion or conjecture" that defendant acted with malice. The State contends *State v. Hemphill*, 104 N.C. App. 431, 409 S.E.2d 744 (1991) supports its argument that the trial court properly found substantial evidence of malice in this case. In *Hemphill*, the defendant took his four-month-old baby to the hospital in the late afternoon, and the baby's pediatrician determined that the baby had been dead for three to four hours. The doctor performing the autopsy found significant evidence of shaken baby syndrome, including vomiting, hemorrhaging in the lungs, and bruises on the front and back of the brain. The doctor testified that the injury resulted from "violent or vigorous" shaking. In a statement to police after the autopsy was completed, the defendant stated that he had shaken the child about four times shortly before noon on the day she died because she was choking. *Hemphill*, 104 N.C. App. at 431-33, 409 S.E.2d at 744-45. After reciting these facts, defining malice, and holding that the facts were sufficient to support a finding of malice, our Court summarized that:

> The evidence that defendant shook the baby as well as the expert testimony that the cause of death was 'Shaken Baby Syndrome,' which typically results from an infant's head being held and shaken so violently that the brain is shaken inside the skull causing bruising and tearing of blood vessels on the surface of and inside the brain, is sufficient to show that defendant acted with

> 'recklessness of consequences, . . . though there may be no intention to injure a particular person.'

Id. at 434, 409 S.E.2d at 745.

Our holding in *Hemphill*, however, was based on all of the State's evidence and not solely on the two factors that the "defendant shook the baby" and "the cause of death was 'Shaken Baby Syndrome[.]' " *See id.* ("We hold the evidence in the present case is sufficient to support a finding by the jury that defendant acted with malice as defined by *Wilkerson*."). Indeed, "all of the evidence, whether competent or incompetent, which is favorable to the State is to be considered by the court" in ruling on a motion to dismiss for insufficient evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980); *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975). Our Supreme Court has stated that

> [i]n passing on a motion for nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially necessary in a case, such as ours, when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt.

State v. Thomas, 296 N.C. 236, 244-45, 250 S.E.2d 204, 209 (1978).

Therefore, our Court in *Hemphill* was required to examine all of the State's evidence to determine whether it was sufficient to permit a rational jury to find the existence of malice beyond a reasonable doubt. *See, e.g., State v. Evans*, 74 N.C. App. 31, 327 S.E.2d 638 (1985), *aff'd per curiam*, 317 N.C. 326, 345 S.E.2d 193 (1986) (defendant indicted for involuntary manslaughter in killing two-year-old child by violent shaking); *State v. Lane*, 39 N.C. App. 33, 249 S.E.2d 449 (1978) (defendant charged with second degree murder, defendant's motion to dismiss allowed as to second degree murder, and defendant convicted of involuntary manslaughter for death by violent shaking of his seven-month-old baby); *State v. Ojeda*, 810 P.2d 1148 (Idaho Ct. App. 1991) (defendant charged with involuntary manslaughter for death by violent shaking of three-month-old baby); *Com. v. Earnest*, 563 A.2d 158 (Pa. Super. Ct. 1989) (defendant charged with involuntary manslaughter for death by striking and shaking fifteen-month-old child); *see also* N.C. Gen. Stat. § 14-17 (1999) (shaken baby syndrome not included among categories of homicide that are necessarily deemed murder if proven); *State v. Camp*, 286 N.C. 148, 153, 209 S.E.2d 754, 757 (1974) (when public policy requires a change in the

law, it is the duty of the legislature and not the courts to make that change). In *Hemphill* our Court did not limit its examination to the sole issues of whether the defendant shook the baby and whether the baby died from shaken baby syndrome.

Our language and holding in *Hemphill* was later relied upon in *State v. Qualls*, 130 N.C. App. 1, 502 S.E.2d 31 (1998), *aff'd per curiam*, 350 N.C. 56, 510 S.E.2d 376 (1999), a case the State cited in its brief herein, but did not argue. In *Qualls*, the majority of our Court recited the relevant definition of malice, found a similarity between its facts and those in *Hemphill*, and followed *Hemphill* because the defendant had severely shaken the baby, causing its death. *Id.* at 11, 502 S.E.2d at 37. The *Qualls* Court then added that the defendant not only shook the baby but also inflicted more than one severe blow to the left side of the head, causing multiple skull fractures. *Id.* at 11, 502 S.E.2d at 37-38. "Considering all this evidence together and giving the State the benefit of all legitimate inferences which may reasonably be drawn therefrom," we concluded in *Qualls* that the State had presented substantial evidence the defendant acted with malice. *Id.* at 11, 502 S.E.2d at 38. We reemphasize that a defendant's shaking a baby and the baby's death by shaken baby syndrome are not the sole determinants of whether the State has produced sufficient evidence of malice to convict the defendant of murder in a shaken baby syndrome case.

Comparing *Hemphill* and *Qualls* to the case before us, we find both cases to be distinguishable. Significantly, Alexis died several hours after she was shaken. Ms. Conner testified Alexis looked normal more than two hours after defendant said he shook her, and after Ms. Conner went to bed she heard Alexis make familiar noises. By contrast in *Hemphill*, a doctor who examined the baby at 3:50 p.m. believed the victim had been dead for three to four hours, and the defendant stated he shook the baby around 11:30 a.m. The victim in *Qualls* was transported to the hospital by ambulance immediately after the baby began to gag during an incident in which the defendant admitted in one interview to shaking the baby, and after the baby was flown to another hospital he was not breathing and had no brain activity. Furthermore, Alexis was underdeveloped and weak. The evidence did not show she was shaken violently or vigorously and she did not suffer from the same signs of injury as the baby in *Hemphill* or in *Qualls*. Specifically, Alexis did not vomit, have bruises to the brain, or suffer hemorrhaging in her lungs, as in *Hemphill*; nor did she have multiple external injuries, as in *Qualls*.

Nevertheless, we must review the evidence in the light most favorable to the State to determine whether the State presented sufficient evidence of malice so as to charge defendant with murder. The evidence shows defendant was not the father of Alexis, who was an underdeveloped and weak child. Ms. Connor said defendant acted "paranoid and jumpy" when he asked her where she was going both times she left her bed on the night of 19 February 1998. Furthermore, defendant dressed Jaylenn the next morning, which was atypical, and woke Ms. Connor by telling her they were running late. Defendant also later said "you know they are going to try and blame this on us."

A police officer and medical technician described defendant as nervous and distraught, and defendant asked Ms. Conner if she planned to request an autopsy. Dr. Wittenberg testified that Alexis died from shaken baby syndrome, which he said was caused by more than a light shaking. Finally, defendant did not mention the shaking incident at the first interview with police, but only after the results of the autopsy were made known to him. During his second interview, defendant said he "became frustrated and started shaking Alexis" but did not "realize that he was shaking her that hard" and that he did not mean to hurt her.

These facts fail to present substantial evidence of malice, an essential element of second degree murder. *See Elliott*, 344 N.C. at 266-67, 475 S.E.2d at 212. Specifically, the facts do not satisfy the *Wilkerson* definition of malice employed in *Hemphill* and *Qualls* requiring "not only a particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind utterly regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person[.]' " *See Wilkerson*, 295 N.C. at 578, 247 S.E.2d at 916. Instead, the evidence is sufficient only to raise a suspicion or conjecture of malice required for a conviction of second degree murder. *See Malloy*, 309 N.C. at 179, 305 S.E.2d at 720. Thus, the trial court erred in denying defendant's motion to dismiss the charge of second degree murder.

[2] Defendant also argues the trial court erred in its jury instructions on the State's burden of proof. Specifically, defendant contends that the following instruction on circumstantial evidence was error:

> The law simply requires the party having the burden of proof on a particular issue to satisfy the jury as to that issue by the greater weight of all the evidence in the case.

In a criminal case the State must prove a defendant's guilt beyond a reasonable doubt, not by the greater weight of all the evidence in the case.

> It is fundamental that evidence must satisfy a jury of guilt beyond a reasonable doubt before conviction of crime is authorized. A finding of guilt by the greater weight of the evidence cannot be sustained in a criminal prosecution. A charge that a jury may convict on the greater weight of the evidence is error.

State v. Orr, 260 N.C. 177, 181, 132 S.E.2d 334, 337 (1963). We recognize that this erroneous reference by the trial court to the greater weight of the evidence appears in the jury instructions among nearly twenty references to the correct burden of proof of guilt beyond a reasonable doubt. Nonetheless, in anticipation of defendant's new trial, we emphasize that "a correct charge is a fundamental right of every accused." *Id.*

New trial.

Judges JOHN and HUNTER concur.

HAMLET HMA, INC. D/B/A HAMLET HOSPITAL, PLAINTIFF-APPELLANT v. RICHMOND COUNTY, RICHMOND MEMORIAL HOSPITAL, AND THAD USSERY, KENNETH R. ROBINETTE, JOHN B. GARNER, J. C. LAMM, R. LYNN MCCASKILL, CRAIG S. MCNEILL AND J. C. WATKINS, IN THEIR OFFICIAL CAPACITIES AS COUNTY COMMISSIONERS, AND FIRSTHEALTH OF THE CAROLINAS, INC., DEFENDANT-APPELLEES

No. COA99-716

(Filed 20 June 2000)

1. Statute of Limitations— continuing wrong doctrine—not a malpractice action—not applicable

The continuing wrong doctrine of *Costin v. Shell*, 53 N.C. App. 117, did not apply to provide relief from the statute of limitations in a declaratory judgment action arising from the conveyance of a hospital tract and facility because this was not a case involving professional malpractice. The general rule for claims other than malpractice is that a cause of action accrues as

soon as the right to institute and maintain a suit arises. Plaintiff here could have instituted the suit at the time of conveyance.

2. Statute of Limitations— transfer of hospital facility—two- or three-year limitations period

Plaintiff's action seeking a declaratory judgment and injunctive relief voiding the transfer of a hospital facility was barred by the statute of limitations where the deed to the hospital tract was executed on 28 March 1994, a quitclaim deed to personal property within the hospital was recorded on 20 February 1995, and the action was brought on 21 August 1998. Although plaintiff argued for the ten-year limitations period of N.C.G.S. § 1-56, the causes of action against the County and the county commissioners require the use of the two-year period of N.C.G.S. § 1-53(1) for actions against a local unit of government arising from a contract (a deed is a contract), while the three-year period of N.C.G.S. § 1-52(1) applies to claims against the defendants which are not local units of government.

3. Statute of Limitations— transfer of hospital facility—session law—constitutionality—three-year limitations period

A challenge to the constitutionality of Senate Bill 335 arising from the transfer of a hospital facility was time barred pursuant to the three-year period of N.C.G.S. § 1-52(2) ("upon liability created by statute") because the claim was that some or all of the defendants were liable for creating or following an unconstitutional law.

Appeal by plaintiff from orders entered 21 October 1998 by Judge Sanford L. Steelman, Jr. in Richmond County Superior Court. Heard in the Court of Appeals 21 February 2000.

Moore & Van Allen, PLLC, by Denise Smith Cline and Robert A. Meynardie, for plaintiff-appellant.

Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant-appellees Richmond County, Thad Ussery, Kenneth R. Robinette, John B. Garner, J. C. Lamm, R. Lynn McCaskill, Craig S. McNeill and J. C. Watkins.

Maupin Taylor & Ellis, P.A., by D. Royce Powell and James E. Gates, for defendant-appellee Richmond Memorial Hospital.

Kilpatrick Stockton LLP, by Noah H. Huffstetler, III, for defendant-appellee Firsthealth of the Carolinas, Inc.

Attorney General Michael F. Easley, by Special Deputy Attorney General James A. Wellons, on behalf of the North Carolina Medical Care Commission, amicus curiae.

McGEE, Judge.

Richmond Memorial Hospital (RMH), a nonprofit corporation formerly named Richmond County Memorial Hospital, was incorporated in 1947 by approximately forty citizens of Richmond County. In 1948 three citizens deeded a tract of land (hospital tract) of approximately twenty acres in Richmond County to RMH as a gift. In 1949 RMH conveyed the hospital tract to Richmond County (the County) in order that the County would qualify for matching federal and state funds under federal law for development of a hospital. For the next two years the County invested approximately $250,000 in a facility to be built on the hospital tract. The hospital opened in 1952 and since then has been operated continuously by RMH. In 1952 the County leased to RMH the hospital tract upon which the hospital is located for a sum of $1.00 per year for an initial term of twenty-five years, including an automatic renewal for another twenty-five year term expiring on 31 May 2002. The County did not invest in the hospital or hospital tract after 1952.

The Richmond County Commissioners (county commissioners) approved a resolution on 1 June 1992 authorizing the conveyance of the hospital tract to RMH, citing "authority to do so under N.C.G.S. 131E-8." *See* N.C. Gen. Stat. § 131E-8 (1999) ("A [county] . . . upon such terms and conditions as it deems wise . . . may sell or convey to a nonprofit corporation . . . any rights of ownership . . . in a hospital facility[.]") In the resolution the county commissioners specified that "Richmond County never has been in the hospital business and does not intend to get into the operation of a hospital in the foreseeable future." The county commissioners asked state legislators on 7 December 1992 to introduce a bill in the North Carolina General Assembly permitting the County to convey the hospital by means other than those provided in N.C. Gen. Stat. § 131E-13(d)(2), which requires that "At the meeting to adopt a resolution of intent, the [county] . . . shall request proposals for lease or purchase by direct solicitation of at least five prospective lessees or buyers." *See* N.C.G.S. § 131E-13(d)(2) (1999).

During the 1993 legislative session, the North Carolina General Assembly enacted Chapter 10 of the 1993 Session Laws stating: "The provisions of G.S. 131E-13(d)(2) do not apply to the conveyance by Richmond County to [RMH], a North Carolina nonprofit corporation, of [the hospital tract]." In the 1995 session, the General Assembly approved Senate Bill 725 and enacted Chapter 597 of its 1995 Session Laws, entitled "An act to exempt Richmond County from certain restrictions relating to the sale of hospital facilities to nonprofit corporations." Section 1 of the Act rewrites N.C. Gen. Stat. § 131E-8(a) to read: "A [county] . . . may sell or convey to a nonprofit corporation . . . any rights of ownership . . . in a hospital facility . . . if the nonprofit corporation is legally committed to continue to operate the facility as a community general hospital[.]" Section 2 of the Act states: "This act applies to Richmond County only." N.C.G.S. § 131E-8(a) has since been modified and no longer refers to the County except in a notation by the publisher appearing below the statutory language. *See* N.C. Gen. Stat. § 131E-8(a) (1999) ("Local Modification—Richmond: 1995 (Reg. Sess., 1996), c. 597, s. 1.).

The County held public hearings to discuss the conveyance and executed a deed on 28 March 1994 conveying the hospital tract to RMH. RMH assumed the County's debt of approximately $3.7 million in bonds. *See* N.C. Gen. Stat. § 131E-8(b) (1999) ("[T]he nonprofit corporation . . . will provide sufficient money to pay the principal of and the interest and redemption premium, if any, on all bonds then outstanding[.]"). The deed between the County and RMH includes an express reversionary provision which would be triggered in the event the hospital tract were no longer used for the operation of a nonprofit hospital.

RMH and the County executed a "termination of lease," recorded on 20 February 1995, which ended the hospital tract lease between RMH and the County. The County also recorded a quitclaim deed on 20 February 1995 for any personal property located in the hospital. The deed states that "Richmond County has never claimed any title or interest in the personal property located in the hospital building[.]" RMH then constructed a $9,000,000 patient tower and birthing center, which included the renovation of nearly 25,000 square feet of the existing facility. RMH also hired 300 new employees, bringing the total number of employees to 750, and doubled the annual payroll to total $18,000,000. For the construction and renovation, RMH applied for a "certificate of need" (CON) which was issued by the North Carolina Department of Human Resources (NCDHR) as required by

N.C. Gen. Stat. § 131E-175 (1999) (entitled "Certificate of Need"). A "declaratory ruling" from NCDHR concluded that "RMH is the owner of all CONs issued to it as applicant, so long as RMH is in lawful possession of the real property comprising the Hospital[.]" The construction and renovation were financed with $12,000,000 in hospital revenue bonds issued by the North Carolina Medical Care Commission. RMH's title to the hospital tract was pledged as collateral for a letter of credit, which collateralized the bonds.

Plaintiff Hamlet HMA, Inc. was incorporated in 1987 as a North Carolina corporation and has since continuously operated Hamlet Hospital, which is the only other hospital in Richmond County. Hamlet HMA, Inc. is a wholly owned subsidiary of Health Management Associates, Inc. (HMA), a for profit Delaware corporation headquartered in Florida and traded on the New York Stock Exchange. HMA is not authorized to conduct business in North Carolina. Between 19 May 1992 and 30 March 1994, neither HMA nor Hamlet HMA, Inc. expressed interest in purchasing the hospital tract or made objection to its conveyance.

Sometime during or before 1994, RMH "finally recogniz[ed]" its "increasing competitive disadvantage" among larger hospital groups, and decided "an alliance with an acceptable larger entity [was] needed quickly." In November 1994, RMH began "discussions about selling or leasing its assets" primarily with HMA and two nonprofit corporations, Carolinas Medical System and FirstHealth of the Carolinas, Inc. (FirstHealth). RMH executed a letter of intent on 23 July 1998 to sell its assets for $44 million to FirstHealth, which is based in Pinehurst, North Carolina and is sole owner of Moore Regional Hospital. Following the sale, RMH planned to spend $14,000,000 to satisfy debts in bonds and loans that were secured by the hospital tract, and the remaining $30,000,000 for "charitable healthcare needs of the citizens of Richmond County and . . . other charitable purposes as permitted by the Internal Revenue Service."

The senior vice president of HMA stated in a letter dated 30 July 1998 to Thad Ussery, chairman of the county commissioners, and to Robert Hutchinson, chairman of the RMH board, that:

> Hamlet Hospital (a Richmond County taxpayer) and [HMA] must voice [their] concern relating to the process for selling [RMH]. While it may or may not be legal to bypass the prescribed procedure that all other North Carolina Hospitals must follow in similar transactions, it is certainly not in the best interest of

> Richmond Countians for [RMH] and Richmond County to consider the sale of [RMH] without an open and public bidding process. HMA, therefore, is submitting an alternative proposal[.]

In its proposal dated the same day, HMA offered to purchase the assets of RMH for $55,000,000, consisting of $45,000,000 to be paid to RMH and $10,000,000 to the County. RMH refused HMA's offer.

The county commissioners adopted a resolution on 3 August 1998 entitled

> Resolution initiating the correction of certain statutory procedures affecting the transfer and conveyance of Richmond Memorial Hospital from Richmond County to Richmond Memorial Hospital, a North Carolina nonprofit corporation, and notice of intent to quitclaim the hospital facility as a corrective action pursuant to N.C. Gen. Stat. §131E-13(d), as amended.

According to the resolution:

> The Commissioners will not request proposals for the lease or purchase of the Hospital facility by direct solicitation of at least five (5) prospective lessees or buyers as generally required by N.C. Gen. Stat. §131E-13(d)(2), since such requirements have been rendered inapplicable to the conveyance by Richmond County to [RMH], a North Carolina nonprofit corporation, of the real property on which the Hospital is situated, as stated in Senate Bill 335, described above[.]

The resolution also states "[t]he Commissioners shall conduct a public hearing on this matter[.]" The hearing was held on 23 and 24 August 1998.

Hamlet HMA, Inc. filed a verified complaint against defendant RMH, the County, and the county commissioners in their official capacities on 21 August 1998. The complaint asserts three claims for relief: (1) a declaratory judgment that the County's conveyance of the hospital tract and facility to RMH is void for failure to comply with N.C. Gen. Stat. § 131E-13(d); (2) a declaratory judgment that a session law enacted by the General Assembly, Senate Bill 335, is void and unconstitutional pursuant to Article II, section 24 of the North Carolina Constitution; and (3) a preliminary and permanent injunction restraining the County from conveying real or personal property to RMH unless it complies with N.C. Gen. Stat. §131E-13(d). Defendants RMH, the County, and the county commissioners filed

motions to dismiss in September 1998. The trial court entered orders on 21 October 1998 denying a preliminary injunction for plaintiff and dismissing plaintiff's complaint with prejudice pursuant to Rules 12(b)(1) and 12(b)(6) of the N.C. Rules of Civil Procedure, as requested by defendants' motions. Plaintiff timely filed notice of appeal.

In its brief, plaintiff contends the trial court erred in: (1) dismissing the complaint pursuant to N.C.R. Civ. P. 12(b)(6) because the complaint states valid causes of action for which relief may be granted; (2) dismissing the complaint pursuant to N.C.R. Civ. P. 12(b)(1) because plaintiff has standing; and (3) denying plaintiff's motion for a preliminary injunction because plaintiff is likely to succeed on the merits and will be irreparably harmed without the injunction.

[1] Defendants argue that plaintiff cannot prevail on its claims in that the applicable statute of limitations expired prior to filing of plaintiff's complaint. In the order denying an injunction for plaintiff, the trial court stated "[i]t is proper for the Court to consider the applicable statute of limitations[,]" and "[t]he plaintiff has failed to meet its burden of proof showing that it is likely to prevail on the merits of its case." The order dismissing plaintiff's complaint cites N.C.R. Civ. P. 12(b)(6), failure to state a claim upon which relief may be granted. As to this dispositive issue, plaintiff argues that its claims are not time-barred.

Plaintiff argues that regardless of the correct statute of limitations period, its complaint invokes the "continuing wrong doctrine" whereby "an ongoing violation causes the action not to accrue until the violation . . . ceases." Plaintiff cites *Costin v. Shell*, 53 N.C. App. 117, 280 S.E.2d 42, *disc. review denied*, 304 N.C. 193, 285 S.E.2d 97 (1981) to support its argument. In *Costin* our Court upheld an injunction granted by the trial court against the defendant, who had been violating podiatry statutes by unlawfully practicing podiatry and holding himself out as a Doctor of Podiatry when the complaint was filed. We stated that "the ten-year statute of limitations, if applicable, would not have been tolled at the time the complaint was filed" by the Board of Podiatry Examiners. *Costin*, 53 N.C. App. at 120, 280 S.E.2d at 44. Indeed, as to both malpractice actions and omissions the cause of action accrues and the statute of limitations begins to run at the time of defendant's last act giving rise to the cause of action. N.C. Gen. Stat. § 1-15 (c) (1999); *Callahan v. Rogers*, 89 N.C. App. 250, 253, 365 S.E.2d 717, 719 (1988). The general rule, for claims other than malpractice, provides that a cause of action accrues as soon as the right

to institute and maintain a suit arises. N.C. Gen. Stat. § 1-15 (a) (1999); *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962). Plaintiff's complaint is for (1) a declaratory judgment as to the constitutionality of legislation governing conveyances, (2) a declaratory judgment upon the validity of a conveyance between two other parties, and (3) enjoining a conveyance between two other parties. Assuming *arguendo* that plaintiff has standing, plaintiff could have instituted this lawsuit at the time of the 1994 conveyance, and therefore the action accrued not later than 1994. *Costin* does not apply because this is not a case involving professional malpractice.

[2] Plaintiff also argues the correct limitations period is ten years pursuant to N.C. Gen. Stat. § 1-56 (1999), as cited in *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965). Our Supreme Court in *Fulp* stated in dicta that "[t]he ten-year statute applies when the title to property is at issue, not where, as here, the action is merely for breach of contract[.]" *Fulp*, 264 N.C. at 27, 140 S.E.2d at 714 (citation omitted). This statement was made in the context of trust law. *See id.* ("Were plaintiff the *cestui que trust* of a resulting or a constructive trust, the ten-year statute would apply[.]"). Indeed, N.C. Gen. Stat. § 1-56 has been applied mainly in cases related to trusts, accountings, tax liens and fiduciary duty. *See, e.g., Tyson v. N.C.N.B.*, 305 N.C. 136, 286 S.E.2d 561 (1982) (action to impose constructive trust); *Nunnery v. Averitt*, 111 N.C. 394, 16 S.E. 683 (1892) (right to surcharge and restate a final account); *Bradbury v. Cummings*, 68 N.C. App. 302, 314 S.E.2d 568 (1984) (tax lien foreclosure); *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990) (breach of fiduciary duty). N.C.G.S. § 1-56 does not apply to this case.

In arguing for a ten-year limitations period, plaintiff denies that the shorter limitations periods argued by defendants apply. Defendants first argue for the application of N.C. Gen. Stat. § 1-53 (1), providing a two-year limitations period for "[a]n action against a local unit of government upon a contract, obligation, or liability arising out of a contract, express or implied." Alternatively, defendants ask us to apply the three-year limitations period in N.C. Gen. Stat. § 1-52 (2) for "a liability created by statute, either state or federal, unless some other time is mentioned in this statute creating it."

In *Liptrap v. City of High Point*, 128 N.C. App. 353, 496 S.E.2d 817, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 873 (1998), current and retired city employees sued the City of High Point claiming that

the City's resolution freezing the amount of their longevity pay and subsequent refusals to pay additional amounts to those plaintiffs reaching greater increments of service, constituted and continued to constitute breaches of their employment contracts. The City argued that the plaintiffs' cause of action accrued, and the two-year statute of limitations in N.C.G.S. § 1-53 (1) began to run, upon the passage of the City's 1992 resolution freezing the amount of the longevity pay. Our Court agreed, stating that the statute of limitations begins to run as soon as the injury becomes apparent or should reasonably become apparent, regardless of whether further damage could occur. Thus, the plaintiffs' claims were barred. *Liptrap*, 128 N.C. at 356, 496 S.E.2d at 819.

Defendant RMH cites *Colombo v. Dorrity*, 115 N.C. App. 81, 443 S.E.2d 752, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 517 (1994), in which the driver of a vehicle sued the City of Durham for damages sustained in an accident on a state highway based on the City's contract with the Department of Transportation to maintain the state highway. Our Court held that any liability the City might have for the accident would arise out of that contract, but the two-year statute of limitations in N.C.G.S. § 1-53 (1) applied. We therefore concluded that plaintiff's claim was barred as the action occurred on 16 July 1988 and the complaint was filed on 17 July 1991. *Colombo*, 115 N.C. App. at 86, 443 S.E.2d at 756.

Our Court also applied N.C.G.S. § 1-53 (1) in *Cooke v. Town of Rich Square*, 65 N.C. App. 606, 310 S.E.2d 76 (1983), *disc. review denied*, 311 N.C. 753, 321 S.E.2d 130 (1984). In *Cooke*, the plaintiff sued on a contract with the Town that provided the Town was to repay plaintiff from the taxes and fees collected from the residents of Cooke Circle once ten houses had been built in that area. Ten houses had been built by 1970, and plaintiff instituted the action in 1980. Our Court held that the plaintiff failed to present his claim within the two-year statute of limitations prescribed by N.C.G.S. § 1-53 (1) and his claim therefore was barred. *Cooke*, 65 N.C. App. at 608, 310 S.E.2d at 78.

Similar to *Liptrap*, *Colombo* and *Cooke*, plaintiff's causes of action against the County and the county commissioners in the case before us to enjoin the conveyance and for a declaratory judgment upon the validity of the conveyance, require the use of N.C.G.S. § 1-53 (1) for actions against a local unit of government upon liability arising out of a contract. "A deed is a contract[.]" *Yopp v. Aman*, 212 N.C. 479, 482, 193 S.E. 822, 824 (1937) (citation omitted); *see also*

Meachem v. Boyce, 35 N.C. App. 506, 510, 241 S.E.2d 880, 883 (1978) (citation omitted) ("The purported deed is a contract to convey[.]"); *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 186 (1963) ("The easement in the instant case is by deed, which is of course a contract."); *Butler Drive Property Owners Assn.* v. *Edwards*, 109 N.C. App. 580, 584, 427 S.E.2d 879, 881 (1993) (citation omitted) ("An easement deed is a contract."). Plaintiff's causes of action against the County and the county commissioners are barred as they were filed on 21 August 1998 and the deed conveying the hospital tract was executed on 28 March 1994. This result extends also to the quitclaim deed for personal property located in the hospital, which was recorded on 20 February 1995.

Plaintiff alleges the same claims against defendants RMH and FirstHealth, which are not local units of government. Therefore, the general three-year limitations period for actions upon contract liability applies to these claims. N.C. Gen. Stat. § 1-52 (1) (1999). "[W]hen such a cause of action is targeted against a local unit of government, the general three-year limitations period gives way to a specific two-year limitations period provision created for such a contingency." *McCullough v. Branch Banking & Trust Company*, 35 F.3d 127, 132 n.2 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151, 130 L. Ed. 2d 1069 (1995). Again, plaintiff's action was filed on 21 August 1998 and even with a three-year limitations period its cause of action was time-barred.

[3] Plaintiff also challenges the constitutionality of Senate Bill 335 which absolves all defendants from their liability to plaintiff for participating in the conveyance process without requiring outside bids. In *Rose v. Currituck County Bd. of Educ*ation, 83 N.C. App. 408, 350 S.E.2d 376 (1986), the plaintiff sought reinstatement as a teacher in the defendant's school system, back pay, and other benefits arising out of the defendant's alleged violation of the teacher tenure act. The defendant argued that because plaintiff resigned as a probationary principal, he automatically forfeited his rights as a career teacher and the dismissal procedures for career teachers were inapplicable. Our Court disagreed with the defendant and held that plaintiff, as a probationary principal, had a statutorily protected right as a career teacher until he resigned as a career teacher, which could not be stripped from him without proper notice and a hearing. The defendant argued that the plaintiff's action was barred by the two-year statute of limitations in N.C.G.S. § 1-53 (1), but our Court stated that the applicable statute of limitations was the three-year statute in

N.C.G.S. § 1-52 (2) "upon liability created by statute." *Rose*, 83 N.C. App. at 412, 350 S.E.2d at 379. We apply the same limitations period to plaintiff's constitutional challenge in this case for the reason that plaintiff's claim in the complaint for "declaratory relief regarding constitutionality of Senate Bill 335" is a claim that some or all defendants are liable for creating or following an unconstitutional law. Therefore plaintiff's constitutional claim asserted is time-barred pursuant to N.C.G.S. § 1-52 (2).

Plaintiff's claims for a declaratory judgment as to the conveyance of the hospital and for injunctive relief against the County and the county commissioners are barred by N.C.G.S. § 1-53 (1). The same claims, as asserted against RMH and FirstHealth, are not timely filed pursuant to N.C.G.S. § 1-52 (1). Finally, plaintiff's claim for declaratory relief regarding the constitutionality of Senate Bill 335 is also barred by the limitations period in N.C.G.S. § 1-52 (2).

The orders of the trial court are affirmed.

Affirmed.

Judges EAGLES and HORTON concur.

BRAD FULK, PLAINTIFF v. PIEDMONT MUSIC CENTER, PIEDMONT MUSIC, INC., AND WELCH-FULK ENTERPRISES, INC., DEFENDANTS

No. COA99-645

(Filed 20 June 2000)

1. Judgments— motion to amend denied—joinder of alternative claims—joint and several liability—same transaction—same question of law or fact

The trial court did not abuse its discretion by refusing to allow defendants' motion to amend the judgment to allocate the damages among defendants, based on alternative claims being joined under N.C.G.S. § 1A-1, *Rule 20(a) in* a case awarding plaintiff unpaid commissions earned under an alleged employment contract with defendants, because: (1) the claims arose out of the same transaction, the same occurrence, or a series of either since plaintiff worked for at least two of the three defendants over the course of the year of employment and had the same manager; and

(2) the claim contains a question of law or fact which will arise common to all parties since plaintiff asserts that one or more of defendants are liable for the commissions owed him.

2. Employer and Employee— employment compensation—breach—judgment notwithstanding the verdict

The trial court did not err by denying defendants' motion for judgment notwithstanding the verdict in a case awarding plaintiff unpaid commissions earned under an alleged employment contract with defendants, because viewing the evidence in the light most favorable to plaintiff reveals that: (1) by both their words and actions, the parties conveyed they had reached a "meeting of the minds" with regard to plaintiff's employment with defendants; and (2) plaintiff was entitled to have all material issues of fact decided by a jury since he met his burden of presenting evidence as to each element of the contract, N.C.G.S. § 1A-1, Rule 38.

3. Employer and Employee; Pleadings— amendment—after judgment entered—North Carolina Wage and Hour Act

The trial court did not abuse its discretion by allowing plaintiff to amend his pleadings under N.C.G.S. § 1A-1, Rule 15 to reflect a claim pursuant to the North Carolina Wage and Hour Act of N.C.G.S. §§ 95-25.6 and 95-25.7 after judgment had been entered in the case, because: (1) amendment of the pleadings was necessary to conform to the evidence since plaintiff had earned commissions which defendants had not paid and which plaintiff had demanded, in violation of the Act; (2) although plaintiff did not identify defendants' violation according to the particular statute, plaintiff did raise the violation in the pretrial order which defendants signed, thereby putting defendants on notice of the claims against them; and (3) the trial court's allowing the Act to be named simply identified the violation and did not change the nature of plaintiff's complaint.

4. Costs— attorney fees—North Carolina Wage and Hour Act

The trial court did not abuse its discretion by awarding plaintiff attorney's fees under N.C.G.S. § 95-25.22(a) and (d) for a violation of the North Carolina Wage and Hour Act because the Act does not require a finding that defendants acted in bad faith in order for attorney's fees to be awarded to plaintiff.

Appeal by defendants from judgment entered 28 October 1998 by Judge Thomas W. Ross in Forsyth County Superior Court. Heard in the Court of Appeals 14 March 2000.

Gordon & Nesbit, PLLC, by Thomas L. Nesbit for plaintiff-appellee.

William L. Durham for defendant-appellants.

HUNTER, Judge.

Piedmont Music Center, Piedmont Music, Inc., and Welch-Fulk Enterprises, Inc. ("defendants") appeal the judgment of the trial court in which the jury awarded Brad Fulk ("plaintiff") $9,405.06 in unpaid commissions he earned under an alleged employment contract with defendants. The trial court further awarded plaintiff costs and attorney's fees under the North Carolina Wage and Hour Act ("Act"). Defendants contend that the trial court erred in: (1) denying their motion to amend the judgment to conform to the evidence where the defendants did not have joint and several liability; (2) denying defendants' motion for judgment notwithstanding the verdict on the grounds that the verdict was not supported by the evidence and did not conform to law; (3) allowing plaintiff to amend his pleadings, reflecting a claim under the Act, after judgment had been entered in the case; and, (4) awarding statutory fees when plaintiff did not allege a violation of the statute and where the court specifically found defendants acted in good faith. We find no error.

The relevant facts of the case are as follows. In August 1995, plaintiff agreed to work for defendants selling pianos at their "college sales." The agreement allowed no salary for plaintiff but instead, he earned twenty percent (20%) commission on the gross profit of what he sold. In October 1995, plaintiff was hired on as a full-time employee to manage defendants' piano store and take primary responsibility for in-store piano sales. Although plaintiff worked for defendants approximately one year, it is the terms of his October 1995 hiring that gave rise to the issues in this suit.

Plaintiff filed suit in superior court alleging defendants breached their employment contract with him and thus owed him back commissions that he earned over the course of the year in which he worked for defendants. Plaintiff contended that in the October 1995 hiring meeting, defendants agreed to pay him $500.00 per week in salary plus a straight twenty percent (20%) commission on the gross profit of all in-store piano sales. Contrarily, defendants contended that the agreement was plaintiff would earn $500.00 per week in salary, and twenty percent (20%) commission on the gross profit of all in-store piano sales only *if and when plaintiff's commissions total exceeded half of his salary.*

At trial, plaintiff testified to his version of the hiring agreement, presented three letters he had written to Chris Fulk (owner of the Piedmont entities) which essentially laid out his demands, and presented as exhibits a copy of one commission check he earned early into his tenure in defendants' employ and a calculation of the commissions still owing him. Chris Fulk testified to his version of the hiring agreement, and the jury brought in a verdict for plaintiff.

[1] Defendants' first assignment of error is that the trial court erred in denying their motion to amend the judgment to conform to the evidence where defendants did not have joint and several liability and plaintiff's harm was clearly divisible between defendants. Defendants contend that because North Carolina law does not allow for contribution from other defendants held jointly liable in contract, they are prejudiced by the trial court's applying joint and several liability to this case. We disagree.

It is established in North Carolina law that the question of whether there should be severance of parties or issues is a matter which rests in the sound discretion of the trial judge, and "its determination thereof is not reviewable on appeal in the absence of abuse of discretion or of a showing that the order affects a substantial right of the moving party." *Insurance Co. v. Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E.2d 612, 614 (1972). Additionally, N.C.R. Civ. P. 20 provides in part that:

> . . . All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. . . .

N.C. Gen. Stat. § 1A-1, Rule 20(a) (1999). However, this Court recognizes that joinder for the purpose of joint and several liability is most often applied when " 'the substance of plaintiff's claim indicates that he is entitled to relief from someone, but he does not know which of two or more defendants is liable under the circumstances set forth in the complaint.' " *Woods v. Smith*, 297 N.C. 363, 367, 255 S.E.2d 174, 177 (1979) (quoting 7 Wright & Miller, *Federal Practice and Procedure: Civil*, § 1654, p. 278).

Further, this Court has held that "[a]lternative claims may be joined under G.S. 1A-1, Rule 20(a) if two tests are met. First, each claim must arise out of the same transaction, the same occurrence, or

a series of either." *Insurance Co. v. Transfer, Inc.*, 14 N.C. App. at 483, 188 S.E.2d at 613. In the case at bar, this first test is met by the fact that plaintiff worked for at least two of the three defendants over the course of the year of employment in question, having the same manager, Chris Fulk. "The second test is that each claim must contain a question of law or fact, which will arise, common to all parties." *Id.* This second test is satisfied in this case because plaintiff asserts that one or more of the defendants are liable for the commissions owed him. Since the evidence at trial tended to show: (1) that plaintiff worked for all three defendants at some point over the course of the year in question; (2) that the sole or major owner of all three entities is the same person, Chris Fulk; and (3) that all three entities therefore owed the plaintiff some portion of the commissions owed, we hold the trial court did not abuse its discretion in refusing to allow the defendants to amend the judgment, allocating the damages among defendants.

[2] Defendants' second assignment of error is that the trial court erred in denying their motion for judgment notwithstanding the verdict on the grounds that the verdict was not supported by the evidence and did not conform to law. Defendants argue that plaintiff failed to present evidence of every element of a contract. Specifically, they contend that for the jury to have found that there was an oral employment contract between the parties, plaintiff needed to prove there was a "meeting of the minds" which, defendants state, did not exist. However, we are unpersuaded by defendants' argument and thus, overrule it. Furthermore, since this is the only element that defendant argues was lacking from plaintiff's case in chief, it is the only element this Court will address. N.C.R. App. P. 28(a).

First, we recognize the standard of review for a judgment notwithstanding the verdict is the same as that for a Rule 50 directed verdict: whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury. *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825, (1993).

> If, after undertaking such an analysis of the evidence, the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied.

Id. at 215, 436 S.E.2d at 825. Therefore, motions for directed verdict and judgment notwithstanding the verdict should be granted only when the evidence is insufficient to support a verdict in the non-movant's favor. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985). In the case at bar we conclude, when viewed in the light most favorable to plaintiff, the evidence was sufficient to support the jury's verdict and to withstand defendants' motion for judgment notwithstanding the verdict.

Defendants are correct when they contend that "[t]o constitute a valid contract the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. [Further,] [i]f any portion of the proposed terms is not settled, there is no agreement." *Goeckel v. Stokely*, 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952). Additionally, case law is clear that a "meeting of the minds requires an offer and acceptance of the same terms[; and] [i]f, in his acceptance, the offeree attempts to change the terms of the offer, such constitutes a counter-proposal and thereby a rejection of the initial offer." *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126 (1988). However, when construing the terms of the contract, it is the parties' intentions which control, "and their intentions may be discerned from both their writings and actions." *Id.*

In the case *sub judice*, defendants agree that from the conversation in question, they hired plaintiff to manage their store, which plaintiff did for a full year, and for which defendants, in turn, paid him. The record before us reveals that plaintiff produced a log of defendants' payments to him along with copies of paychecks which defendants issued to him for work done throughout the year in question. Several of the checks evidenced payment of the twenty percent (20%) commissions on the total gross sales of the store. Furthermore, defendants acknowledge that they paid plaintiff the twenty percent (20%) commissions of the stores' gross sales for the first quarter of the year in which he worked for them (albeit, testifying of a different reason as to *why* they paid it).

Nevertheless we hold that, by both their words and actions, the parties conveyed they had reached a "meeting of the minds," with regard to plaintiff's employment with defendants. *Id.* Beyond that, "the evidence *pro* and *con* as to [the terms of plaintiff's earning commissions] presented a clear-cut issue of fact for the jury." *Goeckel*, 236 N.C. at 607, 73 S.E.2d at 620 (emphasis in original). In fact, "pursuant to N.C.G.S. § 1A-1, Rule 38, [plaintiff was] entitled to have all mate-

rial issues of fact . . . decided by a jury." *Darnell v. Rupplin*, 91 N.C. App. 349, 353, 371 S.E.2d 743, 746 (1988). "[O]ur Supreme Court has held that issues of fact must be tried by a jury regardless of the equitable nature of the action." *Overcash v. Blue Cross and Blue Shield*, 94 N.C. App. 602, 614, 381 S.E.2d 330, 338 (1989). Thus, we hold that plaintiff met his burden of presenting evidence as to each element of the contract, including the parties' "meeting of the minds." Therefore, viewing the evidence before the trial court in the light most favorable to plaintiff, we hold plaintiff's evidence was sufficient to support a verdict in his favor, and the trial court was correct in denying defendants' motion for judgment notwithstanding the verdict.

[3] Because defendants' final assignments of error are dependent upon one another, we choose to address them together. Defendants' last two assignments of error are that the trial court erred in allowing plaintiff to amend his pleadings, reflecting a claim under the Act, after judgment had been entered in the case, and; that such amendment opened the door to the trial court's awarding plaintiff attorney's fees under the Act, even though: (1) plaintiff did not plead a violation of the Act, (2) there were no common law provisions for attorney's fees if not under the Act; and (3) the trial court found that defendants did not act in bad faith. Again, we find no error.

Our Rules of Civil Procedure are clear regarding whether, when and how a party may amend its pleadings. N.C.R. Civ. P. 15 states in pertinent part:

> (a) *Amendments.*—A party may amend his pleading once as a matter of course at any time *before a responsive pleading is served* or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. *Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party*; and leave shall be freely given when justice so requires. . . .
>
> (b) *Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made* upon motion of any party at any time, *either before or after judgment*, but failure so to amend does not affect the result of the trial of these issues.

> If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may *grant* a continuance to enable the objecting party to meet such evidence.

N.C. Gen. Stat. § 1A-1, Rule 15(a), (b) (1999) (emphasis added).

Additionally, case law has long held that a trial judge's decision to grant or deny a party's motion to amend his pleadings "will not be reversed on appeal absent a showing of abuse of discretion . . . *unless* some material prejudice to the other party is demonstrated. [Furthermore,] [t]he burden is upon the opposing party to establish that [it] would be prejudiced by the amendment." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (citations omitted).

In the case at bar the trial court allowed plaintiff to amend his pleadings to reflect a claim that defendants violated the Act which states in pertinent part:

> Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. *Wages based upon* bonuses, *commissions*, or other forms of calculation may be paid as infrequently as annually *if prescribed in advance.*

N.C. Gen. Stat. § 95-25.6 (1999) (emphasis added). Furthermore:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. *Wages based on* bonuses, *commissions* or other forms of calculation *shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture.* Employees not so notified are not subject to such loss or forfeiture.

N.C. Gen. Stat. § 95-25.7 (1999) (emphasis added).

Reviewing the evidence presented at trial, indeed plaintiff's evidence tended to show defendants violated the Act. Defendants admit plaintiff was their employee, that plaintiff had the opportunity to earn commissions, and that plaintiff did, in fact, earn some commissions in the course of his employment with them. The only issue before the court was whether plaintiff had earned and not been paid commissions later in his employment with defendants. Therefore, where a jury could find, as this one did, that plaintiff had earned commissions which defendants had not paid, and which plaintiff had demanded, there was a violation of the Act. *Id.*

Defendants argue that:

> Allowing a party to amend a Complaint and effectively add a new cause of action after the evidence has closed leaves the other party defenseless, since he is unable to offer evidence which may have aided his cause.
>
> Also, as a matter of policy, a plaintiff should not be able to proceed under one cause of action, resulting in particular findings of fact, only to adopt and add additional causes of action to fit the facts which have already been tried. . . .

In support of their position, defendants cite *Gallbronner v. Mason*, 101 N.C. App. 362, 399 S.E.2d 139, *review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991) and *Chrisalis v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628, *review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991). We agree with defendants' proposition; however, it is inapplicable to the facts of defendants' case at bar.

As mentioned above, under N.C.R. Civ. P. 15, the trial court in its discretion allowed plaintiff to amend his pleadings to reflect an Act violation. Therefore, in order for defendants to be successful in their argument that the trial court erred, the evidence must show either that defendants were prejudiced by the trial court's allowing plaintiff to amend his complaint, or that in doing so the trial court abused its discretion. *Mauney*, 316 N.C. 67, 340 S.E.2d 397. Defendants have failed to meet their burden of proof.

Paragraph 6 of plaintiff's complaint alleged: "Plaintiff has at one time or another worked for all three defendant entities and has earned commissions or other compensation from each of these three entities, all of which is now past due and owing and has not been paid." Paragraphs 8 and 9 read: "Within the course and scope of his

employment, plaintiff made sales for defendants and earned commissions on these sales." "Defendants have refused to pay the commissions and/or other compensation due and owing plaintiff despite demand by plaintiff." Furthermore, in the pretrial order, signed by both the presiding judge, plaintiff's and defendants' attorneys, paragraph 11 states in pertinent part that: "[p]laintiff contends the contested issues [include] . . . what is the amount of wages to be doubled pursuant to N.C. Gen. Stat. § 95-25.22," of the Act.

It is clear then that regardless of the fact that in his complaint plaintiff did not identify defendants' violation according to the particular statute, plaintiff did raise the violation in the pretrial order which defendants signed and thereby, put defendants on notice of the claims against them. We then hold that the trial court's allowing the Act to be named simply identified the violation; it did not change the nature of plaintiff's complaint. Thus, defendants' argument that plaintiff was allowed "to amend [his] Complaint and effectively add a new cause of action," is completely without merit, and defendants cannot now claim that they are prejudiced by it.

Furthermore, because defendants were put on notice *before trial* of plaintiff's intent to show they had violated the Act, and because plaintiff's evidence did, in fact, show that defendants violated the Act, we hold that it was proper for the trial court to apply N.C.R. Civ. P. 15(b) and allow "[s]uch amendment of the pleadings as [was] necessary to cause them to conform to the evidence," defendants having had the opportunity "to meet such evidence." N.C. Gen. Stat. § 1A-1, Rule 15(b). We note that both cases cited by defendants in support of their position involved plaintiffs who wished either to add new defendants or new issues to their complaints. However, that is not the case here and those cases therefore, are distinguishable. We thus find no error in the trial court's allowing the pleadings to be amended.

[4] Our holding being such, defendants' contention that the trial court erred in awarding the plaintiff attorney's fees under the Act is also without merit. The relevant portion of the Act unambiguously states:

> (a) Any employer who violates the provisions of . . . [G.S. 95-25.6 and 7] shall be liable to the employee . . . affected in the amount of their unpaid [commissions] due under G.S. 95-25.6 [and 7] . . . plus interest at the legal rate set forth . . . .
>
> . . .

(d) The court, in any action brought under this Article may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant. . . .

N.C. Gen. Stat. § 95-25.22(a), (d) (1999). We note, the Act does not require a finding that defendants acted in bad faith in order for attorney's fees to be awarded to plaintiff. Thus where, as here the Act applies, the court in its discretion may award plaintiff attorney's fees. *Id.* Again, we find no abuse of discretion and defendants argue none. Therefore, we find no error in the trial court's judgment.

No error.

Judges WYNN and MARTIN concur.

DEMETRIUS LYNN, PLAINTIFF-APPELLANT v. STARNISHA BURNETTE AND UNKNOWN DRIVER "JANE DOE" A/K/A NIKKI FRASIER, DEFENDANT-APPELLEES

No. COA98-1303

(Filed 20 June 2000)

Negligence; Assault— accidental shooting—civil action in negligence

The trial court erred by granting summary judgment in favor of defendant Burnette in an action which arose when defendant intended to shoot at plaintiff's tire but shot him in the neck and plaintiff filed a civil action for negligence rather than the intentional tort of battery. Under a line of cases including *Vernon v. Barrow*, 95 N.C. App. 642, plaintiff may sue in negligence and therefore rely upon the three-year statute of limitations for personal injury rather than the one-year period for battery.

Appeal by plaintiff from order entered 15 October 1997 by Judge F. Gordon Battle in Durham County Superior Court. Heard in the Court of Appeals originally on 10 June 1999 in an opinion filed 17 August 1999. Remanded to the Court of Appeals for reconsideration by order of the North Carolina Supreme Court on 7 February 2000.

Keith A. Bishop for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Ian J. Drake, for defendant-appellees.

McGEE, Judge.

Defendant Starnisha Burnette and an individual known as Nikki Frasier followed Demetrius Lynn (plaintiff) and Dwayne Pratt to the Carolina-Duke Inn in Durham, North Carolina on 13 July 1993 and found plaintiff and Pratt in the company of two other women. Burnette and Pratt had been romantically involved, and Burnette went to plaintiff's motel room in search of Pratt. Later, as plaintiff and the two women were departing from the motel in an automobile, plaintiff saw Burnette and Frasier in a vehicle parked across the street at a gas station.

Plaintiff drove across the street to the gas station, parked, and walked over to the vehicle occupied by Burnette and Frasier. Plaintiff asked Burnette why she was following him. After plaintiff and Burnette spoke, plaintiff returned to his automobile. As he began to drive away, he was shot in the neck. In criminal court, Burnette pled guilty to assault with a deadly weapon inflicting serious injury.

Plaintiff filed an "application and order extending time to file complaint" on 12 July 1996. Plaintiff filed his complaint against defendants Burnette and Frasier on 1 August 1996 alleging that both were negligent. The complaint states that "[d]efendant Burnette owed a positive duty of care . . . to protect Plaintiff from injury when she discharged the hand gun at the tire of an automobile in which the Plaintiff was a driver." The complaint further alleges that "[d]efendant negligently caused the uncontrolled discharge of the hand gun[,]" and Frasier "facilitated the negligent discharge of the hand gun by either operating her automobile or permitting her automobile to be operated by [d]efendant Burnette while [d]efendant Burnette negligently discharged the hand gun." In defendant Burnette's answer, she "admit[s] that on or about July 13, 1993 the firearm discharged while aimed at a tire and plaintiff was hit by the bullet." Frasier did not file an answer. Plaintiff filed a motion for entry of default against Frasier, which was granted on 13 May 1997.

Defendant Burnette filed a motion to dismiss plaintiff's complaint. Following a hearing, the trial court entered an order dismissing claims against defendant Burnette with prejudice on 15 October 1997. The order stated the trial court treated the motion to dismiss as

a motion for summary judgment. The trial court determined there was no genuine issue as to any material fact regarding the claims against Burnette and granted summary judgment in favor of defendant Burnette. Plaintiff appealed. Burnette moved to dismiss plaintiff's appeal, which was granted by this Court in an order entered 31 July 1998. Plaintiff filed a petition for writ of certiorari with this Court on 20 August 1998, which was granted on 31 August 1998. In an opinion filed 17 August 1999, our Court dismissed plaintiff's appeal for plaintiff's failure to file written notice of appeal. In an order entered 7 February 2000, our Supreme Court remanded this matter to our Court for reconsideration in light of *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *cert. denied*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983).

In his brief, plaintiff argues only the third of his assignments of error and his remaining assignments of error are deemed abandoned and will not be reviewed. *See* N.C.R. App. P. 28(a) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Plaintiff's sole assignment of error argued in his brief is that the trial court erred in granting summary judgment in favor of defendant Burnette. Plaintiff failed to designate this assignment of error in his argument, in violation of our appellate rules. N.C.R. App. P. Appendix E ("Each question will be . . . followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear[.]"). Nevertheless, we will review the argument pursuant to N.C.R. App. P. 2.

In his brief, plaintiff argues "plaintiff [may] assert a negligence cause of action against a defendant when that defendant discharges a firearm and inflicts seriously disabling injuries" to the plaintiff. Plaintiff contends that "[d]efendant's conduct in firing the gun gave rise to actions for assault and battery and also for negligence." By contrast, defendant Burnette argues an "objective review of the evidence requires a holding that as a matter of law the only proper basis for this claim was one for the intentional tort of assault and battery," which must be brought within one year of the date of the assault and battery. Defendant Burnette then concludes that "plaintiff has failed to bring this action within the applicable statutory limitations period by wrongly bringing a negligence claim for acts constituting only an intentional tort."

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c); *Toole v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 291, 294, 488 S.E.2d 833, 835 (1997). At summary judgment all of the evidence is viewed in the light most favorable to the nonmoving party. *Coats v. Jones*, 63 N.C. App. 151, 154, 303 S.E.2d 655, 657 (1983), *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). The movant bears the burden of proving the absence of any genuine issue of material fact. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 355, 348 S.E.2d 772, 774 (1986).

We have reviewed the allegations in plaintiff's complaint and defendant Burnette's answer, along with the transcript of the arguments at the summary judgment hearing. The complaint alleges that defendant Burnette "negligently caused the uncontrolled discharge of the hand gun" and she "discharged the hand gun at the tire of an automobile in which the Plaintiff was a driver." Defendant Burnette's answer admits "the firearm discharged while aimed at a tire and plaintiff was hit by the bullet," but states the "alleged actionable negligence is again expressly denied." At the summary judgment hearing, defendant Burnette's attorney read Burnette's answer to a question asked by plaintiff's attorney during Burnette's deposition about how the shooting occurred. Defendant answered:

> Well, I thought I was firing at the tire. That was my first time ever shooting a gun and the only way I can see how the bullet hit him was I did not have a direct aim at the tire because as I remember when I was putting the gun at—pointing—putting the gun out the window to shoot I was—I guess I was already pulling the trigger but I thought I was aiming the gun at the time.

Plaintiff still contends the question of defendant Burnette's intent is for the jury, which might conclude that she was negligent. Plaintiff argues that defendant Burnette "never intended to hurt anybody," and "[w]hat she did say is that she is sitting in the car and she puts her hand out and she fires at the same time." Therefore, "[w]e don't know what intent she possessed at that time and I would present to the Court that is a factual determination again for a jury." We disagree. The evidence before the trial court presented no genuine issue of material fact as to defendant Burnette's intentional act in that she had already testified in her deposition that her intent was to shoot plaintiff's tire. Rather, the evidence presented purely a question of law as to how Burnette's actions are characterized in tort. *See, e.g., Town of*

Spencer v. Town of East Spencer, 351 N.C. 124, 135, 522 S.E.2d 297, 305 (1999) ("The evidence before the trial court presented 'no genuine issue as to any material fact,' N.C.G.S. § 1A-1, Rule 56(c) (1990), but presented purely a question of law as to the validity of East Spencer's resolution of intent."). Our question is whether defendant Burnette's act, which the parties agree is an intentional tort, also gives rise to a claim of negligence, which is not barred by the one year statute of limitation.

Negligence is the breach of a legal duty proximately causing injury. *Tise v. Yates Construction Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997). A breach may be caused by the performance of some positive act. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 238 n.1, 488 S.E.2d 608, 611 n.1 (1997), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998) (active negligence denotes some positive act or some failure in duty of operation which is equivalent to a positive act). As defined by our Supreme Court, willful negligence is "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *See Pleasant v. Johnson*, 312 N.C. 710, 714, 325 S.E.2d 244, 248 (1985). The duty that is intentionally breached has been defined as "an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Daniels v. Reel*, 133 N.C. App. 1, 9, 515 S.E.2d 22, 27, *disc. review denied*, 350 N.C. 827, — S.E.2d — (1999). All "[a]ctionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Id.* The law may impose that duty by statute, or else "generally by operation of law under application of the basic rule of the common law" which requires one to exercise due care when performing an undertaking and "not to endanger the person or property of others." *Id.*

By contrast, the intentional tort of battery is not premised on the existence of a duty between the parties. A battery occurs when the plaintiff is offensively touched against the plaintiff's will. *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 410, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). The issue in an action for battery is not the hostile intent of the defendant, but rather the absence of consent to contact on the part of the plaintiff. *McCracken v. Sloan*, 40 N.C. App. 214, 216-17, 252 S.E.2d 250, 252 (1979). Battery need not necessarily be perpetrated with malice, willfulness or wantonness. *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496, *disc.*

review denied, 323 N.C. 477, 373 S.E.2d 865 (1988). Indeed, the intent required for battery may be supplied by grossly or culpably negligent conduct. *Jenkins v. Averett*, 424 F.2d 1228, 1231 (1970); *see also Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248 ("Wanton and reckless negligence gives rise to [the requisite intent]"); *see also Jones v. Willamette Industries*, 120 N.C. App. 591, 594, 463 S.E.2d 294, 297 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 714 (1996) (one's belief that certain consequences are substantially certain to follow from an action will also establish intent for battery). When intent to act is shown, the tortfeasor will be held liable for the results, even if they were not foreseen. *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 65 (1985), *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986) (one who intends to touch a person only as a practical joke is liable for a dislocated kneecap suffered when plaintiff fell as a result of being touched on the back of the knee).

Negligence and intentional tort have been described as mutually exclusive theories of liability.

> [N]egligence excludes the idea of intentional wrong[.] . . . [W]here an intention to inflict the injury exists, whether that intention is actual or constructive only, the wrongful act is not negligent but is one of violence or aggression[.]

65 C.J.S. Negligence § 3 (1966). In the context of assault, Professor Prosser has stated simply that "[t]here is, properly speaking, no such thing as a negligent assault." Prosser, The Law of Torts, ch.2, sec. 10 at 40-41 (4th ed. 1971). State supreme courts have ruled accordingly. *See, e.g., McLanahan v. St. Louis Public Service Co.*, 363 Mo. 500, 506, 251 S.W.2d 704, 708 (1952) ("[N]egligence is one kind of tort, an unintentional injury usually predicated upon failure to observe the prescribed standard of care . . . while a willful, wanton reckless act is another kind of tort, an intentional act often based upon an act done in utter disregard of the consequences."); *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981) (discussing a "well established division between intentional torts and negligence in common law" and noting a "definite tendency to impose greater responsibility upon a defendant whose conduct has been intended to do harm, or morally wrong"); *see also generally Fulmer v. Rider*, 635 S.W.2d 875 (Tx. App. 1982) (analyzing case law in various jurisdictions, including North Carolina, and concluding that evidence of an intentional tort is distinct from negligence, and a plaintiff may not "waive" the intentional injury and elect to sue in negligence instead).

Our North Carolina Supreme Court has also acknowledged that an intentional tort and willful negligence are discrete concepts. "[A]n intentional act of violence is not a negligent act." *Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 563, 94 S.E.2d 577, 580 (1956). "Such [] conduct is beyond and outside the realm of negligence." *Id.* Indeed, negligence "cease[s] to play a part" in the analysis where the injury is intentional, and such intent to injure may be actual or constructive. *See Pleasant*, 312 N.C. at 714-15, 325 S.E.2d at 248 (citing *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929)). Constructive intent to injure, which may provide the mental state necessary for an intentional tort, "exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified." *Id.* Our Court has echoed this distinction:

> [Our Supreme Court has discussed] the subtle distinction which must be drawn between willful negligence and an intentional tort. Willful negligence arises from the tort-feasor's willful breach of a duty arising by operation of law. The tort-feasor must have a deliberate purpose not to discharge a legal duty necessary to the safety of the person or property of another. This willful and deliberate purpose not to discharge a duty differs crucially for our purposes from the willful and deliberate purpose to inflict injury—the latter amounting to an intentional tort.

Siders v. Gibbs, 39 N.C. App. 183, 186-87, 249 S.E.2d 858, 860 (1978) (citations omitted).

Applying these rules to this case could lead to a determination, as argued by defendant, that the firing of a handgun in the direction of an automobile and its driver is a violent act which cannot be negligence under *Jenkins*. Also, that it is reckless conduct threatening safety, constituting constructive intent to injure and resulting in a battery, removes the act from a negligence analysis according to *Pleasant*. Finally, the duty required for a finding of negligence, as discussed in *Siders*, was arguably absent in this case in that there was no legal relationship between the two parties, and defendant Burnette did not injure plaintiff through the careless execution of any certain undertaking. *See Daniels*, 133 N.C. App. at 9, 515 S.E.2d at 27.

A conflicting line of cases has emerged in North Carolina. In *Vernon v. Barrow*, 95 N.C. App. 642, 383 S.E.2d 441 (1989), when the defendant entered a lounge owned by him to collect rent, he noticed

the plaintiff standing at the bar and demanded that the plaintiff leave the property immediately. Defendant left the lounge and later returned. He again asked the plaintiff to leave. When the plaintiff refused, the defendant drew a gun and fired several shots into the floor of the lounge near the plaintiff's feet, one of which ricocheted into the plaintiff's leg. Our Court held that the "defendant's conduct in firing the gun gave rise to actions for assault and battery and also for negligence." *Vernon*, 95 N.C. App. at 643, 383 S.E.2d at 442. We quoted a sentence from *Lail v. Woods*, 36 N.C. App. 590, 592, 244 S.E.2d 500, 502, *disc. review denied*, 295 N.C. 550, 248 S.E.2d 727 (1978) stating that "there are situations where the evidence presented raises questions of both assault and battery and negligence." *Id.* (referring to the holding in *Williams v. Dowdy*, 248 N.C. 683, 104 S.E.2d 884 (1958)).

Our Court in *Lail*, however, reached the opposite result. In *Lail*, several children threw rocks at each other after an earlier altercation. The defendant threw a rock at one of the children, and although he did not mean to hit that child, the defendant "intended to participate in the rock fight, an intentional act of violence." Our Court then explained that this act did not support a theory of negligence. *Lail*, 36 N.C. App. at 591, 244 S.E.2d at 501-02. In our Court's analysis, we distinguished the case of *Williams v. Dowdy*, in which there was evidence that the defendant employer had fired his gun into a group of workers, competing with other evidence that the defendant had fired a warning shot into the ground before him which ricocheted into someone in the group. We noted that it was the conflicting evidence in *Dowdy* that prompted our Supreme Court to allow instructions on both intentional tort and negligence theories. *Lail*, 36 N.C. at 591, 244 S.E.2d at 502.

Our Court cited *Vernon* and *Lail* in our more recent case of *Key v. Burchette*, 134 N.C. App. 369, 517 S.E.2d 667, *disc. review denied*, 351 N.C. 106, — S.E.2d — (1999). In *Key*, the defendant purchased cocaine from the plaintiff twice in one day when the defendant and his wife were arguing. Defendant returned home around 11:00 p.m. after his second cocaine purchase and noticed his wife had been drinking. The plaintiff then arrived at the defendant's house, and while all three were in the kitchen, defendant's wife picked up a pistol from the counter, pointed it toward the floor, and fired it. The bullet struck the plaintiff in the leg. *Key*, 134 N.C. App. at 369, 517 S.E.2d at 668. In depositions, both defendant and his wife testified that the shooting was accidental. The plaintiff asserted, in an affidavit filed in a prior action involving an insurance company claim, that he did not

believe the shooting had been intentional. The plaintiff sued in negligence as the one-year statute of limitations for a battery claim had expired. Our Court held the action was not barred because there was a question of whether defendants were negligent. *Id.* at 372, 517 S.E.2d at 669.

In the case before us, viewing the evidence in the light most favorable to plaintiff, *see Coats*, 63 N.C. App. at 154, 303 S.E.2d at 657, defendant Burnette intended to shoot at the tire on plaintiff's vehicle but pulled the trigger before she had properly aimed, causing the bullet to strike plaintiff, similar to *Vernon* and *Key*, and as argued in *Dowdy*. Although *Dowdy* is distinguishable where the parties disagreed upon the facts of that case, *Vernon* and *Key* allow plaintiff in this case to sue defendant in negligence.

Thus, plaintiff may rely upon the three-year statute of limitations for personal injury. *See* N.C. Gen. Stat. § 1-52 (16) (1999). The trial court's summary judgment in favor of defendant Burnette is reversed and the case is remanded for trial.

Reversed and remanded.

Judges WALKER and EDMUNDS concur.

STATE OF NORTH CAROLINA v. GARY LEONARD BLYTHER

No. COA99-331

(Filed 20 June 2000)

1. Burglary and Unlawful Breaking or Entering— first-degree burglary—dwelling house of another—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the first-degree burglary charge and by denying his request to submit to the jury the issue of whether defendant had a claim of right to enter his grandmother-victim's residence because: (1) the victim had exclusive possession of her residence at the time defendant broke and entered into it; (2) the victim expressly refused to allow defendant entry into her house, and the screen door had been locked to keep others, including

defendant and his girlfriend, outside; and (3) the facts that defendant had a key, paid rent, kept personal belongings in the house, and had recently lived there, do not change this result.

2. Constitutional Law— double jeopardy—first-degree burglary—first-degree murder under felony murder rule—no violation

Defendant's double jeopardy rights were not violated by his convictions of first-degree murder under the felony murder rule and first-degree burglary based on defendant's claim of an alleged inconsistency in the finding of specific intent to murder as one of the elements of burglary, without a finding of premeditation and deliberation required for first-degree murder, because: (1) defendant has not been prosecuted a second time for the same offense after acquittal since first-degree murder based on either deliberation and premeditation or the felony murder rule is not the same offense as first-degree burglary; (2) defendant has not been prosecuted a second time for an offense after conviction; and (3) defendant has not been punished more than once for the same offense since his sentence on the underlying felony of burglary was arrested.

Appeal by defendant from judgment entered 20 May 1998 by Judge W. Douglas Albright in Moore County Superior Court. Heard in the Court of Appeals 14 February 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Marilyn R. Mudge, for the State.

Bruce T. Cunningham, Jr., for defendant.

McGEE, Judge.

Defendant was indicted on 10 February 1997 for first degree murder and first degree burglary. The victim was defendant's grandmother, who was "sickly and weak" and "didn't put up a fight" according to defendant's girlfriend, Rebecca Ann DeLouise (DeLouise), who was present during the crimes. Defendant was convicted of both offenses and was sentenced on 20 May 1998 to life imprisonment without parole for first degree murder under the felony murder rule and judgment was arrested for first degree burglary.

DeLouise testified to the following at defendant's trial: DeLouise met Gary Leonard Blyther (defendant) when they were in-patients in

the psychiatric ward at Moore Regional Hospital. Upon leaving the hospital, they resided together in DeLouise's trailer. DeLouise "was having problems with the landlord because of [her] pets" on or about 1 May 1996, so they moved into the home of defendant's grandmother, Hattie J. Blyther (Ms. Blyther) at 107 Blyther Street in Aberdeen, North Carolina. Defendant and DeLouise obtained a key to Ms. Blyther's home on 1 May 1996.

DeLouise and defendant cashed their disability checks and paid Ms. Blyther $300 "for living expenses" or "rent" on 3 July 1996; they had purchased food for the household prior to that time. Of the $300, DeLouise paid $200 and defendant paid $100. Also that day, defendant and DeLouise purchased crack cocaine in Southern Pines and used it in Southern Pines, Aberdeen and Cameron. They spent the evening of 3 July in Aberdeen at the residence of Carol Campbell (Campbell), a friend of DeLouise's.

At Campbell's home, defendant and DeLouise met Gary Strickland (Strickland) for the first time. Defendant and DeLouise drove Strickland to cash a check and then drove him to Raeford. Strickland purchased liquid cocaine, which was "shot up" by "all of [them]" at Campbell's trailer. Later that night, defendant and DeLouise "came home later than [Ms. Blyther] wanted [them] to, and she didn't want [them] to stay there because of it." Ms. Blyther did not let them in her house and she asked them not to stay there anymore. Defendant and DeLouise were not able to enter the house at that time, and they spent the night instead at Campbell's trailer. The next day, 4 July 1996, DeLouise and defendant again stayed at Campbell's trailer where "there was consumption of more drugs."

On the evening of 5 July 1996, Strickland, his son, defendant, DeLouise and Campbell were together at Campbell's house. Defendant and DeLouise had no money, but defendant procured more drugs and owed Strickland and Campbell approximately $200 or $250 for the drugs. Defendant and DeLouise planned to go to Ms. Blyther's house "to take her money," and defendant planned "to kill her." They left Campbell's house in DeLouise's car at around midnight. DeLouise and defendant first drove to an abandoned house to smoke crack as they had done on prior occasions. They decided to leave the car at that location "because it was secluded, and the car wouldn't be seen."

They walked to Ms. Blyther's house. The screen door was locked, and defendant unlocked it with his finger through a hole in the

screen. He then opened the inside door with his key. Both defendant and DeLouise entered the house, and DeLouise walked to Ms. Blyther's bedroom door. DeLouise testified that defendant took a pillow from a couch and walked into Ms. Blyther's room, where she was sleeping on her back. DeLouise saw defendant put a pillow over Ms. Blyther's face and heard Ms. Blyther mumble, "Lord Jesus." Defendant held Ms. Blyther with his left hand and with his right hand took money out from under her brassiere, where she normally kept money. A few minutes later defendant walked or "run-walk[ed]" out the back door. DeLouise left the house through the back door, closing it behind her. Defendant presented evidence at trial but did not testify himself. Defendant was convicted of first degree murder and first degree burglary. Defendant appeals.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the burglary charge and denying his request to submit to the jury the issue of whether the defendant had a claim of right to enter Ms. Blyther's residence. He argues that a person cannot be guilty of burglarizing his own house, and that defendant was living in the home he broke into and entered the morning of 6 July 1996. Defendant presented evidence that he had been staying overnight with his girlfriend in one room of the house for approximately two months before the murder, all of his belongings were in the house, he and DeLouise had paid $300 for household expenses or rent, and Ms. Blyther had given him a key to the house.

Within his first argument, defendant also argues the trial court erred in denying his written request for a jury instruction on burglary. Defendant requested the following instruction:

> Now with respect to the element of whether the house at 107 Blyther Street was the dwelling house of another, I instruct you that the State has the burden of proving beyond a reasonable doubt that the Defendant was not a resident of 107 Blyther St. at the time of the entry. If Mr. Blyther was entitled to have access to 107 Blyther street at the time of the alleged offense then he would be not guilty of the offense of burglary. The element of breaking and entering the dwelling house of another means that the dwelling must be exclusively the dwelling of Hattie Blyther and not the dwelling of Hattie Blyther and the defendant. In considering this element you may take into account, among other things, whether the Defendant's clothes and personal belongings were located there.

The trial court declined to instruct the jury as requested by defendant and instead used a pattern jury instruction. The trial court also omitted the word "tenant," denoted as an alternative to "owner," in the pattern instruction as the individual who may give consent. N.C.P.I., Crim. 214.10. Defendant argues this omission prejudiced him in that "a tenant has similar rights to an owner in burglary cases." Moreover, defendant insists the trial court's instruction referring to "her" consent "eliminat[ed] any possibility the jury could conclude the defendant resided in the house as a tenant."

First and second degree burglary are codified in N.C. Gen. Stat. § 14-51 (1999):

> There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house . . . and any person is in the actual occupation of any part of said dwelling house . . . at the time of the commission of such crime, it shall be burglary in the first degree.

Ms. Blyther was "in the actual occupation" of the house when she was murdered, and thus if defendant committed burglary, it was burglary in the first degree. At common law,

> [t]he elements of the crime of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) of another (6) which is actually occupied at the time of the offense (7) with the intent to commit a felony therein.

State v. Ledford, 315 N.C. 599, 606, 340 S.E.2d 309, 314 (1986) (citation omitted); *State v. Harold*, 312 N.C. 787, 791, 325 S.E.2d 219, 222 (1985) (citations omitted); *see State v. Accor and State v. Moore*, 277 N.C. 65, 72-73, 175 S.E.2d 583, 588 (1970), *aff'd*, 281 N.C. 287, 188 S.E.2d 332 (1972).

Our Supreme Court has recognized a two-fold purpose for establishing the element of ownership:

> There are only two reasons for requiring ownership of the house to be stated in the indictment for burglary: (1) for the purpose of showing on the record that the house alleged to have been broken into was not the dwelling house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into one's own house, and (2) for the purpose of so identifying the

> offense as to protect the accused from a second prosecution for the same offense.

State v. Beaver, 291 N.C. 137, 141, 229 S.E.2d 179, 181-82 (1976) (citations omitted).

The Court in *Beaver* discussed the meaning of "owner" for purposes of burglary.

> [I]n a burglary indictment, "the occupant of the building at the time of the burglary is the owner," and it is unnecessary to allege ownership of the title to the building. The decisions of this Court require only that the breaking and entering in the nighttime with intent to commit a felony be into a dwelling or a room used as a sleeping apartment which is actually occupied at the time of the offense.

Id. at 141, 229 S.E.2d at 182 (citations omitted). Thus, in burglary cases, occupation or possession of a dwelling or sleeping apartment is tantamount to ownership. *Id.*; *Harold*, 312 N.C. at 791-92, 325 S.E.2d at 222 (citation omitted) ("[I]n burglary cases occupation or possession of a dwelling is equivalent to ownership, and actual ownership of the premises need not be proved."); *State v. Singletary*, 344 N.C. 95, 102, 472 S.E.2d 895, 899 (1996) ("[T]he controlling question in burglary cases is one of possession or occupation rather than ownership or property interests."). Indeed, a burglary frequently has been said to require "only that the breaking and entering in the nighttime with intent to commit a felony be into a dwelling or a room used as a sleeping apartment which is actually occupied at the time of the offense," which eliminates the "of another" language. *Beaver*, 291 N.C. at 141, 229 S.E.2d at 182; *see also State v. Freeman*, 307 N.C. 445, 448, 298 S.E.2d 376, 378 (1983) (defining first degree burglary without the "of another" element). *Accord State v. Meadows*, 306 N.C. 683, 689, 295 S.E.2d 394, 398 (1982), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983); *State v. Simpson*, 303 N.C. 439, 449, 279 S.E.2d 542, 548 (1981); *State v. Person*, 298 N.C. 765, 768, 259 S.E.2d 867, 868 (1979); *State v. Davis*, 282 N.C. 107, 116, 191 S.E.2d 664, 670 (1972).

However, our Supreme Court has specified that "[t]he requirement that the dwelling house or sleeping apartment broken into be that of someone other than the defendant was an element of burglary at common law and is implicitly incorporated in N.C.G.S. 14-51."

Harold, 312 N.C. at 791, 325 S.E.2d at 222 (citations omitted). "[I]t is incumbent upon the State to produce substantial evidence tending to show that the premises broken into is the dwelling house of another." *Id.* at 792, 325 S.E.2d at 222. Indeed, at least three North Carolina cases have focused on the requirement that a breaking and entering must occur on property "of another" to constitute a burglary.

In *Harold*, the defendant and his former girlfriend had purchased a house and lived in it together until the week before he murdered her. *Harold*, 312 N.C. at 789-90, 325 S.E.2d at 221. The defendant was convicted of first degree burglary, and also first degree murder based on premeditation and deliberation. He argued that the jury instructions should not have read "without her consent" and that they should have required a finding that he had no ownership interest in the house to permit a burglary conviction. *Id.* at 791, 325 S.E.2d at 222. Our Supreme Court stated that the defendant's emphasis on ownership was "misplaced," explaining that "the reason for prohibiting the offense of first degree burglary 'is to protect the habitation of men, where they repose and sleep, from meditated harm.' " *Id.* (quoting *State v. Surles*, 230 N.C. 272, 275, 52 S.E.2d 880, 882 (1949)). The *Harold* Court held that the evidence was sufficient to find the residence to be a "dwelling house of another," where the victim had lived in the house for five months preceding her death and had occupied the house when she was murdered. *Harold*, 312 N.C. at 792, 325 S.E.2d at 222.

In *Singletary*, the defendant and his wife left their home in Winston-Salem and the wife leased an apartment alone in Greensboro, as the sole lessee. *Singletary*, 344 N.C. at 102, 472 S.E.2d at 899. The defendant moved into his wife's apartment one month later, but then moved out following an argument. He returned his key to his wife and took most or all of his belongings with him. Two days later he broke and entered into the apartment. In his motion to dismiss the burglary charge, the defendant argued that he did not break and enter into the dwelling house "of another" in that the apartment was his residence and he had left it only for a "cooling off" period, as they had argued many times previously but had not permanently separated. *Id.* at 101, 472 S.E.2d at 899. He also challenged the jury instructions on this issue. Our Supreme Court held that the evidence did not support a finding that the apartment was the defendant's dwelling where his wife had maintained exclusive possession for the two days prior to defendant's breaking and entering. *Id.* at 102, 472 S.E.2d at 899. In so holding, the Court adopted the reasoning of a

decision from the Florida Supreme Court that a husband can be guilty of burglary if he makes a nonconsensual entry onto the premises which are under the sole possession of his wife with the intent to commit an offense. *Id.*

Similarly, in *State v. Cox*, 73 N.C. App. 432, 326 S.E.2d 100, *disc. review denied*, 313 N.C. 605, 330 S.E.2d 612 (1985), the defendant, his wife and their daughter had lived together in a rented house until the defendant moved out, which to his wife signified a permanent separation. The defendant continued to visit his daughter and contribute to the support of his family. A year after the defendant had lived apart from his wife and daughter, he telephoned his wife one night at around midnight asking permission to come to the house. When she refused, he asked to speak to their daughter, but his wife said she was spending the night elsewhere. This led to an argument, after which the wife hung up the telephone. Shortly thereafter she heard the defendant exit his truck outside the house, and defendant knocked on the door calling her name. Once the defendant had kicked down the door, he stabbed a man who was in the house. *Id.* at 435, 326 S.E.2d at 102. The defendant argued that his motion to dismiss the charge of first degree burglary should have been granted because he and his wife were still married and he kept clothing and tools in the house, but our Court rejected the argument. We held the defendant entered the dwelling "of another" where the evidence showed that the defendant had lived elsewhere for more than a year while his wife occupied the house, paid rent and utilities, and forbade him to enter the home that night. *Id.* at 436-37, 326 S.E.2d at 102-03.

We follow the reasoning in *Harold*, *Singletary* and *Cox* to hold that defendant committed burglary in this case. As in each of those cases, the victim in this case had exclusive possession of her residence at the time defendant broke and entered into it. Furthermore, Ms. Blyther had expressly refused to allow defendant entry into her house, and the screen door had been locked to keep others, including defendant and DeLouise, outside. *See Cox*, 73 N.C. App. at 435, 326 S.E.2d at 102 (wife expressly refused defendant's request to come to the house). The facts that defendant had a key, paid rent, kept personal belongings in the house, and had recently lived there, do not change this result. *See id.* (defendant burglarized house in which he had personal belongings and had helped to financially support its residents); *Harold*, 312 N.C. at 792, 325 S.E.2d at 222 (defendant burglarized house that he helped his girlfriend purchase); *Singletary*, 344 N.C. at 99-100, 472 S.E.2d at 898 (defendant moved out only two days

before the burglary). For the same reasons, we also reject defendant's argument challenging the jury instructions. *See Harold*, 312 N.C. at 791, 325 S.E.2d at 222 (rejecting identical arguments); *Singletary*, 344 N.C. at 102, 472 S.E.2d at 899 (rejecting defendant's argument that jury instructions were improper).

[2] In his second argument, defendant claims the trial court erred in denying his motion to dismiss the first degree burglary conviction notwithstanding the verdict. He insists the jury's verdicts were inconsistent and should be set aside pursuant to the double jeopardy clause of the United States and North Carolina Constitutions. Defendant finds inconsistency in the finding of specific intent to murder as one of the elements of burglary, without a finding of premeditation and deliberation required for first degree murder. He contends that if the jury did not find premeditation and deliberation, the jury could not have logically found the specific intent required for burglary, and that he was prejudiced by essentially being tried twice on this issue.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. "The North Carolina Constitution does not have a Double Jeopardy Clause, but the protection against double jeopardy has been considered an integral part of the Law of the Land Clause." *State v. Rambert*, 341 N.C. 173, 175 n.1, 459 S.E.2d 510, 512 (1995) (citing *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972)). "Also, the United States Supreme Court has held that the Double Jeopardy Clause of the United States Constitution is applicable to the states through the Fourteenth Amendment." *Rambert*, 341 N.C. at 175 n.1, 459 S.E.2d at 512 (citing *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969). It "protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gilley*, 135 N.C. App. 519, 521, 522 S.E.2d 111, 113 (1999); *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted); *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 802, 104 L. Ed. 2d 865, 874-75 (1989).

First, defendant has not been prosecuted a second time for the same offense after acquittal. First degree murder, based upon either

deliberation and premeditation or the felony-murder rule, is not the same offense as first degree burglary, because each offense contains an element not included in the other. *State v. Parks*, 324 N.C. 94, 97, 376 S.E.2d 4, 7 (1989) ("Clearly, the offenses of first degree burglary and first degree murder both require proof of an additional fact which the other does not."). Therefore, a jury may properly convict defendant of first degree burglary while not finding the existence of an element required for first degree murder. *State v. Parks*, the case cited by defendant, defeats his own position. *Parks* held that a defendant could not sustain a double jeopardy claim where he was convicted of premeditated first degree murder and first degree burglary, for the reason that the crimes were not the same. *Id.* at 97-98, 376 S.E.2d at 7. Defendant argues double jeopardy because here, unlike *Parks*, there was no conviction of premeditated murder. This distinction does not invoke double jeopardy because first degree felony-murder, for which defendant was convicted, also is an offense different from first degree burglary. Thus, defendant was not prosecuted a second time for the same offense following an acquittal. *Id.* at 98, 376 S.E.2d at 7 ("Since it is clear that here at least one essential element of each crime is not an element of the other, we find no merit in defendant's contentions that he was subjected to double jeopardy.").

Second, defendant has not been prosecuted a second time for an offense after conviction. Finally, defendant has not been punished more than once for the same offense. He has not been punished more than once for his first degree murder conviction pursuant to the felony-murder rule, and his sentence on the underlying felony of burglary was arrested by the trial court. *See State v. Wilson*, 345 N.C. 119, 125, 478 S.E.2d 507, 512 (1996).

For the reasons above, we hold that the trial court did not err.

No error.

Judges EAGLES and HORTON concur.

MARGARET RAGAN, EXECUTOR OF GRACE FINCH CATES, DECEASED, PLAINTIFF-APPELLEE v. WHEAT FIRST SECURITIES, INC., DEFENDANT-APPELLANT

No. COA99-959

(Filed 20 June 2000)

1. **Arbitration and Mediation— securities agreement—termination at death of party**

   The trial court properly denied defendant's motion to compel arbitration under a securities agreement with a deceased account holder because the agreement and its arbitration clause terminated at her death.

2. **Arbitration and Mediation— securities agreement with estate—not applicable to deceased's account**

   The trial court did not err by concluding that an estate's capital resources account agreement with defendant securities broker was not a basis to support a motion to compel arbitration where the dispute concerned defendant's alleged negligence and conversion in unilaterally selling securities in an account which the deceased opened before her death.

Appeal by defendant from order entered 18 March 1999 by Judge Larry G. Ford in Davidson County Superior Court. Heard in the Court of Appeals 27 April 2000.

Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts and Peter G. Pappas, for the defendant-appellant.

Brinkley Walser, P.L.L.C., by Walter F. Brinkley and David E. Inabinett, for the plaintiff-appellee.

WYNN, Judge.

In 1982, Grace Finch Cates opened an account with Wheat First Securities, Inc., requiring her to sign a securities account agreement that contained the following arbitration clause:

> AGREEMENT TO ARBITRATE CONTROVERSIES—Except with respect to any future dispute or claim arising under the federal securities laws or where this arbitration requirement would violate applicable state law or rule of the United Securities and Exchange Commission, it is agreed that any controversy between us arising out of our relating to this Agreement or transactions

> between us shall be submitted to arbitration under the rules of The New York Stock Exchange, Inc., National Association of Securities Dealers or, where appropriate Chicago Board Options Exchange or Commodities Future Trading Commission, as I may elect by sending notice of such election to you by registered mail . . . ."

Following Cates' death—about two years after she signed the agreement—the Clerk of Superior Court, Davidson County, appointed Margaret Ragan as the executrix of her estate. Ragan closed Cates' account and directed Wheat First to transfer the securities into a capital resources account. To open the capital resources account for Cates's estate, Ragan signed a capital resources account agreement that also contained an arbitration clause.

In October 1998, Ragan, in her capacity as executrix of the Estate of Grace Cates, brought this action against Wheat First. The complaint alleged claims for negligence and conversion arising out of Wheat First's sale of securities contained in the account opened by Cates. Specifically, the complaint stated:

> 3. After Cates died on March 15, 1995, Wheat, through its agent, Alex Galloway, had knowledge of her death shortly after it occurred and knew or should have known that Wheat's authority to sell any securities held in Cates' account had been terminated.
>
> 4. Plaintiff is informed and believes that shortly after Cates' death and, after acquiring knowledge of Cates' death and without obtaining authorization from the plaintiff as Cates' executor or any other person having authority to conduct Cates' business affairs, Wheat through its agent, Alex Galloway, sold certain securities ("the Securities") which where held by Wheat in Cates' account . . . . The proceeds from these sales were retained by Wheat and the plaintiff was not notified of the sale.
>
> 5. Following the sale of the Securities, they appreciated substantially in value.
>
> 6. Wheat reinvested the proceeds of the sale in other securities which did not appreciate in value to the same extent as the Securities originally held by Wheat for plaintiff's testator.
>
> . . . .
>
> 9. The estate of Cates has been damaged as a result of the unauthorized sale of the Securities.

In response, Wheat First moved to compel arbitration under the arbitration clause in the Cates' securities agreement, or in the alternative, under the arbitration clause in the Cates Estate's capital resources account agreement. The trial court denied that motion finding that the arbitration clause under the Cates' securities agreement terminated upon the death of Grace Cates, and that arbitration clause under the Cates Estate's capital resources account agreement did not cover the subject matter for arbitration.

From this order, Wheat First appeals.

In considering a motion to compel arbitration, the trial court should determine (1) the validity of the contract to arbitrate and (2) whether the subject matter of the arbitration agreement covers the matter in dispute. *See AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 89 L. Ed.2d 648 (1986). Once the "court answers these questions in the affirmative, the parties must take up all additional concerns with the arbitrator." *Elzinga & Volkers, Inc. v. LSSC Corp.*, 838 F. Supp. 1306, 1309 (N.D. Ind. 1993).

I.

[1] On appeal, Wheat First contends that the trial court erroneously denied its motion to compel arbitration because the arbitration agreement under the Cates' securities agreement did not terminate upon Grace Cates' death. We disagree.

Securities brokerage agreements, such as the Cates' securities agreement, constitute contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2; *see PaineWebber Inc. v. Elhai*, 87 F.3d 589 (1st Cir. 1996). Thus, the Federal Arbitration Act preemptively determines the application of arbitration clauses in securities brokerage agreements. *See* 9 U.S.C. § 2 of the Federal Arbitration Act, (stating that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see also Hendrick v. Brown & Root, Inc.*, 50 F. Supp.2d 527, 531-32 (E.D. Va. 1999) (stating that "by its terms the [Federal Arbitration Act] requires the enforcement of arbitration agreements that: (1) are part of a written contract between the par-

ties if the contract or transaction involves interstate commerce; (2) cover the particular dispute at issue; and (3) are valid under general principles of contract law."); *Morrison v. Colorado Permanente Medical Group, P.C.*, 983 F. Supp. 937, 943 (D. Col. 1997) (stating that by "enacting § 2, . . . Congress precluded States from singling out arbitration provisions for suspect status requiring instead that such provisions be placed upon the same footing as other contracts.").

In determining the validity of the arbitration clause in the Cates' securities agreement, issues concerning the arbitrability of the clause are governed by federal law. *See PaineWebber*, 87 F.3d at 593; *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446, 452 (4th Cir. 1997) (holding that federal law for those issues concerning the arbitrability of such agreements governs arbitration agreements covered by the Federal Arbitration). However, state law generally governs issues concerning the validity, revocability, and enforcement of arbitration agreements. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 134 L. Ed.2d 902 (1996) (holding that generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act).

In the subject case, the Cates' securities agreement provides that the substantive law of Virginia applies:

> JURISDICTION—This agreement and all transactions made in my account shall be governed by the laws of the Commonwealth of Virginia (regardless of the choice of law rules thereof).

In *King v. Beale*, 96 S.E.2d 765 (Va. 1957), the Virginia Supreme Court addressed a strikingly similar issue to the one at hand—whether an arbitration clause survives the death of a party to the arbitration. In that case, the Virginia Supreme Court held that where the party had entered into a common-law arbitration agreement, the death of one party before the arbitrator's award revoked the submission agreement and terminated the power and authority which that party had granted the arbitrator to enter an award. The Court noted:

> [i]n case of the death of a party to an arbitration agreement, the agreement is revoked and the power of the arbitrator is terminated by operation of law upon the universally accepted principle that the death of a principal operates as an instantaneous and

> absolute revocation of the agent's power or authority, unless the agency is coupled with an interest.

Id. at 770.

The arbitration agreement present in *King*, however, unlike the arbitration clause present in the instant case, was not covered by the Federal Arbitration Act. Thus, *King* is not binding on our determination; rather, the case provides guidance only to the extent that it emphasized the general principles of agency law.

Under those principles, upon the death of the principal, the agent's powers cease unless the agent's authority is coupled with an interest. *See Triplett v. Woodward's Adm'r.*, 35 S.E. 455 (Va. 1900) (holding that the powers of an agent of a testator cease on the death of the latter and he must surrender to the personal representatives all evidences of debts due the estate); *Sturgill v. Virginia Citizens Bank*, 291 S.E.2d 207 (Va. 1982) (holding that because the death of a principal terminates an agent's authority, unless that authority is coupled with an interest, the bank depositor's girlfriend who the depositor had given the authority to draw checks on the depositor's individual account had no authority to write checks on the account after the death of the depositor).

> To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power must be vested in the person to whom the agency, or power is given, so that he may deal with it in his own name; such that, in the event of the principal's death, the authority could be exercised in the name of the agent.

Casey v. Walker & Mosby, 95 S.E. 434, 435 (1918).

In this case, the securities agreement between Wheat First and Cates contained a clause concerning the death of a party which stated that:

> We will give you immediate notice in writing of the death of any one of us. The estate of anyone of us who shall have died shall be liable, and the survivor or survivors shall continue liable, jointly and severally, for any debt balance or loss in the account, or which you may sustain, by reason of the completion of transactions initiated prior to receipt by you of written notice of death of any one of us, or incurred in the liquidation of the account.

> This Agreement shall inure to the benefit of your successors and assigns and shall remain in effect until an authorized member of your firm shall acknowledge in writing the receipt of a written statement from one of us that he or she wishes to terminate the account, at which time the party giving such notice will not be bound for any further transactions made for the account thereafter. However, he or she shall remain bound for any further transactions and for all further deliveries to any of us of any assets in the account, and all communications regarding the account.

In effect, this clause specified the required notice in the event of the death of a party. It does not, however, connote an agency coupled with an interest.

Hence, as an agent, Wheat First's power to act on behalf of Cates terminated at the time of her death, thereby terminating the securities agreement between Wheat First and Cates. It, therefore, follows that the arbitration clause contained in the securities agreement also terminated. Consequently, the trial court properly denied Wheat First's motion to compel arbitration under the Cates' securities agreement.

II.

[2] Wheat First also contends that a valid arbitration agreement existed since the dispute at issue—Wheat First's alleged negligence and conversion arising out of its sale of securities contained in the account opened by Cates—is within the subject matter of the Cates Estate's capital resources account agreement. Again, we disagree.

If the terms of an agreement are unambiguous, the court should not apply rules of construction or interpretation. *See Seoane v. Drug Emporium, Inc.*, 457 S.E.2d 93 (Va. 1995). Rather, it is the duty of the court to merely interpret the language in the agreement according to its plain meaning. *See id.*

In this case, the arbitration clause in the Cates Estate's capital resources account agreement stated that:

> You agree, and by carrying on an account for you, Wheat agrees that all controversies which may arise *between us* concerning any transaction or the construction, performance, or breach of this or any other agreement *between us*, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.

(Emphasis added).

Finding the language in the arbitration clause to be clear and unambiguous, we apply the plain meaning in interpreting this language. Under the agreement, the plain meaning of the language "between us" means between Wheat First and Ragan, as the executrix of Cates' Estate. Therefore, the scope of the arbitration clause applies to any controversy between Wheat First and Ragan arising out of any transactions between Wheat First and Ragan.

However, the dispute at issue in this case is Wheat First's alleged negligence and conversion in unilaterally selling securities in the account which Cates opened before her death. Thus, the dispute in the present action does fit within the scope of the arbitration clause. Consequently, the trial court properly concluded that the Cates Estate's capital resources account agreement was not a basis to support a motion to compel arbitration.

Accordingly, the trial court's judgment denying Wheat First's motion to compel arbitration is,

Affirmed.

Judges HORTON and SMITH concur.

ROBERT LEE LANCASTER v. PATRICIA PRICE LANCASTER

No. COA99-911

(Filed 20 June 2000)

1. Divorce— separation agreement—property settlement—confidential fiduciary relationship—adversaries

The trial court did not err by declaring the separation agreement and property settlement valid based on the confidential fiduciary relationship terminating between the husband and wife when the parties became adversaries because: (1) the use of an attorney by one party but not the other ends a confidential relationship, and the record reveals that the attorney consulted by the parties was the husband's attorney only, despite the wife's assertion that she thought the attorney represented both of them; (2) although the parties attempted to work out the terms of the separation agreement between themselves, the parties did not

amicably agree to all of the agreement's terms; (3) the wife moved out of the family home shortly after first meeting the husband's attorney, but before signing the separation agreement; and (4) the wife's contention that she moved out since she feared her husband also indicates the couple did not share a trusted and confidential relationship.

2. Divorce— separation agreement—property settlement—validity

The trial court did not err by declaring the separation agreement and property settlement valid because: (1) there was no evidence of fraud, duress, or undue influence by the husband on his wife to sign the agreement; (2) the agreement was not so inequitable to be unconscionable; and (3) the agreement is not invalid merely because one party later decides what she bargained for is not as good as she would have liked.

3. Divorce— separation agreement—property settlement—alleged mutual mistake of fact

Although defendant-wife contends there are four mutual mistakes of material fact comprising the essence of the parties' separation agreement, the trial court did not err by failing to alter the parties' agreement because: (1) plaintiff-husband offers no such argument, thereby negating the contention that the alleged mistakes were mutual; and (2) defendant's attempts to rescind or alter the contract are barred by the parol evidence rule.

4. Divorce— separation agreement—no material breach

The trial court did not err by concluding that plaintiff-husband did not commit a material breach of the separation agreement by failing to disclose the fact that he belonged to his current employer's retirement plan because: (1) plaintiff disclosed information about his former employer's retirement plan in which he was enrolled until summer 1995; (2) plaintiff's retirement plan at his current employment began in December 1995; (3) the parties agreed to use 16 June 1995 as their date of separation, and the parties agreed to equally divide plaintiff's retirement property from the date of marriage until the date of separation; and (4) the nondisclosure did not affect the terms of the agreement or defendant's share of the property since plaintiff did not join the latter retirement plan until after their agreed-upon date of separation.

Appeal by defendant from judgment entered 18 November 1998 by Judge Ralph C. Gingles in Gaston County Superior Court. Heard in the Court of Appeals 10 May 2000.

Page Dolley Morgan and Mark Warshawsky for the plaintiff-appellee.

Malcolm B. McSpadden for the defendant-appellant.

WYNN, Judge.

Robert Lee Lancaster and Patricia Price Lancaster married in 1970 and their two children are now emancipated. During the marriage, Ms. Lancaster worked outside the home for the first three years, then she stayed home for several years to raise the children. During the last five years of their marriage, Ms. Lancaster once again worked outside of the home, earning about $215 each week. Mr. Lancaster earned approximately $1,700 each week at the end of the marriage. Mr. Lancaster handled most of the family's finances and made most of the family decisions. He paid most of the family's expenses out of his salary and he provided Ms. Lancaster with a generous monthly allowance to be spent however she wished. As time went on, the couple argued often. On 17 May 1996, Ms. Lancaster moved out of the family home.

Shortly before Ms. Lancaster moved out, she and Mr. Lancaster visited an attorney—Page Dolley Morgan—to discuss entering into a separation agreement. At first Ms. Lancaster thought that Ms. Morgan would represent both of them, but Ms. Morgan informed her that while she could answer Ms. Lancaster's questions seeking information, she could only give legal advice to Mr. Lancaster. On one of her visits, Ms. Morgan's paralegal suggested that Ms. Lancaster get her own attorney. Ms. Lancaster declined to seek the advice of another attorney. Mr. Lancaster and Ms. Lancaster signed the separation agreement on 14 June 1996. It dictated the terms of their property settlement, alimony, and settled the date of separation as 16 June 1995.

On 15 January 1997, Mr. Lancaster filed a complaint seeking a divorce based on one year separation and seeking the incorporation of the separation agreement. Ms. Lancaster filed an answer and counterclaim in which she denied the date of separation alleged by Mr. Lancaster, denied the validity of the separation agreement, and requested an equitable distribution of the marital property and

alimony. The district court entered a divorce judgment on 30 July 1997, holding all other issues until a later date.

On 11 February 1998, Ms. Lancaster obtained an order requiring Mr. Lancaster to respond to her discovery requests. Mr. Lancaster's attorney provided Ms. Lancaster with the requested information. The date of the trial was pushed back a number of times, with the hearing finally set for 5 October 1998. On 1 October 1998, Ms. Lancaster obtained an order requiring Mr. Lancaster to produce certain documents at the hearing. The district court struck that order the next day after determining that Mr. Lancaster had already furnished the requested information to Ms. Lancaster. The hearing occurred on 5 October and the trial court entered judgment on 18 November 1998, finding that the separation agreement was valid. Ms. Lancaster appealed to this Court.

I.

[1] Ms. Lancaster first argues that the trial court erred in declaring the separation agreement and property settlement valid because the evidence showed the existence of a fiduciary relationship by Mr. Lancaster to Ms. Lancaster and showed unconscionability regarding the alimony and distribution terms of the agreement. We disagree.

To be valid, "a separation agreement must be untainted by fraud, must be in all respects fair, reasonable, and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *Harroff v. Harroff*, 100 N.C. App. 686, 689, 398 S.E.2d 340, 342 (1990), *review denied*, 328 N.C. 330, 402 S.E.2d 833 (1991) (citation omitted). We may hold a separation agreement invalid if it is manifestly unfair to one because of the other's overreaching. *See Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).

During a marriage, a husband and wife are in a confidential relationship. In this relationship, the parties have a duty to disclose all material facts to one other, and the failure to do so constitutes fraud. *See Daughtry v. Daughtry*, 128 N.C. App. 737, 740, 497 S.E.2d 105, 107 (1998). Further, a presumption of fraud arises where the fiduciary in a confidential relationship benefits in any way from the relationship. *See Curl by and Through Curl v. Key*, 64 N.C. App. 139, 142, 306 S.E.2d 818, 821 (1983), *rev'd on other grounds*, 311 N.C. 259, 316 S.E.2d 272 (1984). In such a case, the burden shifts to the fiduciary to

show that the transaction was a voluntary act of the alleged victim. *See id.* Finally, even spouses not in a confidential relationship may not engage in unconscionable behavior when entering into a separation agreement. *See King v. King*, 114 N.C. App. 454, 457, 442 S.E.2d 154, 157 (1994). Unconscionability is both procedural—consisting of fraud, coercion, undue influence, misrepresentation, inadequate disclosure, duress, and overreaching; and substantive—consisting of contracts that are harsh, oppressive, and one-sided. *See id.* at 458, 442 S.E.2d at 157.

Ms. Lancaster argues that she and Mr. Lancaster had a confidential relationship at the time they entered into the separation agreement. Ms. Lancaster asserts that Mr. Lancaster stood in a fiduciary relationship to her, and he must be held to the stringent rules set forth above. However, while a husband and wife generally share a confidential relationship, this relationship ends when the parties become adversaries. *See Avriett v. Avriett*, 88 N.C. App. 506, 508, 363 S.E.2d 875, 877, *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988). It is well established that when one party to a marriage hires an attorney to begin divorce proceedings, the confidential relationship is usually over, *see id.*, although the mere involvement of an attorney does not automatically end the confidential relationship. *See Harroff*, 100 N.C. App. at 690, 398 S.E.2d at 343; *Sidden v. Mailman*, 2000 WL 517914 (N.C. App. 2 May 2000). Further, when one party moves out of the marital home, this too is evidence that the confidential relationship is over, although it is not controlling. *See Harroff*; *Sidden*.

Ms. Lancaster asserts that, although she and Mr. Lancaster were proceeding with a divorce and she had moved out of the family home, their confidential relationship continued. She bases this argument on the fact that she and Mr. Lancaster tried to work out the terms of the separation themselves, *see Harroff*, and because they consulted the same attorney for advice. She further asserts that because she did not seek her own counsel or advice from her family, but instead trusted Mr. Lancaster to treat her fairly, the confidential relationship continued.

However, the trial court found, and we agree, that the confidential relationship between Mr. Lancaster and Ms. Lancaster did not exist when the parties signed the separation agreement. The record shows that Ms. Morgan was Mr. Lancaster's attorney only, despite Ms. Lancaster's assertion that she *thought* Ms. Morgan represented both of them. First, Ms. Lancaster visited Ms. Morgan's office only two or three times, as compared to the numerous visits made by Mr.

Lancaster. Second, the separation agreement explicitly states that Ms. Morgan is Mr. Lancaster's lawyer. Third, at the Lancasters' initial consultation, Ms. Morgan stated that she could answer Ms. Lancaster's questions seeking information, but could only give legal advice to Mr. Lancaster. Finally, Ms. Morgan's paralegal advised Ms. Lancaster to seek her own counsel before signing the separation agreement. Ms. Lancaster's refusal to seek her own counsel may not now be used as a means of alleging unconscionability. Indeed, the facts before us are quite similar to those in *Avriett*, in which we held that the use of an attorney by one party but not the other ended the confidential relationship.

Further, although working out the terms of a separation agreement themselves indicates that a divorcing couple is not adversarial but still in a confidential relationship, the record shows that the Lancasters did not amicably agree to all of the agreement's terms, but rather argued over such things as the amount of alimony. Moreover, Ms. Lancaster moved out the family home shortly after first meeting Ms. Morgan, but before signing the separation agreement. Her contention that she moved out because she feared Mr. Lancaster also indicates that the couple did not share a trusted and confidential relationship.

We distinguish the factually similar case of *Sidden v. Mailman*, *supra*, in which we found a fiduciary duty between a separating husband and wife. The evidence in the case at bar shows the end of a fiduciary duty between Mr. Lancaster and Ms. Lancaster based on the fact that the parties here were more clearly adversaries. Mr. Lancaster's attorney did more than merely formalize the terms of an amicable separation, but rather advised and assisted Mr. Lancaster alone. Also, Ms. Lancaster had left the family home out of fear of her husband. As further comparison, the wife in *Sidden* alleged a breach of fiduciary duty based on her husband's failure to disclose the existence of a $158,100 retirement account. In this case, Ms. Lancaster does not allege such a material breach, but rather argues only that the separation agreement was unfair.

[2] Since no confidential relationship existed between the Lancasters, we now review the agreement as we would any other bargained-for exchange between parties who are presumably on equal footing. *See Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985). In determining the validity of a separation agreement, we are not required to make an independent determination as to whether the agreement is fair. Absent a showing of any wrongdoing by a party

to the agreement, "we must assume that this arrangement was satisfying to both spouses at the time it was entered into." *Hagler v. Hagler*, 319 N.C. 287, 293, 354 S.E.2d 228, 234 (1987).

In this case, the trial court found, and we agree, that there was no evidence of fraud, duress, or undue influence by Mr. Lancaster on Ms. Lancaster to sign the agreement. Further, we do not find that the agreement was so inequitable as to be unconscionable. A separation agreement is not invalid merely because one party later decides that what she bargained for is not as good as she would have liked.

II.

[3] Ms. Lancaster next argues that the trial court erred by failing to address issues raised by the pleadings of reformation of the separation agreement to conform with uncontroverted evidence of both parties. We disagree.

Ms. Lancaster alleges four different areas of contention: (1) She and Mr. Lancaster agreed that $18,000 of their savings account would be used to pay for their daughters' education; however, no provision was made for these funds in the separation agreement; (2) both parties agreed that Mr. Lancaster's retirement plans would be divided equally by a qualified domestic relations order; however, the parties disagree as to which separation date should be used and therefore, the amount of benefits to be divided; (3) the balance of the parties' saving and checking accounts, after deducting $20,000 of Mr. Lancaster's separate property and $18,000 for the daughters' education, would be split evenly; but apparently, it was not split evenly; and (4) the parties intended to divide their furniture equally but did not do so. Ms. Lancaster alleges that these "mutual mistakes" should be rectified by this Court, since the separation agreement did not reflect the true intentions of the parties.

It is well established that the existence of a mutual mistake as to a material fact comprising the essence of the agreement will provide grounds to rescind a contract. *See Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 251, 395 S.E.2d 160, 162 (1990). "A mutual mistake of fact is a mistake 'common to both parties and by reason of it each has done what neither intended.' " *Swain v. C & N Evans Trucking Co., Inc.*, 126 N.C. App. 332, 335, 484 S.E.2d 845, 848 (1997) (citation omitted). Although Ms. Lancaster argues that the separation agreement contains "mutual mistakes," Mr. Lancaster offers no such argument, thereby negating the contention that the alleged mistakes

were "mutual." Moreover, Ms. Lancaster's attempts to rescind or alter the contract are barred by the parol evidence rule, which forbids the admittance of evidence used to alter the written terms of a contract. The parol evidence rule provides that when parties have formally and explicitly expressed their contract in writing, that contract shall not be contradicted or changed by prior or contemporaneous oral agreements. *See Gaylord v. Gaylord*, 150 N.C. 222, 230, 63 S.E. 1028, 1032 (1909). Ms. Lancaster attempts to add or change four terms of the separation agreement by arguing that she and Mr. Lancaster really agreed to terms other than those expressly written in the agreement. However, the parol evidence rule bars that evidence.

III.

[4] Ms. Lancaster next argues that the trial court erred by failing to address the issue of recission of the separation agreement based on Mr. Lancaster's material breach thereof. We disagree.

Ms. Lancaster alleges that Mr. Lancaster breached the separation agreement by not revealing the full extent of his property as required by the agreement. Specifically, Ms. Lancaster alleges that Mr. Lancaster failed to disclose the fact that he belonged to his current employer Weyerhauser's retirement plan and the value of that plan, despite a court order requiring that he provide that specific information. She also argues that he failed to disclose to her that using an earlier separation date in the agreement could affect the value of her share of his retirement plans.

Rescission of a separation agreement requires a material breach of the agreement—a substantial failure to perform. *See Cator v. Cator*, 70 N.C. App. 719, 722, 321 S.E.2d 36, 38 (1984). Small lapses or inconsequential breaches are not substantial breaches requiring rescission.

Mr. Lancaster provided information about his former employer Westvaco's retirement plan, in which he was enrolled until summer 1995. Mr. Lancaster's retirement plan at Weyerhauser began in December 1995. The parties agreed to use 16 June 1995 as their date of separation. They also agreed to equally divide Mr. Lancaster's retirement property from the date of marriage until the date of separation set forth in the agreement. Although Mr. Lancaster did not disclose his enrollment in the Weyerhauser retirement plan, this nondisclosure did not affect the terms of the agreement, nor did it affect Ms. Lancaster's share of the property since Mr. Lancaster did not join this program until after their agreed-upon date of separation. We, there-

fore, conclude that Mr. Lancaster did not commit a material breach of the separation agreement.

IV.

We have reviewed Ms. Lancaster's remaining arguments and finding no error, we affirm the decision of the trial court to uphold the validity of the separation agreement.

Affirmed.

Judges MARTIN and SMITH concur.

JAMES S. RHEW, PLAINTIFF v. LUETTA F. RHEW (FELTON), DEFENDANT

No. COA99-606

(Filed 20 June 2000)

1. Divorce— alimony—dependency—findings not specific

An order finding defendant not to be a dependent spouse and denying her claim for alimony was remanded where the court's findings were insufficiently detailed or specific. The court must provide sufficient detail to satisfy a reviewing court that it has considered all relevant factors and it is not enough that there is evidence in the record from which such findings could have been made.

2. Divorce— alimony—standard of living—savings and retirement contribution

The trial court erred in an alimony action by failing to consider the parties' contributions to savings and retirement in determining accustomed standard of living where evidence was presented that established a historical pattern of such contributions.

3. Divorce— alimony—pending equitable distribution claim

The trial court erred in an alimony action by speculating about the results of a pending equitable distribution between the parties. The issues of amount and whether a spouse is dependent may be reviewed after the conclusion of the equitable distribution claim. N.C.G.S. § 50-16.3A(a).

Appeal by defendant from order entered 6 October 1998 by Judge L.W. Payne in Wake County District Court. Heard in the Court of Appeals 23 February 2000.

Sokol & Lefante, P.A., by Elizabeth C. Todd and William L. Ragsdale, for plaintiff-appellee.

Tharrington Smith, L.L.P., by Carlyn G. Poole, Jaye Meyer, and Suzanne G. Richards, for defendant-appellant.

EDMUNDS, Judge.

Defendant appeals from an order finding her not to be a dependent spouse and denying her claim for alimony. We vacate the order and remand to the district court for further action.

Plaintiff James S. Rhew and defendant Luetta F. Rhew were married 25 November 1966. They separated 1 October 1995 and divorced 31 October 1997. Two children born of the marriage had reached the age of majority at the time of the parties' divorce. During their marriage, plaintiff obtained undergraduate and graduate degrees and was the parties' major financial support. Although defendant periodically worked, she devoted most of her time to the children and to the home.

Throughout their marriage, the parties enjoyed a comfortable standard of living. They budgeted a sizeable portion of their income to savings and retirement accounts. When the parties separated, plaintiff was earning $85,000 per year, while defendant was unemployed. After the separation, defendant, who was then approximately fifty years old, moved into her parents' home. At the time of the hearing, plaintiff's annual income exceeded $104,000, while defendant was earning $40,000 per year. After the hearing on defendant's claim for alimony, the trial court made the following pertinent findings of fact:

> 6. In 1994, the last full year of the marriage, the parties had about $5,000 per month of disposable income after deducting for taxes and savings. . . .
>
> 7. In 1995 the parties had about $4,000 per month of disposable income after deducting for taxes and savings. . . .
>
> 8. Since the date of separation defendant has resided with her parents and has had minimal expenses except for groceries.

9. Defendant presently has substantial deductions from her bi-monthly salary for deferred compensation and stock purchases. It appears that she would have about $2,500 per month in disposable income if she had only mandatory deductions from her salary.

10. As of the date of this hearing the parties had not resolved their respective claims for equitable distribution. Defendant is entitled to an equitable share of the proceeds from the sale of the marital residence, a substantial amount of IBM stock, plaintiff's IBM retirement and the other assets of the marriage. After equitable distribution defendant will have the ability to make a substantial down payment toward the purchase price of a residence and should be able to finance the unpaid amount with a relatively small mortgage.

11. Defendant's claim for alimony is based in part on the argument that the accustomed standard of living of the parties included significant monthly contributions to savings. It does not appear that the appellate courts of this state have addressed this issue. However, the appellate courts have stated that the purpose of alimony is to provide "reasonable subsistence" to a dependent spouse. This Court understands "reasonable subsistence" to mean the necessities of daily living, including but not limited to shelter, utilities, food and clothing, but not including putting money away for the future. Based upon this understanding of the law of North Carolina and based further upon the estate of defendant as set forth in paragraph #10, the income of defendant and the disposable income of the parties during the last two years of the marriage as set forth in paragraphs #6 and 7, it appears that defendant has the ability to provide "reasonable subsistence" for herself consistent with the parties' accustomed standard of living and that she is not, therefore, a dependent spouse.

The trial court accordingly found that defendant was not entitled to alimony. Defendant appeals.

I.

[1] Defendant first argues the trial court erred by "fail[ing] to make the detailed findings of fact needed to determine dependency." Only a dependent spouse, that is, one "who is *actually substantially dependent* upon the other spouse for his or her maintenance and support *or is substantially in need of maintenance and support* from

the other spouse," N.C. Gen. Stat. § 50-16.1A(2) (1999) (emphasis added), is entitled to alimony in North Carolina, N.C. Gen. Stat. § 50-16.3A(a) (1999). To be "actually substantially dependent," a spouse must have "actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation." *Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E.2d 256, 258 (1985) (citation omitted), *superseded on other grounds by* N.C. Gen. Stat. § 50-16.3A(a). If the trial court determines that one spouse is not *actually dependent* upon the other, the court must consider the second test set out in N.C. Gen. Stat. § 50-16.1A(2) and determine whether one spouse is "substantially in need of maintenance and support" from the other. In other words, the court must determine whether one spouse would "be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other." *Talent*, 76 N.C. App. at 548, 334 S.E.2d at 258-59.

Section 50-16.3A(b) directs the trial court to "consider all relevant factors" when making the determination of alimony and enumerates fifteen such relevant (but non-exclusive) factors. N.C. Gen. Stat. § 50-16.3A(b). " 'The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award.' " *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991) (quoting *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986) (citations omitted)); *see also Patterson v. Patterson*, 81 N.C. App. 255, 343 S.E.2d 595 (1986) ("The analysis under this test . . . requires detailed and specific findings by the trial court."). "In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings." *Talent*, 76 N.C. App. at 548-49, 334 S.E.2d at 259 (citation omitted). Accordingly, " '[t]he requirement for detailed findings is thus not a mere formality or an empty ritual; it must be done.' " *Lamb*, 103 N.C. App. at 545, 406 S.E.2d at 624 (quoting *Skamarak*, 81 N.C. App. at 128, 343 S.E.2d at 562 (citation omitted)).

Plaintiff contends that defendant presented insufficient evidence to enable the trial court to make detailed findings of fact. However, a review of the record reveals that substantial evidence was presented to the court. On 31 October 1997, defendant submitted an affidavit to

the court listing her monthly income and expenses. Her monthly gross income was $3,333 and her monthly expenses (including, *inter alia*, medical, entertainment, insurance, and 401(k) savings) totaled $2,445. Although she lived with her parents at the time of the hearing, on the basis of her prior expenses she estimated additional monthly expenses (including house payment, power and water, homeowner's fees or maintenance, property insurance, etc.) to be $2,241.

During the hearing on defendant's claim for alimony, defendant indicated her desire to move into a home of her own. She testified as to an affair plaintiff had from 1976 to 1981, but about which she had not become aware until 1989. She testified about her health problems. Upon being diagnosed with cancer shortly after the parties' separation, she underwent a mastectomy in November 1995, followed by reconstructive surgery. She needed to see a neuromuscular therapist once a week, but because those visits were not covered by her insurance, she had to reduce her visits to once a month. Defendant also testified that she takes medication for diabetes and depression and had been diagnosed with Attention Deficit Disorder.

As to her monthly expenses, defendant testified that she based the estimated $2,241 mortgage and utility expenses that she would have to pay upon moving out of her parents' home on the similar expenses incurred while married. She testified that her automobile expenses included $70 or $80 per month in gasoline, approximately $300 every six months for auto insurance, and $1,050 on recent car repairs. She testified that her medical expenses not covered by insurance averaged $784 per month. She paid $220 per month for health insurance and contributed $667 per month to her 401(k) plan.

Defendant testified that during their marriage, the parties went on vacations, weekend trips, boat outings, etc. When defendant was working, the parties employed a domestic. During their marriage, the parties made regular donations to their church, went out regularly to dinner and movies, and entertained friends at their home. Defendant testified she was unable to maintain that same standard of living at the time of the hearing, but that if she received contributions from plaintiff, she would be able to own her own home.

Defendant also called plaintiff as a witness. He testified that he owned a 2,500 square-foot home on which he made monthly mortgage payments of $1,700. To make this payment, plaintiff had stopped his practice of devoting approximately 25% of his income to investing.

Plaintiff's total taxable income for 1997 was $104,413. At the time of the hearing, he entertained regularly. He indicated a vehicle debt of $30,000 because he needed to purchase a new car. He dined in restaurants approximately twenty times a month, and his monthly grocery bill was about $300 per month. Plaintiff spent $55 per month for medication for high blood pressure and diabetes. He paid $80 twice a month to have his home cleaned and estimated an additional $140 for maintenance that he may need. He had taken several trips in the six months prior to the hearing to such destinations as Nashville, Tennessee, and the Bahama Islands.

This evidence was sufficient to enable the trial court to consider the relevant factors and make specific findings of fact required by N.C. Gen. Stat. § 50-16.3A. However, the actual findings of fact made by the trial court and quoted above are insufficiently detailed or specific. Other than the parties' contributions to retirement and stock, the trial court made no findings regarding the parties' standard of living during the marriage, and beyond a finding that "defendant . . . has had minimal expenses," the trial court made no findings regarding the parties' respective living expenses since the separation.

Although we do not suggest that the court is required to set out specific findings as to each factor listed in section 50-16.3A(b), the court must provide sufficient detail to satisfy a reviewing court that it has considered "all relevant factors." In the case at bar, the order sets out defendant's income and concludes that she had the ability to provide herself reasonable subsistence. Although this conclusion undoubtedly is based on the evidence presented at the hearing, "[i]t is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not [the Court of Appeals], to determine what facts are established by the evidence." *Talent*, 76 N.C. App. at 549, 334 S.E.2d at 259 (citation omitted). Therefore, we vacate the order and remand this case to the district court for a redetermination of defendant's dependency and entry of judgment containing findings of fact sufficiently specific to show that the court properly considered the statutory requirements. *See id.* at 551, 334 S.E.2d at 260. On remand, the court in its discretion may receive additional evidence or enter a new order on the basis of evidence already received. *See* N.C. Gen. Stat. § 50-16.9 (1999) ("An order . . . for alimony or postseparation support, . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."); *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on*

other grounds, 336 N.C. 575, 444 S.E.2d 420 (1994), *and superseded by statute on other grounds as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000).

II.

[2] Defendant also contends the trial court erred by failing to consider the parties' contributions to savings and retirement. In paragraph eleven of its order, the trial court declined to consider the parties' saving habits in determining whether or not to award alimony to defendant, stating that "reasonable subsistence" did not include savings for the future. However, shortly after the trial court entered its order, this Court stated that "the trial court can properly consider the parties' custom of making regular additions to savings plans *as a part of their standard of living* in determining the amount and duration of an alimony award." *Glass v. Glass*, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239 (1998) (emphasis added). Although the Court in *Glass* properly identified the difficulty that might arise when a party increased or decreased his or her contribution to savings in order to manipulate an alimony award, no such problem exists here. Evidence was presented that established an historical pattern of such contributions, which satisfied the requirement in *Glass* that there be a custom of regular savings. Therefore, the trial court erred when it found in paragraph eleven of its order that "it appears that defendant has the ability to provide 'reasonable subsistence' for herself *consistent with the parties' accustomed standard of living*" without considering contributions to savings. (Emphasis added.) Upon remand, the trial court shall consider evidence pertaining to such savings made in accordance with a pre-existing pattern in determining defendant's accustomed standard of living and make findings of fact accordingly.

III.

[3] Finally, defendant contends the trial court erred by speculating about the results of the pending equitable distribution between the parties. "The claim for alimony may be heard on the merits prior to the entry of a judgment for equitable distribution, and if awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." N.C. Gen. Stat. § 50-16.3A(a). In the case at bar, no evidence was presented as to the likely outcome of the equitable distribution. Consequently, paragraph ten of the order is unsupported by evidence.

Vacated and remanded.

Judges LEWIS and JOHN concur.

IN THE MATTER OF: JONATHAN PATRICK LEE SMALL, FORREST HOWARD COBB, IV

No. COA99-1009

(Filed 20 June 2000)

Termination of Parental Rights— mental incapacity—evidence insufficient

The trial court erred by terminating respondent's parental rights pursuant to N.C.G.S. § 7A-289.32(7) where the court found that defendant had a profound mental incapacity compounded by a bipolar disorder, that respondent was unable to protect her children from harm from Forest Cobb, that respondent was incapable of providing proper care and supervision, and that respondent's incapacity to provide proper care and supervision arose from deficits in her intellect and reasoning ability as reflected in the report of a psychologist. Respondent does not exhibit any behavior indicative of bipolar disorder, respondent's guardian ad litem testified that she had not uncovered evidence that would lead her to believe that respondent's mental condition would prevent her from parenting or that she had abandoned her children, the psychologist's testimony did not provide clear and convincing evidence to support the finding that respondent is incapable of providing proper care to her children, and Mr. Cobb is now deceased.

Appeal by respondent mother from order entered 3 March 1998 and filed 4 March 1998 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 29 March 2000.

New Hanover County Department of Social Services, by Julia Talbutt, for petitioner-appellee.

James M. Maggard, P.C., by James M. Maggard, for respondent-appellant.

WALKER, Judge.

On 27 July 1998, the New Hanover County Department of Social Services ("DSS") filed a petition to terminate the parental rights of respondent mother Clarissa Cobb. The petition alleged three bases to justify termination of respondent's parental rights: (1) the minor children were neglected pursuant to N.C. Gen. Stat. § 7A-289.32(2); (2) respondent willfully left the minor children in foster care for more than twelve months pursuant to N.C. Gen. Stat. § 7A-289.32(3); and (3) respondent is incapable by virtue of mental illness or mental limitations of providing for the proper care and supervision of the minor children pursuant to N.C. Gen. Stat. § 7A-289.32(7). The record reveals that the petition to terminate respondent's parental rights pursuant to N.C. Gen. Stat. §§ 7A-289.32(2) and (3) was not addressed.

Harvey Joseph Jones, father of Jonathan Patrick Lee Small, consented to the termination of his parental rights. Forrest Howard Cobb III, the father of Forrest Howard Cobb IV, died sometime prior to 10 November 1998.

Forrest Cobb III appeared at the Public Health Department in a drunk and disorderly condition with Forrest Cobb IV. Based upon this incident, DSS sought non-secure custody of both children, and on 5 March 1996, the children were placed in foster care and have remained continuously in foster care since that date. On 4 April 1996, pursuant to a stipulation of the parties, the minor children were adjudicated neglected and respondent was ordered to undergo a psychological evaluation. The 4 April 1996 adjudication order was based upon Mr. Cobb's alcohol abuse, domestic violence in the home, and respondent's mental illness and inability to provide consistent parenting. On 18 June 1996, respondent was diagnosed with a personality disorder with passive and aggressive dependent features. Respondent's I.Q. was determined to be 75, although the full exam could not be administered due to respondent's vision problems. Additionally, both children have been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD). After several periodic reviews, DSS petitioned for termination of parental rights on 27 July 1998, which was granted on 3 March 1999.

In the trial court's order terminating parental rights, the trial court found:

> 7. That the Respondent has profound mental incapacity. Respondent's tested IQ is 75. Her ability in mathematics is below

the first percentile and her abilities in short-term memory are below the fifth percentile as compared to the adult population. Respondent's incapabilities as they affect her parenting abilities could with support from appropriate community resources most likely be overcome; however, Respondent's mental incapacity is compounded by an Axis II mental illness, bipolar disorder, which while presently in remission, is incurable.

. . .

13. That Respondent lacked the insight, ability and willingness to protect her children from the harm the father of Forrest Howard Cobb, IV posed to her children. The deficits causing this failure have not been cured. That Respondent's pattern of inability to protect her children from harm when harm when risk of harm [sic] comes through the door and her inability to provide a stable, nurturing environment has persisted and also preceded the marriage of Respondent to Forrest Howard Cobb, III, as evidenced by the problems and neglect experienced by Respondent's older children.

. . .

15. That Respondent is incapable by virtue of her mental illness and her mental incapacity of providing proper care and supervision of these children because of the unique diagnosis of Attention Deficit/Hyperactivity Disorder and difficult [sic] to control. That there is a reasonable probability that Respondent's incapacity will continue throughout the minority of Jonathan Patrick Lee Small and Forrest Howard Cobb, IV.

16. That Respondent's incapacity to provide proper care and supervision arises from the deficits in her intellect and reasoning abilities as reflected in the report of the independent psychologist, Dr. Mark Davis, and her diagnosis of mental illness which has been made in fact by experts and established beyond clear, cogent and convincing evidence. Because of Respondent's inabilities, the children cannot be returned to the Respondent today nor in the reasonably foreseeable future.

17. That the children are placed in a stable home, committed to the adoption of the children and providing an environment which provides safety, structure and stability and an opportunity for the children to mature into responsible adults.

Based upon these and other findings, the trial court concluded:

1. That the grounds for termination of the Respondent's parental rights have been established by clear, cogent and convincing evidence; and

2. That the best interests of the minor children will be served by termination of the parental rights of the Respondent. Termination of Respondent's parental rights will afford the juveniles an opportunity for adoption and permanence.

3. Further attempts at reunification will not be in the best interests of these children.

Respondent contends the trial court erred in finding her incapable of providing proper care and supervision by reason of her mental illness and mental incapacity. Specifically, there was not clear and convincing evidence offered by DSS to support such a finding.

In a termination proceeding, the appellate court should affirm the trial court where the trial court's findings of fact are based upon clear and convincing evidence and the findings support the conclusions of law. *See In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

N.C. Gen. Stat. § 7A-289.32(7)[1], as written at the time of the trial court's order, provides that parental rights may be terminated when:

> the parent is incapable of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.

N.C. Gen. Stat. § 7A-289.32(7) (Cum. Supp. 1998).

N.C. Gen. Stat. § 7A-517(13)[2] defines a dependent juvenile as:

> A juvenile . . . whose parent . . . is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7A-517(13) (Cum. Supp. 1998).

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1. This section was repealed by Session Laws 1998-202, s. 5, effective 1 July 1999. See now N.C. Gen. Stat. § 7B-1111.

2. Repealed by Session Laws 1998-202, s. 5, effective 1 July 1999. See now N.C. Gen. Stat. § 7B-101(9).

This Court, in *In re Scott*, 95 N.C. App. 760, 383 S.E.2d 690 (1989), held that the trial court's finding that the mother was mentally incapable of providing proper care and supervision to her minor children, and that such incapability would last throughout the minority of the children, was not supported by clear and convincing evidence and reversed the trial court's order terminating the mother's parental rights.

In *Scott*, the mother admitted to suffering from a personality disorder. However, her psychiatrist testified that the fact that someone carries a diagnosis of personality disorder "does not mean that they are incapable of raising children." *Id.* at 763, 383 S.E.2d at 691. Further, the psychiatrist testified that the mother's pattern of behavior by itself did not mean that she was incapable of taking care of her children. *Id.* With regard to the probability of the mother's illness lasting throughout the minority of the children, the psychiatrist testified, "[u]sually, these kinds of behavior patterns are very difficult to change over the long haul, although that can be done. I would find it very difficult to guess how things would go with [the mother]." *Id.*

Based upon this testimony, the *Scott* Court held that the psychiatrist "could not predict within a reasonable probability that respondent's mental illness would continue throughout the minority of the children." *Id.* The court noted that, "in fact, [the psychiatrist] testified that [the mother] was currently experiencing her longest sustained period of improvement, and she had dealt with the stress of the hearing in a positive manner." *Id.* at 763, 383 S.E.2d at 692.

In this case, Dr. Mark Davis, the court appointed clinical psychologist, testified concerning respondent's mental abilities. Dr. Davis testified that he could not conclude that respondent suffered from a personality disorder or from any mental illness. On direct examination, Dr. Davis testified to the following in part:

Q: [. . .] Dr. Davis, did you arrive at an estimation of any impairment in Ms. Cobb's parenting abilities? And if so, what?

A: My—I—I have next to no information directly bearing on her interactions with her children. So, I'm kind of shooting in the dark here. The areas of concern that would be suggested by the results of testing and interview would include a probable tendency for a certain amount of cognitive fragmentation

under stress when challenged by a complex situation that would potentially result in inconsistent and rather fragmented behaviors that in a child-rearing situation would not be helpful, and in fact, could be detrimental.[. . .]

On cross-examination, Dr. Davis testified in part:

Q: [. . .] In your summary, you indicate 'Ms. Cobb appears to have made significant improvements in functioning, despite a number of serious psychological difficulties and shortcomings.' And my question to you would be, are these improvements such that they would be more of a benefit to Ms. Cobb's functioning as an individual, or are these improvements such that they would somehow assist in her parenting abilities?

A: I think that's a very good question. I attempted to point out, probably in about that same paragraph, on the closing, that I don't feel as though I have a sufficient enough assessment of the extent to which she is involved in active—active coping activities these days that would be similar to the challenges posed by children with special needs, or children in general.[. . .]

. . .

Q: [. . .] Assuming she did have a mental illness to some degree, does the fact that she had some mental illness, in and of itself, make her unable to parent a child?

A: No.

Q: Were you able to conclude, on the basis of a personality disorder or mental illness, that she is unable to parent these minor children through their minority?

A: No, I was not so able to conclude.

. . .

Q: [. . .] Based on the information that you . . . had before you in your evaluation of Clarissa Cobb, you cannot determine or form an opinion, based upon a reasonable degree of certainty, that she is incapable of parenting her two children through minority based on mental deficiencies, correct?

A: To a reasonable degree of certainty, I don't believe I can.

On re-direct examination, the following exchange occurred:

> Q: What difficulties can you predict, with a reasonable degree of certainty, that Ms. Cobb will encounter parenting two children, both of whom are ADHD?
>
> A: My degree of uncertainty is largely a function of the extent to which I am unaware of how much of her daily routine involves coping with equivalent challenging stressors. My impression is that not much of it does.[. . .]

Thomas Maultsby, respondent's counselor for the four years preceding the termination hearing, testified concerning her improved mental condition. He testified that she was last diagnosed as manic depressive with bipolar disorder in 1997, but that the illness was in remission. Further, respondent does not exhibit any behavior indicative of bipolar disorder and there has been no need to see a psychiatrist since 1997.

Beth Smerko, the guardian ad litem appointed to represent respondent, testified that "I have not, in my role as guardian, uncovered evidence that would lead me to believe that her mental . . . condition would prevent her from parenting or that she has abandoned her children."

Additionally, we note the record reveals Ms. Smerko testified that she read a report from Ms. Kramer, the guardian ad litem for the children. However, Ms. Kramer's report does not appear in the record and the trial court's order does not reference the report.

The testimony of Dr. Davis does not provide clear and convincing evidence to support the trial court's finding that respondent is incapable, by virtue of her mental illness and mental incapacity, of providing proper care to her children because of their ADHD diagnosis. *See In re Scott*, 95 N.C. App. at 763, 383 S.E.2d at 691; *In re LaRue*, 113 N.C. App. 807, 812, 440 S.E.2d 301, 304 (1994). Although the trial court found that respondent lacked the ability to protect her children from the harm of Mr. Cobb, he is now deceased. Therefore, we reverse the decision of the trial court terminating respondent's parental rights pursuant to N.C. Gen. Stat. § 7A-289.32(7).

Reversed.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH FULLER

No. COA99-400

(Filed 20 June 2000)

1. Homicide— second-degree murder—driving while impaired—malice—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two charges of second-degree murder based on substantial evidence revealing that defendant had malice of the type manifesting a mind utterly without regard for human life and social duty, because: (1) defendant operated his automobile with a high degree of alcohol in his blood and after numerous prior driving convictions including reckless driving, speeding and driving while license was revoked due to his habitual offender status; (2) during a 16.7 mile chase by a police officer, defendant ran both a stop sign and a red stoplight, passing stopped traffic at speeds of 90-95 miles per hour; and (3) both passengers in the truck defendant struck during the high speed chase died as a result of the collision.

2. Evidence— marijuana in purse—collision scene—guilt of another—irrelevancy

The trial court did not err in a second-degree murder case by excluding evidence of marijuana found in a purse at the scene of the automobile collision because: (1) evidence offered to show the guilt of someone other than the defendant must do more than create an inference in order to be relevant; (2) the bare fact that there was a purse containing marijuana at the scene of the collision indicates neither that one of the parties to the collision was under the influence of marijuana nor that defendant did not proximately cause the accident; and (3) admission of the purse, whose owner was not established, would have at most created a speculative inference that some other victim of the collision was carrying a purse containing marijuana, and not necessarily one of the other drivers.

3. Evidence— prior convictions—traffic violations

The trial court did not commit plain error in a second-degree murder case by admitting defendant's prior traffic convictions for the previous eight years because: (1) evidence of prior convictions is admissible under N.C.G.S. § 8C-1, Rule 404(b) to establish

the malice necessary to support a second-degree murder conviction; (2) defendant's driving violations are sufficiently proximate in time to the offenses charged in this case; and (3) defendant's driving record need not establish solely alcohol-related driving offenses to be admissible in this context under Rule 404(b).

4. Criminal Law— limiting instruction—prior traffic violations

The trial court did not err in a second-degree murder case by its jury instruction limiting the use of evidence of defendant's prior traffic violations under N.C.G.S. § 8C-1, Rule 404(b) because: (1) the trial court instructed the jury that the driving record was received for the limited purpose of establishing malice; and (2) the trial court later instructed the jury adequately on the issue of malice.

5. Sentencing— second-degree murder—aggravating factor—knowingly created a great risk of death

The trial court did not err in a second-degree murder case by finding as an aggravating sentencing factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person under N.C.G.S. § 15A-1340.16(d)(8), because: (1) defendant's operation of a motor vehicle in this case did not constitute one of the elements of second-degree murder; (2) the use of the challenged aggravating factor within the context of motor vehicle collisions caused by legally intoxicated drivers is proper; and (3) a reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path.

Appeal by defendant from judgment entered 8 October 1998 by Judge Peter M. McHugh in Rockingham County Superior Court. Heard in the Court of Appeals 16 February 2000.

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

Danielle M. Carman for the defendant-appellant.

LEWIS, Judge.

On 15 May 1997 defendant was involved in a motor vehicle collision. State Trooper Robert Gibson of the North Carolina State

Highway Patrol clocked defendant traveling 77 m.p.h. in a 55 m.p.h. zone. Trooper Gibson activated his siren and blue lights and attempted to pull defendant over. Defendant accelerated, and a 16.7-mile chase ensued whereby Trooper Gibson clocked defendant traveling at speeds of 90-95 m.p.h. After running a stop sign and a red stop light in order to pass stopped traffic, defendant approached the last intersection, traveling between 80 and 85 m.p.h., when he struck a truck containing two passengers. The truck was forced into oncoming traffic and was struck by a third automobile. Both passengers in the truck died as a result of the collision.

A blood test revealed defendant had an alcohol concentration of .15 grams of alcohol per 100 milliliters of blood. The evidence indicated that at the time of the collision defendant's license had been revoked due to his status as an habitual offender by the Virginia Department of Motor Vehicles. Defendant's prior driving record included numerous convictions occurring within the previous eight years.

Defendant was indicted for two counts of first-degree murder. On 8 October 1998, the jury convicted defendant on two counts of second-degree murder. Defendant was sentenced to consecutive sentences, each imposing a minimum prison term of 237 months. Defendant appeals from both convictions, making five arguments.

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charges of second-degree murder. To withstand defendant's motion to dismiss, the State had to show substantial evidence as to each essential element of the crime. *State v. Workman*, 309 N.C. 594, 598, 308 S.E.2d 264, 267 (1983). The trial court must consider all the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

Murder in the second degree is the "unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Although an intent to kill is not a necessary element of murder in the second degree, the crime does not exist in the absence of some intentional act sufficient to show malice. *State v. Snyder*, 311 N.C. 391, 393, 317 S.E.2d 394, 395 (1984). Defendant argues the State's evidence was insufficient to establish malice.

The element of malice may be established by at least three different types of proof: (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind 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). The second type of malice, commonly referred to as "depraved-heart" malice, *see, e.g., State v. Rich*, No. 161PA99 (N.C. Sup. Ct. Apr. 7 2000), is applicable to this case.

Defendant argues several facts surrounding the collision indicate a lack of substantial evidence on the issue of malice. Defendant points to Trooper Gibson's continued pursuit during a dangerous, high-speed chase for a prolonged period of time, defendant's consent to the blood alcohol test, defendant's testimony that he consumed only several ounces of alcohol despite his blood alcohol content of .15, and the deceased driver's blood alcohol content of .17. In light of the other evidence in this case, however, we do not agree. While some of these facts may suggest defendant did not possess the type of malice requiring express hatred or ill-will, there was substantial evidence at trial to prove the type of malice manifesting a mind utterly without regard for human life and social duty.

Defendant here operated his automobile with a high degree of alcohol in his blood and after numerous prior driving convictions, including reckless driving, speeding and driving while his license was revoked due to his habitual offender status. During the 16.7-mile chase, defendant ran both a stop sign and a red stop light, passing stopped traffic at speeds of 90-95 m.p.h. Both passengers in the truck defendant struck died as a result of the collision. We conclude this conduct manifests a mind utterly without regard for human life and social duty, supporting a finding of malice sufficient for a conviction of second-degree murder. *See also State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984); *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998); *State v. McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (1993). The charge of second-degree murder was properly submitted to the jury.

[2] Defendant next argues the trial court erroneously excluded evidence of marijuana found in a purse at the scene of the collision. The court excluded the evidence before trial, finding it in no way pro-

bative of any material issue in the action. Defendant contends this evidence was relevant since it raised an inference that one of the other drivers may have been impaired, which could have been the proximate cause of the victims' deaths, possibly eradicating defendant's culpability. We disagree.

Evidence offered to show the guilt of someone other than the defendant, to be relevant, must do more than create an inference; it must point directly to the guilt of the other party. *State v. Potts*, 334 N.C. 575, 585, 433 S.E.2d 736, 741 (1993). Facts and circumstances which raise only a conjecture or suspicion should be rejected as distracting or confusing to the jury. *Corum v. Comer*, 256 N.C. 252, 254, 123 S.E.2d 473, 475 (1962). Here, the bare fact that there was a purse containing marijuana at the scene of the collision indicates neither that one of the parties to the collision was under the influence of marijuana nor that defendant did not proximately cause the accident. Admission of the purse, whose owner was not established, would have at most created a speculative inference that some other victim of the collision was carrying a purse containing marijuana, not necessarily one of the other drivers. Accordingly, this evidence, raising a mere conjecture, was properly excluded.

[3] In his next assignment of error, defendant contends the trial court erred in admitting his prior traffic convictions because they occurred as much as eight years before the date of the collision and lacked similarity to the offenses charged. Defendant admits, however, the evidence complained of was not objected to at trial. Because the question of admissibility of this evidence was not preserved for appeal, we may review it only for plain error. To constitute plain error, an instructional error must have "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). Defendant, therefore, "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Rule 404(b) provides:

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

N.C.R. Evid. 404(b). This list of permissible purposes in Rule 404(b) for admission of "other crimes" evidence is not exclusive; rather, such evidence is "admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). This Court has repeatedly held that evidence of prior convictions is admissible under Rule 404(b) to establish the malice necessary to support a second-degree murder conviction. *Rich*, No. 161PA99 (N.C. Sup. Ct. Apr. 7 2000); *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998). When the State offers such evidence, not to show defendant's propensity to commit the crime, but to show the required mental state for a conviction of second-degree murder, admission of such evidence is not error. *State v. Byers*, 105 N.C. App. 377, 382, 413 S.E.2d 586, 589 (1992).

Defendant's driving record in this case revealed traffic convictions from the previous eight years, including reckless driving in 1989, operating an uninsured motor vehicle in 1992, speeding 10-19 miles above the speed limit in 1993, failure to carry a license and registration in 1993, operating a vehicle with signs or decals on the windshield in 1994, safety belt violation in 1994, driving while license was suspended or revoked twice in 1994 and once in 1995, and passing on the crest of a hill in 1995. Furthermore, the Virginia Department of Motor Vehicles determined defendant to be an habitual offender in 1996. Defendant's driving offenses from eight to two years past are sufficiently proximate in time to the offenses charged here. *Grice*, 131 N.C. App. at 53, 505 S.E.2d at 169 (driving convictions from ten years prior to collision admissible under 404(b)); *Rich*, No. 161PA99 (N.C. Sup. Ct. Apr. 7 2000) (driving convictions from eight years prior to collision admissible under 404(b)). Furthermore, defendant's driving record need not establish solely alcohol-related driving offenses to be admissible in this context under Rule 404(b). *McBride*, 109 N.C. App. at 68, 425 S.E.2d at 734 (admitting prior convictions for driving while license was permanently revoked and using false tags to obtain an inspection sticker); *Rich*, No. 161PA99 (N.C. Sup. Ct. Apr. 7 2000) (admitting prior convictions for speeding). We conclude the court did not err in admitting defendant's driving offenses; we find no plain error.

[4] Defendant also argues the trial court erred by failing to give a proper jury instruction limiting the use of evidence of defendant's prior traffic violations under Rule 404(b). The trial court here instructed the jury that "the status of an individual's driving record

under certain circumstances may be considered by the jury as evidence of malice, and for that reason [defendant's driving record] is received for the limited purpose of establishing that driving record and may be considered by you only for that purpose." (Tr. at 116.) Defendant contends the court's instruction was incomplete since it failed to provide guidance as to why evidence of defendant's driving status was relevant to the issue of malice in this case. However, the trial court later instructed the jury adequately on the issue of malice. All considered, we find the court's limiting instruction sufficiently descriptive of the purpose for which this evidence could be considered. *See, e.g., State v. Bostic*, 121 N.C. App. 90, 103, 465 S.E.2d 20, 27 (1995). We find no error.

[5] In his next two assignments of error, defendant contends the trial court erred by finding as an aggravating sentencing factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. N.C. Gen. Stat. § 15A-1340.16(d)(8) (1999). Defendant first argues the trial court erred in applying this aggravating factor because it constitutes an element of the offense for which defendant was convicted, and contrary to N.C. Gen. Stat. § 15A-1340.16(d)(8), allowed evidence necessary to prove an element of the offense to be used to prove a factor in aggravation. We disagree.

The court in *State v. Ballard*, 127 N.C. App. 316, 489 S.E.2d 454 (1997), addressed this specific issue within the context of the operation of an automobile by a legally intoxicated driver. Like the defendant here, the defendant in *Ballard* was convicted of second-degree murder resulting from a collision in which defendant was operating a motor vehicle with a blood alcohol level of .18. The trial court in that case used the same aggravating factor to impose a sentence greater than the presumptive range. In *Ballard*, we stated:

> "Malice arises when an act which is done so recklessly and wantonly as to manifest a mind utterly without regard to human life and social duty, and deliberately bent upon mischief." Thus, it is the reckless and wanton nature of the act committed which leads to the inference of malice. On the other hand, it is the use of a device, normally hazardous to the lives of more than one person, to create a risk of death to more than one person which supports the aggravating factor at issue. Therefore, we hold that the defendant's operation of the motor vehicle did not constitute one of the elements of second degree murder.

Id. at 323, 489 S.E.2d at 458-59. In accordance with *Ballard*, we conclude defendant's operation of the motor vehicle in this case did not constitute one of the elements of second degree murder.

Defendant also argues the State's evidence was insufficient to support a finding as to this aggravating factor. Our Supreme Court has established that in order to apply this aggravating factor, the trial court must focus on two considerations: "(1) whether the weapon or device in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created." *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990).

Defendant contends the automobile he was driving does not qualify as a weapon or device which in its normal use is hazardous to the lives of more than one person. We disagree. It is well-settled that the use of the challenged aggravating factor within the context of motor vehicle collisions caused by legally intoxicated drivers is proper. *State v. McBride*, 118 N.C. App. 316, 319, 454 S.E.2d 840, 842 (1995); *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993). We conclude the trial court did not err in finding defendant's automobile, under the circumstances surrounding its use in the present case, constituted a device which in its normal use is hazardous to the lives of more than one person.

Defendant also contends he did not knowingly create a great risk of death. Again, we disagree. This Court has established "any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path." *McBride*, 118 N.C. App. at 319-20, 454 S.E.2d at 842. We conclude defendant created this great risk of death knowingly.

No error.

Judges JOHN and EDMUNDS concur.

MOLLY WIEBENSON, PETITIONER v. BOARD OF TRUSTEES, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. COA99-842

(Filed 20 June 2000)

Costs— attorney fees—substantial justification

The trial court did not err in awarding petitioner $19,623.02 in costs and attorney fees under N.C.G.S. § 6-19.1 based on respondent not being substantially justified in denying petitioner her retirement benefits because: (1) the fact that a court agreed or disagreed with the government's position does not establish whether its position was substantially justified; (2) respondent had information concerning petitioner's leaves of absence and the fact that the State made representations to petitioner that she was a full-time employee participating in the Retirement System; (3) petitioner's personnel forms note the State's characterization of petitioner as a full-time permanent employee and reflect the fact that petitioner took an annual approved leave of absence; (4) at the time respondent took its position, N.C. Administrative Code title 25, rule 1D.1003 provided that periods of leave without pay do not constitute a break in service; (5) computer printouts reflect that someone with access to petitioner's records had direct knowledge of her situation as early as 1987; and (6) copies of annual statements show petitioner continued to accumulate retirement benefits during the years that she took a leave of absence.

Appeal by respondent from order entered 5 April 1999 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 8 May 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for the State.

Thomas D. Roberts for the petitioner-appellee.

EAGLES, Chief Judge.

This case presents the question of whether the petitioner Molly Wiebenson is entitled to attorney's fees from the respondent Teachers' and State Employees' Retirement System for its improper denial of her retirement benefits.

This is the second appeal arising out of this case. The relevant facts are as follows. Petitioner worked as a full-time alcohol rehabilitation therapist for the Alcoholic Rehabilitation Center in Black Mountain, North Carolina, from October 1971 to May 1984. While working at ARC, petitioner participated in the Teachers' and State Employees' Retirement System (Retirement System). In 1984, petitioner and Evelyn Brank, another rehabilitation therapist at the Black Mountain ARC, approached Millard P. Hall Jr., the director of ARC, to explore sharing a position. Petitioner and Ms. Brank sought to each work six months out of the year. While making her inquiries, petitioner sought assurances that the job sharing plan would not jeopardize her eligibility for retirement benefits. Mr. Hall sent them a memorandum in which he stated that he had "pursued this with DHR personnel" and that petitioner and Ms. Brank could share one position. He went on to state:

> The two of you then will share on a six months basis in Molly's current position as a Rehabilitation Therapist, Grade 62. By doing so will allow each of you to maintain the benefits afforded to employees of the State of North Carolina. During the six months each of you work per year your Retirement, Insurance and other deductions you may have will be processed through the normal channels of deductions of payroll. During the months you are on leave you will be able to pay to the system your portion of these benefits and be maintained within the Retirement Insurance and other benefit packages you are currently enrolled in.

For almost eight years from 31 May 1984 to 19 January 1992, petitioner worked under the job sharing plan. The plan was implemented through recurring leaves of absence without pay whereby the petitioner would work for approximately six months and then was off for the following six months. At the end of each "off period," petitioner was reinstated to her prior status as working full time. The record is replete with evidence that respondent had knowledge of petitioner's situation. Throughout this period, respondent continued to accept retirement contributions deducted from petitioner's paycheck. Further, the Retirement System provided the petitioner with annual statements that reflected the petitioner's accumulating retirement credit each year from 1984 to 1990. These statements indicate that the petitioner was accumulating between one-half and two-thirds creditable retirement service for each calendar year.

The record also contains petitioner's "personnel action forms." These forms classify the petitioner as a permanent full-time employee

and reflect that the petitioner took leaves of absence from 1984 to 1992. Further, the record includes a computer report dated April of 1987. This untitled printout reflects the petitioner's periodic interruptions in work contributions for 1984, 1985 and 1986.

In 1991, petitioner began making inquiries to the Retirement System in preparation for her retirement. Later in 1991, respondent sent the petitioner an estimated benefits statement. In this statement, respondent calculated the plaintiff's benefits as if she had worked as a full-time employee throughout her job-sharing period. Subsequently, in November of 1991, the Deputy Director of the Retirement System J. Marshall Barnes, III informed the petitioner by letter that the job-sharing arrangement did not allow her to participate in the Retirement System. Therefore, petitioner had not been a member of the system since she began job-sharing in 1984. Barnes' letter advised the petitioner that the Retirement System would refund all retirement contributions plus interest while she had participated in the job-sharing plan.

Petitioner sought a contested case hearing from the Office of Administrative Hearings in 1994. After a hearing, an administrative law judge entered a recommended decision concluding that the petitioner was not an employee under N.C.G.S. § 135-1(10) (1999). The State Treasurer Harlan E. Boyles entered a final agency decision adopting the ALJ's determination. Superior Court Judge Dennis J. Winner upheld the final decision. On appeal, this Court reversed.

While this Court agreed that the petitioner was not an employee under N.C.G.S. § 135-1(10), we reasoned that the respondent was bound by its representations and its ratification of Hall's actions. *Wiebenson v. Bd. Of Trustees, State Employees' Ret. Sys.*, 123 N.C. App. 246, 250, 472 S.E.2d 592, 595 (1996), *aff'd on other grounds, Wiebenson v. Bd. Of Trustees, State Employees' Ret. Sys.*, 345 N.C. 734, 483 S.E.2d 153 (1997). The Supreme Court affirmed this Court's decision on other grounds. In its opinion, the Supreme Court held that the petitioner was an employee under G.S. § 135-1(10). *Wiebenson*, 345 N.C. at 737, 483 S.E.2d at 154. The Court reasoned that the petitioner's six month breaks were "regular approved leaves of absence," and that "these leaves of absence did not cause petitioner to become a part-time employee." *Id.* at 738, 483 S.E.2d at 155. While the petitioner was working, the State treated her as a full-time employee. *Id.* The Court held that her subsequent leaves of absence did not affect her right to retirement benefits. *Id.* at 739, 483 S.E.2d at 155.

On remand, the Superior Court entered judgment for petitioner. Pursuant to G.S. § 6-19.1 (1999), petitioner requested that the court tax costs including attorneys fees to the State. Following a hearing, the trial court entered an order making the following relevant findings and conclusions of law:

> 1. Prior to the defense of Petitioner's claim, the Respondent knew or should have known, among other relevant facts that the Department of Human Resources categorized the Petitioner as a full time permanent employee who was granted six months leaves of absence on an annual basis for the last several years of employment. The Respondent further knew that it had accepted her contributions into the retirement system, and that in fact she was being treated as a full time permanent employee who had been granted leaves of absence [sic].
>
> . . . .
>
> 1. The Respondent acted without substantial justification in defending the claim of the Petitioner.
>
> 2. That there are no special circumstances that would make the award of attorney's fees unjust.

Based on those findings, the trial court awarded the petitioner $19,623.02 in costs and attorneys fees. Respondent appeals.

The issue before this Court is whether the respondent was substantially justified in denying the petitioner her retirement benefits. Under G.S. § 6-19.1,

> In any civil action, . . . unless the prevailing party is the State, the court may in its discretion allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

"Substantial justification" means "justified in substance or in the main—that is justified to a degree that could satisfy a reasonable person." *Crowell Constructors, Inc. v. State Ex Rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996). Our courts should not interpret this

standard so strictly as to require the "agency to demonstrate the infallibility of each suit it initiates." *Id.* Likewise, our courts should not interpret this standard so loosely as to require the agency only to show that the suit was not frivolous. *Id.* Rather, the "substantial justification" standard is a middle ground objective test. *Id.* To show that it acted with "substantial justification," the agency must demonstrate that its position was rational and legitimate to the satisfaction of a reasonable person at the time of its initial action and in light of the circumstances known to the agency. *Id.*

Respondent claims that it was "substantially justified" in its actions. First, respondent suggests that the proof of its "substantial justification" lies in the results of the lower courts. Respondent points out that the agency, the superior court, and this Court all agreed with its interpretation of G.S. § 135-1(10). Accordingly, respondent asserts that these decisions show the inherent reasonableness of its position. However, this argument impermissibly ignores two important aspects of this case. First, our courts have made clear that the fact that a court agreed or disagreed with the government's position does not establish whether its position was substantially justified. *Id.* at 845-46, 467 S.E.2d at 680 (quoting *Pierce v. Underwood*, 487 U.S. 552, 569, 101 L.Ed.2d 490, 507 (1988)). This standard is not a question of whether a party prevailed at a particular point in the litigation. *Crowell*, 342 N.C. at 845, 467 S.E.2d at 680. The question is whether the agency's position "was justified to a degree that could satisfy a reasonable person." *Id.* at 844, 467 S.E.2d at 679. Second, respondent's argument also ignores the fact that this Court opined that petitioner should receive her retirement benefits and that the Supreme Court agreed holding that she was a full time state employee.

Next, respondent asserts that it was "substantially justified" because it reasonably interpreted a novel statutory question. G.S. § 135-1(10) states in pertinent part that "[e]mployees of State agencies, departments, institutions, boards and commissions who are employed in permanent job positions on a recurring basis and who work thirty or more hours per week for nine or more months per calendar year are covered by the provisions of this subdivision." Respondent claims that one can reasonably read this statute to require an individual to work 30 hours a week for nine months a year in order to be an employee under the system. Of course, the Supreme Court ultimately concluded that respondent's interpretation was incorrect.

Under the "substantial justification" analysis we must consider the respondent's position in light of the law and facts known to the respondent. *Crowell*, 342 N.C. at 845, 467 S.E.2d at 680. The record contains ample evidence that the respondent had information concerning the petitioner's leaves of absence and that the State made representations to the petitioner that she was a full-time employee participating in the Retirement System. Initially, petitioner sought approval for her leaves of absence through her supervisor, Millard Hall. Hall wrote the petitioner a letter informing her that he had discussed the plan with "DHR personnel." Hall's letter informed her that DHR accepted the job-sharing plan and assured that she would maintain her status within the Retirement System during the months she was on leave. Additionally, the record contains the petitioner's personnel forms. These forms note the State's characterization of the petitioner as a full-time permanent employee. Further, these forms reflect the fact that petitioner took an annual approved leave of absence. At the time the respondent took its position, the North Carolina Administrative Code provided that "periods of leave without pay do not constitute a break in service." N.C. Admin. Code tit. 25, r. 1D.1003 (April 2000); *Wiebenson*, 345 N.C. at 739, 483 S.E.2d at 155. Therefore, these interferences should not have affected the petitioner's status within the Retirement System.

The petitioner has also brought forth a computer printout of her "computer database record" done in 1987. The printout reflects the petitioner's leaves of absence for 1984, 1985 and 1986. This printout indicates that someone with access to petitioner's records had direct knowledge of her situation as early as 1987. Finally, the record includes copies of annual statements that the respondent provided to the petitioner. These statements show that the petitioner continued to accumulate retirement benefits during the years that she took a leave of absence.

Despite this information and respondent's purported statutory interpretation, the respondent continued to accept the petitioner's contributions and represent to petitioner that she was a full-fledged member of the Retirement System. Respondent first informed petitioner that she was not a Retirement System member just as she was preparing to collect her retirement benefits some seven years after she began taking leaves of absence. Respondent took this position although the North Carolina Administrative Code allowed for periods of interrupted service. In light of this conduct, the respondent's actions are not justified to a degree to satisfy a reasonable person. Therefore, we now hold that the respondent was without "substantial

justification" for denying the petitioner's retirement benefits and we affirm the trial court's award of attorney's fees.

Affirmed.

Judges LEWIS and EDMUNDS concur.

STATE OF NORTH CAROLINA v. ALFRED LEE COOPER

No. COA99-822

(Filed 20 June 2000)

Burglary and Unlawful Breaking or Entering— sexual intent— evidence insufficient

A burglary conviction based upon the intent to commit a sexual offense was vacated where the complainant heard a noise from her son's bedroom, she found the screen missing from the window when she went to investigate, the lock on the window was broken and items from the sill were on the floor, and defendant grabbed the complainant through the window from the outside. The fact that a defendant has broken into and entered a dwelling at night permits an inference of intent to commit felonious larceny, but the State must prove sexual intent when it proceeds on that theory. The State's proffer consisted of defendant's failure to flee when complainant appeared in the bedroom, his act of grabbing her arms above the elbows for five seconds, and his flight when she screamed; however, defendant did not speak in a sexual manner, nothing about his clothes or demeanor was suggestive of sexual intent, and defendant did not remove his clothing or attempt to remove complainant's clothing. The case was remanded for judgment and sentence on non-felonious breaking and entering.

Judge LEWIS dissenting.

Appeal by defendant from judgment entered 21 April 1998 by Judge W. Osmond Smith in Superior Court, Wake County. Heard in the Court of Appeals 30 May 2000.

Attorney General Michael F. Easley, by Associate Attorney General Angel E. Gray, for the State.

Thigpen, Blue, Stephens & Fellers, by Carlton E. Fellers, for defendant-appellant

TIMMONS-GOODSON, Judge.

Alfred Lee Cooper ("defendant") appeals from the judgment entered upon his conviction by a jury of first-degree burglary. For the reasons discussed below, we vacate his conviction and remand this matter to the superior court.

The State's case was built primarily on the testimony of the complaining witness. The complainant testified that she was at home alone on the night of 13 September 1997, when she heard a noise coming from her son's bedroom. She went into the bedroom and discovered that the screen was out of the window and objects displayed on the window sill had spilled onto the floor.

The complainant left the room, turned on the back patio light and came back to the window with a step stool. As she was trying to shut the window, defendant reached in from outside and grabbed her arms above the elbows. The complainant screamed and stepped off the stool, breaking defendant's grip. Defendant backed away from the window and ran off. The complainant estimated that defendant had his hands on her for "no more than five seconds."

At the conclusion of the State's case, defendant moved to dismiss the charge of first-degree burglary. He argued that the State failed to adduce evidence of his intent to commit a felony at the time of the alleged break-in. The State responded that the evidence demonstrated defendant's intent to commit "rape or some kind of sexual offense." The court denied defendant's motion.

The trial court then asked the State to identify the felony it would submit to the jury on the intent portion of the burglary charge. The State asked for an instruction on second-degree sexual offense. Defense counsel reiterated his position that the charge should be dismissed, arguing that the State had failed to show "some overt act" by defendant suggestive of an intention to commit a sexual offense. The court responded, "I've already denied the motion to dismiss[.]" The court instructed the jury that in order to find defendant guilty of first-degree burglary, it had to find "that at the time of the breaking and entering the defendant intended to commit a second degree sexual

offense." The court then defined second-degree sexual offense. The court also instructed the jury on the lesser offense of non-felonious breaking and entering.

The jury found defendant guilty of first-degree burglary. After his sentence of 120 to 153 months imprisonment was announced by the trial judge, defendant noted his appeal in open court.

On appeal, defendant contends that the trial court erred in denying his motion to dismiss the burglary charge. He maintains that the State did not prove a "breaking" into complainant's house. In addition, defendant insists there was no evidence that he intended to commit a second-degree sexual offense when he reached into the window. On a related point, defendant argues that the trial court committed plain error in instructing the jury on second-degree sexual offense, absent any supporting evidence. Because we agree that the evidence was insufficient to support defendant's conviction for first-degree burglary, we need not address defendant's second argument.

In reviewing the denial of a defendant's motion to dismiss, this Court determines only whether the evidence adduced at trial, when taken in the light most favorable to the State, was sufficient to allow a rational juror to find defendant guilty beyond a reasonable doubt on each essential element of the crime charged. *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). The State is entitled to all inferences that may be fairly derived from the evidence. *Id.*

"To convict a defendant of burglary, 'the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. . . . If the burglarized dwelling is occupied it is burglary in the first degree.' " *State v. Ball*, 344 N.C. 290, 306, 474 S.E.2d 345, 354 (1996) (quoting *State v. Wilson*, 289 N.C. 531, 538, 223 S.E.2d 311, 315 (1976)), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997).

We find that the State presented sufficient circumstantial evidence of a "breaking" by defendant. Complainant heard a noise from her son's bedroom. When she went to investigate, the screen was missing from the window, the lock on the window was broken and items on the window sill were on the floor. Defendant then grabbed complainant through the window from outside. These facts permit an inference that defendant opened the window and/or removed the screen in order to enter complainant's home.

We agree with defendant, however, that the State failed to meet its evidentiary burden on the issue of intent. Generally, the fact that a defendant has broken into and entered a dwelling at night permits an inference of the intent to commit the felony of larceny. *See State v. Dawkins*, 305 N.C. 289, 290, 287 S.E.2d 885, 886-87 (1982). However, where the State proceeds on the theory that the defendant intended to commit a sex offense, it is obliged to prove defendant's sexual intent. *Id.* at 290, 207 S.E.2d at 887. Sexual intent may be proved circumstantially by inference, based upon a defendant's actions, words, dress, or demeanor. *State v. Robbins*, 99 N.C. App. 75, 80, 392 S.E.2d 449, 452, *aff'd*, 327 N.C. 628, 398 S.E.2d 331 (1990). There must, however, be evidence of " 'some overt manifestation of an intended forcible sexual gratification[.]' " *State v. Robinson*, 97 N.C. App. 597, 602, 389 S.E.2d 417, 420 (quoting *State v. Davis*, 90 N.C. App. 185, 188, 368 S.E.2d 52, 54 (1988)), *appeal dismissed and disc. review denied*, 326 N.C. 804, 393 S.E.2d 904 (1990).

In *State v. Rushing*, 61 N.C. App. 62, 300 S.E.2d 445, *aff'd per curiam*, 308 N.C. 804, 303 S.E.2d 822 (1983), a shirtless defendant entered the victim's bedroom window at night while she was sleeping. He told the victim, "Don't holler, don't scream, I got a gun, I'll shoot you." *Id.* at 63, 300 S.E.2d at 447. When the victim moved away to the head of her bed, defendant grabbed her arm. When she tried to turn on the light, defendant ordered her not to move. When the victim began to scream, defendant covered her mouth with his hand. He fled only when the victim's child started to scream. We found the evidence insufficient to permit an inference that the defendant entered the victim's dwelling with the intent to commit rape. *Id.* at 67, 300 S.E.2d at 449.

We find even less evidence of defendant's sexual intent here than in *Rushing*. The State's proffer on this issue consists of defendant's failure to flee when complainant appeared in the bedroom, his act of grabbing her arms above the elbows for five seconds, and his flight when she screamed. However, we note that defendant did not speak to complainant in a sexual manner. *Cf. Robbins*, 99 N.C. App. at 80, 392 S.E.2d at 452. Nothing about his clothes or demeanor was suggestive of a sexual intent. Defendant wore jeans and a t-shirt, and his face was described by complainant as one "you would not be afraid to see if you were walking down the street." Defendant did not remove his own clothing or attempt to remove complainant's clothing. *Cf. State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974); *Robbins*, 99 N.C. App. at 80, 392 S.E.2d at 453; *Robinson*, 97 N.C. App. at 602, 389 S.E.2d at 420.

Defendant's burglary conviction must be vacated. Because the jury necessarily found facts that would support defendant's conviction for non-felonious breaking and entering, N.C. Gen. Stat. § 14-54(b) (1999), we remand the cause for entry of an appropriate judgment and sentence. *See Dawkins*, 305 N.C. at 291, 287 S.E.2d at 887.

Vacated and remanded.

Judge SMITH concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I believe there is evidence sufficient from which a jury could infer an intent by the defendant to commit a felony. The State contends the defendant intended to commit a second-degree sexual offense. Such a crime is defined as engaging in a sexual act by force and against the will of another person. N.C. Gen. Stat. § 14-27.5(a)(1) (1999). The State did not suggest that the defendant intended to rape Ms. Sellew.

The evidence is clear that it was 0130 to 0200 in the early morning. The defendant had no right or reasonable business at that home. Ms. Sellew had heard noises and found the window raised with personal property scattered on the floor from its previous position on the windowsill. The defendant, outside, had not been detected. He could have departed. He did not. He reached in and seized Ms. Sellew by both her arms. Had he intended larceny, he could have already done that or waited and perhaps entered after Ms. Sellew had left the room. He did not. He reached into the room and physically grabbed Ms. Sellew.

Many cases have recited more physical facts as being sufficient to infer an intent by a defendant. In *State v. Boon*, 35 N.C. 244 (1852), a defendant entered a bedroom in which a female slept, seized her feet but fled after she screamed. In that opinion, by Pearson, J., (later Chief Justice) the court said in part:

> The evidence of the intent charged is certainly very slight, but we cannot say there is no evidence tending to prove it. The fact of the breaking and entering was strong evidence of some bad intent; going to the bed and touching the foot of one of the young ladies

> tended to indicate that the intent was to gratify lust. Taking hold of—"*grasping*" (as the case expresses it)—the ankle, after the foot was drawn up, and the hasty retreat without any attempt at explanation, as soon as the lady screamed, was some evidence that the purpose of the prisoner, at the time he entered, was to gratify his lust by force. It was, therefore, no error to submit the question to the jury.

Id. at 246-27.

No error was found in that case, though the felony there intended was rape. I believe that case is sufficiently similar to this case whereby the jury should have the question of intent submitted to it. The intent for second-degree sexual offense must be inferred here. I do not believe as a matter of law this was insufficient. Therefore, I would vote to find no error.

IN RE: KIMBERLY D. BIDDIX AND WAL-MART, INC.

No. COA99-886

(Filed 20 June 2000)

1. Workers' Compensation— subrogation lien—third-party tortfeasor settlement

Constitutional challenges to N.C.G.S. § 97-10.2(j) arising from the elimination of a workers' compensation subrogation lien have been rejected previously or were not preserved for review in that the employer presented no evidence in support of these contentions to the trial court during the hearing.

2. Workers' Compensation— subrogation lien—employer's negligence

Although an employer whose workers' compensation subrogation lien was eliminated contended that it was free from culpability in the accident and was therefore entitled to a lien on the third-party tortfeasor settlement proceeds, the employer's negligence becomes relevant only when the third-party tortfeasor asserts that the employer's negligence joined or concurred with the negligence of the third party in causing the injury.

3. Workers' Compensation— subrogation lien—third-party tortfeasor—elimination of lien

The trial court did not abuse its discretion by ordering that the employer (Wal-Mart) have no lien upon the proceeds of the employee's settlement with a third-party tortfeasor where the court made findings with respect to the extent of the employee's injuries, her ongoing pain and suffering, her medical expenses paid by Wal-Mart, her compensation for temporary disability, the amount of the settlement, and the fact that the third-party tortfeasor had no additional assets from which she could recover, and concluded that the amount of the settlement inadequately compensated plaintiff for her injuries.

Appeal by defendant from order entered 22 February 1999 by Judge Zoro J. Guice, Jr., in McDowell County Superior Court. Heard in the Court of Appeals 10 May 2000.

Donald Fred Coats for plaintiff-appellee Kimberly D. Biddix.

Young Moore and Henderson, P.A., by J. Aldean Webster, III, and Kathryn H. Hill, for defendant-appellant Wal-Mart, Inc.

MARTIN, Judge.

Wal-Mart, Inc., (Wal-Mart) appeals from an order eliminating its workers' compensation subrogation lien against the proceeds of a settlement entered into between its employee, Kimberly D. Biddix (Biddix), and a third party. Biddix was injured in an automobile collision, caused by the negligence of a third party, which occurred in the course and scope of her employment with Wal-Mart. Wal-Mart paid Biddix workers' compensation benefits, consisting of medical benefits in the amount of $16,844.03 and temporary total disability benefits in the amount of $1,874.40. Biddix subsequently entered into a settlement with the insurer for the third party tortfeasor for $25,000, the limits of liability under the insurance policy. She petitioned the superior court to exercise jurisdiction pursuant to G.S. § 97-10.2(j) to determine the amount of Wal-Mart's subrogation lien and to distribute the settlement amount.

At a hearing on her request, Biddix presented evidence that she had suffered a broken femur, necessitating the insertion of a metal rod into her leg; a fractured wrist; and emotional trauma. She had returned to work as a stocker at Wal-Mart, but testified that she was still experiencing extreme pain in her leg, was under the care of a

doctor, might need additional surgery to relieve her pain, and intended to pursue additional workers' compensation benefits from Wal-Mart. Wal-Mart presented no evidence, but was permitted to file a written response in which it objected to any reduction in the lien as being in excess of the superior court's authority and a violation of its rights under the North Carolina Constitution and the United States Constitution.

The trial court entered an order concluding that the settlement did not adequately compensate Biddix for her injuries and ordering the elimination of Wal-Mart's subrogation lien. Wal-Mart appeals.

In its brief, Wal-Mart argues the superior court erred in eliminating Wal-Mart's subrogation lien on the proceeds of the third party settlement because the court had no authority to do so and, even if such authority exists, the order was an abuse of discretion under the circumstances of the case. Wal-Mart further contends the elimination of the lien pursuant to G.S. § 97-10.2(j) was a violation of its substantive and procedural due process rights and its rights to equal protection of laws under the State and Federal constitutions. For the following reasons, we affirm.

[1] Wal-Mart's challenges to G.S. § 97-10.2(j) as unconstitutionally vague and violative of due process have been previously rejected in *Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990). With respect to the remaining constitutional challenges argued in Wal-Mart's responsive pleading, the record discloses that Wal-Mart presented no evidence in support of those contentions to the trial court during the hearing. Thus, such issues are not preserved for appellate review and we will not address them. N.C.R. App. P. 10(b)(1); *See State v. Fayetteville St. Christian School*, 299 N.C. 351, 359, 261 S.E.2d 908, 914 (1980) (court will pass upon the constitutionality of a statute only when the issue is squarely presented upon an adequate factual basis); *U.S. Fidelity and Guaranty Co. v. Johnson*, 128 N.C. App. 520, 523, 495 S.E.2d 388, 390 (1998) (record must affirmatively show constitutional issue was raised and passed upon by trial court).

[2] Wal-Mart argues that it was free from culpability with respect to the accident in which Biddix was injured and is therefore entitled to a lien on the settlement proceeds in order to recoup the payments which it made to Biddix. The employer's negligence, however, becomes relevant only when the third party tortfeasor, in the course

of litigation with the injured employee, asserts that the employer's negligence joined or concurred with the negligence of the third party in causing the injury. N.C. Gen. Stat. § 97-10.2(e) (1998). See *Wiggins v. Bushranger Fence Co.*, 126 N.C. App. 74, 483 S.E.2d 450, *disc. review denied*, 346 N.C. 556, 488 S.E.2d 825 (1997) (employer's negligence is irrelevant to the question of whether the trial court abused its discretion under G.S. § 97-10.2(j)).

[3] The remaining issues are whether the superior court has the authority to order that Wal-Mart will have no lien upon the proceeds of Biddix's settlement with the third party tort-feasor, and whether, in this case, it abused its discretion by doing so. G.S. § 97-10.2(j) grants the superior court authority, in certain instances, to determine the amount of the employer's subrogation lien in funds obtained by an injured employee, who has been paid workers' compensation benefits for the injury, from a third party tortfeasor.[1] As applicable here, the statute provides:

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

In this case, the event which triggers the authority of the superior court to allocate the amount of the lien or distribute funds is the settlement, and there is no requirement that the settlement amount be insufficient to compensate the workers' compensation insurance carrier, as is the case when a judgment is the triggering event.

In *Wiggins, v. Bushranger Fence Co.*, 126 N.C. App. 74, 483 S.E.2d 450, we held that the superior court has discretionary authority, pursuant to G.S. § 97-10.2(j), to reduce or eliminate an employer's lien on the proceeds of an employee's settlement with a third party.

1. G.S. § 97-10.2(j) has been amended, effective 18 June 1999, applicable to judgments or settlements entered on or after that date.

Thus, the only issue remaining is whether the superior court abused its discretion in this case by allowing Wal-Mart no lien upon the proceeds of Biddix's settlement.

Once a trial court properly assumes jurisdiction under G.S. § 97-10.2(j), it is vested with the discretion to determine how to distribute the settlement proceeds. In *Allen v. Rupard*, 100 N.C. App. at 495, 397 S.E.2d at 333, this Court noted that the discretion granted under G.S. § 97-10.2(j) is not unlimited; "the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review." Where the trial court makes sufficient findings of fact and conclusions of law, the due process rights of the employer have been protected. *Id.* Although there is no mathematical formula or list of factors for a trial court to employ when making disbursement decisions, we are guided by precedent.

In *Allen v. Rupard*, the employee was injured when the truck he operated for his employer collided with another truck driven by Stamy Rupard. The employee suffered three crushed vertebrae, and underwent three operations requiring the insertion and removal of hooks and rods in his back. Rupard's insurer paid the full amount of his liability insurance, $25,000, after which the employee petitioned the court for the distribution of these proceeds; the court divided these proceeds in half. In its findings, the court listed the injuries sustained by the employee, the extent to which they would likely be permanent, the expenses paid by the employer's carrier and the potential damages likely to be incurred, the current and potential amount of the workers' compensation carrier's subrogation lien, taking into account future payouts for medical expenses, and the amount by which the settlement would be reduced by currently owed attorney's fees. This Court concluded that "considering the nature and circumstances of the incident, the nature and extent of Plaintiff's injury, the fact that Plaintiff is seeking no attorney fee to be paid out of the $25,000.00 proceeds . . . and other circumstances in the case, . . . the Court finds that it is fair, equitable, and just that one-half (1/2) of said sum . . . be paid to [employee] and that the remaining one-half (1/2) of said sum . . . be paid to . . . Employer and its insurance carrier . . . ." *Id.* at 496-97, 397 S.E.2d at 334. We held the findings of fact and conclusions of law sufficient to permit meaningful review and a determination that the trial court's decision was "a reasoned choice which [was] factually supported." *Id.* at 497, 397 S.E.2d at 334.

In *United States Fidelity and Guarantee Company v. Johnson*, 128 N.C. App. 520, 495 S.E.2d 388, an employee died in an automobile accident which occurred when he was driving his own automobile on business for the Department of Transportation. His widow received a settlement of $372,825 from the insurance company of the driver who struck her husband; she then petitioned the superior court to disburse these proceeds pursuant to G.S. § 97-10.2(j). After finding the employee's age, his earnings, the extent of his family, and the extent of his estate, the superior court concluded that "fair compensation for the injuries and damages received by . . . Executrix far exceed all forms of assets available to compensate her including both liability coverage by [third party's insurance carrier] and workers' compensation benefits," and "to allow the Department of Transportation to recover the workers' compensation lien for funds paid to or to be paid in this particular case would be inequitable under the particular facts and circumstances of this case." *Id.* at 522, 495 S.E.2d at 390.

Similarly, in the present case, the superior court made findings with respect to the extent of Biddix's injuries, her ongoing pain and suffering, her medical expenses as paid by Wal-Mart, her compensation for temporary disability, and the amount of the settlement and the fact that the third party tortfeasor had no additional assets from which she could recover. Based on those facts, the court concluded that the amount of the settlement inadequately compensated plaintiff for her injuries, and we cannot say the conclusion is unreasonable. Thus, a reasoned choice would exist to either reduce the lien by some amount or in its entirety. The superior court's determination that the lien be reduced in its entirety was factually supported and a proper, constitutional exercise of its discretion. The order is

Affirmed.

Judges WYNN and SMITH concur.

STATE OF NORTH CAROLINA v. WILLIE HERBERT ROBERTSON

No. COA99-698

(Filed 20 June 2000)

1. **Criminal Law— voluntary intoxication—specific intent crimes—issue for the jury**

The trial court did not err by submitting assault and robbery charges to the jury even though defendant contends his voluntary intoxication negated the specific intent elements required for each charge because: (1) whether defendant was so intoxicated as to prevent his forming the specific intent to rob and assault the victim was a question of fact to be determined by the jury; and (2) the jury concluded that defendant was still able to form the requisite specific intent.

2. **Robbery— purse snatching—force-sufficiency of evidence**

The trial court erred by failing to dismiss a charge of common law robbery based on the State's inability to produce sufficient evidence as to the requisite element of force, because: (1) defendant used neither actual nor constructive force to gain possession of his victim's purse; (2) defendant never attempted to overpower his victim or otherwise restrain her; (3) this incident was no more than a typical purse-snatching incident, which courts in other jurisdictions routinely have held to be larceny instead of robbery; and (4) the victim was not induced to part with her property as a result of defendant's placing her in fear.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 20 January 1999 by Judge Ronald K. Payne in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 April 2000.

Attorney General Michael F. Easley, by Assistant Attorney General George K. Hurst, for the State.

Ronald D. Everhart for defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 19 January 1999 session of Mecklenburg County Superior Court on one count of assault with a deadly weapon with intent to kill inflicting serious injury, in violation

of N.C. Gen. Stat. § 14-32(a), and one count of common law robbery. At trial, the State's evidence tended to show that defendant and the victim, Ms. Dover, had in the past been involved in a relationship. On 17 November 1997, while Ms. Dover was riding the bus home from work, defendant came up to her and stated that he had heard she was engaged, to which she responded, "Yes." Defendant then snatched her purse from her shoulder, got off the bus, and ran. Ms. Dover chased defendant to the home of Diane Williams, defendant's cousin, whereupon defendant eventually threw her purse on the roof of a nearby church. At some point, a fight broke out between defendant, Ms. Williams, and Ms. Dover. Defendant threatened each of them with a knife before Ms. Williams was able to disarm him. In order to appease defendant and get her purse back, Ms. Dover agreed to walk with defendant to his home. While inside, defendant began beating Ms. Dover with bottles and with a two-by-four plank that had exposed nails in it. Ms. Dover sustained serious injuries as a result. The evidence at trial also tended to show that defendant had been drinking heavily prior to this incident, and the issue of defendant's capacity to form an intent due to intoxication was submitted to the jury. The jury returned a verdict of guilty as to both the assault and robbery charges. Defendant now appeals.

[1] Defendant first contends that the trial court should not have submitted the assault and robbery charges to the jury because his intoxication negated the specific intent elements required for each charge. In essence, defendant is arguing that he was so intoxicated that, *as a matter of law*, he could not have formed the specific intent to commit either assault or robbery. Such an argument is without merit.

Voluntary intoxication in and of itself is not a legal defense. *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). It is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense. *Id.* Because the intoxication defense focuses not just on the level of intoxication, but on its effect on a defendant's state of mind as well, its validity necessarily involves matters for a jury to decide. As our Supreme Court has explained in the context of first degree murder:

> "Intoxication, though voluntary, is to be considered *by the jury* in a prosecution for murder in the first degree, in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the accused at the time to form and

> entertain such a design, not because, *per se*, it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear. . . . *No inference of the absence of [the requisite specific intent] arises from intoxication, as a matter of law.*"

State v. Murphy, 157 N.C. 614, 618-19, 72 S.E. 1075, 1077 (1911) (quoting *Wharton on Homicide* 811 (3d ed.)) (emphasis added); *see also State v. Caldwell*, 616 So. 2d 713, 721 (La. Ct. App. 1993) ("Questions of fact, such as guilt or innocence, sanity at the time of the offense, self-defense, or *intoxication*, are issues decided by the jury.") (emphasis added); *Bryant v. State*, 574 A.2d 29, 35 (Md. Ct. App. 1990) ("In any event, it seems clear that the possible effect of voluntary intoxication upon a particular specific intent is quintessentially a question of fact for the jury, properly instructed."); *State v. Givens*, 631 S.W.2d 720, 721 (Tenn. Crim. App. 1982) ("The defense of intoxication negating specific intent is a question of fact for the jury upon receiving proper instructions.").

Thus, whether defendant was so intoxicated as to prevent his forming the specific intent to rob and assault Ms. Dover was a question of fact, to be determined by the jury. Here, the jury concluded that defendant still was able to form the requisite specific intent, and we cannot disturb that finding on appeal.

[2] Next, defendant contests the trial court's failure to dismiss the charge of common law robbery due to an insufficiency of evidence to establish each element of the offense. Common law robbery requires proof of four elements: (1) felonious, non-consensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force. *State v. Hedgecoe*, 106 N.C. App. 157, 161, 415 S.E.2d 777, 780 (1992). We conclude the State failed to produce sufficient evidence as to the requisite element of force.

The requisite force for robbery may be either actual or constructive. *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944). Actual force connotes violence, or force to the body. *Id.* Constructive force connotes placing the victim in fear. *Id.* Here, defendant used neither actual nor constructive force to gain possession of Ms. Dover's purse.

Nearly a century and a half ago, our Supreme Court articulated the amount of violence required to constitute actual force. In a case in which that court overturned the conviction of a slave without

counsel who was sentenced to death, the court explained: "To constitute the crime of highway robbery, the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*" *State v. John*, 50 N.C. 163, 169 (5 Jones) (1857) (emphasis added). In short, the victim must be *induced* to part with her property as a result of the violence. *State v. Parker*, 322 N.C. 559, 566, 369 S.E.2d 596, 600 (1988).

Here, the victim testified as follows:

A: [Defendant] came up to me. I was sitting on the seat in the back. He came and he said to me, I heard you had a new boyfriend. And I said, yes, I'm engaged.

. . . .

Q: And then what happened next, after you told him that you were engaged?

A: He snatched my pocketbook.

Q: Where were you holding your pocketbook?

A: On my—on this side, right here (indicating). I had it on my shoulder.

Q: You mean you had the straps on your shoulder?

A: Um-hmm.

Q: And then what happened next?

A: He grabbed it, and I told the bus driver to call the police. And he did, but by that time he had got off the bus. The bus stopped on Mills Road, so I got off and ran after him, cause he had my pocketbook.

(Tr. at 19-20). As Ms. Dover's testimony indicates, the only force used by defendant was that sufficient to remove her purse from her shoulder. Defendant never attempted to overpower her or otherwise restrain her. Rather, this was no more than a typical purse-snatching incident, which courts in other jurisdictions routinely have held to be larceny, not robbery. *See generally* 4 Charles E. Torcia, Wharton's Criminal Law § 465, at 44 (15th ed. 1996) ("The taking of property from the person of another by surprise, as by sudden snatching, does not constitute robbery. Thus, the sudden snatching of a purse or other

property from a person's hand is not robbery. The offense constitutes larceny . . . ."); Peter G. Guthrie, Annotation, *Purse Snatching as Robbery or Theft*, 42 A.L.R.3d 1381, 1383 (1972) ("[T]he rule prevailing in most jurisdictions [is] that the mere snatching or sudden taking of property from the person of another does not in itself involve such force, violence, or putting in fear as will constitute robbery.").

We conclude there was insufficient evidence of constructive force as well. Constructive force exists if the defendant, by words or gesture, has placed the victim in such fear as is likely to create an apprehension of danger and thereby induce her to part with her property for the sake of her person. *Sawyer*, 224 N.C. at 65, 29 S.E.2d at 37. Again, the victim must be *induced* to part with her property as a result of the defendant's placing her in fear. *Parker*, 322 N.C. at 566, 369 S.E.2d at 600.

Here, defendant made no threatening remarks or gestures to Ms. Dover on the bus. According to her testimony, the only words uttered by defendant concerned her being engaged. Although Ms. Dover also testified defendant had told her over the phone the night before, "I'll get you," this threat was sufficiently removed in time to eliminate any apprehension or fear. None was cited or shown. Furthermore, this "threat" was never made in the context of defendant trying to take her property. Thus, it was not uttered to induce Ms. Dover to part with her purse.

In sum, we uphold defendant's conviction as to the assault charge. But because the requisite element of force was not present, we vacate defendants's conviction of robbery and remand for entry of a judgment of guilty and re-sentencing as to the lesser-included offense of larceny from the person. *See generally State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (remanding for re-sentencing as to lesser-included offense where evidence was insufficient as to one element of the greater offense, even though the lesser offense was not originally submitted to the jury); *State v. Suggs*, 117 N.C. App. 654, 662, 453 S.E.2d 211, 216 (1995) (same).

No error in part; vacated and remanded in part.

Judge MARTIN concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I concur in the majority opinion which finds no error in the defendant's conviction on the assault charge.

I respectfully dissent to the majority opinion which vacates the defendant's conviction on the charge of common law robbery. I disagree with the general rule asserted that a typical purse snatching incident is larceny and not common law robbery. Here, the victim was seated on a bus and was holding her purse which had a strap over her shoulder. Even though the defendant and the victim knew each other, the victim, in her statement, stated that defendant said, "I'll fix you" as he grabbed her purse and pulled it from her hands.

In *State v. Sawyer*, 224 N.C. 61, 29 S.E.2d 34 (1944), our Supreme Court held that the degree of force is immaterial so long as it is sufficient to cause the victim to part with her property. A purse snatching incident, as here, involves an element of force and violence such that the State's evidence was sufficient to withstand the defendant's motion to dismiss.

MARY NELL HYLTON, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MCKINLEY HYLTON, DECEASED, PLAINTIFF v. THOMAS J. KOONTZ, M.D., SALEM SURGICAL ASSOCIATES, P.A., BENZION SCHKOLNE, M.D., PIEDMONT ANESTHESIA AND PAIN CONSULTANTS, P.A., AND MEDICAL PARK HOSPITAL, INC., DEFENDANTS

No. COA99-1052

(Filed 20 June 2000)

Medical Malpractice— Rule 9 certification—telephone conversation

The trial court erred by dismissing a medical malpractice action where plaintiff's counsel represented to his medical expert in a telephone conversation certain facts about the care provided by defendant and the expert opined that defendant breached the standard of care. This procedure was in full compliance with N.C.G.S. § 1A-1, Rule 9(j); there is no requirement that the expert review the actual medical records prior to expressing his opinion and defendant did not contend that the "facts" presented to the expert were not predicated on such facts as the evidence would reasonably tend to prove.

Appeal by plaintiff from order filed 24 June 1999 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 16 May 2000.

Young, Haskins, Mann, Gregory & Smith, P.C., by Fred D. Smith, Jr., for plaintiff-appellant.

Sharpless & Stavola, P.A., by Joseph M. Stavola and Joseph P. Booth, III, for defendant-appellees.

GREENE, Judge.

Mary Nell Hylton (Plaintiff), Administratrix of the Estate of William McKinley Hylton (Decedent), appeals from the trial court's dismissal of her suit against Benzion Schkolne, M.D. (Dr. Schkolne) and Piedmont Anesthesia and Pain Consultants, P.A. (collectively, Defendants).

The record and pleadings reveal Decedent was a forty-five-year-old black male, whose medical history included *inter alia* a myocardial infarction (heart attack) and an angioplasty surgery in 1993. On 22 July 1996, Decedent reported to Medical Park Hospital, Inc. suffering from cholecystitis (inflamation of the gall bladder). An outpatient laparoscopic cholecystectomy (gall bladder removal) was scheduled and performed that day on Decedent. Dr. Schkolne was the anesthesiologist for the operation, and surgery commenced at 8:50 a.m. with completion at 9:50 a.m. Decedent was released from the Recovery Room at 10:40 a.m., and his vital signs were assessed after the surgery at 11:00 a.m. and again at 11:50 a.m. At 2:58 p.m., Decedent was found unresponsive to verbal stimuli, and at 3:25 p.m., he was pronounced dead.

Plaintiff's complaint alleges, in pertinent part:

> 13. The medical treatment provided to . . . [D]ecedent by . . . Dr. Schkolne did not meet the minimum acceptable standard of practice among physicians with similar experience and training as that of . . . Dr. Schkolne who practice in the same specialt[y], to wit: . . . anesthesiology, in Winston-Salem, North Carolina and similar communities in July of 1996 . . . .
>
> . . . .
>
> 15. The Defendants' failure to comply with the applicable standard of care resulted in a failure to timely and appropriately diag-

nose and treat the cause of . . . [D]ecedent's post-operative demise on July 22, 1996.

16. The medical care afforded to . . . [D]ecedent on the occasion complained of herein has been reviewed by persons Plaintiff's counsel reasonably expects to qualify as expert witnesses under Rule 702 of the North Carolina Rules of Evidence and who have stated that they are willing to testify that such medical care did not comply with the applicable standards of care.

17. The Defendants' failure to comply with the applicable standard of care resulted in a failure to diagnose the cause of . . . [D]ecedent's post-operative demise, the administration of contraindicated treatment, [and] the failure to provide needed treatment, which proximately caused . . . [D]ecedent unnecessary pain, suffering, mental anguish, and death on July 22, 1996.

Plaintiff's responses to Defendants' Rule 9(j) interrogatories, verified by Plaintiff's expert witness Brian G. McAlary, M.D. (Dr. McAlary), provided Dr. McAlary would "testify that Dr. Schkolne violated the applicable standard of care" in treating Decedent. The responses provided that on July 21, 1998 (the same day Plaintiff filed her complaint), Dr. McAlary was advised of certain "facts" in a telephone conversation with Plaintiff's counsel. Following the presentation of the facts, Dr. McAlary opined that in view of Decedent's medical history and his "serious systemic disease," "the applicable standard of care[] required . . . [Decedent] be admitted for surgery to a[n] in-patient facility where appropriate monitoring and intervention were available for adverse cardiac events [and receive] . . . a cardiology consult."

In response to Defendants' Rule 9(j) motion to dismiss the complaint, the trial court dismissed Plaintiff's claims against Defendants with prejudice. The order provided the following findings of fact:

1. Dr. . . . McAlary is the only expert designated by [P]laintiff for purposes of compliance with Rule 9(j) . . . , relative to the medical care provided by [Defendants].

2. On July 21, 1998, counsel for [P]laintiff presented selected medical information relative to the care of [Decedent] to Dr. . . . McAlary during a telephone conversation.

. . . .

4. Dr. . . . McAlary did not review the actual medical records relative to the medical care at issue herein until some time after the filing of the complaint on July 21, 1998.

Based on these facts, the trial court concluded:

1. Presentation of selected medical information by [P]laintiff's counsel to Dr. . . . McAlary during the telephone conversation of July 21, 1998, was not a "review" of the medical care of [Decedent] for purposes of compliance with Rule 9(j) . . . .

2. Because no "review" of [Decedent's] medical care took place prior to [P]laintiff's filing of her complaint, she has failed to comply with the requirements of Rule 9(j) . . . .

The dispositive issue is whether a review of hypothetical medical facts, presented by plaintiff's attorney, by a qualified medical expert witness is a "review[]" of "medical care" within the meaning of N.C. Gen. Stat. § 1A-1, Rule 9(j).

Rule 9(j) of our Rules of Civil Procedure provides that complaints alleging:

> [M]edical malpractice by a health care provider as defined in G.S. 90-21.11 . . . shall be dismissed unless:
>
> (1) The pleading specifically asserts that the *medical care has been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the *medical care* did not comply with the applicable standard of care . . . .

N.C.G.S. § 1A-1, Rule 9(j)(1) (1999) (emphasis added). Even if the complaint contains the necessary Rule 9(j) allegations, the defendant may, through discovery, inquire into whether the Rule 9(j) allegation is supported in fact.[1] *See Trapp v. Maccioli*, 129 N.C. App. 237, 238, 497 S.E.2d 708, 709 (defendant permitted to depose plaintiff's expert to determine if qualified under Rule 702), *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998). In other words, the defendant is permitted to inquire into whether the medical care received by plaintiff

1. Although not applicable to this case, our legislature amended Rule 9(j), effective 31 October 1998, to require plaintiff to provide, at defendant's request, "proof of compliance" with Rule 9(j). Under this amendment, a defendant is permitted to tender "up to ten written interrogatories, the answers to which shall be verified by the expert required under" Rule 9(j). N.C.G.S. § 1A-1, Rule 9(j).

was indeed reviewed by a Rule 702 witness who is willing to testify "the medical care did not comply with the applicable standard of care."

In this case, there is no dispute the complaint "specifically asserts that the medical care has been reviewed by a person" qualified under Rule 702. Defendants' discovery, however, reveals Plaintiff's expert, Dr. McAlary, did not review Decedent's medical records prior to the filing of the complaint. He instead responded to questions posed by Plaintiff's attorney that were based on a summary of the "facts" regarding Decedent's medical care. Defendants contend this procedure is not in compliance with Rule 9(j). We disagree.

The Rule 9(j) pleading certification must be supported by a "review[]" of "the medical care" by an expert. This clear and unambiguous language leaves " 'no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). The plain meaning of words in a statute can be ascertained from dictionaries. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Dictionaries define "review" to include "[t]o look over, study, or examine again . . . [or t]o examine critically," *American Heritage College Dictionary* 1169 (3d ed. 1997), "medical" to include "[o]f or relating to the study or practice of medicine," *id.* at 846, and "care" to include "[a]ttentive assistance or treatment to those in need," *id.* at 212. Thus, utilizing the plain meaning of "medical care has been reviewed," the Rule 9(j) certification must be based upon an examination, by a Rule 702 expert, of the treatment given by a medical practitioner to his patient. A review of a summary of the treatment provided to a patient is sufficient compliance with Rule 9(j), and this summary may be provided to the expert in the form of hypothetical questions.[2] *See Haponski v. Constructor's, Inc.*, 87 N.C. App. 95, 100, 360 S.E.2d 109, 112 (1987) (hypothetical questions

2. If, through discovery, it is determined the *summary* provided to the expert was not predicated on such facts as the evidence would reasonably tend to prove, the certification is not well founded and requires dismissal of the complaint. If the summary was predicated on such facts as the evidence would reasonably tend to prove and if the certification is based on the expert's opinion based on that summary, any change of the expert's opinion, after reviewing the medical records, goes to the admissibility of his testimony at trial, and does not affect the Rule 9(j) certification. *See Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711 (although verifying expert may not qualify under Rule 702, his verification may, in some instances, be relied upon to support a Rule 9(j) certification).

are permitted under Rule 705 and may be predicated on "such facts as the evidence reasonably tends to prove"). There is no requirement the expert review the actual medical records prior to expressing his opinion with regard to the medical care provided.

In this case, Plaintiff's counsel presented to Dr. McAlary, during a telephone conversation, certain "facts" about the medical care provided Decedent by Dr. Schkolne. Based on this information, Dr. McAlary opined Dr. Schkolne breached the applicable standard of care for an anesthesiologist. This procedure was in full compliance with Rule 9(j). As Defendants do not contend the "facts" presented to Dr. McAlary were not predicated on such facts as the evidence would reasonably tend to prove, the trial court erred in dismissing Plaintiff's complaint.

Reversed and remanded.

Judges HORTON and HUNTER concur.

WALTER H. WHITE AND THERESA W. WHITE, PLAINTIFFS V. CHARLES ALAN CRISP, IN HIS INDIVIDUAL CAPACITY, DEFENDANT

No. COA99-889

(Filed 20 June 2000)

1. Public Officers and Employees— action against Board of Education employee—official capacity only

The trial court did not err by granting summary judgment for defendant in his individual capacity in an action arising from a motor vehicle accident involving a van owned by the Board of Education and driven by defendant within the scope of his employment where defendant filed a motion for summary judgment on the basis that the complaint sued defendant only in his official capacity and that he was immune; the trial court allowed an amendment but stated that the statute of limitations was not being addressed; summary judgment was granted for defendant in his official capacity; and claims against defendant in his individual capacity were dismissed as barred by the statute of limitations. The original complaint contains numerous allegations indicating that plaintiffs were suing defendant in his official

capacity and there was an absence of any clear indication that defendant was sued in his individual capacity.

2. Pleadings— amended complaint—new claim against defendant in individual capacity—new party—no relation back

An amended complaint did not relate back to the original and was barred by the statute of limitations where the original claim was against defendant in his official capacity and the amended complaint named defendant in his individual capacity. The amended complaint had the effect of adding a new party and therefore did not relate back.

Appeal by plaintiffs from judgment entered 10 May 1999 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 April 2000.

Jeffrey G. Scott; and Poyner & Spruill, L.L.P., by E. Fitzgerald Parnell, III and Parmele P. Calame, for plaintiff-appellants.

Smith Helms Mulliss & Moore, L.L.P., by James G. Middlebrooks, for defendant-appellee.

WALKER, Judge.

On 1 June 1998, Walter H. and Theresa W. White (plaintiffs) initiated this action against Charles Alan Crisp (Crisp) and the Charlotte Mecklenburg Board of Education (Board), alleging that Crisp was negligent in causing a motor vehicle accident on 8 June 1995 and that the Board was liable under the doctrine of *respondeat superior*. Defendants filed an answer on 3 August 1998 in which they alleged that "plaintiffs have sued Mr. Crisp only in his official capacity." On 8 January 1999, plaintiffs then filed a motion for leave to amend their complaint. On 12 January 1999, defendants filed a motion for summary judgment on the basis that the Board had not waived its governmental immunity and that Crisp, sued only in his official capacity, was also immune from suit.

In an order filed 15 February 1999, the trial court allowed an amendment to the complaint, but stated that "[t]his order does not address any future motion or question as to the statute of limitations." On 22 February 1999, the trial court granted summary judgment in favor of the Board and Crisp in his official capacity on the basis that immunity had not been waived. No appeal was taken from

that order. On 23 March 1999, Crisp filed a motion to dismiss the claims filed against him in his individual capacity as being barred by the statute of limitations. In its 10 May 1999 order, the trial court granted Crisp's motion to dismiss, after finding that the original complaint did not state a claim against Crisp in his individual capacity. Further, since the amended complaint did not relate back to the original complaint, the claims were barred by the three-year statute of limitations.

Plaintiffs assign as error the trial court's dismissal of their claims against Crisp in his individual capacity since: (1) the amended complaint relates back to the filing of the original complaint; and (2) the original complaint states a claim against Crisp in his individual capacity.

[1] We first address plaintiffs' contention that the original complaint states a claim against defendant Crisp in his individual capacity. Plaintiffs rely on *Williams v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166, *affirmed*, 349 N.C. 225, 504 S.E.2d 784 (1998), in which this Court found that the plaintiffs were seeking recovery from the defendant police officer in both his individual and official capacities although the caption was "silent" as to whether the officer was sued in his official or individual capacity. Defendant argues that *Williams* "provides no true guidance" and that *Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998), filed 6 February 1998, subsequent to *Williams*, is controlling.

In *Mullis*, our Supreme Court held:

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words 'in his official capacity' or 'in his individual capacity' after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity. These simple steps will allow future litigants to avoid problems such as the one presented to us by this appeal.

Id. at 554, 495 S.E.2d at 724-725. "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." *Reid v. Town of Madison*, 137 N.C. App. 168, 172, 527 S.E.2d 87, 90 (filed 21 March 2000); *See Johnson v. York*, 134 N.C. App. 332, 517 S.E.2d 670 (1999); *Warren v. Guilford*, 129 N.C. App. 836, 500 S.E.2d 470, *disc. review denied*, 349 N.C. 379, 516 S.E.2d 610 (1998).

Plaintiffs argue that the case at bar is distinguishable from *Mullis* in that their original complaint indicates that they sought to recover "jointly and severally" from defendants. Defendant Crisp contends that this argument was rejected in *Warren*, where this Court found that "neither the caption, the allegations, nor the prayer for relief contains any reference" as to whether the defendant case worker was being sued in her official or individual capacity although the complaint sought judgment against the defendants "jointly and severally." *See Warren*, 129 N.C. App. 836, 500 S.E.2d 470.

Plaintiffs further contend that their case is distinguishable from *Mullis* since the original complaint sets forth separate causes of action against Crisp and the Board. However, we note that it was necessary for plaintiffs to allege defendant Crisp's negligence in the original complaint to establish a cause of action against the defendant Board since Crisp was acting as an agent of the Board in performing his duties. *See Mullis*, 347 N.C. at 553, 495 S.E.2d at 724. Additionally, the original complaint contains numerous allegations which indicate that plaintiffs are suing defendant Crisp in his official capacity. *See Johnson*, 134 N.C. App. 332, 517 S.E.2d 670. For instance, plaintiffs first allege that defendant Crisp "at all times relative to this complaint was an employee of defendant Charlotte Mecklenburg Board of Education, and was acting within the course and scope of his employment . . . ." Also, in the original complaint, plaintiffs allege:

> 10. That at the time of this accident, defendant Board of Education was the registered owner of the 1988 Chevrolet Van that was being operated by defendant Crisp.
>
> 11. That at the time of the accident, defendant Crisp[] was an employee of defendant Board of Education and was operating the 1988 Chevrolet Van with the express or implied consent of defendant Board of Education, or in the alternative, defendant Crisp was in lawful possession of said vehicle and was acting within the course and scope of his employment with defendant Board of Education.
>
> 12. That the negligence of defendant Crisp should be imputed to defendant Board of Education under *respondeat superior*.

In view of these allegations and the absence of any clear indication that defendant Crisp is being sued in his individual capacity, we treat plaintiffs' complaint as a suit against defendant Crisp solely in his official capacity.

[2] Plaintiffs lastly contend that the amended complaint relates back to the filing of the original complaint and thus is not barred by the three-year statute of limitations for personal injury actions. *See N.C. Gen. Stat. §* 1-52 (1999). N.C. Gen. Stat. § 1A-1, Rule 15 provides:

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

N.C. Gen. Stat. § 1A-1, Rule 15(c) (1999). In *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995), our Supreme Court recognized that Rule 15(c) applies only to the relation back of claims and is "not authority for the relation back of a claim against a new party." In the case at bar, the trial court found that "alleging claims against Mr. Crisp in his individual capacity, is akin to alleging claims against a new defendant." Plaintiffs argue, however, that they did not add a new party by adding the language "in his individual and in his official capacity" to their amended complaint.

In *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 468 S.E.2d 447 (1996), the plaintiff motorist filed an initial complaint against three Durham police officers in their individual capacities and later amended his complaint to add a claim against the City of Durham and to name the officers as defendants in their official capacities. This Court held that the amended complaint may not relate back to the filing date of the original complaint because the plaintiff was seeking to add new defendants and Rule 15(c) only allows the addition of new claims. *Id.* Furthermore, in *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997), our Supreme Court stated:

> 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.

Therefore, we conclude that the amended complaint, which named defendant Crisp in his individual capacity, had the effect of adding a new party and does not relate back to the filing of the original complaint.

In summary, we find that the trial court did not err in granting summary judgment in favor of defendant Crisp in his individual capacity.

Affirmed.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. HARVEY LEWIS MONTGOMERY

No. COA99-757

(Filed 20 June 2000)

Constitutional Law-right to counsel— forfeiture—pro se representation

The trial court did not violate defendant's constitutional right to counsel by holding that defendant forfeited his right to counsel and by requiring defendant to proceed pro se, because: (1) defendant was afforded ample opportunity over the course of fifteen months to obtain counsel; (2) defendant was twice appointed counsel as an indigent; (3) defendant twice released his appointed counsel and retained private counsel; (4) defendant became disruptive on two occasions in the courtroom over one of his private counsel's inability to secure additional continuances, resulting in the trial being delayed; (5) after being advised by the judge that the case would not be further continued and that his private counsel would not be permitted to withdraw, defendant refused to cooperate with his counsel and assaulted him, resulting in an additional month's delay; and (6) defendant's purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts meant the trial court was not required to determine under N.C.G.S. § 15A-1242 that defendant had knowingly, understandingly, and voluntarily waived his right to counsel before requiring him to proceed pro se.

Appeal by defendant from judgment entered 8 April 1998 by Judge Raymond A. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 May 2000.

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

Jean B. Lawson for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment entered upon his conviction of robbery with a dangerous weapon. Facts necessary to a resolution of his appeal are as follows: Defendant was arrested on 4 January 1997 upon a warrant charging him with robbery with a dangerous weapon which allegedly occurred on 23 October 1996. He appeared in district court on 7 January 1997, was determined to be indigent, and assistant public defender Thurston Frazier was appointed to represent him.

In February 1997, defendant's family retained private attorney George Laughrun to represent defendant. On 25 August 1997, Mr. Laughrun moved to withdraw as counsel, reciting in his motion that defendant had previously asked him to withdraw in May but had changed his mind when the matter was scheduled for hearing, and that defendant had again asked him to withdraw on 24 August. Mr. Laughrun's motion to withdraw was allowed by order dated 26 August 1997.

On 9 September 1997, the public defender was again appointed to represent defendant. On 12 December 1997, private attorney Terry M. Duncan filed a notice of appearance as defendant's counsel. The case was set for trial on 16 February 1998. Defendant's motion for a continuance from that trial setting was denied by Judge Ferrell. On 16 February, defendant appeared with Mr. Duncan before Judge Johnson. Mr. Duncan again moved for a continuance, and advised the court that he had been retained by defendant's girlfriend, Brenda Hollis, and that defendant no longer wished to be represented by him. Mr. Duncan's motion to withdraw was denied. Mr. Duncan advised that he was prepared to proceed, but that defendant's witnesses had refused to meet with him. Judge Johnson denied the motion for a continuance and advised defendant that he had a right to represent himself, to proceed with Mr. Duncan, or to retain another attorney, but that he was not entitled to the appointment of another attorney. The following day, defendant appeared with Mr. Duncan, repeated his

objection to Mr. Duncan's representation, and disrupted the court with profanity, resulting in a finding of contempt and a sentence of 30 days in jail.

On 23 February 1998, defendant appeared before Judge Beal. Mr. Duncan again moved to withdraw as counsel at defendant's request and, when the motion was denied, defendant again became disruptive and was sentenced to an additional thirty days for contempt. Judge Beal set defendant's trial for 25 February. On that date, before jury selection began and while Mr. Duncan was conferring in the courtroom with defendant and Ms. Hollis, Ms. Hollis cursed Mr. Duncan and defendant threw water in Mr. Duncan's face. Both defendant and Ms. Hollis were found in contempt and each was sentenced to 30 days in jail. Defendant was also charged with simple assault upon Mr. Duncan. Judge Beal permitted Mr. Duncan to withdraw as counsel and continued defendant's trial until 30 March 1998. Judge Beal stated: "The Defendant will have an opportunity to hire an attorney if he wants to hire one, but he will not have an attorney appointed for him. He's already waived that right" and concluded "[d]efendant has effectively waived right to appointment of counsel."

On 6 April 1998, defendant appeared before Judge Warren. Attorney Thurston Frazier also appeared and informed the court that he had been appointed to represent defendant in the simple assault case involving Mr. Duncan and that defendant required representation in the present case. Judge Warren refused to appoint Mr. Frazier as defendant's counsel, but permitted him to serve as stand-by counsel. At defendant's trial, Mr. Frazier made opening and closing statements, examined and cross-examined witnesses, and made motions and objections. Defendant was convicted and was sentenced to a minimum of 120 months and a maximum of 153 months.

Defendant contends on appeal that he was denied his constitutionally guaranteed right to counsel by the actions of the trial court. He essentially argues that the trial court failed to conduct the inquiry required by G.S. § 15A-1242 before finding that defendant had waived his right to counsel. Although none of the four assignments of error contained in the record on appeal address the issue of defendant's knowing and voluntary waiver of counsel, or the trial court's failure to comply with G.S. § 15A-1242, we exercise the discretion granted us under N.C.R. App. P. 2 and consider defendant's arguments. For the reasons stated below, we hold that defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed *pro se*.

The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). A part of this right includes the right of an indigent defendant to appointed counsel. N.C. Gen. Stat. § 7A-450, *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799 (1963). A defendant who retains private counsel has a Sixth Amendment right to counsel of his choosing. *McFadden*, 292 N.C. 609, 234 S.E.2d 742. A defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel. *Id.* at 614-15, 234 S.E.2d at 746 (citing *Lee v. United States*, 98 U.S. App. D.C. 272, 235 F.2d 219 (1956)). Finally, a defendant also has a right to represent himself in a criminal proceeding. *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980). Before a defendant can waive counsel and represent himself, the trial court must conduct the inquiry required by G.S. § 15A-1242 to make certain that defendant's waiver of counsel is done voluntarily and willingly and with full knowledge of the consequences. *See Thacker*, *supra*.

However, the right to choose one's counsel is not absolute. *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745 (citing *People v. Brady*, 275 Cal. App.2d 984, 80 Cal. Rptr. 418 (1969)). Where defendant is appointed counsel, he may not demand counsel of his choice. *State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296, *cert. denied*, 528 U.S. 973, 145 L.Ed.2d 326 (1999). Further, if an indigent defendant chooses to proceed with private counsel, he loses the right to appointed counsel. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). Finally, and importantly, "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." *McFadden* at 616, 234 S.E.2d at 747.

Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *United States v. Goldberg*, 67 F.3d. 1092, 1100 (3d. Cir. 1995). A forfeiture results when "the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[] to justify a forfeiture of defendant's right to counsel. . ." La Fave, Israel, & King

Criminal Procedure, § 11.3(c) at 548 (1999). "[A] defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial," and "a defendant who is abusive toward his attorney may forfeit his right to counsel." *U.S. v. McLeod*, 53 F.3d at 322, 325 (11th Cir. 1995).

In *McLeod*, a defendant who threatened his attorney with harm was found to have forfeited any right to counsel. In *Siniard v. State*, 491 So.2d 1062 (Ala., 1986), a defendant who, after being given eight months and allowed several continuances in order to retain counsel, failed to do so was found to have forfeited his right to counsel because "[defendant] was using the right of counsel as a sword instead of a shield." *Id.* at 1064. *See also Painter v. State*, 762 P.2d 990 (Okla. 1988); *Potter v. State*, 547 A.2d 595 (Del. Supr. 1988) (stating that a defendant's dilatory actions in retaining counsel can justify a forfeiture of the right to counsel.)

In the present case, defendant was afforded ample opportunity over the course of fifteen months, to obtain counsel. He was twice appointed counsel as an indigent; twice he released his appointed counsel and retained private counsel. Apparently dissatisfied with Mr. Duncan, and upset at Mr. Duncan's inability to secure additional continuances of his trial, defendant was disruptive in the courtroom on two occasions, resulting in the trial being delayed. After being advised by Judge Beal that the case would not be further continued and that Mr. Duncan would not be permitted to withdraw, defendant refused to cooperate with Mr. Duncan and assaulted him, resulting in an additional month's delay in the trial. Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned. *McFadden*, *supra*, (disapproving dilatory tactics by counsel or client). Defendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine, pursuant to G.S. § 15A-1242, that defendant had knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*.

To the extent defendant's assignments of error were not brought forward and argued in his brief, they are deemed abandoned. N.C.R. App. P. 28(a),(b)(5). Defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and SMITH concur.

JAMES J. LEWIS, PLAINTIFF-EMPLOYEE v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT-EMPLOYER

No. COA99-366

(Filed 20 June 2000)

Workers' Compensation— second deputy commissioner's opinion—first not res judicata

The Industrial Commission erred by concluding in a workers' compensation action on appeal from the second deputy commissioner's opinion that a claim by plaintiff that post-traumatic stress arising from his job as a prison guard aggravated his diabetes was res judicata. Res judicata is defined as a final judgment; here, an application for review to the Commission within 15 days of the deputy commissioner's order prevented the second deputy commissioner's order from becoming final. Additionally, it is the duty of the Commission to decide all matters in controversy between the parties and defendant, having filed a Form 44, is entitled to have the full Commission respond to the questions directly raised by its appeal.

Appeal by defendant from opinion and award entered 23 November 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 January 2000.

Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr. and Martha A. Geer, for plaintiff-employee.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for defendant-employer.

McGEE, Judge.

Plaintiff James J. Lewis suffered from post-traumatic stress disorder while working as a probation and parole officer for defendant North Carolina Department of Correction.

Plaintiff filed a Form 18 on 6 October 1992, seeking worker's compensation benefits. A hearing was held on 17 October 1994 before a deputy commissioner (first deputy commissioner), who entered an award for plaintiff in the amount of $293.14 per week from 10 September 1992 to 13 November 1995 for temporary total disability, medical expenses incurred as a result of the occupational disease, and attorney's fees. The first deputy commissioner amended the opin-

ion and award on 26 March 1996 regarding temporary total disability compensation. Defendant appealed this decision but later withdrew its appeal.

The Department of Correction did not pay the benefits under the 26 March 1996 opinion and award until 3 June 1996. On 21 June 1996, plaintiff requested a hearing regarding tax treatment of compensation, defendant's refusal to pay a ten percent penalty for late payment, defendant's refusal to pay the full amount of attorney's fees, and plaintiff's proposed rehabilitation plan. Plaintiff filed a motion to compel payment and for other relief on 30 September 1996, stating in part that:

> 11. Plaintiff has submitted to Defendant medical bills for treatment for exacerbation of his diabetes related to the stress full [sic] conditions of his employment . . . . Plaintiff has obtained a medical opinion letter from Dr. Gianturco . . . indicating that these bills are related to the post-traumatic stress disorder. The Commission's order unequivocally states that Defendant shall pay medical costs incurred as a result of the covered occupational disease. Therefore these bills must be paid by Defendant.

On 11 October 1996, the Industrial Commission's executive secretary stated in an order that plaintiff's motion would be held in abeyance until heard before a deputy commissioner.

A hearing was held on 24 January 1997. A second deputy commissioner (second deputy commissioner) entered an interlocutory opinion and award on 21 April 1997 stating in the conclusions of law:

> 4. The parties shall have sixty days in which to have Plaintiff submit for a current evaluation and submit the results to the undersigned. At that time, a decision will be rendered as to the medical causation for Plaintiff's diabetes and periodontal problems.

The second deputy commissioner filed an opinion and award on 12 November 1997 finding:

> 10. The issue regarding Plaintiff's diabetes has been previously addressed in an Opinion and Award and is *res jusicata* [sic], since the Defendant provided no evidence that Plaintiff has suffered a change of condition for the better, the decision in the previous Opinion and Award stands.

The second deputy commissioner then concluded that:

> 2. Since the issue regarding Plaintiff's diabetic condition has already been addressed by [a] former Deputy Commissioner . . . in a prior Opinion and Award, that issue is *res judicata* and will not be addressed by the undersigned.

Defendant appealed to the full Commission.

The Commission modified and affirmed the opinion and award of the second deputy commissioner in an order entered 23 November 1998, finding as fact that:

> 10. The issue regarding Plaintiff's diabetes has been previously addressed in an Opinion and Award and is *res jusicata* [sic]. Since the Defendants provided no evidence that Plaintiff has suffered a change of condition for the better, the decision in the previous Opinion and Award stands.

Defendant appeals, contending the Commission erred in concluding that plaintiff's diabetes claim was *res judicata* because the first deputy commissioner's opinion and award failed to determine whether plaintiff's post-traumatic stress disorder caused or aggravated his diabetes. Plaintiff filed a cross-assignment of error arguing the Commission failed to find and conclude that the record establishes that the compensable post-traumatic stress disorder caused an aggravation of his diabetes.

The Commission is not an appellate court. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). "It is a quasi-judicial agency with statutory authority to make findings of fact, state conclusions of law and enter an order resolving the issues between the employee and the employer and the employer's insurance carrier, if any, arising out of the application of the Worker's Compensation Act." *Vieregge v. N.C. State University*, 105 N.C. App. 633, 639-40, 414 S.E.2d 771, 775 (1992).

The Commission's decision not to review the record to determine whether plaintiff's post-traumatic stress disorder caused an aggravation of his diabetes was in error. First, *res judicata* is defined as a *final judgment* on the merits, *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986), and the application for review to the Commission within fifteen days of the deputy commissioner's order prevents the deputy commissioner's order from becoming final. N.C. Gen. Stat. § 97-85 (1991). *See, e.g., White v. Air Systems, Inc.*, 800 S.W.2d 726, 728 (Ark. App. 1990); *see also Wilson*

v. Cargill, Inc. 873 S.W.2d 171, 172 (Ark. App. 1994). In the case before us, the second deputy commissioner concluded that the issue regarding plaintiff's diabetes was *res judicata* because the first deputy commissioner had already addressed the issue in a prior opinion and award. The Commission's finding that "[t]he issue regarding Plaintiff's diabetes has been previously addressed in an Opinion and Award and is *res jusicata* [sic]" incorrectly applies the doctrine of *res judicata* because the second deputy commissioner's conclusion of law about plaintiff's diabetes claim was not a final decision.

Secondly, defendant filed a Form 44 "Application For Review" with the Commission on 30 March 1998 stating, "[t]he issue of diabetes has not been addressed and, therefore, the original decision in this case is not res judicata as to that issue." "This Court has held that when the matter is 'appealed' to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission *to decide all of the matters in controversy between the parties.*" *Vieregge*, 105 N.C. App. at 638, 414 S.E.2d at 774 (emphasis added) (citation omitted). Defendant in this case, having filed a Form 44, "is entitled to have the full Commission respond to the questions directly raised by [its] appeal." *Id.* at 639, 414 S.E.2d at 774. The finding of *res judicata* by the Commission failed to address the issue of plaintiff's diabetes claim and thus failed to satisfy the Commission's statutory duty under N.C.G.S. § 97-85. *See id.* at 639, 414 S.E.2d at 775.

The Commission erred in concluding that the plaintiff's diabetes claim was *res judicata.* Upon remand, the Commission shall "conduct a hearing, make its own findings of fact and conclusions of law and enter an order resolving" the issue of whether plaintiff's posttraumatic stress disorder aggravated his diabetes. *Id.* at 641, 414 S.E.2d at 776. With this remand to the Commission, "it is not sufficient . . . for the full Commission, to then remand the case to the deputy to carry out its duties. Such procedure merely extends the time to a final order in a case already too long delayed." *Id.* at 641-42, 414 S.E.2d at 776.

Vacated and remanded.

Judges JOHN and HUNTER concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. JAMES L. MIZELL AND DOUGLAS W. AUSTIN, DEFENDANTS

No. COA99-947

(Filed 20 June 2000)

Insurance— homeowner's—firing to frighten prowler—exclusion for intended acts

The trial court did not err by granting plaintiff's motion for summary judgment in a declaratory judgment action to determine insurance coverage where plaintiff provided homeowner's insurance to defendant Mizell, who was sued by defendant Austin for personal injuries arising from Mizell's discharge of a firearm. When a person fires multiple shots from a rifle at night in the direction of a prowler who is fifty feet away, that person could reasonably expect injury or damage to result from the intentional act.

Appeal by defendants from order entered 30 April 1999 by Judge J. Richard Parker in Pitt County Superior Court. Heard in the Court of Appeals 26 April 2000.

Harris, Shields, Creech and Ward, P.A., by C. David Creech and Charles E. Simpson, Jr., for plaintiff-appellee.

Gaylord, McNally, Strickland & Snyder, L.L.P., by Danny D. McNally, for defendant-appellant Mizell.

Ward and Smith, P.A., by Donald S. Higley, II and A. Charles Ellis, for defendant-appellant Austin.

WALKER, Judge.

On 2 February 1998, defendant Austin filed suit against defendant Mizell seeking to recover damages for personal injuries arising out of Mizell's negligent discharge of a firearm. Plaintiff North Carolina Farm Bureau Mutual Insurance Company provides homeowner's insurance coverage to Mizell. On 10 September 1998, plaintiff filed a declaratory judgment to determine whether the insurance policy covered Mizell's alleged negligence.

In the early morning hours of 11 August 1997, Austin came to the residence of Mizell wishing to speak to Mizell's daughter. Austin was confronted outside the home by Mizell's son-in-law, who wielded a

baseball bat. Upon hearing the confrontation, Mizell came out of the house with a .38 caliber pistol and fired several shots in the air to scare Austin, who fled the premises.

About one hour later, Austin returned intending to vandalize the Mizell home. Mizell heard a vehicle stop, got out of bed and picked up his .22 caliber rifle. A rock was thrown through the window of Mizell's daughter's room. Mizell came out of his house with the rifle, saw someone running away from his home who he believed had thrown the rock. According to Mizell, he estimated he fired six shots at the ground behind the prowler and above the prowler's head. At least one of the bullets fired struck Austin in the head, injuring him.

Mizell was charged with felony assault. However, the district attorney dismissed the charges, determining that Mizell acted in a negligent manner, but not intentionally such as to commit a crime. This dismissal was based upon Mizell's statement given to the district attorney, which stated:

> 1. On the night of August 11, 1997, I emerged from my house and fired a rifle at a person who I believed to be a prowler.
>
> . . .
>
> 3. I fired the rifle in the general direction of the person whom I later discovered was Doug Austin, intending to scare him but certainly not intending to hit him.

Mizell thereafter insisted that he did not intend to injure Austin.

Plaintiff's insurance policy excludes coverage for "bodily injury" or "property damage":

> a. Which is intended by or which may reasonably be expected to result from the intentional act or omissions or criminal acts or omissions for one or more 'insured' persons. This exclusion applies even if:
>
> . . .
>
> (2) The 'bodily injury' or 'property damage' is of a different kind, quality or degree than intended or reasonably expected;
>
> . . .
>
> This exclusion applies regardless of whether or not one or more 'insured persons' are actually charged with, or convicted of, a crime.

The parties moved for summary judgment and the trial court granted plaintiff's motion for summary judgment, denied defendants' motion, and ordered that plaintiff "has no responsibility for coverage and has no duty to defend in any tort case involving the defendants."

Defendants argue the trial court erred in granting summary judgment for the plaintiff and denying their motion for summary judgment. Specifically, plaintiff's insurance policy covers unexpected injuries caused by intentional actions. Additionally, defendants contend there are at least factual issues to be resolved.

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. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

The issue before this Court is whether, as a matter of law, the bodily injury inflicted by Mizell was "intended by or which may reasonably be expected to result from the intentional act" and is excluded from coverage under the policy.

The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction. *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999). The policy is subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). In such cases, the policy must be construed in favor of coverage and against the insurer; however, if the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written. *Id.* Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language. *Id.* Non-technical words are to be given their meaning in

ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning. *Chatterton*, 135 N.C. App. at 95, 518 S.E.2d at 817.

Defendants cite as authority the case of *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 706, 412 S.E.2d 318, 324 (1992), where our Supreme Court held that an insurance policy's exclusion provision for bodily injury "expected or intended by the insured" did not apply where the insured pushed a fellow employee to the ground, injuring her. Our Supreme Court held that the employee's fractured arm was not an "expected or intended" injury within the meaning of the exclusion in the policy, because the resulting injury was not "substantially certain" to result from the insured's intentional act of pushing. Further, the *Stox* court held that a mere showing that the act was intentional will not suffice to avoid coverage under this type of exclusion provision. *Id.* at 706, 412 S.E.2d at 324.

Defendants also cite *Miller v. Nationwide Mutual Ins. Co.*, 126 N.C. App. 683, 685, 486 S.E.2d 246, 247 (1997), where this Court interpreted a homeowner's insurance policy exclusion provision for bodily injury and property damage "which is expected or intended by the insured." In *Miller*, the insured fired a gun at a stop sign near the plaintiffs' home. The bullet missed the stop sign and went through the window of the plaintiffs' house, breaking an overhead light fixture. *Id.* at 684, 486 S.E.2d at 247. Nothing in the record suggested that the insured intended to shoot at or cause damage to the plaintiffs or their home. *Id.* at 686, 486 S.E.2d at 248. This Court held that the defendant insurance company failed to show that the insured "expected or intended any injury to the plaintiffs." *Id.* at 687, 486 S.E.2d at 249.

Both *Stox* and *Miller* are distinguishable from this case. In each of those cases, the insurer failed to show that the action of the insured was expected or intended to cause injury or damage. Thus, the policy language did not preclude coverage.

Additionally, we note that plaintiff changed its policy language in 1995 such that the policy now excludes coverage for injury or damage "which may reasonably be expected to result from the intentional act . . . ." This language now suggests the application of an objective standard as opposed to the subjective language involved in previous policy interpretations. In other words, when a person fires multiple shots from a rifle at night in the direction of a prowler who is approximately fifty feet away, that person could reasonably expect injury or

damage to result from the intentional act. *See e.g., Erie Ins. Group v. Buckner*, 127 N.C. App. 405, 408, 489 S.E.2d 901, 904 (1997) (holding that "intended or expected" exclusion provision applied where insured "should have expected that punching [someone] in the face would cause injury").

Based upon the exclusion provision contained in the policy at issue, we hold the trial court did not err in granting plaintiff's motion for summary judgment.

Affirmed.

Judges MARTIN and SMITH concur.

IN THE MATTER OF: APPEALS OF LEON H. & MARY L. CORBETT FROM THE DECISION OF THE PENDER COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF REAL PROPERTY FOR TAX YEAR 1998

No. COA99-923

(Filed 20 June 2000)

Taxation— property valuation—single tract divided—no new appraisal—allocation of prior appraised value

The County was without statutory authority to reappraise for tax purposes one tract of land as two tracts following a division of the land and the conveyance of one of the tracts. A county may not increase or decrease the appraised value of real property except in a general reappraisal or horizontal adjustment year unless specifically permitted within N.C.G.S. § 105-287, which permits under subsection (a)(3) an increase or decrease to recognize an increase or decrease in the value of the property. Any occurrence directly affecting the property which falls outside the control of the owner (and is not included within the scope of subsection (b)) is treated as a subsection (a)(3) factor, but the division and transfer of the property here was within the sole authority of the taxpayers. The case was remanded for an equitable allocation at the prior appraised value.

Appeal by petitioners Mary Louise Brown Corbett and Leon H. Corbett, Jr. from final decision entered 24 March 1999 by the North

Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 25 April 2000.

Leon H. Corbett, Jr. for petitioner-appellants.

C.B. McLean, Jr., for Pender County, respondent-appellee.

GREENE, Judge.

Mary Louise Brown Corbett (Mrs. Corbett) and Leon H. Corbett, Jr. (Mr. Corbett) (collectively, Taxpayers) appeal from the final decision of the North Carolina Property Tax Commission (the Commission), sitting as the State Board of Equalization and Review, affirming the decision of the Pender County (the County) Board of Equalization and Review.

The record reveals the County's most recent general appraisal of real estate was effective 1 January 1995. In 1997, Taxpayers were the owners of a single 1.91 acre parcel of land bordering on Virginia Creek (the parent tract), which was improved with a single family residential structure. The parent tract was appraised by the County in the course of its 1995 general appraisal at a tax value of $196,610.00. This tax value remained in effect for tax years 1995, 1996, and 1997. On 6 December 1997, Taxpayers conveyed .69 acres of the parent tract (Wallin tract) to Mrs. Corbett's sister, Edna Brown Wallin (Wallin). Mr. Corbett stated Taxpayers received the parent tract from Mrs. Corbett's parents with the "understanding" Wallin "was supposed to have a piece" of the property, and the division and transfer "was to carry out [the] wish of [Mrs. Corbett's] parents."

In 1998, Harold Dean Triplett, the County's Assessor (Assessor), reduced the appraised value of the 1.22 acre tract of property retained by Taxpayers (Corbett tract) from $196,610.00 to $188,718.00. In 1998, Assessor valued the Wallin tract at $89,838.00. Taxpayers appealed the 1998 reappraisal of the Corbett tract to the County's Board of Equalization and Review. The County's Board of Equalization and Review affirmed the decision of the Assessor. Taxpayers thereafter appealed this decision to the Commission.

The final decision of the Commission affirmed the County's Board of Equalization and Review and found as pertinent facts:

> 9. Applying the 1995 schedule of values, rules, and standards, the . . . Assessor properly reassessed the [Corbett tract] to recognize the acreage change of the subject property.

10. Effective January 1, 1998, the [Corbett tract] was properly reassessed at a value of $110,099. . . .

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

1. A county assessor has a duty to increase or decrease the assessed value of real property in a year not subject to reappraisal or horizontal adjustment to "recognize an increase or decrease in the value of the property resulting from a factor other than one listed in G.S. 105-287(b).["] (See G.S. [§] 105-287(a)(3).)

2. The . . . Assessor properly decreased the value of Taxpayers' property pursuant to G.S. § 105-287, when a portion of the land was conveyed by deed resulting in an acreage change to the subject property.

. . . .

5. The true value in money of Taxpayers' property effective for January 1, 1998 was $188,718 . . . .

The dispositive issue is whether the increase or decrease in the value of a tract of land formerly valued as one tract, caused by a division of that tract of land into two parts and the conveyance of one of those tracts to another, is a "factor" within the meaning of N.C. Gen. Stat. section 105-287(a)(3), justifying a revaluation of that tract of land.

A county may not, except in a "general reappraisal or horizontal adjustment" year, increase or decrease the appraised value of real property unless specifically permitted within section 105-287(a). N.C.G.S. § 105-287 (1999). Section 105-287(a)(3) permits an "increase or decrease [in] the appraised value of real property . . . [to r]ecognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b)." N.C.G.S. § 105-287(a)(3). The factors listed in subsection (b) are "depreciation of improvements," "economic changes," and "[b]etterments." N.C.G.S. § 105-287(b). If an increase or decrease in the value of the property, *caused* by a "factor" not listed in subsection (b), occurs, the property is to be revalued "in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment." N.C.G.S. § 105-287(c). Any "occurrence directly affecting the specific property, which falls outside the control of the owner," and not included within the scope of subsection (b), is properly treated as a subsection (a)(3) "factor." *In re Allred*, 351 N.C. 1,

12, 519 S.E.2d 52, 58 (1999). Thus, a county can increase or decrease the appraised value of real property under section 105-287(a)(3) only when: (1) there has been an "occurrence directly affecting the specific property, which falls outside the control of the owner," not included within the scope of section 105-287(b); and (2) there has been, in consequence of the occurrence, an increase or decrease in the value of the property.

If a property owner believes an appraisal by the county assessor is inaccurate, the taxpayer must complain to the county board of equalization and review and request a hearing. *MAO/Pines Assoc. v. New Hanover County Bd. of Equalization*, 116 N.C. App. 551, 557, 449 S.E.2d 196, 200 (1994). As the actions of the county in assessing the value of property are presumed to be correct, the taxpayer has the burden of establishing the inaccuracy of the revaluation. *Id.* at 556-57, 449 S.E.2d at 200.

In this case, the division of the 1.91 acre tract into two tracts and the conveyance of one of the tracts to Wallin "directly affect[ed]" the property, because it resulted in the creation of two tracts of land owned by different parties. The division and transfer of the property was, however, within the sole authority of Taxpayers, as there was no legal obligation to divide and transfer the property.[1] It follows the division and transfer was *not* a "factor" within the meaning of section 105-287(a)(3).[2] The County, therefore, did not have statutory authority to revalue the 1.91 acre tract, now owned by separate parties, as two separate tracts.[3]

The final decision of the Commission, being without statutory authority, must be reversed and remanded for an equitable allocation

1. There is evidence from Taxpayers that the 1.91 acre tract was received by them from Mrs. Corbett's parents with the "understanding" Wallin "was supposed to have a piece" of the property and the division and transfer "was to carry out [the] wish of [Mrs. Corbett's] parents." Thus, the evidence establishes Taxpayers had no *legal* obligation to divide and transfer the property to Wallin. Accordingly, Taxpayers have met their burden of showing the inapplicability of subsection (a)(3). Although the issue is not presented in this case, we acknowledge a division and transfer made pursuant to a *legal* obligation would appear to be outside the control of the transferor.

2. Because there is no subsection (a)(3) "factor" justifying a revaluation of the property, we need not reach the question of whether the division and transfer of the property also caused "an increase or decrease in the value" of the 1.91 acre tract.

3. As the decision to divide and transfer the property was within the control of Taxpayers, Wallin's decision to accept the transfer of the property was also within her control, as she was under no legal obligation to accept the deed from Taxpayers. *See Ballard v. Ballard*, 230 N.C. 629, 633, 55 S.E.2d 316, 319 (1949) (valid delivery of deed transferring interest in realty requires acquiescence by the grantee).

of the 1995 appraised value of the 1.91 acre between the Wallin and Corbett tracts. N.C.G.S. § 105-345.2(b)(2) (1999) (Court may reverse and remand decision of the Commission if affected by error of law).

Reversed and remanded.

Judges McGEE and EDMUNDS concur.

DAVID K. METZ, PLAINTIFF v. SUSAN D. METZ, DEFENDANT

No. COA99-982

(Filed 20 June 2000)

1. **Child Support, Custody, and Visitation— custody—modification—substantial change of circumstances—best interests**

The trial court did not abuse its discretion in modifying custody by awarding permanent custody to plaintiff-father based on his showing of a substantial change of circumstances involving the father's reformed lifestyle because: (1) the requisite change may be beneficial, instead of merely adverse; and (2) a change in custody would be in the best interests of the child.

2. **Child Support, Custody, and Visitation— custody—modification—best interests—home schooling**

The trial court did not err in a custody modification action by looking at the child's home schooling situation in addressing his best interests because: (1) in custody matters, the trial court under the doctrine of parens patriae may preclude or otherwise limit certain educational options when the circumstances are appropriate; and (2) the child's Tourette's syndrome and his resulting motor and verbal tics required specialized attention that was not being address by defendant-mother's home schooling, but was addressed by the public schools where plaintiff-father placed the child.

Appeal by defendant from order entered 13 April 1999 by Judge C. Christopher Bean in Gates County District Court. Heard in the Court of Appeals 26 April 2000.

Perry W. Martin for plaintiff-appellee.

Thomas D. Roberts for defendant-appellant.

LEWIS, Judge.

Plaintiff and defendant married on 28 December 1987. Together, they had one child, Nicholas, born 22 June 1988. From the outset, the parties' marriage was volatile, to say the least. Plaintiff regularly abused defendant, both physically and emotionally. He also abused alcohol; on four occasions, he was convicted of driving while intoxicated, and on several other occasions, he was arrested for public drunkenness and disorderly conduct. The physical abuse culminated on 12 April 1989, when plaintiff severely choked and nearly strangled defendant. The next day, defendant took Nicholas and checked in to a nearby shelter for victims of domestic violence. On 6 July 1989, the trial court awarded her custody of Nicholas. The parties officially divorced on 5 November 1990.

Since the initial custody order, plaintiff has completely reformed his life. He is now a licensed minister in the Association of Evangelical Ministers and works as a chaplain. He also manages an apartment complex, from which he earns approximately $24,000 per year. He has remarried and has not consumed alcohol in nine years. In fact, no drugs or alcohol are allowed in his home. Meanwhile, defendant has been unable to keep a steady job since the initial custody order. In addition, she has frequently moved between public housing and various rental homes within Pasquotank and Perquimans Counties.

Also since the original order, Nicholas has developed Tourette's syndrome. He presently suffers from various motor and vocal tics. Due to the Pasquotank County public school system's inability to meet Nicholas' special needs, including specialized speech therapy, defendant began home schooling Nicholas in September 1997.

On 13 October 1997, plaintiff filed a motion for modification of child custody, citing his reformed life and the decision to home school Nicholas as reasons for the change. The trial court concluded that a substantial change of circumstances had occurred and awarded plaintiff custody on a temporary basis, beginning 17 August 1998. After an eight-month trial period, the trial court awarded permanent custody of Nicholas to plaintiff on 13 April 1999. From this order, defendant appeals.

[1] A child custody order may be modified at any time upon a showing of a substantial change of circumstances. N.C. Gen. Stat. § 50-13.7(a) (1999). The party seeking the custody change has the burden of showing the requisite change. *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). The trial court here concluded that a substantial change had occurred, relying heavily on plaintiff's reformed lifestyle. Defendant contends the requisite change must be one that adversely affects the welfare of the child. Thus, because the underlying changes here deal more with plaintiff's reformed lifestyle as opposed to any adverse changes in defendant's lifestyle, she claims plaintiff has not met his burden of showing a substantial change. We disagree.

The "adverse effect" cases cited by defendant have all been recently overruled by our Supreme Court. *Pulliam v. Smith*, 348 N.C. 616, 620 n.1, 501 S.E.2d 898, 900 n.1 (1998). *Pulliam* emphasized that the requisite change may be one that is, or is likely to be, beneficial to the child as well. *Id.* at 619-20, 501 S.E.2d at 899-900. In particular, that court stated:

> In reviewing a request for modification of custody, courts may not limit the inquiry as to what constitutes the best interests of the child solely to a consideration of those changes in circumstances which it has found to exist and which may *adversely* affect that child. . . . Rather, courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child.

Id. at 619, 501 S.E.2d at 899. Thus, the trial court did not err by relying on beneficial changes in plaintiff's lifestyle to conclude that a substantial change affecting the child's welfare had occurred. There is competent evidence in the record to support this conclusion and we will not disturb it on appeal. *See Best v. Best*, 81 N.C. App. 337, 343, 344 S.E.2d 363, 367 (1986) ("Modification of a custody decree . . . must be supported by findings of fact that there has been a substantial change in circumstances affecting the welfare of the child[]. The court's findings are conclusive if supported by competent evidence even if there is evidence *contra* or incompetent evidence in the record.") (citation omitted).

Once the trial court makes the threshold determination that a substantial change has occurred, the court then must consider

whether a change in custody would be in the best interests of the child. *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion. *King v. Allen*, 25 N.C. App. 90, 92, 212 S.E.2d 396, 397, *cert. denied*, 287 N.C. 259, 214 S.E.2d 431 (1975).

Here, the trial court made the following findings with respect to Nicholas' best interests: (1) plaintiff's present lifestyle would be better suited to providing Nicholas with the proper structure and educational opportunities he needs; (2) defendant's job would require her to be away from Nicholas in the evenings, leaving him in the care of others; (3) defendant's home schooling of Nicholas would not meet his social and educational needs; (4) since plaintiff enrolled Nicholas in the Gates County public schools during the trial custody period, Nicholas has exhibited "phenomenal" improvement with respect to his stuttering and motor tics due to specialized speech therapy he is receiving; (5) plaintiff lives in a spacious new home in which Nicholas has his own bedroom and bathroom; and (6) defendant lives in an overcrowded rental home in which Nicholas must share a bathroom with four other people. There is competent evidence in the record to support these findings, and we hold that the trial court committed no abuse of discretion by concluding that a modification of custody was in Nicholas' best interests.

[2] Defendant also contends that the trial court's findings with respect to the issue of home schooling versus public schooling punished her for exercising her constitutional right to educate Nicholas as she saw fit. We disagree.

Generally speaking, the custodial parent has the right to make decisions regarding the form, manner, and extent of a child's education. *Zande v. Zande*, 3 N.C. App. 149, 156, 164 S.E.2d 523, 528 (1968). Home schooling has been specifically authorized by statute as one such form of educating children. N.C. Gen. Stat. § 115C-564 (1999). But in custody matters, the trial court, under the doctrine of *parens patriae*, may preclude or otherwise limit certain educational options when the circumstances are appropriate. *Elrod v. Elrod*, 125 N.C. App. 407, 411, 481 S.E.2d 108, 111 (1997); *see also Clark v. Reiss*, 831 S.W.2d 622, 625 (Ark. Ct. App. 1992); *Bowman v. Bowman*, 686 N.E.2d 921, 927 (Ind. Ct. App. 1997); *King v. King*, 638 N.Y.S.2d 980, 981 (App. Div. 1996). Here, Nicholas' Tourette's syndrome, and the result-

ing motor and verbal tics, required specialized attention that was not being addressed by defendant's home schooling, but was being addressed by the Gates County public schools. Accordingly, the trial court did not err by looking at Nicholas' home schooling situation in addressing his best interests.

Affirmed.

Judges MARTIN and WALKER concur.

IN THE MATTER OF: DOUGLAS VOIGHT

No. COA99-948

(Filed 20 June 2000)

Appeal and Error— appealability—county—juvenile proceeding

A county's appeal from orders requiring it to pay $658.74 for the mental health evaluation of a juvenile under N.C.G.S. § 7A-647 is dismissed because: (1) a county has never had the statutory right to appeal in a juvenile proceeding in this state; and (2) the Court of Appeals does not have the power to issue a remedial writ under the North Carolina Constitution.

Appeal by petitioner from an order entered 7 May 1999 by Judge Lawrence C. McSwain in Guilford County District Court. Heard in the Court of Appeals 6 June 2000.

Guilford County Attorney's Office, by Deputy County Attorney J. Edwin Pons, for petitioner-appellant.

D'Amelio, McKinney & Ernest, LLP, by Jeremy L. McKinney for respondent-appellee.

HUNTER, Judge.

Guilford County ("County") appeals orders wherein the trial court ordered that it pay $658.74 for the mental health evaluation of the juvenile Douglas Voight ("Voight") under N.C. Gen. Stat. § 7A-647 (Supp. 1998). Voight contends that the County does not have standing to appeal. We agree, and dismiss the present appeal.

Briefly, the record reveals that Voight was adjudicated to be a delinquent juvenile on 10 December 1998. On 7 May 1999, the trial court ordered the County to pay the costs of Voight's mental health evaluation pursuant to N.C. Gen. Stat. § 7A-647 (repealed effective 1 July 1999 and recodified in the present Juvenile Code, N.C. Gen. Stat. § 7B-100, *et seq.*). This statute provided, in pertinent part:

> (3) . . . [T]he judge may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the judge to determine the needs of the juvenile.
>
> a. Upon completion of the examination, the judge shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other treatment and who should pay the cost of the treatment. *The county manager, or such person who shall be designated by the chairman of county commissioners, of the juvenile's residence shall be notified of the hearing, and allowed to be heard.* If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, the judge shall permit the parent or other responsible persons to arrange for treatment. . . . If the judge finds the parent is unable to pay the cost of treatment, the judge shall order the county to arrange for treatment of the juvenile and to pay for the cost of the treatment. The county department of social services shall recommend the facility that will provide the juvenile with treatment.

N.C. Gen. Stat. § 7A-647(3)(a) (Supp. 1998) (emphasis added). Prior to an amendment by the General Assembly in 1996, which added the portion we have emphasized, this statute did not give counties notice or the right to participate in the hearing which could result in their being required to pay for a juvenile's treatment. *See* Case notes, N.C. Gen. Stat. § 7A-647 (Supp. 1998). While the County in the present case did participate in the hearing in the trial court, our Supreme Court, citing N.C. Gen. Stat. § 7A-667, has held: "Even if the county had been a party [in a juvenile case], it would not have had the *right* to appeal . . ." under N.C. Gen. Stat. § 7A-667. *In re Brownlee*, 301 N.C. 532, 547, 272 S.E.2d 861, 870 (1981) (emphasis in original). N.C. Gen. Stat. § 7A-667 (repealed effective 1 July 1999 and recodified in the present Juvenile Code, N.C. Gen. Stat. § 7B-100, *et seq.*) entitled

"Proper parties for appeal," as quoted in *Brownlee*, provided that in juvenile cases:

> An appeal may be taken by the juvenile; the juvenile's parent, guardian, or custodian; the State or county agency. The State's appeal is limited to the following:
>
> (1) Any final order in cases other than delinquency or undisciplined cases;
>
> (2) The following orders in delinquency or undisciplined cases:
>
> a. An order finding a State statute to be unconstitutional;
>
> b. Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

N.C. Gen. Stat. § 7A-667 (1995 and Supp. 1998). As to this statute, our Supreme Court has stated: "It is manifest that [N.C. Gen. Stat. § 7A-667] . . . does not empower a county to take an appeal in a juvenile proceeding." *Brownlee*, 301 N.C. at 547, 272 S.E.2d at 870. The following year, the Supreme Court affirmed this holding, stating: "the Court of Appeals properly held that [a county] had no right to appeal from the order . . . [in the juvenile proceeding]. We reaffirm our decision in *Brownlee* with respect to a county's right to appeal from orders entered in a juvenile proceeding." *In re Wharton*, 305 N.C. 565, 569, 290 S.E.2d 688, 690 (1982). While the General Assembly chose to amend N.C. Gen. Stat. § 7A-647 in 1996 to give a county notice and the opportunity to be heard at certain juvenile hearings, it did not amend N.C. Gen. Stat. § 7A-667 giving a county the right to appeal in a juvenile proceeding. Under recodification in our new Juvenile Code, the General Assembly specifically deleted "county agency" from this rule, providing:

> An appeal may be taken by the juvenile, the juvenile's parent, guardian, or custodian, or the State. The State's appeal is limited to the following orders in delinquency or undisciplined cases:
>
> (1) An order finding a State statute to be unconstitutional; and
>
> (2) Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding

> that a cause of action is not stated under a statute, or by granting a motion to suppress.

N.C. Gen. Stat. § 7B-2604 (1999). Thus, a county has never had the statutory right to appeal in a juvenile proceeding in this state.

In *Brownlee* and *Wharton*, despite holding that a county had no right to appeal a juvenile delinquency action, the Supreme Court exercised its power under the N.C. Constitution, Article IV, Section 12(1) to issue a remedial writ. This section of our constitution states:

> (1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court *may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.* The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.
>
> (2) *Court of Appeals.* The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.

N.C. Const. art. IV, § 12(1), (2) (emphasis added). Thus, this Court does not have the power to issue a remedial writ under our Constitution, although we do have the power to issue certain prerogative writs under N.C. Gen. Stat. § 7A-32 (1999).

We recognize that this Court considered an appeal by a county in a juvenile case in *In Re D.R.D.*, 127 N.C. App. 296, 488 S.E.2d 842 (1997); however, the issue of whether or not the county had the right to appeal was not raised in that case, as it has been in the case *sub judice*, and the court made no holding on that issue. Thus, though the Court considered the appeal in *In Re D.R.D.*, that case gives us no authority to consider the present appeal, and neither do our General Statutes.

We recognize that it is highly unusual that the county must be given notice and the opportunity to be heard at a juvenile hearing, but is not allowed, under our General Statutes, the right to appeal the trial court's order that it pay for the juvenile's treatment as a result of the hearing. However, until our General Assembly decides otherwise, we must abide by our Supreme Court's holdings in *Brownlee* and

Wharton, and based on the precedent set by them, the County has no right of appeal. Accordingly, we are required to dismiss the present appeal.

Dismissed.

Judges GREENE and HORTON concur.

SHIRLEY DAVIS JIGGETTS, (NOW YANCEY), PLAINTIFF-APPELLANT v. MICHAEL LANCASTER AND REGIONAL ACCEPTANCE CORPORATION, DEFENDANT-APPELLEES

No. COA99-1066

(Filed 20 June 2000)

Employer and Employee— negligent hiring—independent contractor

In a negligent hiring case against defendant Regional Acceptance Corporation (RAC) based on defendant Lancaster's alleged assault of plaintiff in the course of repossessing plaintiff's automobile, the trial court did not err in granting summary judgment under N.C.G.S. § 1A-1, Rule 56(e) in favor of defendant RAC because: (1) Lancaster was an independent contractor and not an employee of RAC since Lancaster alone controlled the method and manner of performing the tasks for which he was hired; (2) none of the evidence reveals that RAC should have known of Lancaster's alleged aggressive behavior since Lancaster has never been involved in, or accused of, aggressive behavior prior to his encounter with plaintiff; and (3) the activity of repossession of automobiles is not a nondelegable duty which would cause RAC to be responsible for the torts of an independent contractor.

Appeal by plaintiff from summary judgment entered 10 May 1999 by Judge Henry W. Hight, Jr., in Vance County Superior Court. Heard in the Court of Appeals 16 May 2000.

Harvey D. Jackson for plaintiff appellant.

Young Moore and Henderson, P.A., by Robert C. Paschal, for Regional Acceptance Corporation defendant appellee.

HORTON, Judge.

On 21 October 1996, Shirley Davis Jiggetts (now, Yancey) (plaintiff) filed this action against Michael Lancaster and Regional Acceptance Corporation (RAC) alleging that defendant Lancaster assaulted her on 30 September 1993 in the course of repossessing her automobile; that Lancaster was employed by RAC; that RAC was negligent in hiring Lancaster to repossess plaintiff's vehicle; that plaintiff was injured as the result of the assault; and that Lancaster and RAC are jointly and severally liable for her damages. Plaintiff never obtained service on Michael Lancaster and he is not a party to this appeal. Defendant RAC moved for summary judgment, which motion was allowed. Plaintiff appealed.

RAC argued below that Lancaster was an independent contractor hired to repossess plaintiff's automobile, and was not an employee of RAC. In support of its motion, RAC introduced the affidavit of Lancaster to the effect that he did business as Interstate Recovery, and was hired "[o]n a fee for service basis . . . by finance companies to repossess and take lawful custody of collateral pledged by debtors to secure loans from finance companies." Lancaster averred that he had never been an employee of RAC, that he negotiated with RAC with respect to the fees he charged it, and that he was paid separately for each job. Lancaster stated that he "alone control[s] the method[] and manner of performing the tasks for which [he is] hired. Regional Acceptance Corporation has at no point had control or exercised the right to control the details of the jobs [he performs] for them." Finally, Lancaster stated that he had no criminal record, and had no previous complaints against him based on his actions in repossessing secured collateral.

A senior vice-president of RAC also submitted an affidavit confirming the statements in Lancaster's affidavit. His affidavit further stated that Lancaster had never previously been charged with assault and neither had a physical encounter with someone whose car was being repossessed, nor had ever exhibited aggressive behavior towards any of RAC's debtors.

Plaintiff submitted an affidavit in response to the motion for summary judgment describing Lancaster's actions when trying to repossess her automobile, including allegations that he pushed her to the ground twice and injured her knee. Plaintiff did not submit any affidavits or other material relating to the question of Lancaster's status as an independent contractor. As a general rule, "an employer or contractee is not liable for the torts of an independent contractor com-

mitted in the performance of the contracted work. However, a condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work." *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (citations omitted), *cert. allowed*, 279 N.C. 727, 184 S.E.2d 886 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1972). "The vital test [of one being an independent contractor] is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944).

Here, defendant RAC offered affidavits to support its motion for summary judgment, and plaintiff chose not to address either of these dispositive issues in her affidavit. Rule 56 of our Rules of Civil Procedure provides in pertinent part that

> [w]hen 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.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (1999) (emphasis added). Here, plaintiff has not set forth specific facts showing that there is a genuine issue for trial. Consequently, we are unable to hold that a genuine issue of material fact exists with regard to Lancaster's relationship to RAC. Further, plaintiff submitted nothing to raise an issue of material fact with regard to RAC's allegedly negligent hiring of Lancaster. None of the evidence before the trial court supports plaintiff's claim that RAC should have known of Lancaster's alleged penchant for aggressive behavior and the likelihood that he would assault plaintiff. What evidence there is tends to show that Lancaster has never been involved in, or accused of, aggressive behavior prior to his encounter with the plaintiff.

Finally, plaintiff argues that the duty to repossess collateral in a peaceful manner is a nondelegable duty. Thus, RAC is responsible, according to plaintiff, for any actions of Lancaster in carrying out the repossession of her automobile. In some instances, an employer may be responsible for the torts of an independent contractor when the independent contractor is engaged in "peculiarly risky activities" for

which "precautionary methods" must be adopted. *Deitz v. Jackson*, 57 N.C. App. 275, 279, 291 S.E.2d 282, 285 (1982). Here, unlike the situation in *Deitz*, there are no allegations in either plaintiff's complaint or affidavit that the repossession of secured collateral is a "peculiarly risky" activity or that there is some substantial danger inherent in the business of repossession of automobiles. The affidavits submitted by defendant RAC support its position that it has had no complaints in the past regarding the activities of Lancaster in carrying out repossessions for it, that Lancaster has no previous charges of assault on its debtors, nor does he have a reputation for aggressive behavior. Nothing in this record supports the view that the activity of repossession of automobiles is inherently dangerous, and plaintiff does not cite authority supporting such a view. Further, we are not convinced by plaintiff's argument that public policy requires such a result. Consequently, even assuming the question is properly before us, we decline to extend the doctrine of nondelegable duties to the extent sought by plaintiff.

There being no genuine issues of material fact, the judgment of the trial court is

Affirmed.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. PATRICK TELLY LOCKLEAR

No. COA99-847

(Filed 20 June 2000)

Confessions and Incriminating Statements— Miranda warnings—booking process—statutory rape—defendant's date of birth

The trial court erred in a first-degree statutory rape case under N.C.G.S. § 14-27.7A(a) by admitting the investigating officer's testimony of defendant's statement of his date of birth during the booking process without the benefit of the Miranda warnings because: (1) Miranda applies to the gathering of biographical information necessary to complete the booking process if the questions posited by the police are designed for the purpose of

eliciting a response they know or should know is reasonably likely to be incriminating; (2) defendant's age was an essential element of the crime charged; and (3) the investigating officer knew or should have known that her question regarding defendant's date of birth would elicit an incriminating response.

Appeal by defendant from judgment dated 3 September 1998 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 16 May 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General Victoria L. Voight, for the State.

Hubert N. Rogers, III, for defendant-appellant.

GREENE, Judge.

Patrick Telly Locklear (Defendant) appeals from a jury verdict finding him guilty of first-degree statutory rape in violation of N.C. Gen. Stat. § 14-27.7A(a).

The State's evidence shows that on 13 August 1996, Defendant had vaginal intercourse with a thirteen-year-old female (H.E.) who was born on 19 November 1982. A few days after this occurrence, H.E. eventually told her mother she had sexual intercourse with Defendant. On 19 August 1996, Detective Donna Freeman Halliburton (Halliburton) of the Robeson County Sheriff's Department took a statement from H.E., which disclosed the details of H.E.'s sexual intercourse with Defendant.

On 13 September 1996, Defendant was arrested by Halliburton on the charge of statutory rape. Halliburton testified that in connection with Defendant's arrest, she filled out an "ARREST REPORT" which was dated "09/13/96" and timed "12:30[]."[1] While obtaining information from Defendant to write on the "ARRESTEE INFORMATION" portion of the "ARREST REPORT," Halliburton asked Defendant his date of birth. She testified she questioned Defendant to fill out the arrestee information before reading Defendant his *Miranda* rights, because "[i]t was just a form we used to get the information on the person that we're talking with." Halliburton testified that "[t]o obtain information about the arrestee and the case," she would request "[h]is name, date of birth, address, height, weight, hair color, any marks or

1. The "ARREST REPORT" provides the "Place of Arrest" was the "Robeson County Courthouse (Juvenile)."

tatoos on him, nearest kin, the arrest information on the warrant, [and] the information about the bond."

At trial, counsel for Defendant objected to and moved to strike the State's question regarding Defendant's date of birth and also moved to suppress Defendant's statement regarding his date of birth. The trial court denied Defendant's motions.

Halliburton subsequently testified Defendant stated his date of birth was 2 August 1976. Defendant's motion to strike this testimony was denied by the trial court. Defendant was read his *Miranda* rights at 1:10 p.m. on 13 September 1996, forty minutes after he had told Halliburton of his date of birth.

After the State rested its case, Defendant asked the trial court to reconsider his motion to suppress the statement given to Halliburton concerning his date of birth. The trial court denied this request.

The dispositive issue is whether a defendant's incriminating statement given to the investigating police officer, during the booking process and without the benefit of the *Miranda* warnings, is admissible as evidence.

As a general proposition, *Miranda*[2] does not apply to the gathering of biographical data necessary to complete the booking of a criminal suspect. *State v. Ladd*, 308 N.C. 272, 286, 302 S.E.2d 164, 173 (1983). *Miranda* does, however, apply to the gathering of biographical information necessary to complete the booking process if the questions posited by the police are designed for the purpose of eliciting a response they know or should know is reasonably likely to be incriminating.[3] *State v. Banks*, 322 N.C. 753, 760, 370 S.E.2d 398, 403 (1988); *see Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980) (interrogation under *Miranda* consists of questions "the police should know are reasonably likely to elicit an incriminating response"); *see also Hughes v. State*, 695 A.2d 132, 141-42 (Md.) (booking question to defendant, without benefit of *Miranda*, which

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2. *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966), provides the Fifth Amendment mandates that no evidence obtained from a defendant through *custodial interrogation* may be used against that defendant at trial, unless the interrogation was preceded by (1) the appropriate warnings of the rights to remain silent and to have an attorney present and (2) a voluntary and intelligent waiver of those rights.

3. A suspect being questioned during a booking process is in custody for the purpose of *Miranda*, as the suspect is under arrest at the time of the booking.

elicits incriminating answer is interrogation in violation of defendant's Fifth Amendment rights, because officer should have known question was reasonably likely to elicit an incriminating response), *cert. denied*, 522 U.S. 989, 139 L. Ed. 2d 393 (1997). "[T]he prior knowledge of the police and the intent of the officer in questioning the defendant is highly relevant to whether the police should have known a response would be incriminating." *Ladd*, 308 N.C. at 287, 302 S.E.2d at 174.

In this case, Halliburton, while completing an arrest form which called for certain basic information about Defendant, asked Defendant his date of birth. Defendant responded by giving his date of birth. Halliburton, in addition to booking Defendant, was also the investigating officer having previously taken a statement from the alleged victim of Defendant's sexual assault. Since Defendant's age was an essential element of the crime charged,[4] Halliburton, as the investigating officer, knew or should have known her question regarding Defendant's date of birth would elicit an incriminating response. Accordingly, Defendant was entitled to the *Miranda* warnings prior to the date of birth question, and the failure to give those warnings renders his response inadmissible as evidence. *Cf. Banks*, 322 N.C. at 760, 370 S.E.2d at 403 (*Miranda* not required prior to questions posited by non-investigating officer, during booking process, who was not interrogating suspect "for the purpose of eliciting incriminating information"). The trial court, therefore, erred in admitting Halliburton's testimony of Defendant's statement of his date of birth. Because there is no other evidence of Defendant's date of birth, an essential element of the crime at issue, Defendant is entitled to a new trial.

New trial.

Judges HORTON and HUNTER concur.

4. N.C. Gen. Stat. § 14-27.7A(a) provides "[a] defendant is guilty of a Class B1 felony if the defendant 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, except when the defendant is lawfully married to the person." N.C.G.S. § 14-27.7A(a) (1999).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 JUNE 2000

BELLSOUTH CAROLINAS PCS, L.P. v. HENDERSON COUNTY ZONING BD. OF ADJUST. No. 98-1579	Henderson (97CVS1155)	Reversed and Remanded
BRIGGS v. FOOD LION, INC. No. 99-1057	Cumberland (97CVS1313)	Affirmed
DURHAM v. PASKE No. 99-481	Wayne (98CVD94)	Affirmed
EPPERSON v. EPPERSON No. 99-1003	Surry (98CVD165)	Vacated and Remanded
HAIR v. HAIR No. 99-248	Cumberland (88CVD4591)	Affirmed
HOWELL v. CLYDE No. 99-994	Watauga (96CVD86)	Affirmed
IN RE APPEAL OF WALLIN No. 99-924	Prop. Tax Comm. (98PTC108)	Reversed and Remanded
IN RE BURRELL No. 99-1223	Wake (97J501)	Affirmed
IN RE ROBERTS No. 99-729	New Hanover (98J312) (98J313) (98J314)	Affirmed
KILBY v. KILBY No. 99-946	Wilkes (89CVD1275)	Affirmed
LANGDON v. N.C. DEP'T OF TRANSP. No. 99-1088	Polk (98CVS139)	Affirmed
LAWING v. THOMASVILLE UPHOLSTERY, INC. No. 99-864	Ind. Comm. (548267)	Affirmed
MASSEY v. N.C. PSYCHOLOGY BD. No. 99-860	Wake (98CVS7988)	Affirmed
MILLS v. THOMAS No. 99-614	Randolph (97CVS856)	Reversed and Remanded
MURRAY v. RUSS No. 99-877	Union (94CVD1025)	Affirmed

NANCE v. VENEER No. 99-420	Ind. Comm. (489537)	Affirmed
ORANGE COUNTY ex rel. PRIDE v. EDWARDS No. 99-1217	Orange (93CVD1348)	Reversed and Remanded
OVERCASH v. CITY OF CONCORD No. 99-652	Cabarrus (99CVS137)	Reversed and Remanded
SIMMONS v. LANDFALL ASSOCS. No. 99-980	Ind. Comm. (676006)	Affirmed
STATE v. BRADDY No. 99-1218	Lincoln (95CRS5159)	No Error
STATE v. CARTER No. 99-764	Rockingham (95CRS9225)	Affirmed
STATE v. COLLINS No. 99-1224	Wake (97CRS23186) (97CRS034783)	No Error
STATE v. COLON No. 99-546	Alamance (95CRS5140) (95CRS5141) (95CRS5142) (95CRS5145) (95CRS5146)	To summarize, in cases 95CRS5140 and 5141, defendant's convictions of attempted second-degree murder are vacated and remanded for further action consistent with this opinion. In cases 95CRS5142 and 5145, we find no error. In case 95CRS5146, we remand with instructions that defendant's motion to dismiss be granted.
STATE v. DUNBAR No. 99-730	Forsyth (98CRS45850) (98CRS41352)	No Error
STATE v. FRAZIER No. 99-761	Guilford (98CRS041068)	Affirmed
STATE v. HOLLOWAY No. 99-521	Durham (97CRS8599)	No Error

STATE v. HOLLOWAY No. 99-1111	Durham (97CRS32006)	Affirmed
STATE v. HUNT No. 99-553	Robeson (96CRS09962)	Remanded for reentry of judgment
STATE v. JORDAN No. 99-1169	Guilford (99CRS024748)	No Error
STATE v. JOYNER No. 99-1171	Durham (98CRS17331) (98CRS38158)	No Error
STATE v. KICKERY No. 99-702	New Hanover (98CRS890) (98CRS893)	No error in the trial; judgment vacated and remanded for re-sentencing.
STATE v. LINDSAY No. 99-921	Guilford (98CRS23685) (98CRS85852)	No Error
STATE v. MARLEY No. 99-539	Forsyth (97CRS42761) (97CRS42763)	No Error
STATE v. MIDGETTE No. 99-694	Pamlico (98CRS382) (98CRS383)	Affirmed
STATE v. MILLS No. 99-1293	Gaston (95CRS33720) (95CRS33721) (95CRS33722)	Affirmed
STATE v. OVERTON No. 99-532	Pasquotank (98CRS212) (98CRS1749)	No error; motion appropriate relief denied
STATE v. PARKER No. 99-965	Hertford (97CRS2238) (97CRS2687) (97CRS3617)	No Error
STATE v. REID No. 99-724	Cabarrus (98J105)	Affirmed
STATE v. SMITH No. 99-870	Pitt (96CRS34136) (96CRS34137) (96CRS34138) (96CRS34139)	No prejudicial error

STATE v. TURNER No. 99-906	Craven (98CRS1074) (98CRS1076) (98CRS1080) (98CRS1082)	No Error
WADE v. LATCO CONSTR. CO. No. 99-479	Ind. Comm. (624825)	Affirmed
WILKINSON v. HENSON BROS., INC. No. 99-879	Mecklenburg (96CVS12445)	Affirmed in part, reversed and remanded in part
WOODWARD v. WOODWARD No. 99-602	Forsyth (97CVD2382)	Affirmed

ANTIONE A. ALLEN AND WIFE, ANGELA D. ALLEN; COLLEEN A. BANNISTER; WILLIAM BARNETT, JR. AND WIFE, PEARL A. BARNETT; ANTHONY T. BRANDON; JACQUELINE B. BROWN; CHINAUWA S. CHANEY; VERA P. DAVIS; ANGELA H. DUNLAP; MORRIS L. ELLIOTT AND WIFE, JACQUELINE L. ELLIOTT; THOMAS E. FENTRESS AND WIFE, SANDRA JONES-FENTRESS; CYNTHIA DIANNE FORD; LAURALEI E. GRAVES; LARRY D. GREEN AND WIFE, MARCIA LYNN GREEN; BARBARA J. HARVEY; RANDY M. HENDERSON AND WIFE, KIMBERLY Y. HENDERSON; JAMES E. HUGGINS; LADON M. JAMES; REGINALD L. MASON; HARRY E. MCCULLOUGH, JR. AND WIFE, JO ANN MCCULLOUGH; SAMUEL D. MCQUEEN, JR. AND WIFE, DOTTIE P. MCQUEEN; FAILYA M. MILES AND SOPHIE L. MILES; PATRICIA A. MOORE; WILLIAM E. MOORE; KIMBEL ROYAL MURPHY AND WIFE, DEBORAH R. MURPHY; CALVIN M. SMITH AND WIFE, GAIL S. SMITH; LINTON A. THOMPSON AND WIFE, DIMPLES G. THOMPSON; TAMMY TUCK; PHYLLIS JOHNSON-WIGGINS; KENNETH S. WORMACK AND WIFE, VANDA V. WORMACK; AND GLADYS M. YARN, PLAINTIFFS V. ROBERTS CONSTRUCTION COMPANY, INC.; BOBBY ROBERTS; AND BRYANT B. ROBERTS, DEFENDANTS

No. COA99-775

(Filed 5 July 2000)

1. **Evidence— photographs—action for defective construction of house—cracks in foundations of other houses—not unfairly prejudicial**

The trial court did not abuse its discretion in an action alleging defective construction of a house by finding that the probative value of photographs of cracks in the foundations and floors of other houses constructed by defendant Roberts Construction in the same subdivision was not outweighed by the danger of unfair prejudice. Plaintiffs' use of the photographs was not so expansive as to be unfairly prejudicial.

2. **Fraud— defective construction of house—cracks in other houses—knowledge of defects**

The trial court properly denied defendants' motion for a directed verdict on the issue of fraud in an action arising from the allegedly defective construction of a house where there was evidence of cracks in the floors and foundations of approximately thirty other houses constructed by defendants using the same slab on grade method and that these houses did not meet building code standards. A reasonable person could find based on this evidence that Roberts Construction had actual knowledge of structural defects in plaintiffs' house at the time plaintiffs' purchased their home.

3. Unfair Trade Practices— construction of house—fraud—failure to obtain contractor's license

The trial court did not err in an action arising from the allegedly defective construction of a house by entering judgment against defendant Roberts Construction and Bobby Roberts for unfair and deceptive trade practices where the court based its conclusion regarding Roberts Construction on a judgment for fraud against Roberts Construction, and the conclusion as to Bobby Roberts upon three conclusions, only one of which (failure to obtain a general contractor's license) was appealed.

4. Construction Claims— negligent construction of house—contractor's license

The trial court properly denied defendants' motion for a directed verdict on the issue of defendant Bryant Roberts' negligence in an action arising from the construction of a house where the single issue regarding Bryant Roberts' negligence was whether Bryant Roberts was the general contractor for the construction of the house (and thereby had a duty to supervise construction) and there was testimony that Bryant Robert's general contractor's license was used to build plaintiff's house.

5. Warranties— express—construction of house—written notice—complaint

The trial court erred by denying defendant Roberts Construction a directed verdict on the issue of breach of express warranty arising from the house not being constructed in substantial conformity with the plans and specifications approved for the house where the terms of the warranty required written notice of the breach. Assuming that service of a complaint is sufficient to give written notice, as plaintiffs contend, this complaint did not allege that Roberts Construction failed to construct the house in substantial conformity with the plans and specifications which were approved for the house and therefore did not provide Roberts Construction with written notice of the alleged breach.

6. Warranties— implied warranty of habitability—house—cracks

The trial court properly denied defendants' motion for a directed verdict on the issue of breach of implied warranty of habitability in a case arising from cracks in plaintiff's house where there was testimony regarding numerous cracks in the

interior and exterior of plaintiff's house, including the floor, foundation wall, and sheetrock; that plaintiffs' foundation did not conform to the minimum requirements of the building code and plans; and the construction of the foundation created a major structural defect. Based on this evidence, a reasonable juror could find that plaintiffs' house was not free from structural defects and that the foundation was not constructed in a workmanlike manner.

Appeal by defendants from order filed 31 July 1998, from judgment filed 2 September 1998, and from order filed 1 October 1998 by Judge Henry W. Hight, Jr. in Durham County Superior Court in favor of plaintiffs Randy M. Henderson and wife, Kimberly Y. Henderson. Heard in the Court of Appeals 9 May 2000.

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, and Couch & Associates, by Finesse G. Couch, for plaintiff-appellees Randy M. Henderson and Kimberly Y. Henderson.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, and Maupin Taylor & Ellis, P.A., by John I. Mabe, Jr. and Kevin W. Benedict, for defendant-appellants.

GREENE, Judge.

Roberts Construction Company, Inc. (Roberts Construction), Bobby Roberts, and Bryant Roberts (collectively, Defendants) appeal the trial court's denial of Defendants' motions for directed verdict, a judgment filed 2 September 1998 in favor of Randy Henderson and Kimberly Henderson (collectively, Plaintiffs), and an order filed 1 October 1998 denying Defendants' motion for judgment notwithstanding the verdict. Additionally, Defendants appeal the trial court's denial of their motions for summary judgment; however, these assignments of error were not set out in Defendants' brief to this Court and are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(5).

This case began as a consolidated action against Defendants filed by approximately forty plaintiffs on 10 March 1997 for breach of contract, breach of implied warranty, breach of express warranty, fraud, and unfair and deceptive trade practices. The allegations in the complaint arose out of the construction by Roberts Construction of approximately thirty houses in the Forestwood subdivision in Durham. This consolidated action came to trial on 10 August 1998, and the parties consented to go forward with Plaintiffs' claims.

Consequently, only Plaintiffs' case was tried on that date, and Plaintiffs' case is the sole case on appeal before this Court.

Plaintiffs' Evidence

Plaintiffs presented evidence at trial that on 26 August 1996 they purchased a house located at 10 Rush Court in the Forestwood subdivision from Roberts Construction. The house was constructed by Roberts Construction, and the purchase price was approximately $86,500.00. At the time of the construction, Bobby Roberts was the sole owner of Roberts Construction and Bryant Roberts was an employee of Roberts Construction. Plaintiffs testified they did not notice any problems with the construction of the house prior to moving into the house; however, Kimberly Henderson noticed cracks in the house beginning in October of 1996.

At the time of Plaintiffs' purchase, Roberts Construction provided Plaintiffs with an express warranty which guaranteed, in pertinent part, that "[Plaintiffs' house] . . . is constructed in substantial conformity with the plans and specifications . . . which have been approved [for the construction of the house]." This warranty required Plaintiffs to provide Roberts Construction with written notice of any nonconformity "within one year from the date of original conveyance of title to . . . [Plaintiffs] or the date of initial occupancy, whichever first occurs."

Benjamin Wilson (Wilson) testified as an expert in the fields of geo-technical engineering and construction materials. Wilson testified regarding the method of constructing a "slab on grade" house, which was the method used by Roberts Construction to build the houses in the Forestwood subdivision. He stated the ground would first be excavated by a backhoe, and the building inspector would then approve the exposed soil for the pouring of concrete. The concrete would be poured around the perimeter of the foundation to the minimum width and thickness required under the North Carolina and Durham Building Codes (the building code) and, after the concrete had hardened, concrete block walls would be constructed around the perimeter. A stone base would be placed on top of the soil inside the perimeter and a vapor barrier, which is a piece of plastic, would be placed on top of the stone base. Concrete would then be poured and, if the plans called for the use of a wire mesh, concrete would be spread over the wire mesh and the wire mesh would be "pulled up into the concrete." Finally, finished flooring, such as vinyl, carpet, or wood, would be placed on top of the concrete slab. The building code

requires a minimum compressive strength for a concrete slab of 2500 pounds per square inch (PSI) and minimum thickness of three-and-one-half inches.

Plaintiffs presented evidence the building plans for the construction of their house required a four-inch stone base and a four-inch concrete slab. Plaintiffs' plans also required the use of a vapor barrier and wire mesh reinforcement.

Wilson testified he inspected Plaintiffs' house on 14 December 1996, 6 January 1998, and 3 August 1998. The 14 December 1996 inspection of the house revealed a three-to-four foot hairline crack in the concrete floor beginning at the front door and hairline cracks running horizontally and vertically "in the foundation wall on the left end of the residence." Wilson stated a hairline crack is "typically just . . . a crack that has not opened up and [is] less than a 16th of an inch." Wilson testified that when he revisited Plaintiffs' house in January of 1998, the crack in the floor continued to the staircase that leads to the second floor, and Wilson could not determine whether the crack continued under the staircase. The crack had increased in width from a hairline crack to a crack one-quarter to three-eighths of an inch at its widest point. Further, an additional crack had appeared in the foundation wall on the left side of the house. Finally, Wilson testified that when he returned to the house on 3 August 1998, he observed numerous additional cracks on the interior and exterior of the house, including a crack in the floor of the washer/dryer area of the kitchen which proceeded between one-half and one-third of the way across the kitchen floor, a crack proceeding across a bedroom floor and under a wall into another room, and a crack in the sheetrock on the front wall of the house. Wilson stated cracks in sheetrock typically "are the last things to appear when a house is undergoing structural problems."

Wilson also testified he took core samples from the floors of Plaintiffs' house on 27 August 1997. Wilson obtained the core samples by pulling back the carpet in the house and coring through the concrete, leaving a hole in the concrete that is six inches in diameter. Gravel was then dug out by hand, and the thickness of the gravel was measured. Once the gravel had been removed, Wilson then cored down through the soil with a hand auger and took a "dynamic cone penetration test." This was done by driving a cone into the soil to obtain a soil sample.

Wilson testified a core sample taken near the end of one of the cracks in the floor indicated the concrete slab was only three inches thick, which was less than the minimum thickness required by Plaintiffs' plans and by the building code. There was also a one and one-half inch air gap between the vapor barrier and the stone, and below the gap there was a two-inch layer of crushed rock mixed with soil. Also, the soil below the rock was not compacted to the standard required by the building code. Wilson testified based on these tests that the compaction under the slab was not done in a workmanlike manner, did not conform to the minimum requirements of the building code, and created a "major structural deficiency." He also testified the slab itself did not meet minimum building code requirements and created a "major structural defect." Wilson testified the concrete samples revealed an average compressive strength of 940 PSI, which does not meet minimum building code standards and created a "major structural deficiency." He also stated the concrete did not contain the wire mesh required in Plaintiffs' plans.

Plaintiffs also presented evidence regarding cracks in other houses in the Forestwood subdivision constructed by Roberts Construction between 1994 and 1996. Plaintiffs offered into evidence photographs of these cracks, and Defendants objected to the admission of the photographs on the ground their probative value was substantially outweighed by undue prejudice under Rule 403 of the North Carolina Rules of Evidence. In response to Defendants' objection, the trial court stated it had "performed the balancing test under Rule 403" and Defendants' objection was overruled. The photographs were authenticated through the testimony of the photographer who had taken the photographs and they were then admitted into evidence. Wilson subsequently testified regarding the cracks in the other houses constructed by Roberts Construction, and he referred to the photographs of these other houses to illustrate his testimony. Wilson testified he had inspected between thirty-two and thirty-five houses in the Forestwood subdivision other than Plaintiffs' house, and these houses contained cracks similar to the cracks in Plaintiffs' house. Also, these houses did not meet various building code standards for average PSI, concrete thickness, rock thickness, and compaction below the slab. During Wilson's testimony, Defendants objected to his testimony "about cracks in other houses other than . . . [Plaintiffs'] house" on the ground this testimony could not be used as a basis for Wilson's opinion about Plaintiffs' house, and the trial court overruled the objection.

Plaintiffs presented evidence that in order to repair the cracking in their house, the concrete slab would have to be torn out and reconstructed and foundation piers would have to be placed under the house. Plaintiffs' evidence showed the cost of this reconstruction would be approximately $58,436.00.

At the close of Plaintiffs' evidence, Defendants made the following motions for directed verdict, which the trial court denied: a motion for directed verdict on the issues of fraud and unfair and deceptive trade practices; a motion for directed verdict on the negligence claim against Bryant Roberts individually; a motion for directed verdict on the fraud claim against Bobby Roberts individually; a motion for directed verdict on the express warranty claim; and a motion for directed verdict on the implied warranty claim.

Defendants' Evidence

Bobby Roberts testified for Defendants that he is employed by Roberts Construction and is the president and sole shareholder of the company. He testified Roberts Construction had 90 to 100 employees at the time Plaintiffs' house was constructed. Roberts Construction constructs slab on grade houses, and the slab upon which Plaintiffs' house was built was constructed under the supervision of Glennie McFarland (McFarland) and Fred Haithcock (Haithcock), who are employees of Roberts Construction. All of the labor on the houses was done by employees of Roberts Construction, and subcontractors were not used to perform any of the work. Bobby Roberts testified that under the building code, the concrete used in constructing slab on grade houses may be reinforced with either a wire mesh reinforcement or fiber reinforcement.

Bobby Roberts testified on cross-examination that Bryant Roberts did not own any shares in Roberts Construction, and Bryant Robert's general contractor's license was used to build Plaintiffs' house. In his continuing testimony, he said he did not know at the time of the construction that it was unlawful for Roberts Construction to build using Bryant Robert's license; however, he was aware at the time of trial that the use of Bryant Robert's license was unlawful. He also testified that at the closing on Plaintiffs' house he had signed documents representing he was the general contractor for the house.

Bobby Roberts testified he signed an affidavit prior to trial that stated: "I am president of Roberts Construction Company, Inc., and in conjunction with Glen McFarland, personally oversaw and super-

vised the construction of all the 223 houses located in the Forestwood subdivision." He testified at trial, however, that he did not "personally supervise anybody" and that he "supervise[d] the superintendents." He stated he did not have any recollection of being at Plaintiffs' house while it was being constructed. Bobby Roberts stated he did not believe the structural problems with Plaintiffs' house were caused by leaving out the wire mesh reinforcement when constructing the foundation. Further, Bernie Ivey, a former building inspector for the City of Durham, testified wire mesh reinforcement has not been required in slab on grade foundations under the building code since approximately 1993.

Larry Hairston, a building inspector for the City of Durham, testified he inspected Plaintiffs' house during its construction and found the thickness of the gravel, vapor barrier, and compactness of the soil met the requirements of the building code.

Haithcock testified concerning the daily activities at Roberts Construction that all of the workers would meet with Bobby Roberts at the company's shop in the morning, and Bobby Roberts would go over with the workers what was planned for the day and what had been done on the previous day. Haithcock stated the construction was directly supervised by McFarland, and the workers were able to remain in radio contact with Bobby Roberts throughout the day. Haithcock stated on cross-examination he never witnessed Bryant Roberts supervising work on a construction site for Roberts Construction.

McFarland testified he is the superintendent of construction for Roberts Construction and, as part of his job, he is required to "supervise the whole of the crew and make sure they [are] performing their job properly." He stated part of the job of the workers at Roberts Construction is to pour concrete slabs, and if the soil underneath the slabs is not properly compacted then the concrete will not be properly supported and might crack. He stated problems with cracking in the concrete slabs did not arise until the reinforcement used in the concrete was changed from wire mesh reinforcement to fiber. McFarland testified the homes in the Forestwood subdivision were built under Bryant Robert's license; however, if McFarland had any problems at a job site, he would contact Bobby Roberts, and he never saw Bryant Roberts supervising any of the construction.

Thomas Caldwell (Caldwell), an expert in structural engineering, testified he had inspected thirty-two houses in the Forestwood sub-

division, and approximately ten of the houses had "either very significant or very severe structural damage to the footings and slabs," while approximately twenty of the houses had "a much lower degree of damage[,] [d]amage that would be fairly typical for most houses, perhaps a few minor cracks, lots of cracked stucco, but no signs of significant settlement or significant structural damage." Caldwell testified he categorized the damage to Plaintiffs' house as "slight foundation damage," which means the house had "small foundation wall cracks, small slab cracks, minor or no footing settlement found or suspected, [and] minor repairs recommended." In Caldwell's opinion, the cost of making the necessary repairs to Plaintiffs' house would be approximately $2,000.00.

At the close of all of the evidence, Defendants made motions for directed verdicts on the following issues: fraud and unfair and deceptive trade practices as to all Defendants; all individual claims against Bryant Roberts; all individual claims against Bobby Roberts; and all claims of breach of express and implied warranty. The trial court denied these motions.

Jury Verdict

Subsequent to its deliberations, the jury returned the following verdict: Roberts Construction breached its express warranty and implied warranty of habitability, causing Plaintiffs $60,236.00 in damage; Bryant Roberts was negligent, causing Plaintiffs $60,236.00 in damage; Roberts Construction committed fraud, causing Plaintiffs $60,236.00 in damage; and Bobby Roberts did not commit fraud. The jury also made the following relevant findings regarding the conduct of Bobby Roberts: (1) Bobby Roberts "[e]ngage[d] in the profession of general contractor with respect to [Plaintiffs' house] without having obtained a general contractor's license as required by law"; (2) Bobby Roberts "[c]onceal[ed] material facts relevant to [Plaintiffs' house] from . . . Plaintiffs which he knew at the time of purchase that . . . Plaintiffs could not discover in the exercise of due diligence"; and (3) Bobby Roberts "[f]alsely represent[ed] to . . . Plaintiffs that [Plaintiffs' house] had been constructed in substantial conformity with plans and specifications approved [for the house]."

The trial court then found, based on the jury's verdict, that Roberts Construction and Bobby Roberts had engaged in unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. The trial court, therefore, entered a judgment for treble damages against Roberts Construction and Bobby Roberts in the amount of

$180,708.00, plus $39,490.00 in attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1. The trial court also entered judgment against Bryant Roberts in the amount of $60,236.00 based on the jury's finding of negligence.[1]

The issues are whether: (I) the probative value of photographs of cracks in the floors and foundations of other houses constructed by Roberts Construction was substantially outweighed by unfair prejudice under Rule 403 of the North Carolina Rules of Evidence; (II) the record contains substantial evidence Roberts Construction had actual knowledge of structural defects in Plaintiffs' house at the time Plaintiffs purchased the house; (III) the record supports entry of judgment for unfair and deceptive trade practices against Roberts Construction and Bobby Roberts; (IV) the record contains substantial evidence Bryant Roberts was the general contractor for the construction of Plaintiffs' house; (V) the record contains substantial evidence Plaintiffs provided Roberts Construction with written notice of its alleged breach of the parties' express warranty; and (VI) the record contains substantial evidence Plaintiffs' house was not constructed in a workmanlike quality.

I

Admission of Evidence

[1] Defendants argue photographs of cracks in the foundations and floors of other houses constructed by Roberts Construction in the Forestwood subdivision should not have been admitted into evidence because the probative value of the photographs was outweighed by unfair prejudice under Rule 403 of the North Carolina Rules of Evidence.[2] We disagree.

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1. Although the judgment does not state Defendants are jointly and severally liable, Plaintiffs conceded during oral argument before this Court that Defendants' liability is joint and several.

2. Defendants also filed a motion *in limine* to exclude *any* evidence of cracks in other houses in the Forestwood subdivision under Rule 403, and Defendants have assigned error to the trial court's denial of their motion *in limine*. The trial court's ruling on a motion *in limine*, however, is insufficient to preserve for appellate review the admissibility of evidence sought to be excluded in the motion. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). Accordingly, because Defendants objected at trial only to the admission of the photographs under Rule 403 and not to other evidence of cracks, the admission of evidence other than the photographs is not properly before this Court.

Additionally, Defendants argue in their brief to this Court that the trial court erred by granting Plaintiffs' motion *in limine* to exclude evidence of other houses con-

Rule 403 provides, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1999). Whether evidence should be excluded under Rule 403 is in the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

In this case, Defendants argue "the cumulative effect of . . . [P]laintiffs' expansive use of [the photographs] [] outweighed the probative value of the evidence." The evidence shows the photographs of other houses were admitted into evidence, and Wilson used the photographs to illustrate his testimony regarding cracking in the floors and foundations of other houses constructed by Roberts Construction. The record does not show Plaintiffs' use of the photographs was so "expansive" as to be unfairly prejudicial, and the trial court did not abuse its discretion by finding the probative value of the evidence was not substantially outweighed by any unfair prejudice to Defendants. *See State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996) ("trial court may be reversed for an abuse of discretion only upon a showing that its ruling could not have been the result of a reasoned decision").

II

Fraud

[2] Defendants argue the record does not contain any evidence Roberts Construction had actual knowledge of structural defects in Plaintiffs' house at the time Plaintiffs purchased the house, and, therefore, a directed verdict should have been granted in favor of Roberts Construction on Plaintiffs' fraud claim. We disagree.

A defendant is entitled to a directed verdict when, viewing the evidence in the light most favorable to the plaintiff, there is no substantial evidence to support the plaintiff's claim. *Cobb v. Reitter*, 105 N.C. App. 218, 220-21, 412 S.E.2d 110, 111 (1992). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

The elements of fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3)

structed by Roberts Construction that did not have cracks in the floors or foundations. Defendants, however, did not offer or attempt to offer this evidence at trial, and the trial court's exclusion of this evidence, therefore, is not properly before this Court. *See id.*

made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Brickell v. Collins*, 44 N.C. App. 707, 710, 262 S.E.2d 387, 389, *disc. review denied*, 300 N.C. 194, 269 S.E.2d 622 (1980). Further, the false representation must relate to facts of which the defendant had actual knowledge, *id.* at 711-712, 262 S.E.2d at 390, and actual knowledge may be shown by circumstantial evidence admitted pursuant to Rule 404(b), N.C.G.S. § 8C-1, Rule 404(b) (evidence of other acts admissible to show knowledge); *State v. Sisk*, 123 N.C. App. 361, 368, 473 S.E.2d 348, 353 (1996) (evidence of other forged checks cashed by defendant or her boyfriend admissible under Rule 404(b) to show defendant's knowledge that the check in question was forged), *aff'd in part and review dismissed in part*, 345 N.C. 749, 483 S.E.2d 440 (1997); *State v. Gregory*, 32 N.C. App. 762, 764, 233 S.E.2d 623, 624 (evidence defendant had on a previous occasion received stolen goods admissible under Rule 404(b) to show defendant knew goods in question were stolen), *disc. review denied*, 292 N.C. 732, 236 S.E.2d 701 (1977).

In this case, Plaintiffs presented evidence regarding cracks in approximately thirty other houses constructed by Roberts Construction between 1994 and 1996. These other houses were constructed using the same slab on grade method used by Roberts Construction to construct Plaintiffs' house, and Wilson testified these houses contained cracks in their foundations and floors that were similar to the cracks found in Plaintiffs' house. Additionally, Wilson testified that, similar to Plaintiffs' house, these other houses did not meet various building code standards for average PSI, concrete thickness, and compaction below the slab. Based on this evidence of cracks in the floors and foundations of these other houses, a reasonable person could find Roberts Construction had actual knowledge of structural defects in Plaintiffs' house at the time Plaintiffs purchased their house.[3] Accordingly, the trial court properly denied Defendants' motion for a directed verdict on the issue of fraud.[4]

3. Defendants argued to this Court the evidence of the cracks in the other houses constructed by Roberts Construction was not properly admitted under Rule 404(b) to prove knowledge by Roberts Construction that Plaintiffs' house was constructed with structural defects because there is no evidence Defendants had knowledge of these other defects. Although this issue was not raised in the trial court and thus is not properly before this Court, N.C.R. App. P. 10(b)(1), we nonetheless note there is no requirement under Rule 404(b) that the record contain evidence Roberts Construction had knowledge of the structural defects in the other houses in order for this evidence to be admissible to show Roberts Construction had actual knowledge of the structural defects in Plaintiffs' house. *See Sisk*, 123 N.C. App. at 368, 473 S.E.2d at 353.

4. Defendants do not contend there is insufficient evidence of the additional elements of fraud and we, therefore, do not address these other elements. *See* N.C.R. App. P. 28(b)(5).

III

Unfair and Deceptive Trade Practices

[3] Defendants argue the trial court erred by entering judgment against Roberts Construction and Bobby Roberts for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. We disagree.

Roberts Construction

"Proof of fraud . . . necessarily constitute[s] a violation of the prohibition against unfair and deceptive acts" under section 75-1.1. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

In this case, the trial court based its conclusion of law that Roberts Construction had engaged in unfair and deceptive trade practices, in pertinent part, on the judgment for fraud entered against Roberts Construction. Judgment for violation of section 75-1.1 was, therefore, properly entered against Roberts Construction.

Bobby Roberts

In this case, the trial court based its conclusion of law Bobby Roberts had engaged in unfair and deceptive trade practices on the following three findings by the jury: (1) Bobby Roberts "[e]ngage[d] in the profession of general contractor with respect to [Plaintiffs' house] without having obtained a general contractor's license as required by law"; (2) Bobby Roberts "[c]onceal[ed] material facts relevant to [Plaintiffs' house] from . . . Plaintiffs which he knew at the time of purchase that . . . Plaintiffs could not discover in the exercise of due diligence"; and (3) Bobby Roberts "[f]alsely represent[ed] to . . . Plaintiffs that [Plaintiffs' house] had been constructed in substantial conformity with plans and specifications approved [for the house]."

Defendants argue in their brief to this Court that a judgment for unfair and deceptive trade practices may not be based upon Bobby Robert's "lack of an appropriate general contractor's license"; however, Defendants do not argue in their brief to this Court that the other two grounds cited by the trial court are insufficient to support a judgment for unfair and deceptive trade practices. The sufficiency of these other two grounds, therefore, is not properly before this Court. *See* N.C.R. App. P. 28(b)(5). Accordingly, assuming, without deciding, that the failure of Bobby Roberts to obtain a general contractor's license is insufficient to support a claim for unfair and

deceptive trade practices, the unfair and deceptive trade practices judgment is nevertheless supported by these other two grounds. *See Bailey v. Gooding*, 60 N.C. App. 459, 463, 299 S.E.2d 267, 270 (judgment based on more than one ground presumed valid when one ground is incorrect but other grounds are correct), *disc. review denied*, 308 N.C. 675, 304 S.E.2d 753 (1983).

IV

Negligence

[4] The elements of a cause of action for negligence are the existence of a legal duty, breach of that duty, and injury proximately resulting from the breach. *Hunt v. N.C. Depart. of Labor*, 348 N.C. 192, 195, 499 S.E.2d 747, 749 (1998).

The single issue raised by Defendants regarding Bryant Robert's negligence is whether the record contains substantial evidence Bryant Roberts was the general contractor for the construction of Plaintiffs' house.[5] Bobby Roberts and McFarland testified that Bryant Robert's general contractor's licence was used to build Plaintiffs' house. A reasonable person could find based on this evidence that Bryant Roberts was the general contractor for Plaintiffs' house. *See* N.C.G.S. § 87-1 (1999). Accordingly, the trial court properly denied Defendants' motion for directed verdict on the issue of Bryant Roberts' negligence.

V

Express Warranty

[5] Defendants argue Plaintiffs did not give written notice of the alleged breach of express warranty as required by the terms of the warranty and, therefore, Roberts Construction was entitled to a directed verdict on the issue of breach of express warranty. Plaintiffs contend their complaint filed in this case provided Roberts Construction with written notice.

An express warranty is contractual in nature, *Wyatt v. Equipment Co.*, 253 N.C. 355, 358, 117 S.E.2d 21, 24 (1960), and its

5. Defendants seem to concede that if Bryant Roberts was the general contractor for the construction of Plaintiffs' house then he owed Plaintiffs a duty to supervise the construction of the house, and we agree. *See Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 130, 177 S.E.2d 273, 280 (1970) (purpose of requiring licencing of general contractors under section 87-1 is to "protect the public from incompetent builders").

terms are therefore construed in accordance with their plain meaning, *Brown v. Scism*, 50 N.C. App. 619, 623, 274 S.E.2d 897, 899, *disc. review denied*, 302 N.C. 396, 276 S.E.2d 919 (1981).

In this case, the breach of express warranty alleged by Plaintiffs is that their house was not "constructed in substantial conformity with the plans and specifications . . . which have been approved [for the house]." The terms of the express warranty state Plaintiffs must give written notice of such alleged breach to Roberts Construction "within one year from the date of original conveyance of title." Assuming, without deciding, that service of a complaint is sufficient to give written notice under the terms of the parties' express warranty, Plaintiffs' complaint does not allege Roberts Construction failed to construct Plaintiffs' house "in substantial conformity with the plans and specifications . . . which have been approved [for the house]."[6] The complaint, therefore, did not provide Roberts Construction with notice of this alleged breach. Accordingly, because the record does not contain any evidence Plaintiffs provided Roberts Construction with written notice of the alleged breach, Roberts Construction was entitled to a directed verdict on the issue of breach of express warranty.

VI

Implied Warranty of Habitability

[6] Defendants argue there is no evidence in the record that the existence of cracks in Plaintiffs' house created a breach of the implied warranty of habitability. We disagree.

The doctrine of implied warranty of habitability requires that a dwelling and all of its fixtures be "sufficiently free from major structural defects, and . . . constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction." *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). The test for breach of implied warranty of habitability is "whether there is a failure to meet the prevailing standard of workmanlike quality" in the construction of the house, and whether a defendant has breached the implied warranty of habitability is a question of fact to be determined by the jury. *Gaito v. Auman*, 313 N.C. 243, 252, 327 S.E.2d 870, 877 (1985).

6. While Plaintiffs' complaint did allege other theories of breach of express warranty against Roberts Construction, those theories were not submitted to the jury in this case.

In this case, Wilson testified regarding numerous cracks in the interior and exterior of Plaintiffs' house, including cracks in the floor, foundation wall, and sheetrock. Wilson stated Plaintiffs' foundation did not conform to the minimum requirements of the building code and plans, and the construction of the foundation created a "major structural defect." Based on this evidence, a reasonable juror could find Plaintiffs' house was not free from major structural defects, and the foundation was not constructed in a workmanlike manner. Accordingly, the trial court properly denied Defendants' motion for a directed verdict on the issue of breach of implied warranty of habitability.

Defendants have raised other arguments in their brief to this Court. We either reject these arguments as being without merit or refuse to address them because they are in violation of Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 28(b)(5).

Reversed in part and affirmed in part.

Judges TIMMONS-GOODSON and HORTON concur.

LIVING CENTERS-SOUTHEAST, INC., LUTHERAN RETIREMENT CENTER-WILMINGTON INCORPORATED, AND NEW HANOVER HEALTH CARE CENTER, L.L.C., PETITIONERS V. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT AND THE DEVIN PARTNERSHIP AND DEVIN HEALTH CARE ASSOCIATES LLC, LIVING CENTERS-SOUTHEAST, INC., LUTHERAN RETIREMENT CENTER-WILMINGTON INCORPORATED, AND NEW HANOVER HEALTH CARE CENTER, L.L.C., RESPONDENT-INTERVENORS

No. COA99-795

(Filed 5 July 2000)

Hospitals and Other Medical Facilities— certificate of need—nursing facility beds—summary judgment by ALJ

A certificate of need case involving nursing facility beds was remanded for a full adjudicatory hearing by OAH where an administrative law judge granted motions for summary judgment and the Department issued its final agency decision without hearing

new evidence. A full adjudicatory hearing is appropriate in a certificate of need contested case involving two or more applicants; there will always be genuine issues of fact as to who is the superior applicant where two or more applicants conform to the majority of the criteria in N.C.G.S. § 131E-183 and are reviewed comparatively and it is imperative that the record contain all evidence at the OAH level. The ALJ in this case neither reviewed the initial agency comparative analysis and award nor conducted one on her own and should not have rendered her recommended decision after only reviewing the conformity of each applicant with the criteria of N.C.G.S. § 131E-183.

Appeal by New Hanover Health Care Center, L.L.C., Lutheran Retirement Center-Wilmington, Inc., and Living Centers-Southeast, Inc., from a final agency decision entered 24 March 1999 by Lynda D. McDaniel, Director of Division of Facility Services for the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 27 March 2000.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mary Beth Johnston, for petitioner-appellant Living Centers-Southeast, Inc.

Smith Helms Mulliss & Moore, L.L.P., by Maureen Demarest Murray, for petitioner-appellant Lutheran Retirement Center-Wilmington Incorporated.

Parker, Poe, Adams & Bernstein, L.L.P., by Renée J. Montgomery, for petitioner-appellant New Hanover Health Care Center, L.L.C.

Attorney General Michael F. Easley, by Assistant Attorney General Staci Tolliver Meyer and Special Deputy Attorney General James A. Wellons, for respondent-appellee N.C. Department of Health and Human Services.

Poyner & Spruill, L.L.P., by William R. Shenton, for respondent-intervenor-appellee Devin Partnership and Devin Health Care Associates, L.L.C.

HUNTER, Judge.

Petitioners Living Centers-Southeast, Inc. ("LC-SE"), Lutheran Retirement Center-Wilmington, Inc. ("Lutheran"), and New Hanover Health Care Center, L.L.C. ("NHHC"), appeal a final agency decision

wherein the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section ("Department"), by summary judgment, denied each of their applications for a certificate of need and awarded it to Devin Partnership and Devin Health Care Associates, LLC ("Devin"). The certificate of need in question is for the construction of a nursing facility in New Hanover County. Each petitioner alleges that it is the only applicant to meet all of the statutory certificate of need requirements under N.C. Gen. Stat. § 131E-183, thus it should be granted the certificate of need. We remand for a full contested case hearing, which is required in a certificate of need contested case pursuant to N.C. Gen. Stat. § 131E-175, *et seq.*, ("CON Statute").

CERTIFICATE OF NEED LAW IN NORTH CAROLINA

First, we shall briefly review the history, purpose, and procedure involved in obtaining a certificate of need in North Carolina. "[A]fter Congress passed the National Health Planning and Resource Development Act of 1974 requiring a state certificate of need program as a prerequisite to obtaining federal health program financial grants, our General Assembly enacted [the CON Statute] in 1977." *Hospital Group of Western N.C. v. N.C. Dept. of Human Resources*, 76 N.C. App. 265, 267, 332 S.E.2d 748, 750 (1985). The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in North Carolina to those that are needed by the public and that can be operated efficiently and economically for its benefit. *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 345 S.E.2d 235 (1986); *see* N.C. Gen. Stat. § 131E-175 (1999).

Under the CON Statute, certificate of need applications are reviewed by the Department after the need for a health care service has been identified. Applications which are received by the Department are normally reviewed for ninety days after the deadline established by the Department. N.C. Gen. Stat. § 131E-185(a) (1999). The Department's initial review consists of a two stage process, which

> is consistent with the language, purpose and overall scheme of the [CON statute].
>
> First, after the [Department] "batches" all applications for competing proposals, the [Department] must review each application independently against the [N.C. Gen. Stat. § 131E-183] criteria (without considering the competing applications) and

> determine whether it "is either consistent with or not in conflict with these criteria." G.S. § 131E-183(a). . . .
>
> Second, after each application is reviewed on its own merits, the [Department] must decide which of the competing applications should be approved. This decision may include not only whether and to what extent the applications meet the statutory and regulatory criteria, but it may also include other "findings and conclusions upon which it based its decision." G.S. § 131E-186(b). Those additional findings and conclusions give the [Department] the opportunity to explain why it finds one applicant preferable to another on a comparative basis. . . .

Britthaven, Inc. v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460-61, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). The statutory criteria to be reviewed in the first stage include, among other things, documentation of the needs of the subject population, the applicant's financial and operational projections, the availability of necessary resources, and demonstration that the cost, design, and means of the proposed construction represent the most reasonable alternative. N.C. Gen. Stat. § 131E-183(3), (5), (7), (12) (1999). When the review period ends as provided in N.C. Gen. Stat. § 131E-185, the Department must "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). The Department's decision to approve, approve with conditions, or deny an application for a certificate of need is based upon its determination of whether the applicant has complied with the statutory criteria contained in N.C. Gen. Stat. § 131E-183(a) and rules adopted by the agency contained in 10 North Carolina Administrative Code § 3 R.1100, *et seq.* (1991). *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459. After the initial decision has been made, the Department issues a certificate of need within thirty-five days, provided that no request for a contested case hearing has been filed 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(a) (1999).

The CON Statute provides that a person affected by the award of a certificate of need may file a petition under the Administrative Procedure Act ("APA"), entitling him to a contested case hearing in the Office of Administrative Hearings ("OAH"). N.C. Gen. Stat. § 131E-188(a) (1999). Once this request has been made, the initial

Department award of the certificate of need in question must undergo review in the OAH by an administrative law judge ("ALJ"). N.C. Gen. Stat. § 131E-188(a)(1). Once the contested case petition is filed, an ALJ is assigned within fifteen days, and the parties are required to complete discovery within ninety days after the assignment of the ALJ. N.C. Gen. Stat. § 131E-188(a)(2). Within forty-five days after the end of the discovery period, a "hearing at which sworn testimony is taken and evidence is presented shall be held," and the ALJ must make a non-binding recommended decision within seventy-five days after the hearing. N.C. Gen. Stat. § 131E-188(a)(3), (4). After the recommended decision has been issued, the ALJ compiles an official record in the case, which contains:

(1) Notices, pleadings, motions, and intermediate rulings;

(2) Questions and offers of proof, objections, and rulings thereon;

(3) Evidence presented;

(4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and

(5) Repealed . . . .

(6) The administrative law judge's recommended decision or order.

N.C. Gen. Stat. § 150B-37(a)(1)-(6) (1999). Once the Department receives the official record, it is required to a make a final decision in the case within thirty days. N.C. Gen. Stat. § 131E-188(a)(5). "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).

FACTS

The facts relevant to the present appeal indicate that in 1997, the State Medical Facilities Plan identified the need for 110 additional nursing facility beds for New Hanover County. Devin, LC-SE, Lutheran, and NHHC, along with several other applicants, filed applications with the Agency for a certificate of need pursuant to this plan.

In its initial decision dated 28 January 1998, the Department found that LC-SE conformed to all certificate of need criteria under

N.C. Gen. Stat. § 131E-183, but that Devin, Lutheran, and NHHC did not conform to all criteria. Nevertheless, the Department determined that Devin's application was comparatively superior to all others and granted Devin the certificate of need subject to thirteen conditions. After this initial decision had been entered, LC-SE, Lutheran and NHHC filed petitions for a contested case hearing. These cases were consolidated for hearing and each party was granted permission to intervene in the other parties' contested case.

NHHC filed a motion for summary judgment against Devin, arguing that Devin failed to demonstrate conformity with N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5"), as a matter of law. Criterion 5 provides that an applicant must provide financial and operational projections for the project which "demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal." N.C. Gen. Stat. § 131E-183(a)(5) (1999). The ALJ heard the motions regarding Devin's application on 2 June 1998. She granted NHHC's motion and entered an "interlocutory" recommended decision that Devin's application be denied on summary judgment, finding that Devin did not conform with Criterion 5, and that no genuine issues of material fact existed. In her conclusions of law, the ALJ stated:

> 8. The CON Section is authorized pursuant to N.C.G.S. § 131E-186(a) to approve a CON application with conditions; however, in a competitive review, it is arbitrary and capricious for the Agency to use conditions to obtain statutorily required information to complete a nonconforming application. To do so places the conditionally-approved nonconforming applicant at an unfair advantage over the unapproved nonconforming applicants. N.C.G.S. § 131E-183(a) requires that the Agency determine that ". . . an *application* is either consistent with or not in conflict with these [statutory] criteria before a certificate of need for the proposed project shall be issued." (Emphasis added.) . . . .

In her final conclusion of law concerning Devin's application, the ALJ stated: "Because this recommended decision addressed one issue in this contested case, the undersigned concluded that it was interlocutory in nature and therefore, not subject to review for final agency decision at that time."

Summary judgment motions on the other applications were heard on 18 September 1998, and the ALJ entered a "final" recommended

decision on 24 November 1998 where she restated the interlocutory decision regarding Devin's application, and awarded summary judgment against LC-SE, Lutheran, and NHHC, contending that none of them complied with all of the criteria in N.C. Gen. Stat. § 131E-183, and thus should not be awarded the certificate of need. The ALJ did not review the Department's initial comparative analysis of the applications and award. Apparently, because the ALJ determined that no applicant satisfied the statutory criteria based on summary judgment motions, a comparative analysis and award was not necessary in her recommended decision.

On 24 March 1999, Lynda D. McDaniel, the Director of Facility Services for the Department, entered a final agency decision as required under the APA, wherein the ALJ's recommended decision was rejected. The final agency decision denied the motion for summary judgment against Devin's application, which had been recommended by the ALJ. It stated that Devin had properly been granted the certificate of need subject to certain conditions in the initial decision and that Devin was comparatively superior to all other applicants in the initial comparative review. The final agency decision determined that LC-SE conformed to all criteria under N.C. Gen. Stat. § 131E-183, and rejected the recommended summary judgment against LC-SE, as it concluded that there was an issue of fact as to whether LC-SE had amended its application based on restructuring of LC-SE's parent corporation, and an amendment is prohibited under *Presbyterian-Orthopaedic Hosp. v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 537, 420 S.E.2d 831, 836, (1996), *review improv. allowed*, 346 N.C. 267, 485 S.E.2d 294 (1997). The final agency decision stated that summary judgment against Lutheran's and NHHC's applications was proper because, as a matter of law, they did not conform to all statutory criteria. Thus, the final agency decision awarded the certificate of need to Devin. Petitioners appeal the final agency decision.

STANDARD OF REVIEW

Trial and appellate court review of administrative agency decisions are governed by the APA, N.C. Gen. Stat. § 150B-1 *et seq. See Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 596, 446 S.E.2d 383, 387, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). This Court must first make two determinations when reviewing a final decision in a contested case in which an ALJ made a recommended decision:

> 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 recommended 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).

Dialysis Care of N.C. v. N.C. Dept. of Health and Human Services, 137 N.C. App. 638, 644-45, 529 S.E.2d 257, 260-61 (2000). If the case passes our review under this statute, thereafter our standard of review is governed by N.C. Gen. Stat. § 150B-51(b). This statute provides, in pertinent part, that we may (1) affirm the agency's decision; (2) remand the case for further proceedings; or, (3) modify or reverse the decision of the Department if the petitioners' substantial rights may have been prejudiced because the Department'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, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b)(1)-(6) (1999).

Application

First, we note that our review under N.C. Gen. Stat. § 150B-51(a) indicates that the Department did not hear new evidence after receiving the recommended decision from the ALJ, and that its decision states the specific reasons why the agency did not adopt the rec-

ommended decision. Therefore, we are governed by N.C. Gen. Stat. § 150B-51(b). We have considered this issue, and based on our review and pursuant to N.C. Gen. Stat. § 150B-51(b), we choose to remand the case at bar for further proceedings in the form of a full adjudicatory hearing in the OAH.

Our General Assembly has chosen to give a losing applicant in an initial decision for a certificate of need the opportunity to have the decision reviewed in a contested case hearing before an ALJ. *See* N.C. Gen. Stat. § 131E-188(a). The CON Statute provides, in pertinent part: "The hearing at which sworn testimony is taken and evidence is presented *shall* be held within 45 days after the end of the discovery period." N.C. Gen. Stat. § 131E-188(a)(3) (emphasis added). "[O]rdinarily, the word "must" and the word "shall," in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory . . . . *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978). " 'In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.' " *In re Easement in Fairfield Park*, 90 N.C. App. 303, 309, 368 S.E.2d 639, 642 (1988) (quoting *State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E.2d 706, 718 (1972)). Our review of the individual statutes within the CON Statute, *in pari materia*, indicates that this article grants applicants a full contested case hearing at which they are allowed to present testimony and evidence contained in their applications.

This process also protects the applicants' due process rights. The United States Supreme Court has held, in a similar factual scenario that "where two bona fide applications are mutually exclusive" in the application process for a construction permit under the Federal Communications Act, "the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Ashbacker Radio Corp. v. Federal Com. Com.*, 326 U.S. 327, 333, 90 L. Ed. 108, 113 (1945). Similarly, our General Assembly chose to give disenfranchised applicants for a certificate of need an opportunity to be heard in a full adjudicatory hearing under the CON Statute. N.C. Gen. Stat. § 131E-175, *et. seq.*

Based on the foregoing authority, a full adjudicatory hearing is appropriate in a certificate of need contested case involving two or more applicants. Additionally, we believe that it is inherent that where two or more certificate of need applicants *conform to the*

majority of the criteria in N.C. Gen. Stat. § 131E-183, as in the case at bar, and are reviewed comparatively, there will always be genuine issues of fact as to who is the superior applicant. Our reasoning is in accord with the CON Statute, which does not contemplate the preclusion of a full contested case hearing in a certificate of need case due to a recommended decision of summary judgment by the ALJ. Additionally, because the Department can only base its final decision on the official record developed in the OAH, it is imperative that the record contain all evidence at this level. We recognize that the evidence presented to the ALJ is "limited to the evidence that is presented or available to the [Department] during the [initial] review period." *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (*citing In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 355 S.E.2d 788, *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987); *see also* 2 Am. Jur. 2d, *Administrative Law* § 299 (1994) ("[U]pon resumption of formal proceedings all evidence presented in the informal proceeding becomes part of the record of the formal proceeding")). However, this limitation does not preclude a full adjudicatory hearing as required by the CON Statute.

We note that the ALJ in the present case neither reviewed the initial agency comparative analysis and award, nor conducted one on her own. This was error, as "[t]he subject matter of a contested case hearing by the ALJ is an agency decision." *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459. Thus, the ALJ should not have rendered her recommended decision after only reviewing the conformity of each applicant with the criteria in N.C. Gen. Stat. § 131E-183. To the contrary, she should have reviewed the Department's full initial decision, which follows the two-stage process which we have quoted from *Britthaven*.

Based on the foregoing, we remand the present case to the Department, which shall remand to the OAH for a full adjudicatory hearing in accordance with this opinion. Our ruling is in accordance with the CON Statute, as it protects the applicants' due process rights, allows the record to be fully developed, and encourages judicial economy.

We note that "even though an appeal is fragmentary and premature, the appellate court may exercise its discretionary power to express an opinion upon the question which appellant has attempted to raise." *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 102 N.C. App. 809, 812, 403 S.E.2d 597, 599 (1991) (citing *Cowart v. Honeycutt*, 257 N.C. 136, 140, 125 S.E.2d 382, 385 (1962)). Many of the

assignments of error in the present appeal concern the issue of whether or not a certificate of need may be found to conform to the statutory criteria in N.C. Gen. Stat. § 131E-183 based on conditional approval, and most of them particularly concern Criterion 5. While we do not express an opinion at this time as to whether any of the applicants in the case at bar may conform with statutory criteria due to a conditional approval, we direct the parties to our recent holdings in *Burke Health Investors v. N.C. Dept. of Human Resources*, 135 N.C. App. 568, 522 S.E.2d 96 (1999), and *Dialysis Care of N.C. v. N.C. Dept. of Health and Human Services*, 137 N.C. App. 638, 529 S.E.2d 527 (2000).

Due to our holding, we do not address any of the other issues presented by petitioners. Accordingly, this case is remanded for proceedings in accordance with this opinion.

Remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

JACK K. MILLER, PLAINTIFF v. BILL AND JULEE ROSE, DEFENDANTS

No. COA99-432

(Filed 5 July 2000)

1. Contracts— action for breach—no meeting of the minds

The trial court did not err by entering summary judgment in favor of defendants on a breach of contract claim in a case where a written instrument containing the exact terms of the parties' understanding was never executed, because viewing the evidence in the light most favorable to plaintiff reveals, at most, an understanding between the parties that should defendants obtain suitable financing for the pertinent beach condominium, the parties would enter into a partnership agreement in the future since: (1) the parties never had a concrete understanding or a meeting of the minds concerning the matter of financing; and (2) the financing issue was essential to the proposed deal in order to determine the amount of each party's financial responsibility.

2. Trusts— resulting—no binding agreement

The trial court did not err by entering summary judgment in favor of defendants on plaintiff's claim that the pertinent beach condominium was subject to a parol resulting trust, because: (1) the parties did not have a binding agreement; and (2) none of plaintiff's money or assets were actually used in purchasing the property.

3. Trusts— constructive—no position of trust or confidence

The trial court did not err by entering summary judgment in favor of defendants on plaintiff's claim that the pertinent beach condominium was subject to a constructive trust, because there is no evidence that defendants acted fraudulently in their dealings with plaintiff or that they stood in a position of trust or confidence regarding plaintiff.

4. Unfair Trade Practices— breach of contract—insufficient

The trial court did not err by dismissing defendants' claim for unfair and deceptive trade practices based on plaintiff's alleged failure to keep his promise to assist defendants in purchasing a beach condominium because a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1(a).

Appeal by plaintiff from order entered 29 October 1998 and cross-appeal by defendants from order entered 6 November 1998 by Judge L. Todd Burke in Superior Court, Forsyth County. Heard in the Court of Appeals 12 January 2000.

Smith and Combs, by Steven D. Smith, for plaintiff-appellant/cross-appellee.

McCall Doughton & Blancato, PLLC, by Thomas J. Doughton, for defendant-appellee/cross-appellant.

TIMMONS-GOODSON, Judge.

Plaintiff, Jack K. Miller, appeals from an order of the trial court granting summary judgment to defendants, Bill and Julee Rose, on plaintiff's claims for breach of contract and creation of a parol resulting trust. Defendants cross-appeal from an order dismissing their counterclaim against plaintiff for unfair and deceptive trade practices. Based upon our examination of the record, we conclude that

the orders of summary judgment and dismissal were properly entered.

The evidence, taken in the light most favorable to plaintiff, tends to show the following facts: In or around January of 1996, plaintiff negotiated a "Reservation Agreement" with Winchester Land and Development Corporation, which had begun construction of a condominium complex known as "Sea Watch Plantation," located in Myrtle Beach, South Carolina. The Reservation Agreement entitled plaintiff to purchase condominium Unit #606 for a price of $224,900.00, provided that he deposit $5,000.000 into an escrow account with Anchor Bank. The reservation right was also contingent upon plaintiff executing a Purchase Contract for the unit within ten days of receiving said contract from the developer. After paying the $5,000.00 deposit to reserve the unit, plaintiff attempted to enlist a partner to join in the purchase of the property.

Plaintiff approached defendants about such an endeavor in or around August of 1996. Under the proposed arrangement, defendants would obtain financing to purchase the unit and would make the initial down payment. Defendants would thereupon hold legal title to the property. Then, in exchange for a 50% ownership interest, plaintiff would assume all monthly mortgage payments on the property and would be responsible for leasing and maintaining the condominium. Plaintiff would receive all rental income from the property and would apply that income toward the mortgage payments and the property's maintenance. In addition, plaintiff proposed that on some future date to be determined by the parties, the property would be sold and the proceeds divided equally between the parties. A written instrument containing the exact terms of the parties' understanding was never executed.

Shortly after negotiations between the parties began, plaintiff released his right to purchase Unit #606 and received a refund of his $5,000.00 deposit. Then, in September of 1996, defendants executed a contract to purchase the unit at a price of $224,900.00 and tendered a check in the amount of $22,490.00 as a down payment toward the purchase. Defendants sent a copy of the purchase agreement and the down payment check to plaintiff, with a note indicating what action they had taken toward purchasing the property. Defendants thereafter made several attempts to obtain financing for the remaining 90% of the purchase price, but were unsuccessful. Because plaintiff, who had been involved in other similar ventures, repeatedly assured defendants that such financing was available, defendants attempted

to contact him to inquire as to which lenders would finance 90%. When plaintiff failed to assist them in obtaining the desired financing, defendants became disenchanted with the proposed arrangement and decided not to consummate the deal. Defendants closed on the property in September of 1997 and have since paid all monthly mortgage installments, homeowners' dues, and property taxes.

On 20 October 1997, plaintiff filed a complaint alleging breach of contract and the existence of a parol trust with respect to Unit #606. Defendants answered and alleged counterclaims for breach of contract and unfair and deceptive trade practices. Plaintiff replied and filed a motion to dismiss defendants' counterclaims pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. Defendants moved for summary judgment on the claims raised in plaintiff's complaint, and the court granted the motion by order dated 29 October 1998. Defendants voluntarily dismissed their claim for breach of contract, and on 6 November 1998, the trial court dismissed their claim for unfair and deceptive trade practices pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. From the order of summary judgment in favor of defendants, plaintiff appeals. Defendants cross-appeal from the order dismissing their claim for unfair and deceptive trade practices.

Plaintiff's Appeal

[1] Plaintiff's initial argument is that the trial court erred by entering summary judgment for defendants on plaintiff's claim for breach of contract. Plaintiff contends that the evidence, when considered in his favor, raised genuine and material issues of fact as to whether a partnership agreement existed between the parties. We cannot agree.

The purpose of summary judgment is to dispense with formal trials in cases where only legal issues remain "by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Elliott v. Duke University, Inc.*, 66 N.C. App. 590, 592, 311 S.E.2d 632, 634 (1984). On appeal from an order granting summary judgment, this Court must decide whether, on the basis of the pleadings, depositions, and other evidentiary materials presented to the trial court, there is any genuine issue of material fact and whether the claim in question may be resolved as a matter of law. *Stephenson v. Warren*, 136 N.C. App. 768, 771-72, 525 S.E.2d 809, 811 (2000). The burden on the moving party to show that no genuine issues of fact exist may be met "by proving that an essential element

of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce enough evidence to support an essential element of his claim." *Elliott*, 66 N.C. App. at 592, 311 S.E.2d at 634. Once this burden has been satisfied, "the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, establishing at least a prima facie case at trial." *Stephenson*, 136 N.C. App. at 772, 525 S.E.2d at 812.

Plaintiff argues that the parties entered into an oral partnership agreement or joint venture to purchase condominium Unit #606 for the purposes of leasing it to short-term occupants and selling it, at some future date, for a profit to be divided between the parties. Citing our Supreme Court's decision in *Potter v. Homestead Preservation Assoc.*, 330 N.C. 569, 412 S.E.2d 1 (1992), plaintiff maintains that the conduct of the parties is demonstrative of a valid partnership agreement and that such an agreement is not within the Statute of Frauds.

The plaintiff in *Potter* presented evidence tending to show that she held an option to buy two parcels of land and that she entered into an oral agreement with the defendants to develop the land on a partnership basis. Under the agreement, one partner "was to provide capital," another partner "was to handle the 'legal part,' " and the plaintiff and yet another partner "were to market lots or 'memberships." *Id.* at 572, 412 S.E.2d at 3. "Each partner was to own one-fourth interest in the property and profits from sales." *Id.* The defendants' holding company purchased the properties pursuant to the agreement and thereafter sold them for substantial profits. The plaintiff, however, did not receive a one-fourth share of the profits and brought an action against the defendants for breach of the partnership agreement.

Concluding that the trial court erred in directing a verdict for the defendants on the plaintiff's breach of contract claim, our Supreme Court noted the following:

> "A partnership may be formed by an oral agreement." Even without proof of an express agreement to form a partnership, a voluntary association of partners may be shown by their conduct. A finding that a partnership exists "may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such." "[A] course of dealing between the

> parties of sufficient significance and duration . . . along with other proof of the fact [may] be admitted as evidence tending to establish the fact of partnership, provided it has sufficient substance and definiteness to evince the essentials of the legal concept, including, of course, the necessary intent."

Id. at 576-77, 412 S.E.2d at 5-6 (citations omitted) (alterations in original). The Court determined that the plaintiff presented sufficient evidence of the formation and terms of the partnership agreement to raise a question of fact as to whether such an agreement existed. The Court further concluded that the absence of a writing was not fatal to the plaintiff's breach of contract claim:

> A partner's interest in partnership assets—including real property—is a personal property interest. As such, it is not subject to the statute of frauds. "[T]he general rule supported by the great preponderance of the authorities on the subject is that a parol partnership agreement or joint enterprise entered into by two or more persons for the express purpose of carrying on the business of purchasing and selling real estate, or interests therein, for speculation, the profits to be divided among the parties, is not within the statute of frauds relating to the sale of land or an interest in lands. In other words, such an agreement may be entered into, become effectual, and be enforced although not in writing."

Id. at 577, 412 S.E.2d at 6 (citations omitted) (alteration in original). While the *Potter* decision is instructive, it is not dispositive of the case before us, because plaintiff's evidence, unlike that presented in *Potter*, does not establish an agreement of sufficient definiteness to be legally enforceable.

"It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995). Regarding mutual assent, we have said that " '[t]here must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense and their minds must meet as to *all* the terms. If *any* portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.' " *MCB Limited v. McGowan*, 86 N.C. App. 607, 608-09, 359 S.E.2d 50, 51 (1987) (quoting *Croom v. Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921) (emphasis added)). To be enforceable, the terms of a contract must

be sufficiently definite and certain, *Brooks v. Hackney*, 329 N.C. 166, 170, 404 S.E.2d 854, 857 (1991), and a contract that " 'leav[es] material portions open for future agreement is nugatory and void for indefiniteness,' " *MCB Limited*, 86 N.C. App. at 609, 359 S.E.2d at 51 (quoting *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)). Therefore, when the plaintiff's forecast of evidence shows that the parties never reached a meeting of the minds as to the essential terms of the agreement, summary judgment in favor of the defendants is proper. *Elliott*, 66 N.C. App. at 596, 311 S.E.2d at 636.

Viewed in the light most favorable to plaintiff, the evidence establishes, at best, an understanding between the parties that should defendants obtain suitable financing, the parties would enter into a partnership agreement in the future. In his letter to defendants upon learning of their decision not to go forward with the deal, plaintiff wrote the following:

> The status of our agreement remains the same as presented to you and accepted by you some months ago (August of 1996). We still believe that we need to know the financing terms that you can secure before we work out the exact terms of this agreement. However, our general agreement remains that if you can secure ninety percent financing, then (in exchange for half the appreciation and credit for half of the principle payments), we agree to lease the unit from you at a rate that will pay 100% of the ongoing ownership costs and to fully pay the remaining principle over the next twenty years. Furthermore if you choose to purchase the unit with eighty percent financing then we agree to pay for the unit in only fifteen years or to pay you a deposit of up to $5,000.00 with some adjustment to the payment terms.

Regarding the issue of financing, plaintiff testified as follows:

> Q: Okay. And with respect to your deal, you had no specific agreement as to what type of financing they had to be able to obtain?
>
> A: Absolutely none. Well, they—we—there was a lot of talk about the financing, and there was a clear understanding about the financing.
>
> Q: So it didn't matter whether they got, you know, a thirty-year loan, a fifteen-year loan or a five-year loan? Whatever financing they got didn't matter?

A: They were—there was—if the financing changed over what—it was different than what—you know, normal commercial—what we would expect they might be able to get—then there would be the willingness on my part to renegotiate to some extent . . . .

Q: Okay. So you all didn't have a specific agreement as far as what the terms of the financing would be with respect to the number of years that it had to be financed or the interest rate that he had to be able to obtain or the down payment he was going to have to make; is that correct?

A: We both knew what kind of financing was available at the time. We both knew that, but we were not sure as to whether they—that we would be able to get it with the ten percent down—is really what it boils down to. . . . If it turns out to be some different financing, then I would be willing to look at that and perhaps concede some money on my part because we had made it clear up front a long time ago that I'm not going to put any money in. . . .

Q: Was there an agreement as to what type of interest rate the Roses had to be able to obtain?

A: No; none whatsoever.

Q: So if the bank was willing to make the Roses a loan at eighteen percent, you—are you saying they had to go through with the deal?

A: I'm not saying that I wouldn't have been willing, possibly, to say, "Well, you know, things have changed or something if it's that kind of high interest rate or something." But the Roses accepted that. They accepted that risk. . . . That was his problem—not mine—as to what the interest rate was going to be.

. . . .

Q: And if he got a one-year loan, that was fine?

A: The—

Q: And you were going to make all the payments on it?

A: Our deal said that. Now, I guess I would have been stuck big time if he had gone out and done that and I would have had to pay it off in a year or something . . . .

Q: So there was no agreement as far as how much or any type of cap on the amount of payments that you would have to make on a monthly basis.

A: No. No. We didn't actually discuss a cap of some kind of monthly payment; no.

Q: And, of course, you left open when you were going to sell the property in the future; correct?

A: That's true.

Despite plaintiff's claims to the contrary, it is evident from his deposition testimony that the parties never had a concrete understanding, or a meeting of the minds, concerning the matter of financing. The parties did not delineate what was acceptable in terms of the interest rate on the loan, the duration of the loan, or the percentage of the purchase price financed. The financing issue was essential to the proposed deal, because it would ultimately determine the amount of each party's financial responsibility, i.e., the amount of defendants' down payment and the amount of plaintiff's monthly payments. Failing to specify the financing particulars was, therefore, fatal to the formation of a binding agreement. Since there was no valid partnership agreement between the parties, summary judgment for defendants on plaintiff's breach of contract claim was entirely appropriate.

[2] Plaintiff argues next that he presented a sufficient evidentiary forecast to survive defendants' motion for summary judgment on plaintiff's claim that Unit #606 was subject to a parol resulting trust. Again, we must disagree.

In North Carolina, a resulting trust is created by operation of law:

> A resulting trust arises "when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another."

Patterson v. Strickland, 133 N.C. App. 510, 519, 515 S.E.2d 915, 920 (1999) (quoting *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783

(1982) (citation omitted)). As a general rule, " 'the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes.' " *Mims*, 305 N.C. at 47, 286 S.E.2d at 784 (quoting *Cline v. Cline*, 297 N.C. 336, 344, 255 S.E.2d 399, 404-05 (1979)). An enforceable promise to pay money toward the purchase price made prior to title passing, and subsequent payment made pursuant to that promise, may serve as adequate consideration to support a resulting trust. *Cline*, 297 N.C. at 346, 255 S.E.2d at 406. However, in such a case, a valid agreement must exist between the grantee and the professed trust beneficiary, *see Anderson v. Anderson*, 101 N.C. App. 682, 685, 400 S.E.2d 764, 766 (1989) (stating that where plaintiff claimed resulting trust based on promise to pay, trial court was correct in considering whether valid agreement existed), and "[the alleged beneficiary's] money must have actually been used toward the purchase of the property," *Patterson*, 133 N.C. App. at 519, 515 S.E.2d at 921. Moreover, the party seeking to establish a trust has the burden of proving its existence "by clear, strong, and convincing evidence." *Keistler v. Keistler*, 135 N.C. App. 767, 769, 522 S.E.2d 338, 340 (1999).

In the instant case, the evidence is undisputed that the initial down payment, the closing costs, and all monthly payments on the property were made by or on behalf of defendants. While it is true that plaintiff originally paid $5,000.00 to reserve the unit, those funds were later refunded to plaintiff and were not applied toward the purchase of the property. Thus, given our conclusion that the parties did not have a binding agreement, and given that none of plaintiff's money or assets were actually used in purchasing the property, a resulting trust with respect to Unit #606 did not arise.

[3] As to plaintiff's contention that he presented sufficient evidence of a constructive trust, we note that such a trust " 'arises when one obtains the legal title to property in violation of a duty he owes to another.' " *Id.* at 510, 515 S.E.2d at 921 (quoting *Fulp v. Fulp*, 264 N.C. 20, 22, 140 S.E.2d 708, 711 (1965)). " 'Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship.' " *Id.* (quoting *Fulp*, 264 N.C. at 22, 140 S.E.2d at 711). The record is devoid of any evidence that defendants acted fraudulently in their dealings with plaintiff or that they stood in a position of trust or confidence regarding plaintiff. This argument then must fail, and summary judgment for defendants was properly entered.

Defendants' Appeal

[4] By their appeal, defendants argue that the trial court erred in dismissing their claim for unfair and deceptive trade practices pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. We disagree.

A motion to dismiss 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 when, among other things, the face of the pleading reveals that some fact essential to the claim is absent. *Peterkin v. Columbus County Bd. of Educ.*, 126 N.C. App. 826, 828, 486 S.E.2d 733, 735 (1997). 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.

Under section 75-1.1(a) of our 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). "A 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." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). A deceptive practice is one that " 'possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception.' " *Poor v. Hill*, 138 N.C. App. 19, 28-29, 530 S.E.2d 838, 845 (2000) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). Nevertheless, "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [section 75-1.1 of the General Statutes]." *Gray v. N.C. Ins. Underwriting Assoc'n*, 132 N.C. App. 63, 71, 510 S.E.2d 396, 401 (1999). "Substantial aggravating circumstances attendant to the breach must be shown." *Id.*

In their action for unfair and deceptive trade practices, defendants allege that plaintiff promised to assist them in purchasing a condominium at Sea Watch Plantation. According to defendants, plaintiff assured them that they "would be able to purchase the condominium by paying only ten percent (10%) down and receiving ninety percent (90%) financing." Defendants contend that plaintiff further promised that if they "were unable to obtain 90% financing, he would pay the

additional 10% down plus one-half the closing cost . . ." Defendants aver that when it became clear that they would be able to obtain only 80% financing, plaintiff refused to pay 10% of the down payment or help them to obtain the 90% financing.

Defendants' claim, at most, is a simple breach of contract, as they have failed to allege any substantially aggravating circumstances which would give rise to an unfair or deceptive practices claim. Consequently, the trial court committed no error by dismissing the claim under Rule 12(b)(6).

In sum, we hold that the pleadings, depositions, and other evidence of record failed to demonstrate a triable issue of fact with respect to plaintiff's breach of contract or parol trust claims. Additionally, we hold that defendants' counterclaim for unfair and deceptive trade practices was insufficiently plead. For these reasons, the order of summary judgment and the order of dismissal are

Affirmed.

Judges MARTIN and HORTON concur.

GRANVIL PEAGLER, EMPLOYEE-PLAINTIFF v. TYSON FOODS, INC., SELF INSURED, SELF ADMINISTERED, EMPLOYER-DEFENDANT

No. COA99-618

(Filed 5 July 2000)

1. Workers' Compensation— causation—work-related accident

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff established his condition was caused by a work-related incident because: (1) a doctor testified that the 28 April 1993 incident at work could have produced plaintiff's disc injury, and all that is necessary is that an expert express an opinion that a particular cause was capable of producing the injurious result; and (2) the doctor's testimony is corroborated by other testimony, including plaintiff's testimony that he had never had any problems with his back or neck before the night of 28 April 1993 and his onset of pain was simultaneous with the incident.

2. Workers' Compensation— temporary total disability—diminished earning capacity—unable to perform work of any kind

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff-employee temporary total disability based on its conclusion that plaintiff was unable to perform work of any kind because: (1) at the time of injury to his back and neck, plaintiff was fifty-six years old, educated only through the third grade level and illiterate, and suffered from diabetes; and (2) defendant-employer did not provide plaintiff with any vocational counseling or rehabilitation services.

3. Workers' Compensation— witness credibility—determination by full Commission

The Industrial Commission did not fail to make sufficient findings of fact regarding the testimony of defendant-employer's witnesses in a workers' compensation case regarding plaintiff's failure to report the work-related injury and his wife's statement to one witness that the injury may have been caused by plaintiff's work at home, because: (1) there is no showing the Commission ignored the testimony of defendant's witnesses; (2) the findings of fact show the Commission realized that plaintiff did not initially report his work-related injury to his co-workers or to the benefits department; (3) the Commission's opinion and award reveals that it accepted the injury was caused by plaintiff's work-related incident and thereby rejected contrary testimony offered by one witness that the injury may have been caused by his repair work at home; and (4) the Commission considered all of the evidence before it, and it was not required to make an express finding that it did so.

4. Workers' Compensation— notice of accident—failure to give timely written notice—reasonable excuse—no prejudice

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's failure to give timely written notice of the accident was reasonable, and in concluding that defendant-employer was not prejudiced by the delay, because: (1) a reasonable excuse may be established where the employee does not initially know of the nature or probable compensable character of his injury, and the evidence indicated plaintiff did not initially understand the nature or character of his injury; (2) plaintiff relied on his wife to communicate with his

employer while he was undergoing medical treatment, and defendant's benefits employees gave the wife disability forms without asking her whether her husband had experienced a work-related injury or whether this was a workers' compensation claim; and (3) defendant-employer did not meet its burden to present evidence to show how it was prejudiced by the delay. N.C.G.S. § 97-22.

5. Workers' Compensation— disability payments—employer's entitlement to a credit

The Industrial Commission erred in a workers' compensation case by concluding that defendant-employer was not entitled to a credit for disability payments to plaintiff-employee under N.C.G.S. § 97-42, because: (1) plaintiff received $2,506 in disability compensation; (2) the disability compensation plan was entirely funded by the employer; and (3) the evidence does not indicate the employee contributed to this disability plan.

Appeal by defendant from opinion and award of the full North Carolina Industrial Commission filed 7 January 1998. Heard in the Court of Appeals 27 March 2000.

James S. Weidner, Jr. for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, PC, by Maureen Tierney Orbock, for defendant-appellant.

EAGLES, Chief Judge.

Defendant Tyson Foods, Inc. appeals from an order of the Industrial Commission awarding the plaintiff workers' compensation benefits for a work-related injury which occurred on 28 April 1993.

Evidence before the Commission included the following: Plaintiff Granvil Peagler began working for Defendant Tyson Foods in 1985. Mr. Peagler had dropped out of school after the third grade and was illiterate. At Tyson Foods, Mr. Peagler's job entailed washing out eighteen wheeler refrigeration trucks, checking the tire pressure and fuel level, and moving the trucks as needed. On 28 April 1993, plaintiff, age fifty six, was working during his shift when he had difficulty closing one of the rear doors on a refrigeration truck. Plaintiff stood on the bumper of the truck and struck the lock on the trailer door with his left hand, which immediately caused pain in his arm. Plaintiff went to the employer's medical department and bought two Tylenol

tablets for the pain. The next morning, while at work, plaintiff experienced pain in his arm, shoulder, and chest. Plaintiff went to the medical department and told the personnel on duty that he needed to go see his doctor. He then left work to visit his family doctor, Dr. Willis.

Over the next few days, plaintiff was examined by several different physicians. The doctors initially thought that plaintiff might have had a heart attack. However, after an MRI on 4 May 1993, the doctors concluded that plaintiff suffered from a herniated disc. The test indicated that plaintiff had "cervical osteophytic spurring, mild disc stenosis, . . . a disc herniation at the C4-5 level, . . . and disc protrusions/herniations noted at the C3-4, C5-6 and C6-7 levels." On 24 May 1993, Dr. Darden, an orthopedic surgeon, operated on plaintiff for "a microscopic anterior cervical discotomy and fusion at C6-7, and a right anterior iliac crest bone graft."

Defendant placed plaintiff on disability medical leave after this incident. Plaintiff's wife went to the benefits department to renew his leave each month. However, Mrs. Peagler did not inform the defendant-employer's benefit counselor that her husband's injury was work-related.

Plaintiff filed a Notice of Accident on 14 April 1994 for the injury that occurred on 28 April 1993. Deputy Commissioner Mary M. Hoag concluded that the plaintiff sustained a compensable injury on 28 April 1993; that his failure to report his injury in a timely manner was excusable and defendants were not prejudiced by this delay; and that defendants were not entitled to a credit for the disability payments made to the plaintiff. The defendant appealed to the full Commission.

The full Commission affirmed the deputy commissioner's decision and ordered the defendant to pay plaintiff temporary total disability compensation, medical bills related to plaintiff's injury, and attorneys fees. The Industrial Commission's award is based on the following findings of fact:

> 30. According to Dr. Darden, plaintiff's attempt to close the truck doors on 28 April 1993 could have caused plaintiff's neck, left arm and shoulder injuries. However, plaintiff's disc degeneration at C4-5, C5-6, and C7 was more likely than not normal wear and tear. The aging process causes degenerative disc disease and that trauma can cause it to be symptomatic.
>
> . . . .

37. Plaintiff sustained an injury by way of specific traumatic injury of the work assigned on 28 April 1993. Plaintiff's problems related to his left arm, shoulder and neck, involving the herniation of a cervical disc at C6-7.

. . . .

39. . . . There is no evidence of record that plaintiff is able to perform work of any kind or to earn wages of any kind. Moreover, there is no evidence of record that any job exists for which plaintiff is suited given his educational and physical limitations, age and experience.

Defendant filed a motion for reconsideration on 5 February 1998, which the full Commission denied. Defendant appeals.

On appeal from an award of the Industrial Commission, the scope of our appellate review is limited to two questions: (1) whether the Commission's findings of fact are supported by competent evidence in the record; and (2) whether the findings of fact justify the Commission's conclusions of law. *See Sanders v. Broyhill Furniture Indus.*, 131 N.C. App. 383, 387, 507 S.E.2d 568, 570 (1998), *disc. review denied*, 350 N.C. 99, 528 S.E.2d 367 (1999). This Court does not weigh the evidence; if there is any competent evidence which supports the Commission's findings, we are bound by their findings even though there may be evidence to the contrary. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981). Furthermore, it is well established that the Worker's Compensation Act " 'should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation.' " *Hall v. Chevrolet Co.*, 263 N.C. 569, 576, 139 S.E.2d 857, 862 (1965) (citations omitted).

[1] We first consider whether the Industrial Commission erred in concluding that the plaintiff's medical condition and disability is the result of the 28 April 1993 incident. The defendant argues that the Commission erred in affirming the award of compensation because the plaintiff did not establish that his condition was caused by the work-related incident. In order for there to be a compensable claim for workers' compensation, there must be proof of a causal relationship between the injury and the employment. *See Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). The injury is compensable if " 'it is fairly traceable to the employment' or 'any reasonable relationship to the employment exists.' " *Rivera v. Trapp*, 135

N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999) (quoting *Shaw v. Smith and Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116, *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998)). In evaluating the causation issue, "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 . . . ." *Young v. Hickory Business Furniture*, 137 N.C. App. 51, 55, 527 S.E.2d 344, 348 (2000). "[W]hen conflicting evidence is presented, 'the Commission's finding of causal connection between the accident and the disability is conclusive.' " *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 655, 508 S.E.2d 831, 835 (1998) (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 275 (1965)).

Here, expert medical testimony was required to establish causation. This Court has stated "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 29, 514 S.E.2d 517, 522 (1999) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). In *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980), the Court determined that expert medical testimony was required to establish causation between a specific trauma and the rupture of the plaintiff's invertebral disc. *Click*, 300 N.C. at 169, 265 S.E.2d at 392. *See also Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965).

Here, the plaintiff's doctor, Dr. Darden, testified that he examined the plaintiff on 11 May 1993 and operated on Mr. Peagler's herniated disc on 24 May 1993. On 1 June 1993, Mr. Peagler told Dr. Darden about the work-related incident involving the trailer door. When asked on direct examination whether the incident Mr. Peagler described could have caused Mr. Peagler's disc problems, Dr. Darden testified, "[i]t could have."

However, on cross examination, the following exchange took place:

> DEFENDANT'S ATTORNEY: And isn't it true that with a herniated disc . . . this can have any number of causes, can't it?
>
> DOCTOR DARDEN: That's correct.
>
> Q: And you can herniate a disc by bending over to tie your shoe, right?

A. That's correct.

Q. Sneezing?

A. Yes.

Q. Even rolling over in bed you can herniate a disc; is that correct?

A. That's theoretically possible.

Q. So, really, from looking at the CAT scan or the MRI, there is no way to tell what the cause of the disc herniation is, is there?

A. No.

Q. And you can't be sure, to a reasonable degree of medical certainty, what caused Mr. Peagler's disc herniation in his neck, can you?

A. That's correct.

. . . .

Q. Now, with this MRI that was done, it says that he has a disc herniation in the lower back. You have no idea what caused that, do you?

A. No.

Defendant argues that the doctor's testimony, viewed as a whole, indicates that his opinion as to the cause of plaintiff's disc injury was based upon mere speculation.

At the outset, we note that the expert testimony need not show that the work incident caused the injury to a "reasonable degree of medical certainty." *Cooke v. P.H. Glatfelter/Ecusta,* 130 N.C. App. 220, 224, 502 S.E.2d 419, 422 (1998). Rather, the competent evidence must provide "some evidence that the accident at least might have or could have produced the particular disability in question." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 522 (1999) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)).

This case is analogous to *Buck v. Proctor & Gamble Co.*, 52 N.C. App. 88, 94-95, 278 S.E.2d 268, 272-73 (1981), where the plaintiff's doctor testified that the plaintiff's disc protrusion *could* have been caused by an accident at work. There, the doctor also testified that it

was "equally possible" that "the defect was degenerative in nature." *Id.* at 94, 278 S.E.2d at 272. This Court upheld the award of workers compensation to plaintiff. The Court stated:

> In *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964), the Supreme Court held that an expert's opinion that a particular cause "could" or "might" have produced the result indicates that the result is capable of proceeding from the particular cause within the realm of reasonable probability. . . . [T]he Court [further] recognized that "[a] result in a particular case may stem from a number of causes." 262 N.C. at 668, 138 S.E.2d at 545. All that is necessary is that expert express an opinion that a *particular* cause was *capable* of producing the injurious result. *Id.*

Buck v. Proctor & Gamble Co., 52 N.C. App. 88, 94-95, 278 S.E.2d 268, 272-73 (1981).

Here, Dr. Darden testified that the 28 April 1993 incident could have produced the plaintiff's disc injury. The doctor also testified that most people, as they age, experience asymptomatic degenerative disc changes. However, the doctor testified that specific trauma could cause the degenerative disc changes to become symptomatic, as here; the trauma experienced by Mr. Peagler on 28 April 1993 could have caused a herniated disc.

This is not a case where the record is devoid of a "scintilla of medical evidence that plaintiff's ruptured disc, might, with reasonable probability, have resulted from the accident." *Gillikin v. Burbage*, 263 N.C. 317, 324, 139 S.E.2d 753, 759 (1965). Rather, Dr. Darden's expert testimony provides evidence that the work-related incident could have produced the particular disability in question. Here, Dr. Darden, like the doctor in *Buck*, did *not* testify that the work-related incident could not have caused the plaintiff's condition.

Moreover, we note that Dr. Darden's testimony is corroborated by other testimony. The plaintiff testified that he had never had any problems with his back or neck before the night of 28 April 1993. He also testified that the onset of pain was simultaneous with the incident. The Industrial Commission found that "[i]mmediately after striking the latch with his hand, plaintiff felt pain and a tingling sensation in his left arm." This case is analogous to *Soles v. Farm Equipment Co.*, 8 N.C. App. 658, 175 S.E.2d 339 (1970), where this Court analyzed the issue of causation and affirmed the award of workers' compensation benefits for the plaintiff's disc injury. There,

the doctor testified that "bending over or lifting objects can cause a disc" injury. *Id.* at 660, 175 S.E.2d at 341. This testimony, combined with the testimony that the onset of pain was simultaneous with the work-related incident, was sufficient to establish causation.

[2] Additionally, defendant argues that the competent evidence did not support the finding that the plaintiff was unable to perform work of any kind. Here, the Industrial Commission found that "there is no evidence of record that any job exists for which plaintiff is suited given his educational and physical limitations, age and experience." Dr. Darden testified that the plaintiff might have been able to return to a sedentary type of employment. However, the evidence also showed that the plaintiff, at the time of the injury, was fifty six years old, educated only through the third grade level, and illiterate. Aside from plaintiff's back and neck problems, he also suffers from diabetes. Defendant employer did not provide plaintiff with any vocational counseling or rehabilitation services. We conclude that the Industrial Commission did not err in concluding that the plaintiff was unable to work. Accordingly, defendant's assignment of error is without merit.

[3] Next, we consider whether the Commission erred by failing to make sufficient findings of fact to resolve all of the material issues raised by the evidence. In particular, the defendant argues that the Commission failed to make sufficient findings regarding the testimony of defendant's witnesses. This testimony included statements by defendant's co-workers that he did not report his work-related injury to them, statements by employees of the benefits department that plaintiff did not ask for workers' compensation benefits or report the work-related injury, and a statement by one co-worker indicating that the plaintiff's wife had said that, at one point, she thought that his injury was caused by his repair work at home.

In a workers' compensation case, the Industrial Commission is the finder of fact. "[I]t is exclusively within the Commission's province to determine the credibility of the witnesses and the evidence and the weight each is to receive." *Lanning v. Fieldcrest-Cannon, Inc.*, 134 N.C. App. 53, 57, 516 S.E.2d 894, 898, *disc. review allowed*, 351 N.C. 106, — S.E.2d — (1999). In making these determinations, the Commission may not wholly disregard or ignore the competent evidence before it. *See Harrell v. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830, *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

However, "[t]he Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 525 S.E.2d 203, 205 (2000) (citing *Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 377 S.E.2d 267, *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989)).

Here, there is no showing that the Commission ignored the testimony of defendant's witnesses. In its opinion and award, the Commission indicates that it "reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Mary Hoag . . . ." This record included the testimony of defendant's witnesses. The Commission's findings of fact also indicate that it considered their testimony. The findings of fact show that the Commission realized that the plaintiff did not initially report his work-related injury to his co-workers or to the benefits department. The Industrial Commission found:

> 33. Plaintiff's failure to report his injury to defendant in a timely manner is due to his lack of education, confusion resulting from the initial hospitalization for a possible heart attack, his lack of understanding of the causal relationship between the incident of hitting the truck door latch and the resulting injuries, and his reliance on his wife and Dr. Darden to notify defendant of the work-related injury.
>
> 34. Plaintiff's [sic] did not inform defendant-employer's benefit counselor of her husband's work-related injury . . . . Mrs. Peagler was experiencing difficulty in getting the company health insurance department to pay plaintiff's medical bills.
>
> 35. Betsy Maness, defendant-employer's agent, completed all plaintiff's forms for medical leave of absence, but had little experience with and did not understand workers' compensation claims. Ms. Maness never inquired as to whether plaintiff's injury was work-related, and always gave plaintiff and/or his wife the necessary forms for continuation of leave of absence when they appeared on the premises.

Further, the Commission's opinion and award clearly demonstrates that it accepted testimony that the injury was caused by the plaintiff's work-related incident and it thereby rejected the contrary testimony

offered by one witness that the injury may have been caused by his repair work at home. Clearly the Commission considered all of the evidence before it; the Commission was not required to make an express finding that it did so. *See Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705, *aff'd per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999).

[4] Next we consider whether the Commission erred in concluding that the plaintiff's failure to give timely written notice of the accident was reasonable, and in concluding that the defendant was not prejudiced by the delay. Here, plaintiff was injured on 28 April 1993. The Form 18 was filed with the Industrial Commission on 14 April 1994. N.C.G.S. 97-22 states that no compensation shall be payable to an injured employee unless written notice is given within thirty days after the occurrence of the accident, "unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." Here, the Commission concluded that the plaintiff was reasonably excused from not giving written notice. The Commission concluded:

> Plaintiff's failure to timely report his injury to defendant is excusable due to his limited education, confusion resulting from the initial hospitalization for a possible heart attack, his lack of understanding of the causal relationship between the incident of hitting the truck door latch and the resulting injuries, and his reliance on his wife and Dr. Darden to notify defendant of the work-related injury.

Additionally, the Commission concluded "[d]efendant was not unduly prejudiced by plaintiff's failure to timely file the Form 18 within thirty days after the injury."

"The question of whether an employee has shown reasonable excuse depends on the reasonableness of his conduct under the circumstances." *Lawton v. County of Durham,* 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987). A reasonable excuse may be established where the employee does not initially know of the nature or probable compensable character of his injury. *See id.* Here, the evidence indicated that the plaintiff did not initially understand the nature or character of his injury. The evidence presented at the hearing indicated that plaintiff had a third grade education and was illiterate. The plaintiff testified that after he hit the truck door latch, he felt pain but he did not know what was wrong. The next day, plaintiff felt severe pain

in his chest and arm. He testified, "my arm and shoulder and chest was hurting so bad I couldn't breathe." Plaintiff saw several doctors who initially thought that he may have suffered a heart attack. The plaintiff and his wife did not associate a possible heart attack with the work-related incident.

Additionally, plaintiff testified that he relied on his wife to communicate with his employer while he was undergoing medical treatment. Further, Mrs. Peagler handled all the paperwork relating to plaintiff's health condition because of her husband's illiteracy. Defendant's benefits employees gave Mrs. Peagler disability forms and never asked her whether her husband had experienced a work-related injury or whether this was a workers' compensation claim. The Commission clearly was satisfied that this evidence established a reasonable excuse.

N.C.G.S. § 97-22 also requires that the Commission be satisfied that the employer has not been prejudiced by the delayed written notification. The burden is on the employer to show prejudice. *See Jones v. Lowe's Companies*, 103 N.C. App. 73, 404 S.E.2d 165 (1991). Even assuming defendant did not know about plaintiff's work injury, defendant presented no evidence that it was prejudiced in any way by plaintiff waiting to file his workers' compensation claim. *See Sanders v. Broyhill Furniture Indus.*, 131 N.C. App. 383, 507 S.E.2d 568 (1998). Since the evidence is sufficient to support the Commission's findings that reasonable excuse for not giving the required written notice was shown, and that the employer was not prejudiced by the failure to give written notice, the findings are conclusive on appeal. *See Key v. Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E.2d 254 (1977). This assignment of error is overruled.

[5] Finally, we consider whether the Commission erred in concluding that defendant was not entitled to a credit for disability payments to the plaintiff. Under N.C.G.S. § 97-42:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

The rationale behind the statute is to encourage voluntary payments by the employer during the time of the worker's disability. *See Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987).

Here, the defendant's benefits employee, Betsy Manness, testified that plaintiff received two thousand five hundred and six dollars in disability compensation. She also testified that the disability compensation plan was entirely funded by the employer. The competent evidence in the record does not indicate that the employee contributed to this disability plan. Accordingly, we conclude that the defendant is entitled to a credit for the disability benefits.

We therefore reverse the Industrial Commission on this issue and remand for entry of an Order which credits the defendants for disability payments made to the plaintiff.

Affirmed in part, reversed in part and remanded.

Judges TIMMONS-GOODSON and HUNTER concur.

STATE OF NORTH CAROLINA v. MELVIN KEITH SMITH, DEFENDANT

No. COA99-302

(Filed 5 July 2000)

Criminal Law— motion for mistrial—treated as motion to set aside verdict—one-year delay

In an assault with a deadly weapon case where both parties and the trial court considered defendant's motion for a mistrial that requested the Court to take the motion under advisement until after the jury returned its verdict to also constitute a motion to set aside the verdict, the trial court abused its discretion by denying defendant's motion to set aside the verdict following a delay of over one year because the trial judge had vague recollections of the trial.

Appeal by defendant from judgment entered 12 February 1998 by Judge Zoro J. Guice, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 27 January 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

Teddy and Meekins, P.L.L.C., by David R. Teddy, for defendant-appellant.

JOHN, Judge.

Defendant challenges the trial court's 5 December 1997 order (the Order) denying "Defendant's Motions For A Mistrial and To Set Aside The Jury Verdict" (defendant's motions) as well as the court's 12 February 1998 judgment (the Judgment). We reverse the trial court's denial of defendant's motion to set aside the verdict.

On 6 November 1995, defendant was indicted in Rutherford County on a charge of assault with a deadly weapon with intent to kill inflicting serious injury. The alleged offense arose out of an incident involving Joe Simmons (Simmons), a neighbor with whom defendant shared a mutually antagonistic relationship. On 23 January 1996, defendant tendered a guilty plea which was subsequently stricken upon the belated discovery of defendant's approximately twenty-year-old similar conviction of firing into an occupied vehicle.

Prior to trial which commenced 13 November 1996, the trial court granted defendant's motion *in limine* to prohibit evidence relating to the earlier conviction. On the evening of 14 November 1996, the day the case was submitted to the jury, The Daily Courier, a local newspaper published in Forest City, printed a front page, lead story pertaining to the trial. Included therein was the following:

> According to the DA's office, Smith had been convicted of firing a weapon into an occupied vehicle in 1978 . . . [and] [b]efore the trial began . . . Judge [Guice] accepted a motion from Smith's attorney to prevent the jury from hearing about the previous conviction.

The following morning, in the absence of the jury, defendant alerted the trial court to the article, asserting that the prominent reference in the county newspaper to defendant's prior conviction, which had been excluded at trial, was inflammatory and highly prejudicial. Defendant then moved for mistrial pursuant to N.C.G.S. § 15A-1061 (1999), but suggested that the court "consider postponing a ruling on the motion until after the jury return[ed] with the verdict." The trial court inquired, "[y]ou're making a motion for a mistrial at this time but requesting that the Court take that under advisement"? Defendant's counsel replied "[y]es, sir." The court indicated it would "take the matter under advisement" and allow the jury to resume deliberations. The jury did so at 9:41 a.m. and returned a verdict of guilty as charged at 10:08 a.m. on 15 November 1996.

In the absence of the jury, the trial court thereafter indicated it would "proceed on the motion with respect to the jury's verdict and the motion for a mistrial or a motion to set the verdict aside." Defendant requested an individual *voir dire* of the jurors by the trial court regarding the newspaper article. The court complied and several jurors acknowledged the article had been "mentioned" or "discussed" in the jury room, but none admitted having seen or read it.

Upon conclusion of the *voir dire*, the trial court indicated concern over "conflicting statements" by the jurors and determined that "the best thing to do is take this entire matter under advisement" and "consider this whole situation in a little bit calmer atmosphere than I've got here right now." The court thereupon directed the State and defendant to submit briefs and prepare for a second hearing, following which it would resolve defendant's motions. Defendant was permitted to continue under previously imposed terms and conditions of secured pre-trial release.

Further hearing was subsequently conducted 11 July 1997 before the original trial judge, the Honorable Zoro J. Guice, Jr. After receiving evidence and hearing from both the State and defendant, the trial court again took the matter under advisement. On 5 December 1997, the Order was entered denying "Defendant's Motions For A Mistrial and To Set Aside The Jury Verdict" and directing that defendant appear for a sentencing hearing and imposition of judgment.

The sentencing hearing was conducted 12 February 1998. Defendant objected, through a motion for mistrial, that the court lacked authority and power to enter judgment absent an order continuing the 11 November 1996 session of court. In advancing his motion, defendant further asserted the Order was void as having been entered out of session and out of term. The trial court denied the motion and sentenced defendant to minimum and maximum active terms of seventy-five and ninety-nine months respectively. Defendant was denied release pending the instant appeal.

Defendant contends the trial court erred by entering, out of term and out of session and without consent, both the Order and the Judgment, and that, in any event, the court improperly denied his motions. Preliminarily, we note that, although the words are frequently used interchangeably, "term" in this jurisdiction generally refers to the typical six-month assignment of superior court judges to a judicial district, while "session" designates the typical one-week

assignment to a particular location during the term. *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 154, 446 S.E.2d 289, 291-92 n.1, 2 (1994).

Defendant relies upon N.C.G.S. § 15-167 (1999), pursuant to which the trial court may continue a session of court "as long as in [it]s opinion it shall be necessary for the purposes of the case," in order to complete a case. G.S. § 15-167. In such instance, the court

> shall cause an order to such effect to be entered in the minutes, which order may be entered at such time as the judge directs, either before or after he has extended the session,

G.S. § 15-167, and orders subsequently entered during the time designated in the court's directive are not subject to a claim of invalidity by reason of having been rendered out of session. *See State v. Boone*, 310 N.C. 284, 288-89, 311 S.E.2d 552, 556 (1984) (citing *State v. Saults*, 299 N.C. 319, 261 S.E.2d 839 (1980)) (order pertaining either to pre-trial or post-trial motions entered out of session and out of term is "null and void and of no legal effect"), and *State v. Reid*, 76 N.C. App. 668, 670, 334 S.E.2d 235, 236 (1985) (citation omitted) (order entered "out of term and out of county, and without consent of the parties, . . . is null and void and of no legal effect"); *see also* N.C.G.S. § 15A-101(4a) (1999) ("judgment is entered when sentence is pronounced"), *Boone*, 310 N.C. at 289-90, 311 S.E.2d at 556 ("[a]lthough G.S. § 15A-101(4a) does not specifically apply to orders . . . the same rule should apply to judgments and orders"; "better practice" is for court to announce "rulings in open court and direct the clerk to note the ruling in the minutes. . . . When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the question is presented"), *State v. Horner*, 310 N.C. 274, 278-79, 311 S.E.2d 281, 285 (1984) (where trial court passed on motion to suppress in open court during session and in judicial district and later reduced its ruling to writing, signed the order and filed it with the clerk, order was not void as having been entered out of session and out of district), and *State v. Smith*, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987) (filing, "over six months post-trial, of a written order denying defendant's motion to suppress . . . is simply a revised written version of the verbal order entered in open court" which likewise denied defendant's motion; written version merely "was inserted in the transcript in place of the verbal order rendered in open court");

but see State v. Crumbley, 135 N.C. App. 59, 66-7, 519 S.E.2d 94, 99 (1999) ("sentence actually imposed in this case was the [consecutive] sentence[s] contained in the written judgment" as opposed to the concurrent terms contained in oral judgment given in open court).

The State does not maintain the trial court entered an order pursuant to G.S. § 15-167 either at the 11 November 1996 nor 11 July 1997 sessions. Rather the State contends defendant, by failing to object to continuation of either session or to the trial court's taking defendant's motions "under advisement" and by acquiescing in the court's directive to present written briefs and participating in subsequent proceedings, impliedly consented to the trial court's entry of the Order and the Judgment out of session and term. *But see Reid*, 76 N.C. App. at 670, 334 S.E.2d at 236 (Court "not persuaded" by argument that defendant "impliedly consented to . . . order being entered out of session and out of county when he failed to object to the judge's announcement that he would take the case under advisement"); *cf.* N.C.G.S. § 1A-1, Rule 58 (1994) ("consent for the signing and entry" of civil "judgment out of term, session, county and district shall be deemed to have been given" unless express objection made on the record prior to end of session at which matter heard).

We assume *arguendo*, but expressly do not decide, that the Order and Judgment are not invalid by virtue of having been entered out of session and term and thus do not discuss the issue of consent or the implication herein of G.S. § 15-167. However, we do consider whether, under the circumstances *sub judice*, denial of defendant's motion to set aside the verdict following a delay of over one year constituted an abuse of discretion.

Upon bringing the news article to the attention of the trial court at the 11 November 1996 session, defendant moved for mistrial. The court indicated it was taking the motion under advisement and the jury subsequently returned a verdict. The State properly interjects that a trial court may exercise its mistrial authority in a criminal matter only "during the trial," G.S. § 15A-1061, and

> [t]o retroactively declare a mistrial, after the jury had returned a verdict . . . goes far beyond any concurrence which may be implied from the motion [itself],

State v. O'Neal, 67 N.C. App. 65, 68, 312 S.E.2d 493, 495 (1984) ("retroactive declaration of a mistrial upon reconsideration has no valid basis in policy or law").

Nonetheless, it is apparent that both the parties and the trial court considered defendant's mistrial motion likewise to constitute a motion to set aside the verdict. *See State v. Spangler*, 314 N.C. 374, 387-88, 333 S.E.2d 722, 731 (1985) (quoting *Urquhart v. Durham and South Carolina Railroad Co.*, 156 N.C. 468, 472, 72 S.E. 630, 632 (1911)) (in criminal case upon "misconduct on the part of the jury," trial court is "intrusted with the power and the duty . . . to set aside their verdict"). For example, immediately following the jury verdict and defendant's renewed argument on possible jury contamination, the court specifically referred, without objection, to defendant's motion as "the motion for mistrial or a *motion to set the verdict aside*" (emphasis added). Moreover, upon conclusion of the *voir dire* questioning of the jurors which followed, the court stated it would take the matter under advisement "until [it] decide[d] whether or not [it would] accept th[e] verdict or not accept [the] verdict." Finally, the Order recited the court's determination that it found "no basis in fact or in law to support the Defendant's Motion For a Mistrial or To Set The Jury Verdict aside," as well as the conclusion that defendant's "Motion For A Mistrial and his Motion To Set Aside The Jury Verdict should be denied."

A motion to set aside a jury verdict may of necessity come only upon return of that verdict. *See State v. Daye*, 15 N.C. App. 233, 234, 189 S.E.2d 584, 585 (1972) (motion for mistrial after verdict of guilty "comes too late" and proper motion would have been to "set aside verdict, and order a new trial"). As with a motion for mistrial, a motion to set aside the verdict is addressed to the discretion of the trial court and such ruling will not be disturbed on appeal absent an abuse of discretion. *Id.*

Nonetheless, even prior to the present criminal and civil procedural codes, our Supreme Court, although in a different context and without the complication present herein of alleged failure to extend the session, expressed a preference for ruling upon a motion to set aside a jury verdict during the session at which the case has been tried:

> [h]earing and determining a motion to set the verdict aside . . . involv[es] . . . incidents of the trial not likely to be impressed upon the memory of the judge that he may safely act upon them after adjournment.

Goldston v. Chambers, 272 N.C. 53, 56-7, 157 S.E.2d 676, 678-79 (1967).

The trial court stated in the course of the 15 November 1996 *voir dire*:

> . . . it's a terrible situation we're in because this is *absolutely prejudicial information* and information which was not allowed to be admitted during the trial and here it is on the front page of the newspaper.

(emphasis added).

Immediately following the examination, the court observed that

> [w]hat we've got is conflicting statements from jurors; some of them say that [the article] wasn't mentioned, some of them said that certain jurors mentioned it, those jurors say they didn't.

See N.C.G.S. § 8C-1, Rule 606(b) (1999) ("[u]pon an inquiry into the validity of a verdict," jurors "may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention").

Significantly, however, when taking the matter up again upon commencement of the 11 July 1997 hearing, the trial court understandably acknowledged:

> I have a vague recollection of this case and of the trial. There's been a lot of water over the dam since then, Buncombe County, Mecklenburg County, and wherever else. And this is my first chance to look at this file since the last day of that trial.

Nonetheless, following the hearing, the matter once again was taken under advisement.

The trial court ultimately entered the Order denying defendant's motions 5 December 1997, finding, *inter alia*, that "the record is totally and completely devoid of any evidence which would even suggest any prejudice to the Defendant." We are obliged to contrast the foregoing with the court's observations approximately one year earlier immediately following the *voir dire* when its opportunity to assess the credibility of individual jurors was fresh.

In short, in light of the substantial lapse of time between the 11 November 1996 session and the 5 December 1997 entry of the Order, during which time "impress[ion] upon the memory of the [trial] judge" of "incidents of the trial," *Goldston*, 272 N.C. at 56-7, 157 S.E.2d at 678-79, had quite naturally diminished and in the court's word become

"vague," we hold the trial court abused its discretion in denying defendant's motion to set aside the jury verdict. *See Duke Power Co. v. Winebarger*, 300 N.C. 57, 70, 265 S.E.2d 227, 235 (1980) ("[u]nder particular circumstances of [the instant] case, the failure to rule promptly on . . . meritorious objections . . . constituted reversible error"); *see also Sullivan v. Johnson*, 3 N.C. App. 581, 583, 165 S.E.2d 507, 508 (1969) (error for court to fail to rule upon motion to strike made in apt time; "[t]he right to make [such] motion . . . would be an empty one unless it included the right to have the motion ruled upon"). Accordingly, the Order is reversed and the Judgment subsequently entered in reliance thereon vacated, and this matter is remanded to the trial court for a new trial. *See Daye*, 15 N.C. App. at 234, 189 S.E.2d at 584 (following verdict, proper course upon motion to "set aside the verdict" is to "order a new trial").

Reversed in part, vacated in part, and remanded for new trial.

Judges McGEE and HUNTER concur.

MICHAEL BRUGGEMAN, JACKSON NEWTON, AND MARK McGONIGAL v. MEDITRUST ACQUISITION COMPANY, MEDITRUST COMPANY, LLC, AND MEDITRUST GOLF GROUP, II, INC.

No. COA99-648

(Filed 5 July 2000)

1. Jurisdiction— personal—minimum contacts—contract to locate golf courses

The trial court properly denied MCLLC's motion to dismiss for lack of personal jurisdiction in an action arising from a contract with a realtor to locate golf courses for investment where defendant MCLLC contended that its contacts with North Carolina were not related to the case at hand and were insufficient, but MCLLC leased the property it owned in North Carolina, deriving income and availing itself of the benefits and protections of the laws of the State; MCLLC obtained authority to do business in North Carolina and maintained a registered agent; MCLLC had continuous and systematic contacts with North Carolina, even if they were not high in quantity; North Carolina has an interest in adjudicating a case involving one of its residents which allegedly

arose from a contract to locate property within the state; plaintiffs do not appear to have engaged in forum shopping; and it stands to reason that at least some of the evidence and witnesses are located in North Carolina.

2. Jurisdiction— personal—contract for services within North Carolina—failure to support allegations

An order denying defendant MAC's motion to dismiss for lack of personal jurisdiction was reversed where plaintiffs alleged that MAC had engaged plaintiff Bruggeman to procure real estate in North Carolina and that N.C.G.S. § 1-75.4(5)(a) conferred jurisdiction, defendants denied this allegation by means of an affidavit, and plaintiffs made no attempt to support their allegation with affidavits or otherwise. Additionally, plaintiffs could not rely upon MCLLC's activities within North Carolina to establish the requisite minimum contacts by MAC despite an allegation that the two had merged because defendants filed an affidavit that MAC and MCLLC were not parent and subsidiary and had not merged, and plaintiffs did not come forward with evidence refuting the affidavit and supporting their allegations.

Appeal by defendants from order entered 12 February 1999 by Judge Arnold O. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 14 March 2000.

Johnson & Lambeth, by Robert White Johnson and Maynard M. Brown, for plaintiff-appellees.

Rountree & Seagle, L.L.P., by George K. Freeman, Jr., for defendant-appellants.

MARTIN, Judge.

Plaintiffs Michael Bruggeman, Jackson Newton, and Mark McGonigal brought this action alleging that in January 1998, Meditrust Acquisition Company (MAC) engaged Bruggeman, a licensed real estate broker in Virginia and Maryland, as its agent to locate golf course properties for investment purposes by MAC. Bruggeman associated Newton, a real estate broker licensed in North Carolina, and McGonigal, a real estate broker licensed in New Jersey, to assist him.

Plaintiffs further alleged MAC is a Florida corporation with offices in Palm Beach, Florida, and that MAC merged with Meditrust

Company, LLC (MCLLC), a Delaware corporation with offices in Florida, in May 1998. Plaintiffs alleged that they procured several prospects, including Carolina Golf Services, for defendants and assisted defendants in procuring golf course assets of Carolina Golf Services in North Carolina and Virginia. They alleged that defendants contracted to purchase the properties located by plaintiffs and did not compensate plaintiffs for their services.

Defendants moved to dismiss the complaint for lack of personal jurisdiction, failure to state a claim upon which relief could be granted, failure to join a necessary party, and in the alternative, for a more definite statement. In the motion to dismiss for lack of personal jurisdiction and accompanying affidavit in support thereof, defendants denied contracting with any of plaintiffs to perform any services, denied a merger between MAC and MCLLC, and denied that either company had any contacts with North Carolina other than MCLLC's ownership of a parcel of land in Mecklenburg County which it leases to a third party and MCLLC's maintenance of a registered agent in North Carolina due to its status as a foreign company.

Plaintiffs subsequently moved to amend their complaint to add Meditrust Golf Group, II, Inc. (MGG), a Delaware corporation with offices in Massachusetts, as a defendant. Plaintiffs alleged that MAC had been acting on behalf of MCLLC and MGG, and that either MCLLC or MGG, using the information provided to MAC by plaintiffs, had actually purchased the properties located by plaintiffs. Plaintiffs seek compensation for the services allegedly rendered to defendants.

The trial court denied defendants' motions to dismiss, and allowed their motion for a more definite statement. Defendants MAC and MCLLC appeal from the order denying their motion to dismiss for lack of personal jurisdiction. Meditrust Golf Group, II, Inc. is not a party to the appeal.

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[1] The sole issue presented by this appeal is whether the trial court properly denied defendants' motion to dismiss for lack of personal jurisdiction. The denial of a motion to dismiss for lack of jurisdiction is immediately appealable. N.C. Gen. Stat. § 1-277(b); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982).

In order for the courts of this State to exercise jurisdiction over the person of a nonresident defendant, (1) there must be statutory authority for the exercise of jurisdiction, and (2) the nonresident

defendant must have sufficient contacts with this State such that the exercise of jurisdiction does not violate the federal due process clause. *See Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990). The allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged. *See Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 355 S.E.2d 177 (1987). If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. N.C. Gen. Stat. § 1A-1, Rule 43(e). If the court takes the latter option, the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. *Williams* at 424, 355 S.E.2d at 179. Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence. *See J.M. Thompson Co. v. Doral Mfg. Co. Inc.*, 72 N.C. App. 419, 324 S.E.2d 909, *disc. review denied*, 313 N.C. 602, 330 S.E.2d 611 (1985). Either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required. *See id.; Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980). In the case before us, the trial court's order contained no findings, but there is nothing in the record to show that either party requested them. Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings. *See Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Other than plaintiffs' unverified complaint, the only other source of evidence of the presence or lack of personal jurisdiction in the record before us is the sworn affidavit of Michael Benjamin, senior vice president and general counsel for MCLLC and special counsel for MAC, which was attached to defendants' motion to dismiss. This affidavit contradicts almost every material allegation in plaintiffs' complaint. "Where unverified allegations in the complaint meet plaintiff's 'initial burden of proving the existence of jurisdiction . . . and defendant[s] d[o] not contradict plaintiff's allegations in their sworn affidavit,' such allegations are accepted as true and deemed controlling." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (quoting *Bush v. BASF Wyandotte, Corp.*, 64 N.C. App. 41, 45, 306 S.E.2d 562, 565 (1983)). However, where, as in this case, defendants submit some form of evidence to counter plaintiffs' allegations, those allegations can no longer be taken as true or

controlling and plaintiffs cannot rest on the allegations of the complaint. *See Brandi v. Belger Cartage Serv., Inc.*, 842 F.Supp. 1337, 1339 (D.Kan. 1994) ("The plaintiff has the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading."); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929-30 (6th Cir. 1974) ("Where a motion to . . . dismiss is filed, supported by affidavits, the non-moving party may not rest upon allegations or denials in his pleadings but his response by affidavit or otherwise must set forth specific facts showing that the court has jurisdiction."); *Honeycutt v. Tour Carriage, Inc.*, 997 F.Supp. 694, 696 n.1 (W.D.N.C. 1996) ("Because Plaintiff did not respond in opposition to any of the motions filed by Defendants, the undersigned finds the facts as presented by Defendants."). In such a case, the plaintiff's burden of establishing *prima facie* that grounds for personal jurisdiction exist can still be satisfied if some form of evidence in the record supports the exercise of personal jurisdiction. *See Liberty Finance Co. v. North Augusta Computer Store*, 100 N.C. App. 279, 395 S.E.2d 709 (1990) (holding that a court could find the necessary competent evidence supporting personal jurisdiction in defendant's affidavits). Thus, in evaluating the appeal before us, we look to the uncontroverted allegations in the complaint and the uncontroverted facts in the sworn affidavit for evidence supporting the presumed findings of the trial court.

G.S. § 1-75.4 is North Carolina's long-arm statute and confers jurisdiction over non-residents. Plaintiffs contend that G.S. § 1-75.4(1)(d), which confers personal jurisdiction "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who . . . (d) [i]s engaged in substantial activity within this State . . .," authorizes the exercise of personal jurisdiction over MCLLC because it engages in substantial activity in North Carolina. According to Mr. Benjamin's affidavit, MCLLC owns and leases a parcel of property in Mecklenburg County to a management company and maintains an agent for service of process in North Carolina. Although property ownership alone is insufficient to allow a non-resident to be subject to the personal jurisdiction of the courts of this State, *See Eways, supra*, we must determine whether MCLLC's leasing activities in this State would constitute "substantial activities."

In *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630-31 (1977), the North Carolina Supreme Court stated

that "G.S. 1-75.4(1)(d) . . . grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process." In other words, when evaluating the existence of personal jurisdiction pursuant to G.S. § 1-75.4(1)(d), "the question of statutory authorization 'collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.' " *Hanes Companies v. Ronson*, 712 F.Supp. 1223, 1226 (M.D.N.C. 1988) (citations omitted). Therefore, we proceed directly to the due process inquiry.

Defendant MCLLC contends that its contacts with North Carolina, being unrelated to the case at hand, are insufficient and thus an assertion of jurisdiction in this case would violate their rights to due process. We disagree.

> To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws . . . . This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there."

Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citations omitted). "Factors for determining existence of minimum contacts include '(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.' " *Cherry* at 632, 394 S.E.2d at 655 (citations omitted). In cases which arise from or are related to defendant's contacts with the forum, a court is said to exercise "specific jurisdiction" over the defendant. *See Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989). However, in cases such as the one before us, where defendant's contacts with the state are not related to the suit, an application of the doctrine of "general jurisdiction" is appropriate. *Id.* Under this doctrine, "jurisdiction may be asserted even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state." *Id.* (citations omitted).

In *Hankins v. Somers*, two of the defendants conducted a business selling wire art products in North Carolina "to a substantial extent." 39 N.C. App. 617, 621, 251 S.E.2d 640, 643, *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979). This business was wholly unconnected with the action brought against them by the plaintiff. *Id.* However, this Court held that through such business activities, the defendants had purposely availed themselves of the benefits of conducting business in the State, and thus an assertion of personal jurisdiction over them did not violate due process. *Id.*

Similarly, the record before us indicates that defendant MCLLC, besides owning real property in North Carolina, is engaged in at least one substantial and ongoing profit-making venture in this State through the leasing of that property. We believe that such contacts with the state satisfy the requirements of due process, in particular the higher threshold of "general jurisdiction," by their "continuous and systematic" nature. *Fraser*, *supra*; *see Dillon*, *supra* (presence or absence of forum shopping plays role in due process inquiry). Moreover, plaintiff Newton is a North Carolina resident and the alleged activities for which plaintiffs seek compensation occurred here. *See Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 250, 273 S.E.2d 509, 512, (1981) ("less extensive contacts" are necessary when plaintiff is a resident of the forum state).

We hold that defendant MCLLC's contacts with North Carolina are sufficient to support the exercise of personal jurisdiction over it by the courts of this State. While mere ownership of property in North Carolina is not sufficient to establish the necessary minimum contacts, *Eways*, *supra*, MCLLC leases this property and thus derives income from it. In doing so, MCLLC avails itself to a greater degree of the benefits and protections of the laws of this State. Moreover, MCLLC has obtained authority to do business in North Carolina and maintains a registered agent here pursuant to G.S. § 57C-7-07. Although MCLLC does not have a high quantity of contacts with this State, the quality of those contacts, its ownership and leasing of real property are "continuous and systematic." *Fraser*, *supra*. Furthermore, North Carolina has an interest in adjudicating a case which involves one of its residents (plaintiff Newton) and which allegedly arose from a contract to locate property in the State. *See Tom Togs, Inc.* at 367, 348 S.E.2d at 787. In terms of convenience to the parties, plaintiffs do not appear to have engaged in "forum-shopping," having filed suit in the state in which they allegedly performed services for defendants. *Dillon* at 679, 231 S.E.2d at 632.

Furthermore, it stands to reason that at least some evidence and witnesses related to their allegations are located in North Carolina. *See Tom Togs, Inc., supra*; *Murphy v. Glafenhein*, 110 N.C. App. 830, 836, 431 S.E.2d 241, 245, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993) (indicating significance of location of witnesses and evidence in forum state to due process inquiry). For defendant MCLLC, after having purposely availed itself of the protection of the laws of North Carolina, being haled into court here cannot be considered overly burdensome. *See Murphy, supra; Dillon, supra.* Thus, we hold the exercise of personal jurisdiction over defendant MCLLC was proper and its motion to dismiss for lack of personal jurisdiction was properly denied.

[2] Plaintiffs contend that G.S. § 1-75.4(5)(a) applies to confer personal jurisdiction over defendant MAC. The statute permits personal jurisdiction in an action which:

> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; . . . .

Plaintiffs alleged defendant MAC "engaged" plaintiff Bruggeman to procure real estate in North Carolina and other states for investment purposes. For the reasons stated above, because defendants deny this allegation by means of Mr. Benjamin's affidavit and plaintiffs made no attempt to support the allegation with affidavits or otherwise, we hold it insufficient to establish a *prima facie* showing of long-arm jurisdiction under G.S. § 1-75.4(5)(a), thus obviating the necessity for a related due process inquiry. *See Cherry, supra.*

Plaintiffs also alleged that MAC and MCLLC had merged, and that MCLLC had obtained the benefit of MAC's contract with plaintiffs. This allegation was refuted by Mr. Benjamin's affidavit that "MAC and MCLLC are not parent and subsidiary one to the other, and neither has merged into the other, or been acquired by the other." Again, plaintiffs have not come forward with any evidence refuting the affidavit and supporting their allegations. There being no evidence of a legal relationship between MAC and MCLLC, plaintiffs may not rely upon MCLLC's activities within this State to establish the requisite minimum contacts by MAC. *See Cherry, supra.* Thus, we must hold that plaintiffs have failed to establish grounds for an assertion of personal jurisdiction over MAC and we reverse the order denying MAC's motion to dismiss for lack of personal jurisdiction.

We have noted defendants' arguments with respect to the illegality of the alleged contract which underlies this action due to plaintiff Bruggeman's failure to hold a North Carolina real estate license as required by G.S. § 93A-1. Because this argument is more properly directed to the merits of plaintiffs' claims, rather than the issue of personal jurisdiction, we decline to address the issue at this time.

The order denying MCLLC's motion to dismiss for lack of personal jurisdiction is affirmed; the order denying MAC's motion to dismiss for lack of personal jurisdiction is reversed.

Affirmed in part, reversed in part.

Judges WYNN and HUNTER concur.

STATE OF NORTH CAROLINA v. ROBERT STEVENSON DOISEY

No. COA97-982

(Filed 5 July 2000)

1. Appeal and Error— preservation of issues—failure to object

Although defendant assigns error to the admission of testimony regarding videotapes and a camcorder, he has waived this argument because he permitted prior and subsequent admission of evidence regarding the videotapes and camcorder without objection. N.C. R. App. P. 10(b)(1).

2. Evidence— videotapes and camcorder—no plain error

Although the trial court erred in a first-degree statutory sex offense case by admitting testimony under N.C.G.S. § 8C-1, Rule 404(b) regarding videotapes and a camcorder defendant used to record activities in a bathroom since this evidence did not tend to show defendant's plan or scheme to sexually assault the minor victim, defendant failed to show plain error in light of all the evidence in the case.

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

The trial court did not abuse its discretion in a first-degree sexual offense case by denying defendant's motion for appropri-

ate relief (MAR) under N.C.G.S. § 15A-1420, based on the trial court's finding that it was not reasonably well satisfied that the minor child's testimony at the original trial was false, because: (1) the minor victim stated she signed an affidavit recanting her testimony at trial, and testified that her testimony at the original trial was false at the 1 July 1998 hearing on defendant's MAR, after being repeatedly questioned by defendant's friends and family members about the facts leading to the conviction; (2) the trial court found as fact that the minor victim reaffirmed at the 13 December 1999 hearing that her testimony at trial was correct, thus repudiating her recantation; and (3) the trial court found the minor victim found this situation to be extremely embarrassing to her, and she told her friends and others that it did not happen since she was embarrassed by defendant's actions.

Appeal by defendant from judgment dated 25 April 1997 by Judge Henry V. Barnette, Jr. in Halifax County Superior Court, and from an order filed 3 January 2000 by Judge Thomas D. Haigwood. Heard in the Court of Appeals 14 March 2000.

Attorney General Michael F. Easley, by Assistant Attorneys General Julia R. Hoke and Amy C. Kunstling, for the State.

Ronnie C. Reaves, P.A., by Lynn Pierce; and Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

GREENE, Judge.

Robert Stevenson Doisey (Defendant) appeals from a jury verdict finding him guilty of two counts of first-degree statutory sex offense and also seeks review of an order filed 3 January 2000 denying his motion for appropriate relief.

Trial

At trial, D.H., the victim, testified that during the first week of December in 1995 she was living with her mother Nannie B. Gauldin (Gauldin), her siblings, and Defendant, Gauldin's live-in boyfriend. On an afternoon during that week when Gauldin was not at home, Defendant told D.H. to go into her bedroom and take off her clothes. D.H., who was twelve years old at the time, did so, and Defendant then came into her bedroom and stuck his finger into her vagina. He also stuck his penis into her mouth, vagina, and "butt." Defendant

then told D.H. to put her clothes back on and threatened to punish her if she told anyone what had happened.

During the night of 10 January 1996, Defendant again entered D.H.'s bedroom and told her to take off her clothes. After she removed her clothing, Defendant stuck his finger into her vagina and "butt." He also stuck his penis into her mouth, vagina, and "butt." Defendant then heard Gauldin walking in the hallway, and he told D.H. to go into the bathroom. When Gauldin entered D.H.'s bedroom, Defendant told her D.H. had seen someone outside of the window. While Defendant was outside looking around, D.H. told Gauldin Defendant had "messed" with her. The next morning Gauldin went into D.H.'s room and asked her what had happened. After D.H. related what had happened, Gauldin called the police and Defendant was arrested later that morning.

Gauldin testified she found Defendant in D.H.'s room on the evening of 10 January 1996, and D.H. told her Defendant had "messed" with her. D.H. later described Defendant's conduct to Gauldin, and D.H.'s statements to Gauldin were consistent with D.H.'s testimony at trial. Gauldin testified that on the day following Defendant's arrest, law enforcement officers returned to D.H.'s home and Gauldin turned over several items to them, including two videotapes. Gauldin testified, without objection, the officers found a camcorder "[i]n the bathroom[,] in a table beside the toilet." She stated Defendant had the camcorder "hooked up somehow or other so he could record people that come in and out of the bathroom, and [her] kids, when they would take baths at nighttime." She testified she did not know what was on the videotapes she had turned over to the officers.

During cross-examination, Defendant's counsel questioned Gauldin regarding how the camcorder came to be in the bathroom, and she stated she did not know. Defendant's counsel asked Gauldin if she had asked Defendant to set up the camcorder in the bathroom, and Gauldin responded that she had not.

William Otis Wheeler (Wheeler), an investigator with the Halifax County Sheriff's Department, testified he was assigned to investigate D.H.'s case. He stated D.H. made a statement to him regarding Defendant's actions which was consistent with D.H.'s testimony at trial. On the morning Defendant was arrested, Wheeler went to D.H.'s home and took possession of several items, including two videotapes. Wheeler testified, over Defendant's objection, he had viewed the

videotapes and they contained video of children and adults, including Defendant and Gauldin, coming into a bathroom and using the facilities. Wheeler stated that after he viewed the videotapes he contacted Gauldin and received permission to search her bathroom for a VCR or camcorder. Officers discovered a camcorder inside a table positioned next to the toilet in the bathroom. Wheeler described, without objection, how the camcorder was hooked up inside the table. Photographs of the camcorder and table were also admitted into evidence without objection.

On cross-examination, Defendant's counsel questioned Wheeler regarding these photographs and the method used to hook up the camcorder inside the table. Defendant's counsel also questioned Wheeler regarding the contents of both videotapes.

At the close of the State's evidence, Defendant testified and denied D.H.'s allegations of sexual abuse. He stated he had punished D.H. beginning in late November for misbehavior at school. He also stated he had been fighting with Gauldin, and had informed her on the evening prior to his arrest that he was moving out of her home. He testified Gauldin wanted him to place the camcorder in the bathroom, and she was aware the camcorder was in the bathroom. Defendant then described in detail the method he used to hook up the camcorder.

Motion for Appropriate Relief

While Defendant's appeal was pending before this Court, Defendant filed a motion for appropriate relief in this court, pursuant to N.C. Gen. Stat. § 15A-1415, requesting a new trial on the ground D.H. had recanted her testimony. In an order dated 9 February 1998, we remanded this case to the Superior Court of Halifax County for a determination of the matters alleged in the motion for appropriate relief. The trial court held hearings on the motion on 1 July 1998 and 13 December 1999.[1] On 3 January 2000, the trial court filed an order in the Superior Court of Halifax County denying Defendant's motion for appropriate relief, and the order was filed in this Court on 6 January 2000. Review of this order is properly before this Court pursuant to N.C. Gen. Stat. § 15A-1422(c)(2).

1. The Honorable Louis B. Meyer presided over the 1 July 1998 hearing and, because Judge Meyer subsequently became seriously ill, he did not enter a ruling on Defendant's motion. The Honorable Thomas D. Haigwood was therefore assigned to enter an order on the motion, and Judge Haigwood presided over the 13 December 1999 hearing.

In its order filed 3 January 2000, the trial court made the following pertinent findings of fact:

> 5. That the basis for the Motion for Appropriate Relief was an affidavit offered by [D.H.] which stated she offered false testimony at the trial of . . . [D]efendant.
>
> . . . .
>
> 9. That on Monday, December 13, 1999, [D.H.] testified . . . that she did sign an affidavit alleging that she testified falsely during the original trial of this matter, but that her testimony at trial was in fact correct. Further, that she testified and the court finds that she signed the affidavit after being repeatedly questioned about the facts leading to the conviction of . . . [D]efendant by friends and family members of . . . [D]efendant and also in an effort to avoid having to again testify in this matter.
>
> . . . .
>
> 11. . . . [D.H.] testified again . . . that her testimony at the trial of this matter was correct, that both the affidavit and testimony before Judge Meyer was false and that she did that in an effort to avoid having to come to court.
>
> 12. That [D.H.] further stated and the court finds that the events about which she testified during the trial were extremely embarrassing to her and that she told her friends and others that it did not happen because she was embarrassed by . . . [D]efendant's actions.
>
> . . . .
>
> 15. That the court reviewed the trial transcript and the transcript of the July 1998 hearing and has had ample opportunity to evaluate the demeanor of the victim as well as other witnesses called during this hearing.

The trial court then concluded as a matter of law that "the court is not reasonably well satisfied that the testimony of [D.H.] given at the original trial was false." Accordingly, the trial court denied Defendant's motion for appropriate relief.

The issues are whether: (I) Defendant waived his objection to testimony regarding the videotapes and camcorder when he did not ini-

tially object to admission of testimony regarding the videotapes and later gave testimony regarding the videotapes and camcorder; (II) admission of testimony regarding the videotapes and camcorder was inadmissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence, and whether admission of this testimony was plain error; and (III) the trial court abused its discretion when ruling on Defendant's motion for appropriate relief by concluding it "is not reasonably well satisfied that the testimony of [D.H.] given at the original trial was false."

I

"[T]o preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion." N.C.R. App. P. 10(b)(1). Moreover, "the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979).

[1] In this case, Defendant assigns error to the admission of testimony regarding the videotapes and camcorder. Defendant, however, permitted admission of evidence regarding the videotapes and camcorder without objection. Gauldin testified without objection that Defendant placed the camcorder in the bathroom and had taped people coming in and out of the bathroom. Although Defendant did object to Wheeler's testimony about the contents of the videotapes, he raised no objection to Wheeler's testimony regarding his discovery of the camcorder. Moreover, Defendant himself later testified in detail regarding his placement of the camcorder in the bathroom. Defendant's objection to this evidence, therefore, was waived by the prior and subsequent admission of testimony about the camcorder and videotapes.

II

[2] Defendant argues testimony regarding the camcorder and videotapes was inadmissible pursuant to Rules 403 and 404(b) of the North Carolina Rules of Evidence, and admission of this evidence was plain error.

The test for plain error places the burden on a defendant to show that error occurred and the error "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). The error must be a " ' "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot

have been done." ' " *Id.* at 660, 300 S.E.2d 378 (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)).

Rule 404(b) states, in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b) (1999). Rule 404(b), however, is a general rule of inclusion, *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990), and evidence of conduct is admissible "so long as the evidence is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried," *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). Examples of such proper purposes include "proof of motive, opportunity, intent, preparation, plan, [and] knowledge." N.C.G.S. § 8C-1, Rule 404(b).

In this case, the State contends in its brief to this Court Defendant's use of a camcorder to record activities in the bathroom is relevant to show Defendant's "design or scheme to take sexual advantage of young children." The testimony concerning the videotapes showed both children and adults, including Defendant and Gauldin, in the bathroom, and there was some evidence the camcorder was placed in the bathroom at Gauldin's request. Assuming, however, Defendant placed the camcorder in the bathroom without Gauldin's knowledge, the taping of activities in a bathroom, though deviant behavior, is conduct dissimilar to the conduct with which Defendant was charged. The evidence regarding the videotapes, therefore, did not tend to show Defendant's plan or scheme to sexually assault D.H. *See State v. Maxwell*, 96 N.C. App. 19, 24, 25, 384 S.E.2d 553, 556-57 (1989) (evidence the defendant frequently appeared nude in front of his children and had fondled himself in presence of daughter was not properly admitted to show "plan or scheme to take advantage of his daughter"), *disc. review denied*, 326 N.C. 53, 389 S.E.2d 83 (1990). It was, therefore, error under Rule 404(b) to admit this evidence.[2]

In order to show plain error, however, Defendant must also demonstrate the admission of the evidence "had a probable impact on the jury's finding of guilt." *Odum*, 307 N.C. at 661, 300 S.E.2d at 379.

2. Because testimony regarding the camcorder and videotapes was inadmissible pursuant to Rule 404(b), we need not address Defendant's argument the evidence was also inadmissible pursuant to Rule 403.

In this case, D.H. testified Defendant came into her room in December of 1995 and inserted his finger into her vagina, and his penis into her vagina, "butt," and mouth. D.H. also testified that on 10 January 1996, Defendant again came into her bedroom and inserted his finger into her vagina and "butt," and inserted his penis into her vagina, "butt," and mouth. Gauldin testified Defendant was in D.H.'s room on the night of 10 January 1996 and, when she found Defendant in D.H.'s room, D.H. told her Defendant had "messed" with her. Finally, Gauldin and Wheeler both testified D.H. made statements to them consistent with her testimony regarding what Defendant had done to her. Defendant has not shown, in view of all other evidence admitted in this case, that admission of testimony regarding the videotapes and camcorder had a "probable impact on the jury's finding of guilt." Admission of the testimony, therefore, was not plain error.

III

[3] Defendant argues the trial court's findings of fact do not support its conclusion that it "is not reasonably well satisfied that the testimony of [D.H.] given at the original trial was false."[3] We disagree.

The test for determining whether a defendant may be granted a new trial on the basis of recanted testimony is whether "1) the court is reasonably well satisfied that the testimony given by a material witness is false, and 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial." *State v. Britt*, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987). If an evidentiary hearing is held on a defendant's motion for appropriate relief, the defendant has the burden of proving by a preponderance of the evidence the facts necessary to support the motion. N.C.G.S. § 15A-1420(c)(5) (1999). When reviewing an order entered on a motion for appropriate relief, this Court is bound by the trial court's findings of fact if they are supported by any competent evidence, and "the trial court's ruling on the facts may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law." *State v. Harding*, 110 N.C. App. 155, 165, 429 S.E.2d 416, 423 (1993).

3. Defendant argues in his brief to this Court that the admission of D.H.'s testimony violated Article I, Section 19 of the North Carolina Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendant, however, did not raise this constitutional argument before the trial court and this issue, therefore, is not properly before this Court. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal").

In this case, the trial court found as fact D.H. signed an affidavit stating her testimony at trial was false and testified at the 1 July 1998 hearing on Defendant's motion for appropriate relief that her testimony at trial was false. D.H. testified at the 13 December 1999 hearing, however, that "she signed the affidavit after being repeatedly questioned about the facts leading to the conviction of . . . [D]efendant by friends and family members of . . . [D]efendant and also in an effort to avoid having to again testify in this matter." The trial court found as fact D.H. reaffirmed at the 13 December 1999 hearing "that her testimony at the trial of this matter was correct." The trial court also found as fact that "the events about which [D.H.] testified during the trial were extremely embarrassing to her and . . . she told her friends and others that it did not happen because she was embarrassed by . . . [D]efendant's actions." Based on these findings of fact, the trial court did not abuse its discretion by concluding "the court is not reasonably well satisfied that the testimony of [D.H.] given at the original trial was false."[4] *See State v. Shelton*, 21 N.C. App. 662, 665, 205 S.E.2d 316, 318 (noting a recantation is particularly unreliable when there has been a repudiation of the recantation), *cert. denied*, 285 N.C. 667, 207 S.E.2d 760 (1974). Accordingly, the trial court did not err by denying Defendant's motion for appropriate relief.[5]

Defendant makes no argument in support of his four remaining assignments of error and fails to cite any authority in support of these issues; therefore, these assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(5).

No error.

Judges EDMUNDS and SMITH concur.

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4. Defendant does not argue in his brief to this court that the trial court's findings of fact are not supported by competent evidence and this issue, therefore, is not properly before this Court. N.C.R. App. P. 28(b)(5).

5. Defendant argues in his brief to this Court that the trial court did not have subject matter jurisdiction in this case because Defendant's indictment for first-degree sexual offense did not allege all of the elements of that crime. The indictment in this case, however, complied with N.C. Gen. Stat. § 15-144.2, which authorizes a short-form indictment for the crime of first-degree sexual offense. *See* N.C.G.S. § 15-144.2 (1999). The trial court, therefore, had subject matter jurisdiction over Defendant. *See State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 342-44 (2000).

HYLTON v. KOONTZ

[138 N.C. App. 629 (2000)]

MARY NELL HYLTON, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MCKINLEY HYLTON, DECEASED, PLAINTIFF v. THOMAS J. KOONTZ, M.D., SALEM SURGICAL ASSOCIATES, P.A., BENZION SCHKOLNE, M.D., PIEDMONT ANESTHESIA AND PAIN CONSULTANTS, P.A., AND MEDICAL PARK HOSPITAL, INC., DEFENDANTS

No. COA99-1053

(Filed 5 July 2000)

1. Evidence— affidavits—summary judgment—not based on personal knowledge

Affidavits were not admissible as evidence at a summary judgment hearing in a medical malpractice action where the assertions in the affidavits (with one exception) did not reveal that they were based on the witness's personal knowledge. Affidavits supporting a motion for summary judgment must be made on personal knowledge and affirmations based on personal awareness, information and belief, and what the affiant thinks do not comply with the personal knowledge requirement. N.C.G.S. § 1A-1, Rule 56(e).

2. Hospitals and Other Medical Facilities— medical malpractice—agency of anesthesiologist

Summary judgment was properly granted for defendant hospital in a medical malpractice action where the hospital presented evidence of the agreement between it and the medical practice to which defendant anesthesiologist belonged which satisfied the hospital's initial burden of showing that it had no right to control the manner or method of the doctor's work at the hospital. The burden shifted to plaintiff to present evidence showing a genuine issue of fact on the agency question; while plaintiff presented hospital policies, the duties outlined therein were general in nature and do not reveal any control by the hospital over the manner and method of how the doctor performed his duties.

3. Hospitals and Other Medical Facilities— medical malpractice—agency of doctor—summary judgment

Summary judgment for a hospital in a medical malpractice action based on Dr. Koontz's alleged negligence was reversed where the hospital presented no competent evidence of the nature of its relationship with Dr. Koontz.

Appeal by plaintiff from order filed 24 June 1999 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 16 May 2000.

Young, Haskins, Mann, Gregory & Smith, P.C., by Fred D. Smith, Jr., for plaintiff-appellant.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Tamura D. Coffey, for defendant-appellees.

GREENE, Judge.

Mary Nell Hylton (Plaintiff), Administratrix of the Estate of William McKinley Hylton (Decedent), appeals from the trial court's order granting Medical Park Hospital, Inc.'s (the Hospital) motion for summary judgment.

The record and the pleadings reveal Decedent underwent surgery for the removal of his gall bladder at the Hospital. Thomas J. Koontz, M.D. (Dr. Koontz), a surgeon, performed the operation, and Benzion Schkolne, M.D. (Dr. Schkolne) was the anesthesiologist. Surgery commenced at 8:50 a.m., and at 3:25 p.m. that same day, the Decedent died while still in the Hospital. Plaintiff's complaint alleged vicarious liability against the Hospital for the alleged medical negligence of Dr. Koontz and Dr. Schkolne.

Prior to trial, the Hospital moved for summary judgment. In support of its motion, the Hospital presented two affidavits, over Plaintiff's objection, of its Senior Vice President for medical staff affairs James W. Lederer, M.D. (Dr. Lederer). One of the affidavits included an attachment of the Hospital's contract with Dr. Schkolne's medical practice group Forsyth Anesthesiology Associates, P.A. (FAA) (the Agreement). The Agreement provides in pertinent part:

> 4. Duties of FAA: During the term of this Agreement, FAA shall have the exclusive responsibility and right to provide professional anesthesia services to all patients at the Hospital. FAA agrees to provide services including but not restricted to the following:
>
> . . . .
>
> (f) FAA will appoint at least one physician at any given time, by rotation or fixed term, who shall be directly responsible as medical director for the areas of Recovery Room,

Outpatient Services, Respiratory Therapy and Special Care Unit.

. . . .

. . . .

8. Legal Status: . . . FAA and the Anesthesiologists provided by FAA, in performance of the work, duties and obligations under this Agreement, are at all time acting and performing as independent contractors practicing the specialty of anesthesia. The Hospital shall neither have nor exercise any control or direction over the method and means by which the Anesthesiologists and FAA shall perform their work and functions . . . . Nothing in this Agreement shall be construed to limit the Anesthesiologists from practicing their specialty outside of the Hospital as long as this practice does not infringe on their ability to perform their duties under this Agreement. . . .

. . . .

9. Charges: FAA will be compensated for its delivery of anesthesia services to patients by directly billing the patients and/or their insurers for services rendered by FAA. . . . FAA will receive no compensation for any other duties required of it hereunder. . . .

10. Billing: FAA will bill and collect charges for services provided to patients pursuant to this Agreement at its own cost and expense. . . . The Hospital and FAA shall independently bill and collect from the patient and third-party reimbursement agencies . . . .

In addition to presenting the Agreement, Dr. Lederer affirmed he had, in his capacity as Senior Vice President for medical staff affairs,[1] "reviewed" and is "familiar with the facts involved in [this] case." Based on that review of the facts, he affirms Drs. Koontz and Schkolne are, respectively, a general surgeon and an anesthesiologist, who maintain private practices in Winston-Salem, North Carolina, which are not affiliated with the Hospital. Dr. Koontz, as a properly credentialed practicing physician and surgeon, and Dr. Schkolne, as a properly credentialed practicing physician and anesthesiologist, make their own recommendations with regard to treatment possibili-

1. Dr. Lederer stated his duties "include assisting with litigation matters involving the hospitals."

ties. Their patients, in turn, elect to select or decline the recommendations or to seek another opinion. Both doctors have privileges at the Hospital, but neither doctor is an employee of the Hospital, is provided any financial or other benefits, or is governed by the Hospital's scheduling and leave provisions. Both doctors collect their own fees, and the Hospital does not receive any compensation for their professional services. The Hospital does not direct, supervise, or control any treatment rendered by the doctors to any of their patients, including Decedent.

Plaintiff objected to the admission of these affidavits, in part, on the ground there was no showing of Dr. Lederer's "personal knowledge" of the facts alleged in the affidavits. In opposition to the summary judgment motion, Plaintiff submitted, in pertinent part, the following policies of the Hospital:

> Role of Anesthesiologist:
>
> The anesthesiologist, in addition to the surgeon, is directly responsible for accepting or rejecting a patient for out[-]patient surgery. He or a CRNA or a Physician's Assistant will evaluate each patient prior to surgery and prior to pre-operative sedation. He will order all labs appropriate for anesthesia.
>
> The anesthetic evaluation of the patient in the pre-operative phase is continued until the operative anesthesia is performed. The anesthesiologist is then continuously responsible for the safe conduct of the patient in the recovery phase. He will be available to evaluate and treat problems in the Out-Patient Department as they arise.
>
> Role of the Physician:
>
> The attending physician is responsible for helping determain [sic] the candidacy of patient for surgery. He will be responsible for explaining the surgery, risks and possible complications as well as initiate the pre-operative instruction to the patient. He is also responsible for post-operative care and follow up of surgery procedure after discharge.
>
> . . . .
>
> A. OUTPATIENTS:
>
> Consists of those patients who are admitted for surgical procedures with discharge the same day anticipated. These patients

will generally consist of the American Association of Anesthesiology Classification I through III with the approval of the physician responsible for care and the anesthesiologist. . . . All patients require approval by the attending surgeon and the anesthesiology department.

. . . .

C. Observation Patients:

Consists of those patients admitted for medical or surgical procadures [sic] which may need additional recovery time up to 24 hours post surgery. . . . The decision to observe the patient is made by the patient's physician and or anesthesiologist and can be determined at any point in his hospital stay.

. . . .

II. Role of the Anesthesiologist [in Pre-Operative Assessment and Anesthesia Care]: The anesthesiologist, physician assistant or CRNA will be responsible for physically assessing the patient for anesthesia risk. All appropriate labs, EKG and chest x[-]ray will be ordered and evaluated prior to surgery. The patient will be classified according to the American Society of Anesthesiologist risk classification. The patient will have an understanding of the anesthesia plan and the anesthesia consent will be signed and witnessed.

The anesthesiologist may determine that surgery is inadvisable at this time due to a need for further evaluation or treatment of underlying problems which would increase the patient's perioperative risk. It is therefore at the discretion of the anesthesiologist to postpone or cancel the surgery. This will be discussed with the surgeon and possibly other consultants.

Furthermore, the Hospital policies provide, with respect to the "[m]edical direction" of "Out-Patient Department," that "Dr. Schkolne" and members of FAA are: (1) "responsible for assessing each patient pre-operatively and post-operatively"; (2) "participants in evaluating quality and appropriateness of services rendered by" the Out-Patient Department; (3) "present in the [H]ospital before pre-operative sedation medications are given and at all times when anesthesia is being administered and during post-operative recovery"; (4) "called on to medicate patients pre-operatively and post-operatively";

(5) "responsible for instructing patients as to which of their medication to take prior to surgery"; (6) "responsible for discharge of the patient from [the Post Anesthesia Care Unit] PACU and Out-Patient Department"; and (7) "responsible for ordering appropriate lab tests needed for the individual patient specific to his/her needs specific to the surgery." Additionally, members of FAA "[w]ill provide consultation to the medical staff in such anesthesia fields," such as, "respiratory care, spinal problems in pain relief and CPR."

The issues are whether: (I) facts included in an affidavit, in support of summary judgment, are based on the "personal knowledge" of the affiant when the affiant asserts he has "reviewed" and is "familiar" with those facts; and (II) (A) the Agreement and the Hospital policies present a genuine issue of material fact that the Hospital and Dr. Schkolne were in an agency relationship; (B) the Hospital satisfied its burden of establishing a complete defense to Plaintiff's vicarious liability claim against the Hospital based on Dr. Koontz's alleged negligence.

I

[1] Affidavits supporting a motion for summary judgment must "be made on personal knowledge." N.C.G.S. § 1A-1, Rule 56(e) (1999); *White v. Hunsinger*, 88 N.C. App. 382, 384, 363 S.E.2d 203, 204 (1988). Although a Rule 56 affidavit need not state specifically it is based on "personal knowledge," *Middleton v. Myers*, 41 N.C. App. 543, 546, 255 S.E.2d 255, 256 (1979), *aff'd*, 299 N.C. 42, 261 S.E.2d 108 (1980), its content and context must show its material parts are founded on the affiant's personal knowledge, *Fuller v. Southland Corp.*, 57 N.C. App. 1, 5, 290 S.E.2d 754, 757 (Rule 56 affidavits are sufficient if they "can be interpreted" to be based on personal knowledge), *disc. review denied*, 306 N.C. 556, 294 S.E.2d 223 (1982). Our courts have held affirmations based on "personal[] aware[ness]," *Stanley v. Walker*, 55 N.C. App. 377, 378-79, 285 S.E.2d 297, 298-99 (1982), "information and belief," *Blackwell v. Massey*, 69 N.C. App. 240, 244, 316 S.E.2d 350, 352 (1984); *see also Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972) ("advised and informed"); *Fuller*, 57 N.C. App. at 5, 290 S.E.2d at 757 ("believes"); *Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 32, 258 S.E.2d 77, 81 (1979) ("informed, advised and belief"); *Boone v. Fuller*, 30 N.C. App. 107, 109, 226 S.E.2d 191, 193 (1976) ("believed"), and what the affiant "think[s]," *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 32-33, 187 S.E.2d 487, 489-90 (1972), do not comply with the "personal knowledge" requirement of Rule 56(e).

Knowledge obtained from the review of records, qualified under Rule 803(6), constitutes "personal knowledge" within the meaning of Rule 56(e). *Bell Arthur Water Corp. v. N.C. Dept. of Transportation*, 101 N.C. App. 305, 309, 399 S.E.2d 353, 356, *disc. review denied*, 328 N.C. 569, 403 S.E.2d 507 (1991).

In this case, Dr. Lederer's affidavits indicate the assertions contained therein are based on a review of facts with which he is familiar. There is no statement the information contained in the affidavits are based on Dr. Lederer's "personal knowledge," nor is it clear from the content and context of the affidavits that the information was based on his personal knowledge.[2] With the exception of the matters contained in the Agreement, we cannot ascertain the source[3] of the information Dr. Lederer reviewed and on which he based his affidavits. Accordingly, with the exception of that portion of Dr. Lederer's affidavits relating to the Agreement, his affidavits in their present form do not reveal they were based on his "personal knowledge" and were not, therefore, admissible as evidence at the summary judgment hearing. Their admission by the trial court was, thus, error.

II

Under the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting as its agent. *See Willoughby v. Wilkins*, 65 N.C. App. 626, 633, 310 S.E.2d 90, 95 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 698 (1984). There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor. *Id.* Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court. *Hoffman v. Moore Regional Hospital*, 114 N.C. App. 248, 250, 441

2. We acknowledge that the portion of the affidavit incorporating the Agreement is based on personal knowledge.

3. If, for example, the affiant obtained information from another person and the information did not fall within a recognized exception to the hearsay rule, *see e.g.* N.C.G.S. § 8C-1, Rule 803 (1999), this information would not be based on the affiant's personal knowledge.

If, as another example, the affiant obtained information from a written record and the record did not comply with requirements of the business records exception to the hearsay rule, *see* N.C.G.S. § 8C-1, Rule 803(6) ("Records of Regularly Conducted Activity"), this information would, likewise, not be based on the affiant's personal knowledge, *c.f. Bell Arthur*, 101 N.C. App. at 309, 399 S.E.2d at 356.

S.E.2d 567, 569, *disc. review denied*, 336 N.C. 605, 447 S.E.2d 391 (1994).

The "vital test" in determining whether an agency relationship exists "is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944); *see also Willoughby*, 65 N.C. App. at 633, 310 S.E.2d at 95 (test is whether employer has right to control the "manner or method of doing work"). It is not dispositive that a contract denies the existence of an agency relationship, if in fact the relationship was that of agent-principal. *Ford v. Willys-Overland*, 197 N.C. 147, 149, 147 S.E. 822, 823 (1929).

A

Dr. Schkolne

[2] As to Dr. Schkolne, the Hospital presented evidence of the Agreement.[4] This Agreement states "[t]he Hospital shall neither have nor exercise any control . . . over the method and means by which the Anesthesiologists and FAA shall perform their work," the physicians are not limited from practicing outside the Hospital, the physicians were to receive no compensation from the Hospital, the parties were to bill the patient separately, and scheduling of the physicians at the Hospital was to be determined by FAA. This evidence satisfies the Hospital's initial burden of showing it had no right to control the manner or method of Dr. Schkolne's work at the Hospital, and thus, constitutes a complete defense to Plaintiff's vicarious liability claim against the Hospital based on Dr. Schkolne's alleged negligence. *See Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 593, 394 S.E.2d 643, 646 (1990) (movant for summary judgment has burden of showing complete defense to non-movant's claim), *disc. review denied*, 328 N.C. 89, 403 S.E.2d 824 (1991). The burden, thus, shifted to Plaintiff to present evidence showing a genuine issue of fact on the agency question. *Id.* On this point, Plaintiff presented the Hospital policies which outline some of the duties of its physicians, *i.e.*, "evaluate each patient prior to surgery," "responsible for the safe conduct of the patient in the recovery phase," "[determine] the candidacy of patient for surgery," and "responsible for explaining the surgery, risks and possible complications." These duties are general in nature and do

4. The other information contained in Dr. Lederer's affidavit is not to be considered, as decided in issue I of this opinion, in evaluating the correctness of the summary judgment.

not reveal any control by the Hospital over the manner and method of how Dr. Schkolne performed his duties. *See Hoffman*, 114 N.C. App. at 251, 441 S.E.2d at 569 (general policies of hospital are not indicative of control of details of physician's work). Thus, Plaintiff has failed in her burden of showing a genuine issue of material fact, and summary judgment for the Hospital on Dr. Schkolne's alleged negligence is affirmed.

B

Dr. Koontz

[3] The Hospital has presented no competent evidence of the nature of its relationship with Dr. Koontz.[5] Thus, it failed in its burden of showing a legal bar or complete defense to Plaintiff's vicarious liability claim against the Hospital based on the alleged negligence of Dr. Koontz. *Forbes*, 99 N.C. App. at 593, 394 S.E.2d at 646. Accordingly, Plaintiff had no burden to present any evidence on this issue, *id.*, and summary judgment for the Hospital on Dr. Koontz's alleged negligence must be reversed.

Reversed in part, affirmed in part, and remanded.

Judges HORTON and HUNTER concur.

THOMAS L. PARRISH AND WIFE, RUTH M. PARRISH, PLAINTIFFS v. NORMAN C. HAYWORTH AND WIFE, MYRTLE HAYWORTH; JAMES HAYWORTH AND WIFE, VENESSIA HAYWORTH; WILLIAM F. LASATER, III (DIVORCED) AND NANCY W. LASATER (DIVORCED) (FORMERLY HUSBAND AND WIFE), DEFENDANTS

No. COA99-686

(Filed 5 July 2000)

Easements— recorded plat—right of way—patently ambiguous description—failure to establish location—parties' usage

The trial court did not err by granting summary judgment in favor of defendants on the issue of whether plaintiffs acquired the right to use the original right of way shown in the plat book

5. Although the Hospital did present evidence, through Dr. Lederer's affidavit, of its relationship with Dr. Koontz, we have held, in issue I, that evidence was not admissible. The Agreement did not relate to Dr. Koontz.

because: (1) the description of the right of way in the plat book is patently ambiguous and void since it is incapable of being described and the width of the right of way is not indicated in the plat; (2) plaintiffs have failed to establish the location of the original right of way with certainty; and (3) based on their usage, the parties and their predecessors in title have accepted the present right of way intended to be reserved by the plat.

Judge GREENE concurring in the result.

Appeal by plaintiffs from judgment entered 1 April 1999 and filed 6 April 1999 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 14 March 2000.

Pinto Coates Kyre & Brown, PLLC, by Richard L. Pinto and John I. Malone, Jr., for plaintiffs-appellants.

Benson & Marshall, L.L.P., by Robert A. Benson, for defendants-appellees.

WALKER, Judge.

On 8 September 1995, plaintiffs filed a complaint against defendants James and Venessia Hayworth seeking a judgment pursuant to N.C. Gen. Stat. § 41-10 which "removes the cloud from the title" of the "slender strip of land contiguous with the eastern boundary" of plaintiffs' property. (*See* No. 95 CvS 8537). Plaintiffs argued that they had a survey performed which revealed that "the strip of land which ownership is in controversy has either been dedicated to public use . . . according to Plat Book 87, Page 72, . . . or has been deeded to the Plaintiff by it[s] former possessors in title by deed. . . ."

Defendants James and Venessia Hayworth filed an answer and counterclaim, praying that the trial court remove the cloud of title to the property owned by them. In their reply, plaintiffs alleged that they own the property in question by virtue of adverse possession or "[i]n the alternative the property has been dedicated by plat. . . ."

Defendants James and Venessia Hayworth moved for summary judgment, and at the hearing, the trial court considered evidence from both plaintiffs and defendants regarding the ownership of the contested property. In his 14 November 1996 order, Judge Steve Allen determined that there was no genuine issue of material fact and that the property in question was conveyed to defendants James and Venessia Hayworth on 13 November 1992 by John R. Hill in the deed

recorded in book 4019, page 1587. Judge Allen then ordered that "any cloud on the said title claimed by the Plaintiffs herein is hereby removed. . . ." No appeal was taken from this order.

On 10 September 1997, plaintiffs filed this action seeking to enjoin defendants James and Venessia Hayworth from obstructing or blocking their use of a driveway which crosses defendants' property and for a declaratory judgment establishing their "prescriptive or other rights" to use the driveway. Plaintiffs allege that defendants Norman and Myrtle Hayworth are the natural parents of James Hayworth and the predecessors in interest to "some of the property and right complained of." Defendants filed an answer and counterclaim. Plaintiffs then filed a reply to defendants' counterclaim and a notice of voluntary dismissal without prejudice of the claims directed at defendants William and Nancy Lasater.

Plaintiffs later amended their complaint, seeking a declaratory judgment which would establish that they have a right of way to the public road shown on the plat recorded in book 16, page 56 in the Guilford County Register of Deeds Office. Defendants filed an objection to plaintiffs' motion to amend their complaint, contending that the 14 November 1996 order signed by Judge Steve Allen determined the "rights and liabilities" between the parties as to the right of way depicted on plat book 16, page 56. Both plaintiffs and defendants moved for summary judgment. Defendants argued that "Plaintiff[s'] Complaint is only an attempt to relitigate matters previously determined in Case No. 95 CvS 8537." On 6 April 1999, Judge Judson D. DeRamus, Jr. denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment.

Plaintiffs assign as error the trial court's granting of summary judgment in favor of defendants since: (1) the 1996 order only addressed the issue of ownership and title to the land in question and did not address the abandonment or extinguishment of the original right of way; (2) the 1996 order is null and void due to the failure to join all necessary parties; (3) defendants failed to answer or otherwise plead a response to their complaint for declaratory relief in this action; and (4) the original right of way was not entirely extinguished by the 1996 order.

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 Corp.*, 128 N.C. App. 379, 496 S.E.2d 795 (1998). As the mov-

ing party, defendant 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 may be met by showing: (1) that an essential element of plaintiff's claim is nonexistent; (2) that discovery indicates plaintiff cannot produce evidence to support an essential element; or (3) that plaintiff cannot surmount an affirmative defense. *Id.* at 63, 414 S.E.2d at 342. Once a defendant has met that burden, the plaintiff must forecast evidence tending to show that a *prima facie* case exists. *Id.*

In the recent case of *Harry v. Crescent Resources, Inc.*, 136 N.C. App. 71, 74, 523 S.E.2d 118, 120 (1999), *citing Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964), this Court recognized:

> When a developer sells residential lots in a subdivision by reference to a recorded subdivision plat which divides the tract of land into 'streets, lots, parks and playgrounds,' a purchaser of one of the residential lots 'acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement.'

"A map or plat, referred to in a deed, becomes part of the deed, as if it were written therein." *Stines v. Willyng, Inc.*, 81 N.C. App. 98, 101, 344 S.E.2d 546, 548 (1986). "A recorded plat becomes part of the description and is subject to the same kind of construction as to errors." *Id.*

In determining whether an easement is sufficiently described, our Supreme Court has held:

> When an easement is created by deed, either by express grant or by reservation, the description thereof must be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers.

Allen v. Duvall, 311 N.C. 245, 249-251, 316 S.E.2d 267, 270-271, *rehearing granted*, 311 N.C. 745, 321 S.E.2d 125 (1984), *citing Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942). "There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land." *Id.* If the description is patently ambiguous, the attempted conveyance or reservation is void for uncertainty. *Id.* If, however, the ambiguity in the description is latent and not patent, the reservation will not be held void for uncertainty if identification can be made by referring to something extrinsic. *Id.*

In *Stines v. Willyng, Inc.*, 81 N.C. App. 98, 344 S.E.2d 546 (1986), a recorded plat designated certain land lying north and west of platted lots as "Park Property." This Court found that there was "absolutely no reference here to anything on the plat itself which is sufficient to serve as a pointer or a guide to the ascertainment of the location of the land." *Id.* at 101, 344 S.E.2d at 548. "Nothing on the plat or referred to therein would enable a title attorney to determine the precise boundaries of the area burdened with the park easement." *Id.* Thus, the areas designated as "Park Property" were patently ambiguous and did not create an easement or dedication of the area for park purposes. *Id.*; *See also Thompson*, 221 N.C. 178, 19 S.E.2d 484.

Here, plaintiffs contend that they have acquired the right to use the original right of way shown in plat book 16, page 56, which extends in a northwest direction from Cedar Ridge Road. The record reveals that Alan E. Ferguson, a real estate attorney in Greensboro, concluded in his 25 October 1996 affidavit that the " 'roadway' shown on Plat Book 16, Page 56 cannot be located by reference only to said plat" since:

> (1) The pertin[e]nt lot lines are drawn without bearings [] noted on the plat; (2) the 'roadway' itself is given no bearings and (3) the plat does not make clear whether the boundaries of the lots conveyed along the 'roadway' run to the center of the 'road[,]' the eastern edge of the 'road[,]' or the western edge of the 'road.'

Additionally, we note that the width of the original right of way is not indicated on this plat. Thus, since the original right of way depicted in plat book 16, page 56 is incapable of being described, it is patently ambiguous and void.

Even assuming *arguendo* that the description of the original right of way results in a latent rather than a patent ambiguity, we conclude that the extrinsic evidence in the record is insufficient to identify the original right of way with certainty. *See Thompson*, 221 N.C. 178, 19 S.E.2d 484. Plaintiffs rely on a survey performed by William L. Knight, Jr., recorded in plat book 87, page 72 and dated 23 September 1987 (Knight survey). Plaintiffs argue that this survey "locates the original right-of-way center stakes at the boundary line of the Parrish and Hayworth properties in question" and that the right of way "equally encroached on the property of defendants James and V[e]nessia Hayworth as well as the Parrish property as it traveled down the length of their common boundary line."

The Knight survey locates the property of William F. and Nancy W. Lasater and the roadway along the Lasater property known as Cedar Valley Drive. Although the Knight survey indicates that the original right of way probably lies somewhere west of the Lasater property and the present Cedar Valley Drive, the survey does not identify, by metes and bounds or in any other manner, the location of the original right of way. Thus, after considering the extrinsic evidence in the record, we conclude that plaintiffs have failed to establish the location of the original right of way.

Furthermore, our Supreme Court recognized that:

> It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.

Borders v. Yarbrough, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953); *See also Allen*, 311 N.C. 245, 316 S.E.2d 267. "The law endeavors to give effect to the intention of the parties, whenever it can be done consistently with rational construction." *Allen*, 311 N.C. at 251, 316 S.E.2d at 271. In the case at bar, the parties and their predecessors in title have utilized the roadway, known as Cedar Valley Drive, through the subdivision. Although the original right of way cannot be located, we conclude that, based on their usage, the parties and their predecessors in title have accepted the present Cedar Valley Drive as the right of way intended to be reserved by the plat recorded in book 16, page 56.

In summary, we affirm the trial court's granting of summary judgment in favor of defendants.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE concurs in the result with separate opinion.

Judge GREENE concurring in the result.

I disagree with the majority that the description of the right of way depicted in Plat Book 16, Page 56 is patently ambiguous and, consequently, void.

A description of an express grant or reservation of a right of way is patently ambiguous when the location of the right of way cannot be ascertained based on the plat itself and based on extrinsic information to which the plat refers. *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984).

In this case, the majority states the description of the right of way depicted in the plat is patently ambiguous because the right of way cannot be located solely by reference to the plat and because the width of the right of way is not indicated in the plat. The plat in this case, however, contains a scale by which the width of the right of way may be ascertained. Moreover, the location of the right of way may be ascertained based on the plat itself and upon extrinsic information to which the plat refers. The ambiguity, therefore, is latent. *See id.* at 250-51, 316 S.E.2d at 271 (right of way latently ambiguous when description in deed describes location of right of way as "beginning at G. L. Allen's line and running up on East side of creek over this land").

When an express grant or reservation of a right of way contains a latent ambiguity regarding the location of the right of way, extrinsic evidence may be introduced to ascertain the location. *Id.* at 251, 316 S.E.2d at 271. Such extrinsic evidence includes "[t]he use of the [right of way] in question by plaintiffs' predecessors in title, acquiesced in by defendants' predecessors in title of the servient estate." *Id.*

In this case, there is a genuine issue of material fact regarding the location of the right of way based on extrinsic evidence, which would ordinarily require this Court to remand this case to the trial court. *See Williams v. Board of Education*, 284 N.C. 588, 598, 201 S.E.2d 889, 896 (1974) (summary judgment inappropriate when genuine issue of material fact exists). Nevertheless, because I believe the trial court properly granted summary judgment in favor of defendants and denied plaintiffs' motion for summary judgment on the ground plaintiffs' claims are barred by the doctrine of res judicata, I would affirm the trial court's order. *See Wilson v. Watson*, 136 N.C. App. 500, 502, 524 S.E.2d 812, 813 (2000) (the doctrine of res judicata "entirely bars an identical party or those in privity from relitigating a second action identical to the first where a court of competent jurisdiction has already rendered a final judgment on the merits"); *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.").

LOUIS KILGO, AND WIFE CAROLE KILGO, PLAINTIFFS v. WAL-MART STORES, INC., WAL-MART STORES, INC., D/B/A SAM'S WHOLESALE CLUB, DEFENDANTS

No. COA99-956

(Filed 5 July 2000)

1. **Evidence— similar occurrences after accident—not too remote**

In a negligence action arising from an injury suffered by plaintiff when freight from a trailer fell on him when he opened the rear door, the trial court did not err by allowing testimony that, within 18 months after plaintiff's injuries, the witness had observed the method used by Wal-Mart to pack and load its merchandise into trailers and had observed merchandise fall out of the trailers when the rear doors were opened. The observations were not too remote in time and allow a reasonable inference that Wal-Mart loaded the trailers without taking precautions necessary to prevent shifting during transport.

2. **Evidence— report—unredacted version admitted after redacted version**

The trial court did not abuse its discretion in a negligence action involving Wal-Mart's practices in loading trailers by admitting an unredacted incident report produced pursuant to a subpoena duces tecum after a redacted version had been admitted. Wal-Mart did not move to quash the subpoena, but to redact a portion of the report, so that the argument concerns the admissibility of the unredacted version. While the admission of the unredacted version after admission of the redacted version has some tendency to prejudice Wal-Mart, admission of the unredacted version has probative value and it cannot be said that the decision of the trial court was so arbitrary that it could not have been the result of a reasoned decision.

3. **Evidence— incident report—hearsay and opinion—admissible**

In an negligence action arising from freight falling from a trailer when the rear door was opened, an incident report was not inadmissible because it contained hearsay and opinion where the person making the report was the manager of the store where the injury occurred, his job responsibilities called for him to complete a form incident report, and the form report called for basic information and asked for comments on how the incident occurred.

4. Evidence— expert testimony on opposing expert's methodology—excluded—no abuse of discretion

The trial court did not abuse its discretion in a negligence action by precluding a defense expert from testifying about the methodology used by plaintiff's expert in evaluating plaintiff's vocational rehabilitation prospects. The trial court has great discretion with respect to the examination of witnesses.

Appeal by defendants from judgment filed 13 November 1998 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2000.

Zaman & Associates, by Karen Zaman; Lohf, Shaiman & Jacobs, P.C., by Jeffrey A. Hyman; and Patterson, Karkavy & Lawrence, L.L.P., by Martha A. Geer, for plaintiff-appellees.

Smith Helms Mulliss & Moore, L.L.P., by Bradley R. Kutrow, for defendant-appellants.

GREENE, Judge.

Wal-Mart Stores, Inc. (Wal-Mart) appeals from a judgment entering a jury verdict in the amount of $2,225,000.00 for Louis and Carole Kilgo (the Plaintiffs).[1]

Louis Kilgo (Kilgo), an independent contractor, was injured on 17 January 1991 while opening the rear doors of a trailer (Kilgo trailer) he had transported to a Sam's Club in Fayetteville, North Carolina (the Sam's Club) for unloading. Kilgo worked for National Freight, Inc. and he had been dispatched to transport a load of merchandise from a Wal-Mart distribution center to the Sam's Club, a division of Wal-Mart. The merchandise was packed and loaded by employees of Wal-Mart into the Kilgo trailer. When Kilgo opened the rear left door of the Kilgo trailer, a portion of the cargo fell onto him causing him injury.

The Plaintiffs alleged Wal-Mart was negligent in that Wal-Mart failed to secure the cargo in the Kilgo trailer and the failure to adequately secure the cargo was a proximate cause of his injuries. The Plaintiffs offered the testimony of an eye witness. This witness, Richard West, stated the Kilgo trailer had "no load locks," "[n]o dunnage," "[n]o air bags, [and] no barricade to secure [its] load."

1. The judgment reflects a jury award of $2,000,000.00 for Louis Kilgo, for his personal injuries, and $225,000.00 for Carole Kilgo, for her loss of consortium.

Furthermore, the merchandise on each pallet was not "stretch wrapp[ed]" "from the bottom [of the] pallet up to the top of the freight." Two experts testified Kilgo's injuries were caused by Wal-Mart's loading procedure which permitted the merchandise to shift, during transport, into a void in the back of the trailer and against the back door. They further testified industry standards call for loading a trailer of this type using dunnage (to fill the voids), load locks (to secure the merchandise) and stretch-wrap (plastic wrapped around the merchandise to hold it together).

Troy Seamon, a Wal-Mart employee, testified he worked at a Wal-Mart retail store from July 1992 to February 1995 as a cargo unloader. He was allowed to testify, over Wal-Mart's objection the evidence was not relevant, that he observed on "[q]uite a few occasions" merchandise falling out of Wal-Mart trailers that had been transported to a Wal-Mart retail store for unloading. He further was allowed to state he had observed "the way [the trailers were] loaded." The merchandise "was kind of scattered out through the trailer[s]" and "load locks" were not usually used to secure the merchandise.

The Plaintiffs offered into evidence, as their Exhibit #1, a "Report of Customer Incident," a document prepared by Wal-Mart and relating to the events occurring on 17 January 1991. This exhibit contained answers to thirty form questions, was given to the Plaintiffs by Wal-Mart pursuant to pre-trial discovery, and was identified as a redacted document. On 30 October 1998, the Plaintiffs served a subpoena *duces tecum* on the current manager of Sam's Club, Dale Filley (Filley), directing him to produce at trial, on 9 November 1998,[2] the "Report of Customer Incident" relating to Kilgo's injuries. When the Plaintiffs called Filley as a witness, Wal-Mart requested the trial court "redact the portion of the [incident] report" so as to omit the comments in the report on "how the accident occurred" and, thus, make it consistent with the Plaintiffs' Exhibit #1. The trial court denied Wal-Mart's request. In his testimony, Filley stated he had been subpoenaed to bring to the courtroom the full incident report pertaining to this accident, which he had in his possession. He testified the report was kept in the regular course of business at the Sam's Club; it was found in a "file" at the Sam's Club where all incident reports are kept; the purpose of the report is to "have facts of what happened"; it was signed by the manager of the Sam's Club, Jeffery Marmer (Marmer), who had the responsibility to complete the report;

2. The trial in this case began on 2 November 1998 and extended through 13 November 1998.

it was dated 17 January 1991; and it is the report of the incident that is the subject of this action. The Plaintiffs had the report marked as Exhibit #1C and offered it into evidence. Wal-Mart objected on the bases of "Rule 403" and "opinion and hearsay." The trial court overruled the objection and permitted its introduction into evidence. The Plaintiffs' exhibit #1C, on pre-printed form "WPK/8096-340/0187," lists various questions including number 31, which states as follows: "YOUR COMMENTS ON HOW INCIDENT OCCURRED: It appears that double[-]stacked pallet[s] of fax paper [and] calculator rolls were improperly shrink wrapped, allowing them to shift [and] then fall out when the doors opened." In a signed narrative attachment to the Plaintiffs' exhibit #1C, Marmer explained: "When cleaning up, we noticed that there was very little shrink wrap left around on the ground when the merchandise was picked up[.]"

The issues presented are whether: (I) evidence of cargo falling out of Wal-Mart trucks, after the incident causing the Plaintiff's injuries, is relevant evidence; and (II) the un-redacted 1991 Wal-Mart incident report was inadmissible on the grounds it contains hearsay and/or opinion evidence.

I

[1] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1999). Evidence of the acts or conduct of a defendant occurring subsequent to the time of the transaction in controversy, if not too remote, can constitute relevant evidence within the meaning of Rule 401. *See State v. Beatty*, 64 N.C. App. 511, 515, 308 S.E.2d 65, 67, *disc. review denied*, 309 N.C. 823, 310 S.E.2d 354 (1983); 29 Am. Jur. 2d *Evidence* § 526 (1994); *see also* N.C.G.S. § 8C-1, Rule 406 (1999) (evidence of "routine practice of an organization . . . is relevant to prove . . . conduct was in conformity with . . . the routine practice").

In this case, Seamon was properly permitted to testify he had observed, within 18 months after Kilgo's injuries, the method used by Wal-Mart to pack and load its merchandise into its trailers, and he had observed merchandise fall out of Wal-Mart trailers when the rear doors were opened. The observations were not too remote in time and allow a reasonable inference that Wal-Mart loaded the Kilgo trailer, as they had loaded the trailers observed by Seamon, without

taking precautions necessary to prevent the shifting of the merchandise during transport.[3] The trial court, therefore, did not err in allowing this testimony into evidence. In so holding, we do not address Wal-Mart's contention that Seamon's testimony was inadmissible evidence under Rule 404(b).[4]

II

[2] A subpoena *duces tecum* compels the production of "records, books, papers, documents, or tangible things," N.C.G.S. § 1A-1, Rule 45(c) (1999), patently material to the inquiry, in the context of "a discovery deposition, hearing, trial, or other proceeding in which testimony is to be received," 2 G. Gray Wilson, *North Carolina Civil Procedure* § 45-3, at 98 (2d ed. 1995) [hereinafter 2 *North Carolina Civil Procedure*]; *Vaughan v. Broadfoot*, 267 N.C. 691, 699, 149 S.E.2d 37, 43 (1966). The subpoena may be issued by the clerk of superior court, a trial judge, a magistrate, or a party or their attorney. 2 *North Carolina Civil Procedure* § 45-3, at 98; N.C.G.S. § 1A-1, Rule 45(a), (b). It must be signed by the person issuing it. N.C.G.S. § 1A-1, Rule 45(a). The object of the subpoena *duces tecum* is to secure the production of evidence for presentation to the court, not to secure items for inspection. 81 Am. Jur. 2d *Witnesses* § 19 (1992); *see* N.C.G.S. § 1A-1, Rule 34 (1999) (procedure mandated for discovery of documents). Thus, this subpoena is not properly used for discovery purposes.[5]

3. We reject Wal-Mart's argument that Seamon's testimony is not relevant because his testimony related to the unloading of a trailer of merchandise delivered to a Wal-Mart retail store, not a Sam's store. Although the delivery in this case was to a Sam's store and there is some evidence merchandise is loaded somewhat differently, the trial court is given broad discretion in determining whether the evidence is relevant and we discern no abuse of discretion in this case. In any event, this distinction goes more to the weight of the evidence, not its admissibility. Finally, even if it was error to admit this evidence, Wal-Mart has not shown it was prejudiced thereby. *See FCX, Inc. v Caudill*, 85 N.C. App. 272, 280, 354 S.E.2d 767, 773 (1987) (burden on party complaining about the evidence to show error was prejudicial).

4. Wal-Mart argues once it objected to Seamon's testimony the trial court had an affirmative obligation to conduct a *voir dire* hearing to determine the admissibility of the testimony under Rule 404(b). We disagree. The trial court is required to conduct a *voir dire* hearing only if the evidence is offered pursuant to Rule 404(b). *See State v. Morgan*, 315 N.C. 626, 636, 340 S.E.2d 84, 91 (1986). The Plaintiffs had an obligation to identify the purpose for which the evidence was being offered only if requested to do so, either by the trial court or the party objecting to the evidence. *See State v. Ford*, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000). In this case, the Plaintiffs did not identify their purpose for offering the evidence and there was no request that they do so.

5. A subpoena *duces tecum* is appropriate to make discovery of documentary evidence held by a non-party. N.C.G.S. § 1A-1, Rule 45(d). In that context, we note a Rule 45(a) subpoena is required to mandate a non-party's attendance at either a Rule 30

Vaughan, 267 N.C. at 699, 149 S.E.2d at 43. The subpoena *duces tecum* is properly issued to any person who can be a witness, party or nonparty. *Id.* at 695, 149 S.E.2d at 40 (court acknowledges "common law courts lacked power to compel a party to produce his books and papers"); 81 Am. Jur. 2d *Witnesses* § 21 (1992). The propriety or validity of the subpoena *duces tecum*, usually challenged by a motion to quash or a motion to modify, must be raised before the time for compliance,[6] and these motions raise issues separate from the admissibility of the material into evidence. 2 *North Carolina Civil Procedure* § 45.4, at 101-02. Whether the subpoena should be quashed or modified is a matter within the sound discretion of the trial court. *Vaughan*, 267 N.C. at 697, 149 S.E.2d at 42. Thus, although the motion to quash is denied, the party having to produce the documents may, nonetheless, challenge the admissibility of the documents. *Id.* ("admissibility is to be determined when [subpoenaed documents] are offered in evidence").

In this case, Wal-Mart did not move to quash the subpoena *duces tecum*,[7] although it did ask the trial court to modify the subpoena so as to "redact the portion of the [incident] report" relating to how "the incident occurred" and, thus, make it consistent with the Plaintiffs' Exhibit #1. Wal-Mart now argues the failure of the trial court to grant its request "put [it] in the unfair and irreparable position of having to deal with a different version of the incident report after the redacted version . . . had already been introduced . . . [suggesting it] had acted

(deposition by oral examination) or Rule 31 (deposition upon written questions) deposition. N.C.G.S. § 1A-1, Rules 30(a), 31(a), and 45(a) (1999); 2 *North Carolina Civil Procedure* § 45.5, at 104.

6. A subpoena *duces tecum* may not be proper for a variety of reasons, including, documents are not relevant, material is privileged, or request is over-broad. *See North Carolina Civil Procedure* § 45.4, at 101-02. Furthermore, the subpoena should be quashed "if it is unreasonable and oppressive." N.C.G.S. § 1A-1, Rule 45(c)(1).

7. The record reveals an earlier subpoena for the same 1991 Wal-Mart incident report and a written motion to quash that subpoena. That subpoena, however, was unsigned, and thus, was not valid and enforceable. The Plaintiffs subsequently issued and served a new subpoena for the same incident report, the subpoena now at issue in this case, and the record does not reveal a motion to quash that subpoena.

Nonetheless, Wal-Mart argues in this Court the subpoena must be quashed because of a "procedural impropriety." Specifically, the subpoena "directing a party to produce documents during or just prior to trial is improper, and may not be used instead of established discovery procedures." Although the issue is not presented in this Court, as it was not raised in the trial court, we note that not every subpoena directing a party to produce documents during or just prior to a trial constitutes improper discovery. We see nothing improper about the subpoena in this case.

improperly." This argument does not address the validity or the propriety of the subpoena, but instead concerns the admissibility of the un-redacted version of the incident report. In other words, whether its "probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1999). Admittedly, the admission of the un-redacted version of the incident report, when the redacted version had previously been introduced into evidence, has some tendency to prejudice Wal-Mart. On the other hand, the admission of the un-redacted version has probative value, and it was within the discretion of the trial court to balance the probative value against the prejudicial value. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). We cannot say the decision of the trial court was so arbitrary that it could not have been the result of a reasoned decision, and thus, the decision was not an abuse of discretion. *See State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996).

[3] Wal-Mart argues the un-redacted incident report was not admissible, because it contains hearsay and opinion testimony. We disagree.[8]

Any statement of an agent of a party is admissible into evidence against the principal party if the statement (1) concerns "a matter within the scope of [the] agency," and (2) is "made during the existence of the [agency] relationship." N.C.G.S. § 8C-1, Rule 801(d)(D) (1999). In this case, Marmer was the manager of the Sam's Club at the time Kilgo was injured, and his job responsibilities called for him to complete a form incident report each time someone was injured at the store. The form report called for basic information, *i.e.*, date of accident, nature of injuries, name of injured party, and witnesses to the accident. It also asked for the manager's "COMMENTS ON HOW [THE] INCIDENT OCCURRED." In his capacity as manager, Marmer, on the date of Kilgo's injuries, included on the form his comments on how the incident occurred. Marmer was, thus, an agent of Wal-Mart at the time he entered his comments on the incident report and the entry concerned a matter within the scope of his agency. The un-redacted report was, accordingly, properly admitted into evidence and is not

8. Wal-Mart also argues the redacted portion of the incident report was not admissible because it was prepared in anticipation of litigation and, thus, constituted "work product." This is an issue that was not raised in the trial court either by a motion to quash the properly issued subpoena or by any objection to the admission of the incident report. We note, however, the incident report was prepared in the regular course of business and would not, therefore, be protected under the "work product" rule. *Willis v. Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976).

violative of the rules prohibiting hearsay or opinion testimony.[9] *See Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 295, 401 S.E.2d 837, 839 (1991).

[4] Wal-Mart finally argues the trial court erred in precluding its expert from testifying about the methodology used by the Plaintiffs' expert in evaluating Kilgo's vocational rehabilitation prospects. We disagree. The trial court has great discretion with respect to the examination of witnesses, *see State v. Covington*, 290 N.C. 313, 334-35, 226 S.E.2d 629, 644 (1976), and we observe no abuse of that discretion in this case.

No error.

Judges HORTON and HUNTER concur.

MALINDA G. THOMPSON, PLAINTIFF v. WAL-MART STORES, INC., A DELAWARE CORPORATION, DEFENDANT

No. COA99-1044

(Filed 5 July 2000)

1. Premises Liability— slip and fall—constructive knowledge

The trial court did not err in a slip and fall case by allowing defendant-store's motion for a directed verdict because: (1) plaintiff did not allege that defendant created the dangerous condition that caused her injury; (2) plaintiff offered no evidence showing that any of defendant's employees had actual knowledge of the spill; (3) plaintiff did not offer direct evidence that defendant had constructive knowledge of the spill based on how long it was in the aisle; and (4) plaintiff testified that the aisle was clean and well-lit, and that the puddle itself was clear and free of any debris, negating the inference that the spill must have existed for a long time.

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9. Furthermore, the "COMMENTS" in the report about what caused the injuries constitute admissible opinion testimony by a lay witness in that Marmer's opinion was based on perceptions he obtained from observing the accident scene after the merchandise fell from the trailer. N.C.G.S. § 8C-1, Rule 701 (1999).

2. Premises Liability— slip and fall—store's inspection guidelines

Although plaintiff contends that defendant-store's failure to follow its own guidelines about inspecting its store was some evidence of negligence, the trial court did not err in a slip and fall case by allowing defendant's motion for a directed verdict because: (1) evidence showing the store did not adhere to the corporation's timetable for inspecting the store does not also show the store failed to keep its store clean; (2) even if the store followed its safety sweep guidelines according to schedule, the sweep would have taken place after plaintiff's fall; and (3) the pertinent aisle's overall cleanliness indicates that an employee had recently inspected the aisle.

Appeal by plaintiff from judgment entered 23 March 1999 by Judge Russell G. Walker, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 7 June 2000.

Law Offices of Chandler deBrun Fink & Hayes, by Walter L. Hart IV, for plaintiff-appellant.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by K. Neal Davis and Kimberly R. Matthews, and Stephanie D. Gordon of Wal-Mart Stores, Inc., for defendant-appellee.

WYNN, Judge.

While shopping at the Wal-Mart store in Albemarle, North Carolina on 29 July 1995, Malinda G. Thompson slipped and fell while reaching for an item in the shampoo aisle. On the floor, she saw some small pieces of glass tucked up under the overhang of the lowest shelf. She also saw and felt a puddle that was clear, slimy, thick, and about the size of a dinner plate.

Ms. Thompson stood up and looked for an employee in the area. Not finding anyone, she walked to Wal-Mart's garden center, where she told an employee named Barbara Gregory that she fell in some shampoo and hurt her knee. Ms. Thompson showed her the puddle and Ms. Gregory cleaned it up. Ms. Thompson then made some purchases and left the store.

Afterwards, Ms. Thompson brought an action against Wal-Mart Stores, Inc., alleging that Wal-Mart was negligent in not cleaning up the spill and in failing to warn her about the spill, and that she was

proximately injured as a result of the fall. Wal-Mart denied her allegations of negligence and asserted that Ms. Thompson's injuries were caused by her own contributory negligence.

A trial on this action began on 10 March 1999. At the close of Ms. Thompson's evidence, the trial court granted Wal-Mart's motion for a directed verdict under N. C. R. Civ. P. 50(a), finding that Ms. Thompson's evidence was insufficient as a matter of law to establish a claim for relief against Wal-Mart. Ms. Thompson appeals to this Court.

Ms. Thompson argues that the trial court erred in allowing Wal-Mart's motion for a directed verdict because she presented sufficient evidence to have the jury decide the issues in question. We disagree.

Our review of whether the trial court properly granted Wal-Mart's motion for a directed verdict is limited to a determination of whether the evidence was sufficient to go to a jury. *See Alston v. Herrick*, 76 N.C. App. 246, 249, 332 S.E.2d 720, 722 (1985), *aff'd*, 315 N.C. 386, 337 S.E.2d 851 (1986). We review the evidence in the light most favorable to the non-moving party, accepting the non-moving party's evidence as true and giving her the benefit of reasonable inferences. *See Hunt v. Montgomery Ward and Co., Inc.*, 49 N.C. App. 642, 644, 272 S.E.2d 357, 360 (1980). Reasonable inferences must be drawn from established facts, not other inferences or speculation. *See Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E.2d 411, 413 (1957).

To present a *prima facie* case based on negligence, a plaintiff must present evidence that the defendant had a duty to conform to a certain standard of conduct, the defendant breached that duty, and the breach of duty was the proximate cause of the plaintiff's injury. *See Jenkins v. Stewart & Everett Theaters, Inc.*, 41 N.C. App. 262, 265, 254 S.E.2d 776, 778, *disc. review denied*, 297 N.C. 698, 259 S.E.2d 295 (1979).

In North Carolina, a store owner's duty to its customers is to use ordinary care to keep its store in reasonably safe condition and to warn of hidden dangers or unsafe conditions of which the store owner knows or should know. *See Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981). To show that a store owner breached its duty of care, a plaintiff must show that the store owner either negligently created the condition causing her injury or negligently failed to correct the condition after actual or constructive

knowledge of its existence. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43(1992).

[1] In the case at bar, Ms. Thompson did not allege that Wal-Mart created the dangerous condition that caused her injury. She also offered no evidence showing that any Wal-Mart employee had actual knowledge of the spill. Our inquiry, then, is whether Wal-Mart was negligent because it had constructive knowledge of the spill.

The plaintiff bears the burden of showing that a dangerous condition existed for such a period of time that the defendant through the exercise of reasonable care should have known of its existence. *See Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 275, 488 S.E.2d 617, 620, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997). Constructive knowledge of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 241, 488 S.E.2d 608, 612, *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998). Circumstantial evidence may be used to establish an inference. *See Phelps v. City of Winston-Salem*, 272 N.C. 24, 28, 157 S.E.2d 719, 722 (1967). However, inferences must be based on established facts, not upon other inferences. *See Lane v. Bryan*, *supra*. In other words, a jury may draw an inference from a set of facts, but may not then use that inference to draw another inference.

In this case, Ms. Thompson presented no direct evidence about how long the liquid was in the aisle. She instead presented circumstantial evidence, trying to establish that the liquid had been there for some time. Her evidence included the existence of the puddle and the pieces of glass hidden under the shelf. She also presented evidence showing that no one at Wal-Mart could say when the shampoo aisle had been cleaned last. However, to reach the conclusion that Wal-Mart should have known about the spill, a jury would have to make a number of inferences not based on established facts. For instance, a jury would have to infer that the spill came from a glass container; that the glass under the shelf came from a glass container as opposed to some other glass item; that the glass under the shelf came from the same glass container which held the liquid; that someone cleaned up some of the broken glass container and hid the rest under the shelf, but left the puddle on the ground free of broken glass. The jury would also have to speculate, without factual support, about how long the spill existed. To reach the conclusion that the liquid had

been on the floor a long time, a jury would have to make too many inferences based on other inferences. We uphold the trial court's decision to find as a matter of law that Ms. Thompson's evidence cannot support the conclusion that Wal-Mart had constructive notice of the spill.

In affirming the trial court's decision we acknowledge that Ms. Thompson compares the facts of the case at bar with the facts of four other cases in which we held that the question of whether a store had constructive knowledge of a dangerous condition should go to a jury. However, those four cases are distinguishable from the case at bar.

In *Nourse v. Food Lion*, *supra*, and *Carter v. Food Lion*, *supra*, the plaintiffs in each case slipped on floors that were littered with debris. In both cases, it was clear from the amount and type of debris that the debris must have been on the floor a long time—long enough for the defendant stores to have constructive knowledge of its existence. In the case before us, Ms. Thompson herself testified that the shampoo aisle was clean and well-lit, and that the puddle itself was clear and free of any debris. Because the aisle was clean, a jury could make no inference that the spill must have existed for a long time.

Ms. Thompson also relies on *Mizell v. K-Mart Corp.*, 103 N.C. App. 570, 406 S.E.2d 310, *aff'd*, 331 N.C. 115, 413 S.E.2d 799 (1992), to support her proposition that Wal-Mart had constructive knowledge of the spill. The plaintiff in that case slipped in a puddle of coffee in the defendant store's vestibule. The plaintiff offered no evidence other than the testimony of a witness who said he watched the vestibule for 20 minutes and saw no spills during that time. *Mizell* is distinguishable, however, because the plaintiff could establish that the dangerous condition existed for at least 20 minutes before his fall. In the case at bar, Ms. Thompson offered no evidence about how long the spill was on the floor. A jury, therefore, could make no reasonable inference that it was there for any length of time. *See also France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 493, 320 S.E.2d 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985) (holding that mere speculation about how long a dangerous condition existed was not sufficient to take the case to a jury).

Finally, Ms. Thompson compares her case to *Kennedy v. K-Mart Corp.*, 84 N.C. App. 453, 352 S.E.2d 876 (1987). In that case, a jury was allowed to decide whether the defendant store had constructive

knowledge of a spill. That case is also distinguishable from the case at bar because under the facts of that case, a jury needed to make only one fact-based inference to conclude that the defendant had constructive knowledge of the spill. As we already discussed, Ms. Thompson's facts do not lead to direct inferences of Wal-Mart's negligence; rather, a jury would need to make too many tenuous inferences to conclude that Wal-Mart had constructive knowledge of the spill.

[2] Ms. Thompson also argues that Wal-Mart's failure to follow its own guidelines about inspecting its store was some evidence of negligence. In general, evidence of a defendant violating its own voluntary safety standards constitutes some evidence of negligence. *Peal v. Smith*, 115 N.C. App. 225, 231, 444 S.E.2d 673, 677 (1994), *aff'd per curiam*, 340 N.C. 352, 457 S.E.2d 599 (1995). The plaintiff bears the burden of producing evidence that the defendant breached its own safety standards. *See id.*

Ms. Thompson presented evidence of Wal-Mart's corporate guidelines that required its employees to provide a safe working and shopping environment by periodically inspecting the store. She also presented evidence that this particular Wal-Mart store did not follow the corporation's timetable about inspecting its store. However, the evidence showing that Wal-Mart did not adhere to the timetable does not also show that Wal-Mart failed to keep its store clean. Ms. Thompson showed only that Wal-Mart did not clean the shampoo aisle at a specific time—she does not show that Wal-Mart breached its safety policy by not cleaning the aisle at all. In fact, even if Wal-Mart had followed its safety sweep guidelines according to schedule, the sweep would have taken place after Ms. Thompson's fall, thereby doing her little good. Finally, the aisle's overall cleanliness indicates that an employee had recently inspected the aisle—evidence tending to show that Wal-Mart adhered to its safety guidelines, not ignored them.

For the foregoing reasons, we affirm the trial court's directed verdict favoring the defendant.

Affirmed.

Judges MARTIN and McGEE concur.

STATE OF NORTH CAROLINA v. WAVERLY ORLANDO HARSHAW, JR.

No. COA99-547

(Filed 5 July 2000)

1. Homicide— first-degree murder—specific intent to kill—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge based on the alleged insufficient evidence to establish that defendant formed a specific intent to kill the victim when the victim was shot in the hip, because: (1) conduct and statements of defendant such as threats made against the victim before and after the killing raise inferences of premeditation and deliberation; and (2) defendant made threatening statements about the victim on several occasions prior to the murder.

2. Discovery— due process—detonation of percussion grenade—failure to disclose—materiality

Defendant's due process rights were not violated in a first-degree murder case by the prosecutor's failure to disclose evidence that a percussion grenade was set off in defendant's apartment by the police before the criminal investigation began, because: (1) defendant has not addressed how admission of this evidence would have altered the jury's finding of guilt; and (2) the evidence did not arise to the level of materiality which would have created a different result in the proceeding, especially in light of the fact that defendant used any potential effects this evidence could have had to his benefit at the trial.

3. Evidence— witness testimony—personal knowledge or personal perception required

Although the trial court erred in a first-degree murder case by permitting a witness to testify that defendant intended to purchase a gun for the purpose of threatening the victim, without a foundation establishing that the witness either had personal knowledge or a personal perception as required by N.C.G.S. § 8C-1, Rule 602, there was plenary other evidence at trial revealing premeditation and deliberation, and there was no reasonable possibility that a different result would have been reached absent this error.

4. Criminal Law— prosecutor's argument—intent to kill

The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the prosecutor's closing argument stating that defendant may say he did not mean to kill the victim because he did not shoot him in the head, but intent to kill is found if defendant intentionally shoots the victim or intentionally inflicts serious bodily harm on him, since: (1) the context of the argument does not reveal that the State intended to make a dispositive explanation of what must be established in order to find specific intent; (2) the jury was told numerous times by the trial court during closing arguments that the jury must take the law as instructed by the trial court; and (3) at the conclusion of the arguments, the trial court gave proper instructions on all aspects of the case, including the requisite intent.

5. Criminal Law— prosecutor's argument—lapsus linguae

The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the prosecutor's closing argument misstating that a witness heard defendant make threats in reference to the victim "a couple of weeks" before the shooting, instead of "several months" before the shooting, because: (1) the prosecutor's misstatement was a mere lapsus linguae; and (2) there is no reasonable probability that a different result would have been reached at trial if the trial court had taken corrective action.

Appeal by defendant from judgment entered 4 August 1998 by Judge W. Robert Bell in Catawba County Superior Court. Heard in the Court of Appeals 23 February 2000.

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

Janine C. Fodor for the defendant-appellant.

LEWIS, Judge.

Defendant was tried at the 20 July 1998 session of Catawba County Superior Court for first-degree murder. The jury returned a verdict of guilty on 29 July 1998. Defendant was sentenced to life imprisonment without parole. Defendant appeals, making four arguments.

The State's evidence tended to show the following. On the morning of 5 December 1996, while Rod Robinson was in defendant's apartment, defendant shot Robinson in the right hip, severing an artery. Though shot in the hip, Robinson was still ambulatory, walked to the residence of defendant's neighbor, Betty Hoover, and told her that "Malik" shot him. The defendant in this case is also known as "Malik." Robinson died as a result of the gunshot wound.

Several witnesses testified Robinson and defendant had been in a conflict in the past which involved money. In July 1996, defendant gave Robinson between $700 and $800 to purchase drugs for him, but Robinson instead kept the money for himself. After this incident, defendant openly expressed ill-will towards Robinson on several occasions. Once, defendant pulled a gun on Robert Whitworth, demanding that Whitworth take him to Robinson. When Whitworth refused, defendant stated, "When you see that [Robinson], you tell that m-----f----- I'm going to kill him." (3 Tr. at 950.) Several other witnesses testified defendant threatened to "get" Robinson and "f--- him up" on several occasions. (3 Tr. at 1033, 1076.)

[1] Defendant first contests the trial court's failure to dismiss the charge of first-degree murder due to an insufficiency of evidence to establish defendant formed a specific intent to kill the victim. To withstand defendant's motion to dismiss, the State had to show substantial evidence as to each essential element of the crime. *State v. Workman*, 309 N.C. 594, 598, 308 S.E.2d 264, 267 (1983). For purposes of a motion to dismiss, the trial court must consider all the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

First-degree murder is the "unlawful killing of a human being with malice, premeditation and deliberation." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995). "Premeditation" occurs when the defendant forms the specific intent to kill at some period of time, however short, before the actual killing. *State v. Weathers*, 339 N.C. 441, 451, 451 S.E.2d 266, 271 (1994). "Deliberation" means that defendant formed an intent to kill in a cool state of blood rather than under the influence of a violent passion suddenly aroused by sufficient provocation. *Id.* at 451, 451 S.E.2d at 271-72. "A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder." *State v. McLaughlin*, 286 N.C. 597, 604, 213 S.E.2d 238, 243 (1975), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d. 1208 (1976). Premeditation and

deliberation usually are not established by direct evidence, but by circumstantial evidence from which actions and circumstances surrounding the killing may be inferred. *Truesdale*, 340 N.C. at 234, 456 S.E.2d at 302.

Examples of circumstances that may raise an inference of premeditation and deliberation include (1) "conduct and statements of the defendant before and after the killing," (2) "threats made against the victim by the defendant, ill will or previous difficulty between the parties," and (3) "evidence that the killing was done in a brutal manner." *State v. Bullard*, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984).

Defendant argues that any evidence that he premeditated and deliberated the murder in this case was negated by evidence showing the victim was shot in the hip only one time, and the paramedic did not initially assess the victim's wounds as life threatening. We disagree. The State's evidence also tended to show substantial evidence of premeditation in the form of threats to the victim. Several witnesses testified defendant made threatening statements about the victim on several occasions prior to the murder. (3 Tr. at 1033, 1076.) This evidence was sufficient to allow the trial court to submit the charge of first-degree murder to the jury. *McLaughlin*, 286 N.C. at 604, 213 S.E.2d at 243.

[2] In his next assignment of error, defendant contends the prosecution failed to disclose potentially exculpatory evidence in violation of the mandate of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). This evidence consists of the fact that a percussion grenade was set off in defendant's apartment by the police before the criminal investigation began. In *Brady*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violate[s] due process where the evidence is material either to guilt or to punishment." *Id.* at 87, 10 L. Ed. 2d at 218. However, failure to give evidence to the defense violates defendant's right to due process only if the evidence was "material" to the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481 (1985). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682, 87 L. Ed. 2d at 494.

Defendant has asserted the mere fact that a percussion grenade was set off in his apartment as material to his innocence, yet he has not addressed specifically how admission of this evidence would

have altered the jury's finding of guilt. Although defendant contends the percussion grenade contaminated the scene of the crime, he has set forth no specific argument addressing the potential effects of a percussion grenade, nor has he indicated how this evidence may relate to the question of his innocence. Interestingly, defendant introduced photographs at trial of his apartment, taken after the percussion grenade was set off, in order to establish that a fight had occurred between him and the victim. Thus, any potential effects stemming from detonation of the percussion grenade were used by defendant ultimately to support his defense. Although it is a better practice for the prosecution to disclose potentially exculpatory evidence, we find this evidence does not rise to the level of materiality defined in *Bagley*, especially in light of the fact that defendant used any potential effects this evidence could have had to his benefit at trial. *See also State v. Campbell*, 133 N.C. App. 531, 541, 515 S.E.2d 732, 739 (1999). We find no error.

[3] In his next assignment of error defendant contends the trial court erred in permitting the State's witness, Timothy Sanders, to testify as to matters of which he lacked personal knowledge in violation of Rule 602 of the North Carolina Rules of Evidence. Rule 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." The Commentary to Rule 602 further provides that the "foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception."

Sanders testified defendant intended to purchase a gun for the purpose of threatening the victim. No foundation was established to indicate that Sanders either had personal knowledge of defendant's purported intent to purchase a gun or thought defendant intended to purchase a gun based on his personal perception. This testimony was admitted in violation of Rule 602. However, the State introduced this evidence in order to establish defendant's premeditation and deliberation. As previously noted, there was plenary other evidence at trial pointing to premeditation and deliberation, and as such, no "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). Defendant has not satisfied his burden of showing he was prejudiced by this error.

[4] In his next assignment of error, defendant contends the trial court erred by failing to intervene *ex mero motu* in two arguments made by the prosecutor during the State's closing argument during trial. As defendant failed to object to any of the arguments following, "they are reviewable only to determine whether they were so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct the errors." *State v. Pierce*, 346 N.C. 471, 496, 488 S.E.2d 576, 590 (1997).

In the first argument, the prosecutor told the jury:

> [Defendant] may come and say, well, I didn't mean to kill him because I didn't shoot him in the head. But that's not the law. His Honor is going to tell you if he intentionally shoots him or intentionally inflicts serious bodily harm on him, there is your intent to kill.

(4 Tr. at 1382.) Defendant argues this description does not fully define specific intent, since the State must establish not only an intentional act by the defendant resulting in the death of the victim, but also that defendant intended for the action to result in the victim's death. *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). The prosecutor made this statement in reference to specific evidence adduced at trial, and from the context, it did not appear to be intended as a dispositive explanation of what the State must establish in order for the jury to find specific intent. The record in this case indicates that during the closing arguments of counsel, the jury was told numerous times that the jury must take the law as instructed by the trial court. Further, at the conclusion of the arguments of counsel, the trial court gave proper instructions on all aspects of the case, including proper instructions as to the requisite intent. Thus, the trial court did not abuse its discretion by failing to intervene *ex mero motu*. *See, e.g., State v. Jones*, 336 N.C. 490, 496-97, 445 S.E.2d 23, 25 (1994); *State v. Harris*, 290 N.C. 681, 695, 228 S.E.2d 437, 445 (1976).

[5] Defendant also asserts that the prosecutor misstated the testimony of Eugenia Farrer during the State's closing argument. The prosecutor told the jury that Farrer testified to hearing defendant make threats in reference to the victim "a couple weeks" before the shooting. (4 Tr. at 1362.) Farrer testified she heard defendant make these threats several months before the shooting. (4 Tr. at 1362.) We conclude the prosecutor's misstatement was a *lapsus linguae*, like unto that in *State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997). Thus, the trial court did not abuse its discretion by failing to intervene *ex*

mero motu in the argument to correct the misstatement, and there is no reasonable probability that, had the court taken corrective action, a different result would have been reached at trial.

No error.

Judges JOHN and EDMUNDS concur.

FELIX OLIVARES-JUAREZ, EMPLOYEE PLAINTIFF v. SHOWELL FARMS, EMPLOYER, LIBERTY MUTUAL INS. CO., CARRIER DEFENDANTS

No. COA99-657

(Filed 5 July 2000)

Workers' Compensation— loss of earning capacity—insufficiency of evidence

An Industrial Commission decision in a worker's compensation action was reversed and remanded as premature where the Commission stated that plaintiff was incapable of earning his pre-injury wage at the same or other employment but the opinion and award lacked findings to support that conclusion. The Commission refused to approve the proposed Form 21 Agreement between the parties, so that there was no presumption of disability, and plaintiff made no showing that his earning capacity was diminished as a result of his on-the-job injury.

Appeal by defendants from opinion and award entered 23 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 March 2000.

Robert J. Willis for plaintiff-appellee.

Haynsworth Baldwin Johnson & Greaves, LLC, by Brian M. Freedman and J. Nathan Duggins, III, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Showell Farms ("defendant-employer") and Liberty Mutual Insurance Company ("defendant-carrier") (collectively, "defendants") appeal from an opinion and award wherein the North Carolina

Industrial Commission ("the Commission" or "the Full Commission") awarded Felix Olivares-Juarez ("plaintiff") temporary total disability benefits. For the reasons stated herein, we reverse the Commission's decision and remand this matter for a new hearing.

Plaintiff is Guatemalan and, at all times relevant to these proceedings, did not have the necessary documentation to qualify as a legal immigrant or to hold employment in the United States. His brother, Felipe, possessed the requisite documentation, and on 4 June 1995, plaintiff obtained employment with defendant-employer using his brother's documentation. Defendant-employer was not aware of the misrepresentation.

On 1 August 1995, plaintiff fractured the ulna and radius of his left arm while operating a pressure hose in the course of his employment with defendant-employer. Defendant-carrier initiated disability payments on 14 August 1995 pursuant to section 97-18(d) of the North Carolina General Statutes and filed a Form 63 Notice to "Felipe Olivares Juarez" (plaintiff's brother) of Payment of Compensation Without Prejudice. Plaintiff filed a Form 18 Notice of Accident using his brother's name, and the parties attempted to execute a Form 21 Agreement with plaintiff signing his brother's name. The Commission, however, refused to approve the Form 21 Agreement because "the name listed for the employee was admittedly fictitious."

Plaintiff underwent surgery to repair his left arm fractures on 4 August 1995. Over the course of the next several months, plaintiff engaged in physical therapy, and on 7 December 1995, Dr. Bynum approved plaintiff's return to a modified, "one-handed," clean-up position offered by defendant-employer. Before plaintiff could accept the position, however, defendant-employer withdrew its offer to re-employ plaintiff because of his illegal immigration status. Then, on 2 January 1996, defendant-carrier terminated plaintiff's disability payments.

Dr. Bynum conducted a final examination of plaintiff's condition on 8 February 1996 and assigned him a 5% permanent partial disability rating to his left arm. In addition, Dr. Bynum restricted plaintiff from lifting more than 25 pounds, working with vibrating instruments, or working in cold temperatures for a period of three months. He otherwise permitted plaintiff to return to normal activities.

Plaintiff obtained employment with Quality Molded Products inspecting finished parts on 29 January 1996. The position required plaintiff to use both arms to operate machinery and to lift boxes

containing parts. Plaintiff ultimately resigned from this position on 19 May 1996 due to complaints of pain and discomfort in his left thumb and forearm. On 3 August 1996, plaintiff began employment with Glendale Hosiery Company earning a lesser wage than he received with defendant-employer.

On 2 April 1996, Dr. Andrew P. Bush, an orthopaedic surgeon, examined plaintiff and found some weakness in his thumb, which combined with pain would cause some diminished grip strength. Dr. Bush also found mild weakness in plaintiff's left upper extremity, but anticipated that after four weeks of physical therapy, this condition would return to normal.

Plaintiff presented to Dr. Gary R. Kuzma, an orthopaedic surgeon and hand specialist, for an independent medical evaluation on 8 May 1996. After reviewing plaintiff's medical records and conducting a physical examination of plaintiff, Dr. Kuzma formed the opinion that plaintiff was not suffering from significant dystrophic changes in his left hand and that any dystrophy present was probably fixed and might disappear in time. He further opined that plaintiff was at maximum medical improvement on 8 May 1996 and that he sustained a 10% permanent partial disability to his left hand, which would translate into a 10% permanent partial disability rating for the left arm.

Plaintiff's case came on for hearing before Deputy Commissioner Richard B. Ford on 24 February 1997. On 3 December 1996, Commissioner Ford filed an opinion and award concluding that plaintiff's unemployment subsequent to 7 December 1995 was caused by his illegal immigration status and lack of documentation permitting his employment in the United States. For this reason, the deputy commissioner discontinued plaintiff's temporary total disability compensation and limited plaintiff's permanent partial disability compensation to twenty weeks, commencing 29 January 1996. Plaintiff appealed this decision to the Full Commission.

On appeal, the Full Commission reversed Commissioner Ford's denial of benefits after 7 December 1995. In so doing, the Commission determined that irrespective of plaintiff's illegal immigration status, the light duty position offered to him by defendant-employer did not demonstrate that plaintiff was capable of returning to suitable employment at pre-injury wages. On this basis, the Commission awarded plaintiff temporary partial disability compensation not to exceed 300 weeks from 1 August 1995. Defendants appeal.

Defendants' primary argument is that the Commission erred in placing the initial burden on them to prove the availability of suitable employment at pre-injury wages without first requiring plaintiff to establish the existence and extent of his disability. We agree that the Commission so erred.

Our review of an opinion and award entered by the Full Commission is limited to determining (1) whether the record contains competent evidence to support the Commission's factual findings and (2) whether the Commission's findings likewise support its legal conclusions. *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 518 S.E.2d 200 (1999). If the record contains any competent evidence sustaining the Commission's findings of fact, such findings are final, notwithstanding whether other evidence exists that would support contrary findings. *Id.* The Commission's legal conclusions are, nonetheless, fully reviewable. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

"Disability" under the Workers' Compensation Act refers to "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1999). An injured employee has the initial burden of proving the extent and degree of his disability. *Snead v. 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). To do so, he must demonstrate that he is unable to earn pre-injury wages in the same employment or in any other employment and that the inability to earn such wages is due to his work-related injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee may make this showing in one of the following 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. (Citations omitted.)

Russell v. Lowes Production Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Only after the employee has met his initial burden of proof does the burden then shift to the employer to rebut the evidence of disability. *Coppley v. PPG Indus., Inc.*, 133 N.C. App. 631, 635, 516 S.E.2d 184, 187 (1999).

Furthermore, to permit meaningful appellate review of the Commission's decision, the findings of fact must adequately reflect that plaintiff produced sufficient evidence to meet his burden of proving disability. *Id.* at 635, 516 S.E.2d at 187.

> "The Industrial Commission must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings of fact."

Id. (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981) (citations omitted)).

In Conclusion of Law #3, the Commission stated that "[a]s a result of his compensable injury, . . . plaintiff was incapable of earning his pre-injury wage at the same or other employment." The opinion and award, however, lacks findings to support this conclusion. The record indicates that the Commission refused to approve the proposed Form 21 Agreement between the parties; therefore, as defendants correctly contend, a presumption of disability in favor of plaintiff did not arise. *Cf. Flores*, 134 N.C. App. at 456, 518 S.E.2d at 203 (stating that if "a Form 21 Agreement has been executed by the parties and approved by the Commission, the employee is entitled to a presumption that he is, indeed, disabled.") Consequently, before defendants could be required to prove the availability of suitable employment, plaintiff had to first come forward with evidence to show that his earning capacity was diminished as a result of his on-the-job injury. The findings of fact do not reveal that plaintiff made any such showing. Therefore, the Commission's conclusions regarding the availability and suitability of the modified-duty position offered by defendant-employer was premature. Accordingly, the Commission's decision must be set aside. Moreover, given our holding in this regard, we need not address defendants' remaining arguments.

For the foregoing reasons, we reverse the opinion and award and remand this case to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Judges GREENE and WALKER concur.

STATE OF NORTH CAROLINA v. GARY FRANCIS HENDRICKS

No. COA99-835

(Filed 5 July 2000)

1. Criminal Law— guilty plea—incomplete inquiry by judge

There was no prejudicial error in a prosecution for larceny and other offenses where the trial judge did not personally address defendant for all of the statutorily required inquiries and the prosecutor covered the areas omitted by the judge. Defendant did not argue that he would have changed his plea had the judge strictly complied with the procedural requirements or that his plea was not made knowingly, voluntarily, and with understanding. However, this is not the most desirable method of adjudicating a plea. N.C.G.S. § 15A-1022.

2. Sentencing— victim impact statement—unsworn

There was no error in a sentencing hearing for felonious larceny and other offenses where the trial court permitted an unsworn victim impact statement. The rules of evidence to not apply for purposes of sentencing hearings and defendant never objected to the testimony at the hearing.

3. Criminal Law— sentencing—judge's statement—not a pro-victim bias

A trial court judge did not exhibit a pro-victim bias during a sentencing hearing when he said, at the conclusion of a victim impact statement, "Today is a classic example of why victims need to be recognized and the court system needs to become their friends, not their enemy." At most, the statement illustrates an affinity for victim impact statements, which are specifically endorsed by statute.

4. Sentencing— aggravating factor—property taken of great monetary value

There was sufficient evidence in a sentencing hearing for felonious larceny to find the aggravating factor that the larceny involved taking property of great monetary value. Defendant's indictment listed the value of the property taken as $17,000 and his guilty plea served as an admission of guilt to all facts listed in the indictment. Moreover, during the plea hearing, the prosecutor's summary of the facts included the statement that "at least $17,000 was gone" and defendant did nothing to rebut the evidence.

Judge EDMUNDS concurring.

Appeal by defendant from judgments entered 4 May 1999 by Judge G.K. Butterfield in Wake County Superior Court. Heard in the Court of Appeals 15 May 2000.

Attorney General Michael F. Easley, by Associate Attorney General Vandana Shah, for the State.

John T. Hall for defendant-appellant.

LEWIS, Judge.

Defendant was indicted for one count of felonious larceny, one count of felonious breaking and entering, and one count of felonious possession of stolen property. On 4 May 1999, defendant pled guilty to all three offenses. He was sentenced to consecutive sentences for the larceny and breaking and entering offenses, but judgment was arrested as to the possession offense. Defendant now appeals, asserting errors at both his plea hearing and his sentencing hearing.

Before a judge can accept a guilty plea, our statutes explicitly mandate that the judge must address the defendant personally and inform him of several things, including his right to remain silent and his maximum possible sentence. N.C. Gen. Stat. § 15A-1022(a)(1), (6) (1999). The trial judge also must determine whether defendant understands the nature of the charges against him and whether his plea is the product of any threats or improper pressure. N.C. Gen. Stat. § 15A-1022(a)(2), (b).

[1] Here, there is no question that the trial judge failed to comply with the procedural requirements outlined above. He did make some of the statutorily-required inquiries, but he never personally

addressed defendant on any of the above matters. Although the transcript of plea entered into between defendant and the prosecutor covered all the areas omitted by the trial judge, our legislature's explicit reference to the trial judge addressing the defendant personally and informing him of his rights illustrates that reliance on the transcript of plea alone (with which the judge has no involvement in the first place) is insufficient to meet section 15A-1022's procedural requirements.

This is not the most desirable method of adjudicating a plea. As previously stated by this Court, "We recognize the potential for harm that is present if this method of taking a plea of guilty becomes vogue." *State v. Williams*, 65 N.C. App. 472, 481, 310 S.E.2d 83, 88 (1983). That sentiment bears repeating here. Nonetheless, just because the trial court failed to comply with the strict statutory requirements does not entitle defendant to have his plea vacated. Defendant must still show that he was prejudiced as a result. N.C. Gen. Stat. § 15A-1443(a). Defendant has not met that burden here. He has not argued that he would have changed his plea had the judge complied strictly with the procedural requirements, nor has he asserted that his plea was not in fact knowingly, voluntarily, and with understanding, made. In sum, defendant simply points out the court's non-compliance and contends that he is entitled to replead as a result. A similar argument was made to this Court in *Williams*. We rejected the argument there, as do we here. *Williams*, 65 N.C. App. at 480-81, 310 S.E.2d at 83.

In analyzing the prejudicial error standard, our courts have "refuse[d] to adopt a technical, ritualistic approach" in the context of section 15A-1022 violations. *State v. Richardon*, 61 N.C. App. 284, 289, 300 S.E.2d 826, 829 (1983). Instead, we must look to the totality of the circumstances and determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity. *Williams*, 65 N.C. App. at 481, 310 S.E.2d at 83. In this regard, the transcript of plea signed by defendant, along with what questions the trial court did ask of him, are particularly relevant. In the transcript of plea, the question was posed to defendant whether he understood that he had a right to remain silent and whether he understood the nature of the charges against him. To both of these questions, defendant answered, "Yes." The transcript of plea also includes the question whether defendant's plea is the result of any threats or improper promises, to which he responded, "No." Finally, the worksheet attached to the transcript of plea listed the

maximum possible punishment for each offense as being thirty months. In light of these circumstances, we hold that the trial court's failure to strictly follow the statute resulted in no prejudice to defendant. *See also State v. Crain*, 73 N.C. App. 269, 271-72, 326 S.E.2d 120, 122 (1985) ("The State's evidence from the plea transcript, the court's questions to defendant and the testimony of defendant's attorney all tend to support the State's contention that defendant was properly and adequately informed of the consequence of his plea and that he entered into the plea arrangement freely, knowingly and voluntarily."); *State v. Thompson*, 16 N.C. App. 62, 63, 190 S.E.2d 877, 878 ("The record reveals that the defendant signed the 'transcript of plea' contained in the record and that the trial judge, after the defendant was sworn to tell the truth, made careful inquiry of the defendant regarding his pleas of guilty. The record is replete with evidence to support the adjudication that the defendant's pleas of guilty were in fact freely, understandingly, and voluntarily given."), *cert. denied*, 282 N.C. 155, 191 S.E.2d 604 (1972).

[2] Next, defendant contends that he received an unfair sentencing hearing. He points to the fact that Mrs. Gardner, one of the larceny victims here, spoke at the sentencing hearing without ever being sworn in. The requirement that a witness be sworn in is contained within our rules of evidence. N.C.R. Evid. 603. For purposes of sentencing hearings, however, the rules of evidence do not apply. N.C. Gen. Stat. § 15A-1334(b) (1999). Thus, the trial court committed no error by allowing Mrs. Gardner's unsworn victim impact statement. *Cf. State v. Jackson*, 302 N.C. 101, 111, 273 S.E.2d 666, 673 (1981) (emphasizing that the rules of evidence do not apply at sentencing hearings in holding that it was not error to allow a witness to testify even though her testimony would not have been admissible at trial). Furthermore, defendant never objected at the hearing to Mrs. Gardner's unsworn testimony. He has thus waived any such argument for purposes of appeal. *Cf. State v. Robinson*, 310 N.C. 530, 539-40, 313 S.E.2d 571, 577-78 (1984) (holding that the defendant's failure to object to a witness not being sworn in at trial prevented him from arguing it on appeal).

[3] Defendant also contends that his sentencing hearing was unfair in that the judge exhibited a pro-victim bias that unfairly prejudiced him. Specifically, defendant cites the following statement made by the judge after the conclusion of Mrs. Gardner's victim impact statement: "Today is a classic example of why victims need to be recognized and the court system needs to become their friends, not their

enemy." (Tr. at 13). We do not feel the above statement manifests a bias against defendant. At most, it only illustrates an affinity for the use of victim impact statements, a procedure that is specifically endorsed by our statutes. N.C. Gen. Stat. § 15A-825(9).

[4] Finally, defendant contends there was insufficient evidence to support the trial court's finding of an aggravating factor. In particular, he attacks the evidentiary basis for the aggravating factor that his larceny involved the "taking of property of great monetary value." N.C. Gen. Stat. § 15A-1340.16(d)(14). We find there was sufficient evidence, both in the indictment and at the plea hearing, to support this factor.

Defendant's indictment listed the value of the property taken as $17,000. When defendant pled guilty to larceny, his plea served as an admission of guilt as to all facts listed in the indictment. *State v. Thompson*, 314 N.C. 618, 624, 336 S.E.2d 78, 81 (1985). Thus, defendant admitted to taking $17,000 in property. This alone is sufficient to support the trial court's finding of great monetary value. *See generally State v. Barts*, 316 N.C. 666, 695, 343 S.E.2d 828, 846-47 (1986) (upholding finding of great value based upon evidence of $3200 in property taken); *Thompson*, 314 N.C. at 623-24, 336 S.E.2d at 81 ($3177.40); *State v. Coleman*, 80 N.C. App. 271, 277, 341 S.E.2d 750, 753-54 ($3000), *disc. review denied*, 318 N.C. 285, 347 S.E.2d 466 (1986).

There was also sufficient evidence adduced during the plea hearing to support the finding of this aggravating factor. In summarizing the facts for the judge so that he could determine whether a factual basis for the guilty plea existed, the prosecutor pointed out that "the house had been ransacked" and that "at least $17,000 was gone." (Tr. at 6). Defendant did nothing to rebut this evidence and it therefore was sufficient to substantiate the trial court's finding. *See generally Thompson*, 314 N.C. at 624-25, 336 S.E.2d at 81-82 (stating that the trial court may rely on any evidence adduced that is not rebutted or otherwise challenged by defendant).

In closing, we note that there is a clerical error in one of the judgments. The judge sentenced defendant to two consecutive sentences of twelve-to-fifteen months' imprisonment on the larceny and breaking and entering charges. The judge then arrested judgment on the charge of possession of stolen property because all its elements were contained within the larceny charge. However, the court inadvertently listed larceny as the offense for which it was arresting judg-

ment, as opposed to the possession offense. The result is that defendant has two judgments as to the larceny offense (one sentencing him and one arresting judgment) and no judgment as to the possession offense. We therefore remand to the trial court for entry of a corrected judgment.

No prejudicial error, but remanded for correction of judgment.

Chief Judge EAGLES concurs.

Judge EDMUNDS concurs with separate opinion.

Judge EDMUNDS concurring.

I concur with the majority's conclusion that the failure of the trial court to follow the requirements of N.C. Gen. Stat. § 15A-1022 was not prejudicial to defendant in this case. However, despite this holding, I write to emphasize that judges should conscientiously follow the mandates of that statute when accepting a guilty plea. Although time is a precious commodity in the trial courts, it is not an undue burden to take the minutes necessary to conduct a complete colloquy with the defendant, who may be facing years of imprisonment. By so doing, the judge can ensure that the plea is properly executed.

PAULINE HUTCHINS, EXECUTRIX OF THE ESTATE OF ROMIE L. LADD, PLAINTIFF V. VIRGINIA DOWELL, LYNN W. FRYE, THOMAS R. JONES, DOROTHY JONES, RANDALL JONES AND ADELE M. PRIEST, DEFENDANTS

No. COA99-799

(Filed 5 July 2000)

1. Powers of Attorney— general—attorney-in-fact—conveyance of real property

In a case where decedent exercised a general power of attorney naming his stepdaughter as his attorney-in-fact, the trial court did not err by granting partial summary judgment in favor of plaintiff-executrix, setting aside the 1993 conveyance of decedent's real property by the stepdaughter to herself and her brother, because: (1) the North Carolina Supreme Court held in a 1997 case that an attorney-in-fact may not convey real property by gift unless the power of attorney expressly confers the author-

ity to make gifts of real property, and decisions of our Court are generally presumed to operate retroactively; (2) N.C.G.S. § 32A-14.1(b) provides that unless gifts are expressly authorized by the power of attorney, the power may not be exercised by the attorney-in-fact in favor of the attorney-in-fact, and the power of attorney in this case does not authorize the attorney to make a gift of decedent's real property to herself; and (3) decedent's original verified complaint indicates that the attorney acted beyond the scope of her authority in transferring the property.

2. Banks and Banking— joint bank account—wrongful conversion

The trial court did not err by denying defendants' motion for partial summary judgment on the conversion claims relating to the transfer of funds located in two joint bank accounts of decedent and his stepdaughter attorney-in-fact, because: (1) N.C.G.S. § 41-2.1 does not release one depositor to a joint account from liability to another for withdrawal which constitutes wrongful conversion; (2) a deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other; and (3) decedent's original verified complaint indicates that he lacked donative intent, his stepdaughter used her position to misappropriate large sums of money, and the transfers of large sums of money were made without the knowledge or consent of plaintiff.

Appeal by defendants from judgment entered 1 July 1997 by Judge Catherine Eagles in Davie County Superior Court and from judgment entered 15 April 1999 by Judge Judson D. DeRamus, Jr. in Davie County Superior Court. Heard in the Court of Appeals 17 April 2000.

Wells Jenkins Lucas and Jenkins, PLLC, by Gordon W. Jenkins, for plaintiff-appellee.

Thomas M. King for defendant-appellants.

EAGLES, Chief Judge.

On 6 November 1993, Romie L. Ladd entered the hospital for cancer treatment. On 19 November 1993, he executed a general power of attorney naming his step-daughter, Defendant Virginia Dowell, as his attorney-in-fact. Within two weeks after being designated attorney-in-fact, Ms. Dowell retitled several of Mr. Ladd's assets without his knowledge or permission.

Specifically, on 23 November 1993, Defendant Dowell executed a deed conveying Mr. Ladd's residence to herself and her brother, Defendant Lynn Frye. Ms. Dowell then retitled Mr. Ladd's 1987 Cadillac El Dorado in her own name. She then sold Mr. Ladd's 1979 Cadillac Deville and kept the proceeds for herself.

Additionally, on 19 November 1993, Defendant Dowell began withdrawing money from Mr. Ladd's bank accounts without his knowledge or consent. Defendant Dowell shared two joint bank accounts with rights of survivorship with Mr. Ladd. Defendant Dowell never deposited any money into either of these accounts. On 19 November 1993, Defendant Dowell withdrew money from one of these accounts and transferred the funds to her co-defendants ostensibly "to avoid losing any of the money in taxes." Defendant Dowell transferred $10,000 to herself, $10,000 to Defendant Lynn Frye, $10,000 to Defendant Thomas Jones, $10,000 to Defendant Adele Priest, $5,000 to Defendant Randall Jones, and $4,068.54 to Defendant Dorothy Jones. The defendant-recipients each in turn re-transferred the money to Defendant Dowell and Defendant Frye.

In December, 1993, when Mr. Ladd learned that Ms. Dowell had transferred ownership of his home and had withdrawn all the money from the bank account, he hired an attorney who demanded a full accounting of her activities during the period she served as attorney-in-fact and demanded return of all items she took. She failed to return these items. Mr. Ladd revoked the power of attorney on 10 December 1993. He filed a verified complaint on 23 December 1993 alleging breach of fiduciary duty and fraud. Additionally, Mr. Ladd rewrote his will leaving everything to his niece, Pauline Hutchins. Mr. Ladd died on 6 February 1994, before his lawsuit could be heard.

Pauline Hutchins was appointed the executrix of Mr. Ladd's estate. As executrix, Ms. Hutchins brought suit alleging breach of fiduciary duty and conversion of assets.

On 1 July 1997, Judge Catherine Eagles entered partial summary judgment in favor of plaintiff setting aside the conveyance of real property. On 15 April 1999, Judge DeRamus entered summary judgment against Defendant Dowell for breach of fiduciary duty, constructive fraud and conversion of assets, and against the remaining defendants for conversion of the sums of money transferred to them by Defendant Dowell. Defendants appeal.

[1] We first consider whether the trial court erred in granting the plaintiff's motion for partial summary judgment setting aside the conveyance of real property. Defendant-appellants argue that the trial court erred by improperly applying the case of *Whitford v. Gaskill*, 345 N.C. 475, 480 S.E.2d 690 (1997). In *Whitford v. Gaskill*, 345 N.C. 475, 480 S.E.2d 690 (1997), the North Carolina Supreme Court, in a case of first impression, affirmed this Court's conclusion that an attorney-in-fact may not convey real property by gift unless the power of attorney expressly confers the authority to make gifts of real property. In *Whitford*, the North Carolina Supreme Court noted that nearly every jurisdiction that had considered this issue had concluded:

> A general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.

Id. at 477, 480 S.E.2d at 691 (citations omitted). The rationale behind this majority rule is that "an attorney-in-fact is presumed to act in the best interests of the principal," and a gift of the principal's property is potentially adverse to the principal's interests. *Id.* at 478, 480 S.E.2d at 692. "[S]uch power will not be lightly inferred from broad grants of power contained in a general power of attorney." *Id.*

Here, the defendants argue that the trial court erred in granting the plaintiff's motion for partial summary judgment because the 1997 *Whitford* case should not be retroactively applied to the 1993 transaction at issue here. However, decisions of our Court are generally presumed to operate retroactively, *see State v. Rivens*, 299 N.C. 385, 390, 261 S.E.2d 867, 870 (1980) (citing *Mason v. Nelson Cotton Co.*, 148 N.C. 492, 62 S.E. 625 (1908)), absent a compelling reason to operate only prospectively. *See Faucette v. Zimmerman*, 79 N.C. App. 265, 271, 338 S.E.2d 804, 808 (1986) (citing *Hill v. Brown*, 144 N.C. 117, 56 S.E. 693 (1907)).

Here, the defendants have provided no compelling reason why *Whitford* should be applied prospectively only. Moreover, even in the absence of *Whitford*, plaintiff here was entitled to summary judgment as a matter of law.

Following the Court of Appeal's decision in *Whitford* in 1995, the legislature enacted N.C.G.S. § 32A-14.1 (1995), which provides that an

attorney-in-fact can make gifts of a principal's property "in accordance with the principal's personal history of making or joining in the making of lifetime gifts." However, N.C.G.S. § 32A-14.1(b) also states:

> [U]nless gifts are expressly authorized by the power of attorney, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

In *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 487 S.E.2d 166 (1997), this Court noted that the statutory language of N.C.G.S. § 32A-14.1 was intended as a codification of existing North Carolina common law. *See id.* at 819-20, 487 S.E.2d at 168. Under well-established principles of North Carolina agency law:

> An agent is a fiduciary with respect to matters within the scope of his agency. In an agency relationship, at least in the case of an agent with a power to manage all the principal's property, it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited.

Id. at 820, 487 S.E.2d at 168 (internal citations omitted).

Here, Defendant Dowell purported to act under the power of attorney in deeding Mr. Ladd's real property. The general warranty deed conveying title to Defendants Dowell and Frye shows that Defendant Dowell signed for Mr. Ladd as his attorney-in-fact. However, the record establishes that Defendant Dowell had no authority to make gifts of Mr. Ladd's property to herself. The power of attorney in question here does not authorize Ms. Dowell to make a gift of Mr. Ladd's real property to herself. Moreover, Mr. Ladd's original verified complaint filed 23 December 1993 indicates that Ms. Dowell acted beyond the scope of her authority in transferring the property.

Accordingly, we conclude that the trial court did not err in granting partial summary judgment for the plaintiff setting aside the conveyance of real property. This assignment of error is overruled.

[2] Next, we consider whether the trial court erred in denying defendants' motion for partial summary judgment on the conversion claims. The defendants assert that Ms. Dowell transferred funds that were located in her joint bank accounts which she shared with her step-father. The defendants argue that they did not convert the funds

from these accounts because Ms. Dowell had authority to withdraw from the accounts under N.C.G.S. § 41-2.1. N.C.G.S. § 41-2.1 provides that "[e]ither party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn."

This Court has stated that N.C.G.S. § 41-2.1 "do[es] not release one depositor to a joint account from liability to another for withdrawal which constitutes wrongful conversion." *Myers v. Myers*, 68 N.C. App. 177, 180, 314 S.E.2d 809, 812 (1984). *See also Leatherman v. Leatherman*, 38 N.C. App. 696, 698, 248 S.E.2d 764, 765 (1978), *aff'd.*, 297 N.C. 618, 256 S.E.2d 793 (1979). In *Myers v. Myers*, plaintiff-wife sued defendant-husband for conversion of funds from a joint bank account which they shared. This Court rejected the husband's argument that he could not be liable for conversion from his own joint bank account. "The depositing spouse, as principal, thus may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent." *Id.* at 181, 314 S.E.2d at 813. The Court concluded that the plaintiff wife was still deemed to be the owner of the funds. *See id.* at 181, 314 S.E.2d at 812. Here, the evidence adduced below indicated that Ms. Dowell never deposited any money to these accounts herself. In Ms. Dowell's affidavit, she admits that the money in the account belonged to Mr. Ladd.

Additionally, we note that a deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other. In order for the exchange of property to constitute a gift, there must be donative intent coupled with loss of dominion over the property. *See Smith v. Smith*, 255 N.C. 152, 155, 120 S.E.2d 575, 578 (1961). Here, Mr. Ladd's original verified complaint clearly indicates that he lacked donative intent. Mr. Ladd asserted that in withdrawing the money from the bank accounts, Ms. Dowell "used her position to misappropriate large sums of money and property belonging to Plaintiff for her use and benefit and for the use and benefit of Defendant Frye. Said transfers were made without the knowledge or consent of Plaintiff . . . ." Accordingly, we conclude that the trial court properly denied defendants' summary judgment motion.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

CENTURA BANK, PLAINTIFF v. LEROY B. MILLER; TERRY LEE BROWN, INDIVIDUALLY AND D/B/A ACTION AUTO SALES, INC.; GLORIA R. BROWN; AUTO QUIK, INC.; ROBERT R. KING, INDIVIDUALLY AND D/B/A D&B EQUIPMENT CO., D/B/A D&B EQUIPMENT CO., INC., D/B/A D&B EQUIPMENT COMPANY, D/B/A D&B EQUIPMENT, D/B/A D&B EQUIPMENT SALES, AND D/B/A D&B EQUIPMENT SALES CO., INC.; LANDMARK LEASING, INC. F/K/A D&B EQUIPMENT SALES, INC.; AND D&B EQUIPMENT SALES, INC. DEFENDANTS

No. COA99-279

(Filed 5 July 2000)

1. Venue— fraudulent automobile leases—primary purpose of complaint—recovery of money damages

The trial court did not err by denying defendant Miller's motion for a change of venue in an action arising from an alleged fraudulent automobile lease scheme where defendant contends that plaintiff's action is primarily to recover personal property and must be tried in the county where two of the three vehicles are located, but the primary purpose of the complaint is to recover money damages, with surrender of personal property ancillary to that purpose. N.C.G.S. § 1-76(4) did not apply.

2. Venue— fraudulent automobile leases—leased property not sold—not an action to recover a deficiency

The trial court did not err by denying defendant Miller's motion for a change of venue in an action arising from an alleged fraudulent automobile lease scheme where defendant contended that the action was to recover a deficiency owed on a debt, but the leased property had not been sold. N.C.G.S. § 1-76.1 did not apply.

3. Venue— fraudulent automobile leases—place of business versus principal office

The trial court did not err by denying defendant Miller's motion for a change of venue in an action arising from an alleged fraudulent automobile lease scheme where defendant contended that Guilford County is an improper forum because plaintiff's principal office is in Nash County, although it maintains a place of business in Guilford County. Had the drafters of N.C.G.S. § 1-79(a) intended that a corporation reside either in the county where its principal office is located or where it maintains a place of business, but not both, they would have used language clarifying that "place of business" applies only if no reg-

istered or principal office is in existence, as they did in another subsection.

4. Venue— fraudulent automobile leases—convenience of witnesses

There was no abuse of discretion in the trial court's denial of defendant Miller's motion for a change of venue in an action arising from alleged fraudulent automobile lease scheme where defendant contended that the motion should have been granted for the convenience of witnesses and to promote the ends of justice. The original county is an appropriate venue in which to bring the action and it cannot be said that the court's decision not to transfer venue to Durham County was unreasoned.

Appeal by defendant Leroy B. Miller from order entered 15 December 1998 by Judge Julius A. Rousseau, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 7 December 1999.

Adams Kleemeier Hagan Hannah & Fouts, A Professional Limited Liability Company, by J. Alexander S. Barrett and D. Beth Langley, for plaintiff-appellee.

Glenn, Mills & Fisher, P.A., by Robert B. Glenn, Jr. and Caitlyn T. Fulghum, for defendant-appellant Leroy B. Miller.

TIMMONS-GOODSON, Judge.

Plaintiff, Centura Bank, filed a complaint against defendants, Leroy B. Miller (hereinafter, "Miller"), Terry Lee Brown, Gloria R. Brown, Auto Quik, Inc., Robert B. King, D&B Equipment, Inc., and Landmark Leasing, Inc., alleging claims for conspiracy, breach of contract, breach of promissory note, breach of duty of loyalty and due care, fraud, negligent misrepresentation, unfair and deceptive trade practices, and violations of the Racketeer Influence Corrupt Organizations Act of North Carolina. On 19 October 1998, Miller filed an answer and motion to dismiss plaintiff's action for improper venue. Additionally, Miller moved to transfer venue from Guilford County to Durham County as a matter of right or, alternatively, for the convenience of the witnesses and to promote the ends of justice. The trial court denied the motions by order entered 15 December 1998. Miller appeals and petitions this Court for writ of certiorari.

The question presented on appeal is whether Guilford County is the appropriate venue in which to hear plaintiff's cause of action

against defendants. Miller contends that the trial court erred in denying his motion to dismiss, because our venue statutes require that plaintiff's claims be brought in some forum other than Guilford County. As a related matter, Miller argues that the court erred in denying his motion for change of venue as a matter of right. We address these arguments simultaneously.

Initially, we note that although interlocutory, an order denying a motion to dismiss for improper venue is immediately appealable. *McClure Estimating Co. v. H.G. Reynolds Co., Inc.*, 136 N.C. App. 176, 523 S.E.2d 144 (1999). We further note that direct appeal lies from the denial of a motion for change of venue as a matter of right. *Snow v. Yates*, 99 N.C. App. 317, 392 S.E.2d 767 (1990). Therefore, the issues raised by the present appeal are properly before us.

Miller contends that plaintiff's action is primarily to recover personal property, i.e., three automobiles leased to Miller; therefore, under section 1-76 of the General Statutes, the action must be tried in Durham County, where two of the vehicles are located. We cannot agree.

[1] When an action is brought in an improper forum, the trial court must, upon motion of a party, remove the action to an appropriate venue. *Travelers Indemnity Co. v. Marshburn*, 91 N.C. App. 271, 371 S.E.2d 310 (1988). Section 1-76 of the North Carolina General Statutes dictates that certain causes of action "be tried in the county in which the subject of the action, or some part thereof, is situated." N.C. Gen. Stat. § 1-76 (1999). Such actions include those for "[r]ecovery of personal property when the recovery of the property itself is the sole or primary relief demanded." N.C.G.S. § 1-76(4). In determining whether an action is one governed by section 1-76, the court must look to the allegations of the complaint and the principal object of the action. *McCrary Stone Service v. Lyalls*, 77 N.C. App. 796, 799, 336 S.E.2d 103, 105 (1985).

Plaintiff's complaint asserts fifteen claims arising out of an alleged scheme whereby defendants negotiated a series of fraudulent lease agreements. The complaint states that Miller, a former leasing officer for plaintiff, and the other named defendants obtained money and property at plaintiff's expense by misrepresenting the existence, title, or value of the leased property. Plaintiff, therefore, seeks to recover a judgment against defendants for the damages it sustained as a result of the alleged conspiracy. It is true that plaintiff's prayer for relief includes a request for "an Order that Defendants immedi-

ately surrender any an all property held pursuant to any lease, promissory note or deed of trust between Defendants and Centura." However, this relief is ancillary to the primary purpose of the complaint, which is to recover monetary damages. Therefore, we hold that section 1-76(4) does not apply to plaintiff's action. Miller's contrary argument fails.

[2] Miller argues, in the alternative, that plaintiff's action is essentially to recover a deficiency owed on a debt and, as such, falls within the mandate of section 1-76.1 of our General Statutes. Under section 1-76.1, "actions to recover a *deficiency, which remains owing on a debt after secured personal property has been sold* to partially satisfy the debt, must be brought in the county in which the debtor . . . resides or in the county where the loan was negotiated." N.C. Gen. Stat. § 1-76.1 (1999) (emphasis added). The leased property involved in the instant case, however, has not yet been sold; therefore, section 1-76.1 does not apply. *See M & J Leasing Corp. v. Habegger*, 77 N.C. App. 235, 237, 334 S.E.2d 804, 805 (1985) (finding section 1-76.1 inapplicable, "because the personal property involved ha[d] not yet been sold and the action [was] not 'to recover a deficiency which remain[ed] owing on a debt.' ") This argument also fails.

[3] Next, Miller contends that Guilford County is an improper forum in which to hear plaintiff's action, because none of the parties to the lawsuit reside there. Again, we must disagree.

Our residual venue provision, section 1-82 of the General Statutes, states that "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement." N.C. Gen. Stat. § 1-82 (1999). Section 1-79 of our General Statutes provides that for the purpose of litigation, the residence of a domestic corporation is as follows:

> (1) Where the registered or principal office of the corporation . . . is located, or
>
> (2) Where the corporation . . . maintains a place of business, or
>
> (3) If no registered or principal office is in existence, and no place of business is currently maintained or can reasonably be found, the term "residence" shall include any place where the corporation . . . is regularly engaged in carrying on business.

N.C. Gen. Stat. § 1-79(a) (1999).

In the instant case, plaintiff maintains a place of business in Guilford County, but its principal office is in Nash County. Miller contends that under section 1-79, plaintiff resides in Nash County and that for purposes of filing suit and being sued, a domestic corporation has only one residence. According to Miller, the legislature's use of the word "or," as opposed to the word "and," to connect subsections (1) and (2) suggests that "a corporation resides either in the county where its principal office is located, or where it maintains a place of business, but not both." However, had the drafters intended such a result, they would have used language, as they did in subsection (3), clarifying that subsection (2) applies only "[i]f no registered or principal office is in existence." *See id.* Therefore, we reject Miller's construction of the statute and hold that plaintiff comes within the provisions of section 1-79(a)(2) and is a resident of Guilford County. Since Guilford County is a proper venue for plaintiff's action, the trial court did not err by denying Miller motions to dismiss for improper venue and to transfer venue as a matter of right.

[4] In addition to his appeal, Miller petitions this Court for writ of certiorari to review the court's ruling as to the discretionary basis upon which Miller seeks transfer of venue. In the interests of judicial economy and the expeditious administration of justice, *see Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (recognizing elective of this Court to review interlocutory decision when to do so would be "in the interests of judicial economy" or the expeditious administration of justice), *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998), we grant certiorari and consider Miller's final argument. Miller contends that the trial court abused its discretion by denying his motion to transfer venue to Durham County for convenience of witnesses and to promote the ends of justice. We disagree.

Section 1-83(2) of the General Statutes provides that "[t]he court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C. Gen. Stat. § 1-83(2) (1999). Whether to transfer venue for this reason, however, is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion. *Roanoke Properties v. Spruill Oil Co.*, 110 N.C. App. 443, 429 S.E.2d 752 (1993). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347

N.C. 670, 500 S.E.2d 84 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Here, we find no gross improprieties indicating that the court abused its discretion. We have said that Guilford County is an appropriate venue in which to bring plaintiff's action. Thus, we cannot conclude that the court's decision not to transfer venue to Durham County was an unreasoned one, and Miller's argument to the contrary fails.

For the foregoing reasons, the order denying Miller's motion to dismiss and the motions to transfer venue as a matter of right or, alternatively, for the convenience of witnesses is affirmed.

Affirmed.

Judges GREENE and WALKER concur.

USAA CASUALTY INSURANCE COMPANY, PLAINTIFF v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, RAGSDALE MOTOR COMPANY, INC., AND WILLIAM B. ROBERTS, DEFENDANTS

No. COA99-971

(Filed 5 July 2000)

Insurance— automobile—excess insurance clauses

The trial court did not err by granting summary judgment for defendant Universal in a declaratory judgment action to determine the responsibilities of the two insurers in a claim arising from an automobile accident where both policies contained "other insurance" provisions. The applicable provisions of both policies may be given effect without a mutually repugnant interpretation; under Universal's policy, the plaintiff UGAA's coverage is the other applicable insurance and Universal is only obligated to pay a pro rata share.

Appeal by plaintiff from judgment entered 22 February 1999 by Judge Wiley F. Bowen in Orange County Superior Court. Heard in the Court of Appeals 26 April 2000.

Edgar & Paul, by Patrick M. Anders, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Leigh Ann Smith, for defendants-appellees.

WALKER, Judge.

On 30 December 1997, plaintiff USAA Casualty Insurance Company ("USAA") filed this declaratory judgment action against defendant Universal Underwriters Insurance Company ("Universal") to determine the responsibilities of the two insurers based on a claim arising out of an underlying vehicle accident.

On 22 November 1995, USAA's insured, Burke S. Lewis, was operating a vehicle owned by Universal's insured, Ragsdale Motor Company, Inc., an automobile dealership. Lewis was driving with the permission of Michael R. Ragsdale, Jr. ("Ragsdale"), who was also in the vehicle and is the son of Ragsdale Motor Company's president. Ragsdale had been given the permanent use of the vehicle by his father.

The vehicle Lewis was driving struck another vehicle driven by William B. Roberts, who brought suit against Lewis, Ragsdale, and Ragsdale Motor Company. A dispute arose between USAA and Universal as to the priorities of coverage between their policies. USAA and Universal settled with Roberts for $10,500, with payment contingent upon the outcome of the declaratory judgment.

USAA's liability policy contains an "other insurance" clause which provides:

> If there is other applicable liability insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a temporary substitute vehicle or non-owned auto shall be excess over any other valid and collectible insurance.

USAA's policy limits were $300,000 per person injured.

Under Universal's liability policy, Part (4) of WHO IS AN INSURED states that an insured is:

> any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.

Additionally, COVERAGE PART 500—GARAGE provides in part:

> With respect to part (4) of WHO IS AN INSURED the most WE will pay in the absence of any other applicable insurance, is the minimum limits required by the Motor Vehicle Laws of North Carolina. When there is other applicable insurance, WE will pay only OUR pro rata share of such minimum limits.

Universal's "other insurance" provision provides in part:

> The insurance afforded by this Coverage Part is primary, except:
>
> . . .
>
> (2) WE will pay only OUR pro rata share of the minimum limits required by the Motor Vehicle Laws of North Carolina when:
>
> (a) any person or organization under part (3) or (4) of WHO IS AN INSURED is using an AUTO owned by YOU and insured under the AUTO HAZARD.

Universal's policy limits were $25,000 per person injured.

Both parties moved for summary judgment and the trial court granted Universal's motion, ordering Universal to "pay pro rata as to the minimum limits or Universal is responsible for a 1/12 share" of the $10,500 settlement, or $875 plus interest.

USAA argues the trial court erred in failing to give effect to its "excess" insurance clause in determining the liability under the policies. Specifically, USAA's coverage is "over and above Universal's, since Universal directly insured the vehicle" involved in the accident, so that the settlement should be paid entirely by Universal's policy.

USAA concedes that the language in Universal's policy has been previously examined by our Supreme Court and this Court in *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 463 S.E.2d 389 (1995) ("*Integon I*"), and *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 131 N.C. App. 267, 507 S.E.2d 66 (1998) ("*Integon II*"). In both cases, under substantially similar facts and construing identical policies of Universal, our appellate courts held that Universal was responsible for a pro rata share of the minimum limits required by North Carolina's motor vehicle laws.

In *Integon I*, an automobile dealership loaned a car to Allen and Hope Bridges (the Bridges), whose daughter subsequently was

involved in a collision while operating the vehicle with her parents' permission. *Integon I*, 342 N.C. at 167, 463 S.E.2d at 390. The Bridges were insured by Integon and the dealership was insured by Universal. *Id.* Integon's "other insurance" provision provided that "any insurance we provide for a vehicle you do not own shall be excess over any collectible insurance." *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 116 N.C. App. 279, 284, 447 S.E.2d 512, 515 (1994). Universal's "other insurance" provision provided that it would only pay the pro rata share of the minimum limits required by the Motor Vehicle Laws of North Carolina. *Integon I*, 342 N.C. at 170-71, 463 S.E.2d at 392. Our Supreme Court held that, under Universal's policy, when the driver has other applicable insurance, Universal is responsible for paying a pro rata share of the minimum limits. *Id.* at 170, 463 S.E.2d at 392.

In *Integon II*, Randall Baucom rented a vehicle from Griffin Motor Company, Inc., and subsequently was in a collision while operating the vehicle. *Integon II*, 131 N.C. App. at 268, 507 S.E.2d at 67. Baucom was insured by Integon and Griffin was insured by Universal. *Id.* The two policies' applicable coverage provisions were the same as in *Integon I*. *Id.* at 269, 507 S.E.2d at 68. Just as in *Integon I*, this Court held that, when the driver has other applicable insurance, Universal is responsible for paying a pro rata share of the minimum limits. *Id.* at 275, 507 S.E.2d at 71. Additionally, this Court stated that:

> we note [Integon] has advanced no argument asserting application in the instant case of the coverage limitation in the Integon policy "for a vehicle you do not own" to the "excess over any other collectible insurance." Accordingly, we have not addressed, nor do we express any opinion, as to the effect of this provision upon our analysis herein.

Id.

Here, the applicable provisions of both policies may be given effect without yielding a mutually repugnant interpretation. Under Universal's policy, Lewis's USAA coverage is the other applicable insurance; therefore, Universal is only obligated to pay a pro rata share, or one-twelfth of $10,500. *See Integon I*, 342 N.C. at 170, 463 S.E.2d at 392.

Under USAA's "excess" insurance clause, the "other valid and collectible insurance" is Universal's pro rata share, or one-twelfth of $10,500. Thus, USAA is obligated to pay the remainder.

USAA argues that *Integon I* and *Integon II* are distinguishable in that those cases involved "test drivers or rental cars," while "Lewis was simply a permissive user." This constitutes a distinction without a difference and USAA's argument is without merit. *See Integon II*, 131 N.C. App. at 274, 507 S.E.2d at 71.

USAA also argues that Universal's "other insurance" clause violates North Carolina law and public policy since the provision allows Universal to defeat the statutory requirement of providing minimum limits of coverage under N.C. Gen. Stat. § 20-279.21. Based upon *Integon I*, USAA's argument is without merit. Accordingly, the trial court did not err in granting summary judgment for Universal.

Affirmed.

Judges LEWIS and MARTIN concur.

STATE OF NORTH CAROLINA v. JOSEPH EDWARD COVINGTON, II

No. COA99-578

(Filed 5 July 2000)

1. Search and Seizure— traffic stop—officer in place or position to apprehend or warn

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress all evidence obtained as a result of the stop of his vehicle, because: (1) two officers entered the area to investigate a reported breaking and entering; (2) one officer was positioned to apprehend the suspects or warn incoming residents of possible criminal activity; and (3) the officer stopped two vehicles, the second one being defendant's, in order to perform that very function.

2. Search and Seizure— traffic stop—impaired driving checkpoint not required

Although defendant contends an officer's stop of his vehicle was illegal based on an alleged failure to establish a valid checking station for impaired driving checks as required by N.C.G.S. § 20-16.3A, it was reasonable for an officer to briefly stop and detain defendant to ascertain defendant's identity and his pos-

sible involvement in criminal activity or to warn him as a resident, because: (1) the stop in this case did not arise pursuant to an impaired driving case, making this statute inapplicable; and (2) the stop of defendant's automobile was predicated on the fact that a break-in had been reported recently in the area, revealing that the stop was based on reasonable and articulable facts.

3. Evidence— suppression hearing—presumption judge disregards improper evidence

The trial court did not err in a driving while impaired case by admitting testimony at the suppression hearing concerning events subsequent to the stop of defendant's vehicle, because: (1) defendant has not presented authority limiting the scope of evidence presented at a suppression hearing; and (2) it is presumed that a judge hearing a matter without a jury disregards any improper evidence.

Appeal by defendant from judgment entered 18 May 1998 by Judge James M. Webb in Randolph County Superior Court. Heard in the Court of Appeals 13 March 2000.

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

James Hill, Jr. for the defendant-appellant.

LEWIS, Judge.

Defendant was found guilty of driving while impaired in Randolph County Criminal District Court on 16 December 1997 and appealed to superior court for a trial de novo. On 18 March 1998, the Randolph County Superior Court denied defendant's motion to suppress evidence obtained from the stop of defendant's vehicle. At a hearing at the 18 March 1998 session of Randolph County Superior Court, defendant entered a plea of guilty and was sentenced to two years supervised probation and one year unsupervised probation and fined $200.

The State's evidence tended to show the following. On 23 December 1996 at approximately 3:00 a.m., Officer Paul Maness and his training officer, Scott Messenger, of the Asheboro Police Department, received a call reporting that two males had broken into an apartment building in Asheboro, and that the assailants were leaving the apartment building, heading toward Morgan Avenue. The offi-

cers drove to an intersection approximately 300 yards from the reported break-in and separated; Officer Messenger proceeded to the apartment building on Morgan Avenue and Officer Maness remained at the intersection. Officer Messenger ordered Officer Maness to stop any pedestrians or vehicles entering the area.

Two vehicles entered the area, and Officer Maness stopped them both by waving his flashlight. Officer Maness asked the driver of the first vehicle for his license, spoke with the driver and passengers briefly and allowed them to proceed. Defendant's vehicle approached the intersection next, and Officer Maness again waved his flashlight. Defendant stopped and rolled down his window. Officer Maness explained that he was investigating a possible breaking and entering in the area and was stopping all pedestrians and vehicles as part of the investigation. Without being asked to do so by Officer Maness, defendant exited the vehicle, staggering and talking about what he would do if someone had broken into his house. Having detected an odor of alcohol on defendant when he exited his vehicle, Officer Maness contacted Officer Messenger. When Officer Messenger returned to the intersection, he informed Officer Maness that the breaking and entering report was false. Officer Maness was not made aware of this before stopping defendant's vehicle.

Defendant was given a breath test using an Intoxilyzer, which revealed an alcohol concentration of .19. Defendant was then arrested for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

[1] On appeal, defendant sets forth several arguments surrounding the trial court's denial of his motion to suppress all evidence obtained as a result of the stop of his vehicle. In his first argument, defendant contends the court's finding that Officer Maness was "in a place or a position to apprehend or to warn incoming residents of the subdivision of any criminal activity that might be taking place" is not supported by the evidence. Defendant has not taken issue with any of the trial court's conclusions of law.

In reviewing the trial court's order following a motion to suppress, the trial court's findings of fact are conclusive if supported by competent evidence in the record. *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). As previously stated, the evidence in this case indicates that the officers here entered the area to investigate a reported breaking and entering. Officer Maness was positioned to

apprehend the suspects or warn incoming residents of possible criminal activity. The testimony indicates that Officer Maness stopped two vehicles in order to perform that very function. We find the evidence sufficient to support the trial court's finding.

[2] Defendant next contends the stop itself was illegal, since the officers here failed to establish a valid checking station in violation of N.C. Gen. Stat. § 20-16.3A, which sets forth the requirements for impaired driving checks. Because the stop here did not arise pursuant to an impaired driving check, this provision does not apply. Instead, the officers' conduct in this case is governed by *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979). There, the United States Supreme Court held that random stops of automobiles and detention of drivers for license and registration checks violate the Fourth Amendment. However, the *Prouse* Court stated this rule is inapplicable in situations where there is an "articulable and reasonable suspicion" that an occupant of the vehicle is subject to seizure for violation of the law. *Id.* at 663, 159 L. Ed. 2d at 673. This standard falls short of the traditional notion of probable cause, which is required for an arrest.

Likewise, our courts have established that police officers may be warranted in making investigatory stops and detaining the occupants of motor vehicles when the facts would justify an "articulable and reasonable suspicion" that the occupants of that vehicle may be engaged in or connected with some form of criminal activity. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979); *State v. Douglas*, 54 N.C. App. 85, 91, 282 S.E.2d 832, 835 (1981); *State v. Greenwood*, 47 N.C. App. 731, 735, 268 S.E.2d 835, 838 (1980), *rev'd on other grounds*, 301 N.C. 237, 273 S.E.2d 438 (1981). The relevant standard for testing the conduct of law enforcement officers in effecting a warrantless "seizure" of an individual is that "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." *Thompson*, 296 N.C. at 706, 252 S.E.2d at 779 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)).

The evidence in this case shows that the stop of defendant's automobile was predicated on the fact that a break-in had been reported recently in the area. The hour was late, after 3 a.m., and very few cars were in the area. These facts and the natural inferences arising from them show the stop of defendant was based on reasonable and artic-

ulable facts. *See, e.g., State v. Tillett and State v. Smith*, 50 N.C. App. 520, 274 S.E.2d 361 (1981). Thus, we conclude it was reasonable for Officer Maness to stop and detain defendant briefly to ascertain his identity and his possible involvement in criminal activity or to warn him as a resident.

[3] Defendant next contends the trial court erred in admitting testimony at the suppression hearing as to events subsequent to the stop of defendant's vehicle. Defendant contends that the only issue at the suppression hearing was whether the officer had the right to stop defendant's vehicle, and any evidence regarding what happened after the initial stop was improper. Defendant has presented no authority limiting the scope of evidence presented at a suppression hearing. Nonetheless, we note:

> [T]he rule is well established that in a hearing before a judge on a preliminary motion, the ordinary rules as to the competency of evidence that apply in a trial before a jury are *relaxed* because the judge, being knowledgeable in the law, is able to eliminate immaterial and incompetent testimony and to consider only that evidence properly tending to prove the facts to be found.

State v. Allen, 90 N.C. App. 15, 23, 367 S.E.2d 684, 689 (1988) (emphasis added). Further, it is presumed that a judge hearing a matter without a jury disregards any improper evidence unless it affirmatively appears that he was influenced by the evidence. *State v. Harris*, 43 N.C. App. 346, 350, 258 S.E.2d 802, 805 (1979). Given our conclusion that the trial court found specific, articulable facts sufficient to justify Officer Maness in making an investigatory stop of defendant's car, we find defendant's argument unpersuasive.

We have reviewed defendant's remaining argument and find it to be without merit.

No error.

Judges JOHN and EDMUNDS concur.

PATEL v. STONE

[138 N.C. App. 693 (2000)]

BEVERLY H. PATEL, PLAINTIFF v. JEFFREY A. STONE AND JOE D. GLASS & SONS, DEFENDANTS

No. COA99-1018

(Filed 5 July 2000)

Insurance— automobile—uninsured motorist coverage

Although plaintiff's automobile insurance policy issued by Farm Bureau included an uninsured motorist coverage with policy limits of $50,000 per injured person and plaintiff only received $32,500 in an arbitration with Farm Bureau, the trial court erred in dismissing plaintiff's claim for damages arising out of an automobile accident against defendants who were insured by an insolvent carrier in South Carolina, on the basis that plaintiff failed to exhaust her uninsured motorists rights within the meaning of S.C. Code Ann.§ 38-31-100.1 under the provisions of her policy with Farm Bureau, because: (1) plaintiff had no legal entitlement to the full $50,000 coverage with Farm Bureau, as her entitlement depended on a variety of factors involving liability and damages; (2) plaintiff pursued her claim in a legally sanctioned manner by submitting her claim to arbitration as the Farm Bureau policy permitted; and (3) the South Carolina statute's language reveals the intent to limit the offset to the amount the claimant actually recovers, and not the amount potentially payable under the policy.

Appeal by plaintiff from order dated 9 June 1999 by Judge William H. Helms in Stanly County Superior Court. Heard in the Court of Appeals 6 June 2000.

Crews & Klein, P.C., by Paul I. Klein and Katherine Freeman, for plaintiff-appellant.

Lawrence M. Baker, for defendant-appellees.

GREENE, Judge.

Beverly H. Patel (Plaintiff) appeals the trial court's order dismissing her complaint against Jeffrey A. Stone (Stone) and Joe D. Glass & Sons (Glass & Sons) (collectively, Defendants).

The record reveals that on 8 March 1991, Plaintiff was involved in an automobile accident in Stanley County, North Carolina with a tractor trailer driven by Stone and owned by Glass & Sons. Plaintiff com-

menced a civil suit in 1994 against Defendants alleging Stone negligently operated the tractor trailer as an agent of Glass & Sons.

At the time of the accident, Defendants were insured by United Southern Assurance Company (USAC). Subsequent to the accident, USAC was declared insolvent by a court order entered in Leon County, Florida.[1] Glass & Sons, as a South Carolina resident, came under the protection of the South Carolina Guaranty Association (the Guaranty Association), which became Defendants' insurer, in lieu of USAC.[2]

At the time of the accident, Plaintiff was insured by an automobile insurance policy issued by North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau), which included an uninsured motorist coverage with policy limits of $50,000.00 per injured person. The Farm Bureau policy also contained an arbitration provision providing that uninsured motorists claims covered by Farm Bureau were permitted to be arbitrated.

While this action remained pending, Plaintiff proceeded with the arbitration with Farm Bureau, and an arbitration award in the amount of $32,500.00 in favor of Plaintiff was entered on 1 June 1998. In March of 1999, the Guaranty Association filed a motion to dismiss Plaintiff's claim against Defendants on the basis Plaintiff failed to "exhaust other policy limits as required by South Carolina Statute § 38-31-100." The trial court allowed the motion, and in so doing, concluded that "[b]ecause any claim or action arising out of the accident referenced in the complaint of this matter has been resolved by the arbitration, [D]efendants are entitled to dismissal of this action."

The dispositive issue is whether Plaintiff had exhausted her uninsured motorists rights, within the meaning of section 38-31-100(1) of the Code of Laws of South Carolina, under the provisions of her policy with Farm Bureau.

Under the relevant South Carolina statute, any person having a claim against a South Carolina resident, whose liability insurer subsequently becomes insolvent, "is required," before she is entitled to recover from the Guaranty Association, "to exhaust first [her] right

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1. The record does not contain a copy of the Leon County, Florida court order, but the order of the trial court in this case references the Florida order, and the parties do not dispute its entry.

2. *See* S.C. Code Ann. § 38-31-60 (West Supp. 1999).

under [any other insurance] policy." S.C. Code Ann. § 38-31-100(1) (West Supp. 1999).[3] "Any amount payable" to the claimant by the Guaranty Association "must be reduced by the amount of any recovery" claimant receives from any solvent insurer covering the same occurrence. *Id.*

Although we are required to defer to the South Carolina courts' construction of section 38-31-100, 2 Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 37.03, at 119 (5th ed. 1993), our research failed to reveal any opinions from that state construing the portion of the statute at issue in this case. We, therefore, construe the statute utilizing the rules of statutory construction used by the South Carolina courts. *Id.* § 37.05, at 124.

The primary function of the courts in construing statutes is to ascertain the legislative intent. *Bankers Trust of South Carolina v. Bruce*, 267 S.E.2d 424, 425 (S.C. 1980). Words in the statute must be taken in their plain and ordinary meaning unless there is something in the statute requiring a different interpretation. *Hughes v. Edwards*, 220 S.E.2d 231, 234 (S.C. 1975).

In this case, the plain meaning of the statute requires a claimant insured by an insolvent insurer, prior to perfecting the claim against the Guaranty Association (who assumes the liability of the insolvent insurer), to "exhaust" her "right" under any other insurance policy that provides coverage for the claim at issue.

Defendants argue this language requires Plaintiff to exhaust her Farm Bureau insurance policy limits. Because Plaintiff did not receive an award of $50,000.00, she has not exhausted her right under that policy. We disagree.

Plaintiff's obligation is to "exhaust" or consume entirely her "right" in the Farm Bureau policy. A "right" is defined to be something one is "legally entitled" to receive. *See New Webster's Dictionary and Thesaurus of the English Language* 856 (1992). Plaintiff had no legal entitlement to the full $50,000.00 coverage with Farm Bureau, as her entitlement depended on a variety of factors involving liability (negligence, contributory negligence, etc.) and damages (the extent of her injuries, etc.). In submitting her claim to arbitration, as the Farm

3. We note our legislature has provided, under the "Insurance Guaranty Association Act," N.C.G.S. ch. 58, art. 48 (1999), for the creation of the North Carolina Insurance Guaranty Association, and the provisions of N.C. Gen. Stat. § 58-48-55(a) contain almost identical language to the provisions of the South Carolina statute at issue in this case.

Bureau policy permitted, Plaintiff pursued her claim in a legally sanctioned manner, and thus, exhausted her "right" under the Farm Bureau policy as required by section 38-31-100.

This conclusion is further supported by the second sentence of the challenged statute, which provides that "[a]ny amount payable on a covered claim under this chapter must be reduced by the amount of any *recovery* under that insurance policy." S.C. Code Ann. § 38-31-100(1) (emphasis added). By including this second sentence in the statute, the South Carolina legislature evidenced its intent to limit the offset to the amount the claimant actually recovers, and not the amount potentially payable under the policy. *See Alabama Insurance Guaranty Association v. Colonial Freight Systems, Inc.*, 537 So.2d 475, 476 (Ala. 1988).

The trial court, therefore, erred in dismissing Plaintiff's claim against Defendants.[4]

Reversed and remanded.

Judges HORTON and HUNTER concur.

UNITED LEASING CORPORATION, PLAINTIFF v. JOHN G. PLUMIDES, JOHN G. PLUMIDES, II AND MARY L. PLUMIDES, DEFENDANTS

No. COA99-914

(Filed 5 July 2000)

Jurisdiction— forum selection clause—sureties—Virginia law

The trial court properly denied defendants' notice of defenses to entry of a foreign judgment arising from an equipment lease where the document signed by defendants was titled "Guaranty,"

4. There is a second and more fundamental reason why the dismissal of the action against Defendants was error. The claim in this action is not against the Guaranty Association, and the failure of Plaintiff to exhaust her right under the Farm Bureau policy can only be a defense to a subsequent action against the Guaranty Association. The failure to comply with section 38-31-100(1) is not a defense to an action against the tortfeasors. *See Grigsby v. White*, 492 S.E.2d 603, 604 (Ga. App. 1997) (reversing dismissal of claim against tortfeasor where plaintiffs had allegedly failed to exhaust their right against their uninsured policy when tortfeasor was insured by an insolvent carrier, because the issue was "not yet ripe since a judgment ha[d] not been rendered against" the tortfeasor).

but the content reveals that defendants were directly responsible to plaintiff as soon as the principal debtor defaulted and, as sureties, were bound to the agreement entered into by the principal debtor and the forum selection clause it contained. Defendants failed to establish that the forum selection clause was unfair, unreasonable, or affected by fraud or unequal bargaining power.

Appeal by defendants from an order entered 22 February 1999 by Judge Loto Greenlee Caviness in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 May 2000.

Cansler, Lockhart, Campbell, Evans, Bryant & Garlitz, P.A., by Thomas D. Garlitz, for plaintiff-appellee.

Daniel J. Clifton for defendants-appellants.

WALKER, Judge.

Plaintiff, a Virginia corporation, entered into an equipment lease agreement (agreement) with Caffe' Milan, Inc., a North Carolina corporation. Defendant John G. Plumides, II signed the agreement on 24 October 1994. The agreement provides:

> This Lease shall be interpreted and construed according to the laws of the Commonwealth of Virginia. This Lease is being consummated in Hanover County, Virginia. Lessee agrees that any action brought in law or equity arising from this lease in any fashion may be commenced and maintained in any of the following courts: the General District Court or Circuit Court for either Hanover County, Virginia, or the City of Richmond, Virginia or the United States District Court for the Eastern District of Virginia.

On that same day, defendants John G. Plumides, II and John G. Plumides signed a guaranty of the agreement on behalf of Caffe' Milan, Inc. Mary L. Plumides also signed a guaranty on behalf of Caffe' Milan, Inc. on 7 November 1994.

On or about 30 July 1997, plaintiff brought an action in Hanover County, Virginia, against defendants Plumides, alleging that Caffe' Milan, Inc. is "in default for nonpayment of the foregoing monthly payments." After serving defendants with a motion for default judgment, plaintiff obtained a judgment on 19 November 1997 against defendants, jointly and severally, in the amount of $45,916.87, plus

late charges of $2,246.27, a purchase residual of $7,019.31, attorney fees of $11,036.39, and interest thereon at the rate of 9% per annum from the date of judgment.

On 17 February 1998, plaintiff filed a notice of registration of foreign judgment and supporting affidavit with the Mecklenburg County Superior Court. On 1 June 1998, defendants filed a notice of defenses to entry of foreign judgment pursuant to N.C. Gen. Stat. § 1C-1705, in which they alleged that the Virginia Court lacked personal jurisdiction over them. Plaintiff then filed a motion for entry of foreign judgment on 18 November 1998, alleging that "[p]ursuant to N.C. Gen. Stat. § 1C-1805, the State of Virginia has proper jurisdiction over the Defendants, as is evidenced by Paragraph 19 of the Equipment Lease Agreement executed by the Defendants." After a hearing, the trial court denied defendants' notice of defenses to entry of foreign judgment and allowed plaintiff's motion for entry of foreign judgment, giving the foreign judgment from Virginia full faith and credit.

"Since the validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgement was rendered," it is necessary for us to examine the laws of Virginia. *See Marketing Systems v. Realty Co.*, 277 N.C. 230, 234, 176 S.E.2d 775, 777 (1970).

Defendants contend that the trial court erred in denying their notice of defenses to entry of foreign judgment since the Virginia courts did not have personal jurisdiction over them. Defendants argue that they are not bound by the forum selection clause in the agreement since plaintiff's contract was with Caffe' Milan, Inc. and defendant John G. Plumides, II signed the agreement only in his official capacity as president of the corporation. Defendants further argue that by signing the guaranty, they did not agree to submit to the jurisdiction of the Virginia courts since it did not contain a forum selection clause. However, plaintiff contends that defendants, by unconditionally guaranteeing performance of the agreement, became sureties under Virginia law, subject to the forum selection clause in the agreement.

"A contract of suretyship is distinguishable from a guaranty in that it generally binds the surety to the instrument of his principal." *Klockner-Pentaplast of America, Inc. v. Roth Display Corp.*, 860 F.Supp. 1119, 1121 (W.D. Va. 1994). The Virginia Supreme Court has recognized:

> Whether the contract is that of suretyship or guaranty does not depend upon the use of particular or technical words, such as 'security,' 'surety,' 'guaranty' or 'guarantee.' The nature of the obligation, whether primary or secondary, is the determining element. If the obligation is direct and primary, the contract will be that of suretyship, and not of guaranty, although the word 'guaranty' or 'guarantee' is employed.

The B.F. Goodrich Rubber Company, Inc. v. Fisch, 141 Va. 261, 267, 127 S.E.2d 187, 188 (1925). "The guarantor contracts to pay, if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default." *The Phoenix Insurance Company v. Lester Brothers, Inc.*, 203 Va. 802, 807, 127 S.E.2d 432, 436 (1962), *citing Piedmont Guano & Mfg. Co. v. Morris*, 86 Va. 941, 11 S.E. 883 (1890). "[I]n other words, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid." *Id.*

> The guaranty signed by defendants in the case at bar provides:
>
> For valuable consideration, the receipt of which is hereby acknowledged, the Undersigned jointly and severally unconditionally guarantee to you the full and prompt performance by the Lessee: Caffe' Milan, Inc. . . . .

The guaranty also states that "all sums owing to you by Obligor shall be deemed to have become immediately due and payable if" the Obligor defaults or files a petition for bankruptcy and that the "Undersigned shall reimburse you, on demand, for all expenses incurred by you in the enforcement or attempted enforcement of any of your rights hereunder. . . ." Further, the guaranty provides that "[n]otice of your acceptance hereof, of default and non-payment by Obligor . . ., of presentment, protest and demand, and of all other matters of which Undersigned otherwise might be entitled, is waived." "Legal rights and obligation hereunder shall be determined in accordance with the law of the Commonwealth of Virginia."

Although the document signed by defendants is titled "Guaranty," the content of the document reveals that defendants were directly responsible to plaintiff as soon as the principal debtor, Caffe' Milan, Inc. defaulted on its obligations under the agreement. As sureties, defendants were bound to the agreement entered into by plaintiff and Caffe' Milan, Inc. and the forum selection clause it contained. *See*

Klockner-Pentaplast of America, Inc., 860 F.Supp. 1119, 1121 (W.D. Va. 1994). Since defendants have failed to establish that the forum selection clause is unfair, unreasonable, or affected by fraud or unequal bargaining power, this provision of the agreement is valid and should be enforced. *See Paul Business Systems, Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 397 S.E.2d 804 (1990). Thus, the trial court properly denied defendants' notice of defenses to entry of foreign judgment and allowed plaintiff's motion for entry of foreign judgment, giving the foreign judgment from Virginia full faith and credit.

Affirmed.

Judges McGEE and HUNTER concur.

JAMES W. LITTLE AND WIFE, PAMELA F. LITTLE, PLAINTIFFS V. BARSON FINANCIAL SERVICES CORPORATION, RODNEY HAIRSTON, BALDWIN-SHA KUR & ASSOCIATES, CLARKE W. BALDWIN AND WIFE, KIMBERLY A. AKBAR, FARID SHA KUR, CALVIN BRICE AND WIFE, FAYE Y. BRICE, DEFENDANTS

No. COA99-944

(Filed 5 July 2000)

Judgments— default—entry set aside for remaining defendants

The trial court erred by extending the default judgment it entered for the non-responding defendants to the remaining defendants in an action to quiet title to plaintiff's property because: (1) a default judgment against the non-responding defendants did not make any admissions on behalf of the remaining defendants, bar any of their defenses or claims, or prejudice their rights; and (2) the remaining defendants should have been allowed the opportunity to present their defense to plaintiffs' action to quiet title, and to present their counterclaim to quiet title.

Appeal by defendants Calvin and Faye Y. Brice from an order and judgment entered 12 March 1999 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 11 May 2000.

Metcalf & Beal, L.L.P., by W. Eugene Metcalf, for plaintiff-appellees.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by David S. Pokela, for defendant-appellants Calvin and Faye Y. Brice.

HUNTER, Judge.

Defendants Calvin Brice and Faye Y. Brice ("defendant-appellants") appeal a judgment by the trial court wherein it granted a default judgment against defendants Clarke W. Baldwin, Kimberly A. Akbar, and Farid Sha Kur on claims that they falsely obtained the property of James W. Little and Pamela F. Little ("plaintiffs"). The trial court did not adjudicate defendant-appellants' claims to the property, but proceeded to grant sole lawful ownership of the property to plaintiffs. We reverse, holding that a default judgment as to some, but not all defendants, did not clear title to the property in plaintiffs' favor.

Briefly, the record indicates that plaintiffs filed the complaint in the present case alleging that Baldwin, Akbar, and Sha Kur had fraudulently obtained their property located at 2934 Poinsettia Drive in Winston-Salem, and asked that the court quiet title in their favor. Apparently, a subsequent conveyance of the subject property had been made to defendant-appellants, who counterclaimed and crossclaimed, alleging that even if the plaintiffs had been defrauded by the other defendants, defendant-appellants were innocent bona fide purchasers for value, and were the rightful owners because plaintiffs failed to comply with their duty to read the documents in which plaintiffs conveyed the property to Baldwin and Akbar. Baldwin, Akbar, and Sha Kur failed to answer and the trial court entered a default judgment against them, wherein it quieted title to the property, ordering that plaintiffs were the property's sole owners without hearing the counterclaims and crossclaims of defendant-appellants.

Defendant-appellants first contend that the trial court erred because after entering a default judgment against defendants Baldwin, Akbar, and Sha Kur, it extended the default judgment to them, ruling that defendant-appellants were bound by the facts deemed admitted by the default of the non-responding defendants. Defendant-appellants argue that they did not default, and were never given the opportunity to be heard on their defense to plaintiff's quiet title action or their own counterclaim to quiet title. They contend the trial court erred in quieting title to the property based only on a default judgment against some of the defendants.

This Court has held that an action to remove a cloud on title:

> "[M]ay be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims . . . , and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired. . . ."
>
> N.C. Gen. Stat. § 41-10 (1996). In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest. *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952). By bringing a suit pursuant to this statute, a plaintiff is not demanding possession of the land but is merely stating that defendant has no right, title or interest adverse to his interest. *Development Co., Inc. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971). . . . Further, once a plaintiff establishes a *prima facie* case for removing a cloud on title, the burden rests upon the defendant to establish that his title to the property defeats the plaintiff's claim. *Id.* at 78, 178 S.E.2d at 818-819.

Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 461, 490 S.E.2d 593, 596-97 (1997), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998). Plaintiffs and defendant-appellants had brought actions to quiet title in the present case. Thus, both sought to defeat the other's claim.

In an action commenced against multiple defendants where some, but not all, of the defendants fail to plead or otherwise respond, a default judgment against the non-responding defendants does not bar the other defendants from asserting all defenses they might have to defeat plaintiff's claim. *Harris v. Carter*, 33 N.C. App. 179, 183, 234 S.E.2d 472, 475 (1977) (citing *United States v. Borchardt*, 470 F.2d 257 (7th Cir. 1972)).

> Also, it is equally clear that default final judgment against [a non-responding defendant], d[oes] not adjudicate any rights between plaintiff and the answering defendants. The judgment by default final against [the non-responding defendant], in no way prejudice[s] the rights of the answering defendants in their defense against plaintiff's allegations.

Piney Mountain Properties v. Supply Co., 6 N.C. App. 191, 193, 169 S.E.2d 465, 467 (1969). Under the foregoing authority, assuming that plaintiffs had made a *prima facie* case in their action to quiet title, a default judgment against the non-responding defendants did not make any admissions on behalf of defendant-appellants, bar any of their defenses or claims, or prejudice their rights. It was therefore error for the trial court to quiet title to the property based on a default judgment against Baldwin, Akbar, and Sha Kur, as defendant-appellants should have been allowed the opportunity to present their defense to plaintiffs' action to quiet title, and to present their counterclaim to quiet title. *See Chicago Title*, 127 N.C. App. at 461, 490 S.E.2d at 597. Accordingly, that portion of the order which purports to quiet title to the property in favor of plaintiffs is reversed, and this case is remanded in order for defendant-appellants to be given their day in court in accordance with this opinion. Default judgment as to Clarke W. Baldwin, Kimberly A. Akbar and Farid Sha Kur is affirmed.

Affirmed in part, reversed in part and remanded.

Judges WALKER and McGEE concur.

SHANE REECE v. SCOTT FORGA, FORGA CONTRACTING, INC., JOHN DOE AND DOE CORP.

No. COA99-969

(Filed 5 July 2000)

Workers' Compensation— jurisdiction—work-related injury

The trial court did not err by dismissing plaintiff's complaint for personal injuries based on lack of subject matter jurisdiction because: (1) claims for work-related injuries are within the exclusive jurisdiction of the Industrial Commission; (2) plaintiff alleged only that he sustained injuries due to defendants' negligence while he was performing duties within the course and scope of his employment; and (3) plaintiff has not alleged any facts that would show defendants had not accepted the Workers' Compensation Act as presumed under N.C.G.S. § 97-3, or that defendants were not otherwise subject to it.

REECE v. FORGA

[138 N.C. App. 703 (2000)]

Appeal by plaintiff from order entered 17 May 1999 by Judge Dennis J. Winner in Haywood County Superior Court. Heard in the Court of Appeals 26 April 2000.

Melrose, Seago & Lay, by Randal Seago, for plaintiff-appellant.

Patrick U. Smathers for defendant-appellees.

MARTIN, Judge.

Plaintiff brought this action seeking damages for personal injuries allegedly caused by the negligence of defendants. In his complaint, plaintiff alleged that while he was employed by defendants and was engaged in loading wood into the bucket of a front end loader, defendant Scott Forga negligently caused the machine to swing around, injuring plaintiff. Defendants moved to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6) for plaintiff's failure to state a claim upon which relief can be granted. After a hearing, the trial court entered the following order:

> **THIS CAUSE** coming on to be heard before the undersigned Superior Court Judge Presiding upon Defendants' motion to dismiss, and the Court finding that this is a claim for injury sustained during an employer/employee relationship between the Parties, and there is no allegation in Plaintiff's Complaint alleging a basis for this action to be heard outside the scope of the North Carolina Workers Compensation Act, and the Court determining that it does not have subject matter jurisdiction of this matter.
>
> **NOW, THEREFORE,** it is hereby **ORDERED, ADJUDGED and DECREED** that Plaintiff's action is hereby dismissed.

Plaintiff appeals.

The sole issue raised by the two assignments of error brought forward in plaintiff's brief is whether the trial court erred in dismissing the complaint for lack of subject matter jurisdiction. Initially, we dispense with plaintiff's contention that the superior court erred in addressing the question of subject matter jurisdiction *sua sponte* since the question was not raised by defendants. A party may not waive jurisdiction, *Miller v. Roberts*, 212 N.C. 126, 193 S.E. 286 (1937), and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking. *Lemmerman v. A.T.*

Williams Oil Co., 318 N.C. 577, 350 S.E.2d 83, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986).

The provisions of Chapter 97 of the General Statutes, the Workers' Compensation Act (the Act), apply to all employees and employers where the employer regularly employs three or more employees. N.C. Gen. Stat. § 97-2(1), 97-3. Subject to certain exceptions not applicable here, where the employer and employee are subject to and have complied with the Act, the rights granted an injured employee under the Act are the exclusive remedy in the event of the employee's injury by accident in connection with the employment. N.C. Gen. Stat. § 97-10.1. Under such circumstances, the injured employee may not elect to maintain a suit for recovery of damages for his injuries, but must proceed under the Act. *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 364 S.E.2d 186 (1988). Such cases are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute. *Lemmerman v. A.T. Williams Oil Co.*, *supra; Sneed v. Carolina Power & Light Co.*, 61 N.C. App. 309, 300 S.E.2d 563 (1983). However, where the employer fails to secure the payment of compensation by either insuring against liability or qualifying as a self-insurer, G.S. § 97-93(a), such employer

> shall be liable during continuance of such refusal or neglect to an employee either for compensation under the Article or at law at the election of the injured employee.

N.C. Gen. Stat. § 97-94(b). There is a presumption that every employer and employee subject to the Act has accepted its provisions. N.C. Gen. Stat. § 97-3; *Miller v. Roberts*, *supra.*

The foregoing statutes express a clear intent by the General Assembly that claims for work related injuries be adjudicated pursuant to the Act. Thus, where the relationship of employer-employee as defined by the Act exists, the employee may elect to pursue, in a court of law, a claim for accidental injuries arising from that relationship only when the employer's conduct has taken him outside the provisions of the Act; otherwise, jurisdiction has been statutorily conferred upon the Industrial Commission. *See Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) (Act does not relieve employer from civil liability for employer's intentional tort or intentional misconduct substantially certain to cause serious injury or death); *Seigel v. Patel*, 132 N.C. App. 783, 513 S.E.2d 602 (1999) (noting that G.S. § 97-94

"arguably" permits plaintiff to bring a claim at law where employer has failed to secure compensation).

In the present case, plaintiff alleged only that he sustained injuries due to defendants' negligence while he was performing duties within the course and scope of his employment by them. Such allegations bring plaintiff's claim within the G.S. § 97-3 presumption of acceptance of the provisions of the Act. While such presumption may be rebutted, plaintiff has alleged no facts which, if proved, would show that defendants had not accepted the Act or were not otherwise subject to it. Nothing else appears of record to rebut the presumption of acceptance. Absent some allegation or showing to rebut the presumption, plaintiff's claim is within the exclusive jurisdiction of the Industrial Commission. The trial court's order dismissing the action for lack of subject matter jurisdiction must be affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

BARBARA GRIFFETH McCALL, PLAINTIFF v. MARVIN RANDALL McCALL, DEFENDANT

No. COA99-844

(Filed 5 July 2000)

1. Appeal and Error— appealability—motion for jury trial

An appeal from the denial of a motion for a jury trial in an action for equitable distribution and divorce from bed and board was not interlocutory; orders either denying or granting a party's motion for a jury trial affect a substantial right and are appealable.

2. Divorce— motion for jury trial—equitable distribution—divorce from bed and board

The trial court did not err by denying a motion for a jury trial on the issue of the date of separation for purposes of equitable distribution in an action for divorce from bed and board. There is no State constitutional right to a jury trial because a constitutional right to jury trial exists only if such a right existed either by statute or in common law at the time the Constitution was

adopted in 1868; the legislature did not provide for a right to jury trial in the equitable distribution statutes; and defendant's abstract argument concerning collateral estoppel does not come into play because no finding with respect to the date of separation is required in an action for divorce from bed and board.

Appeal by defendant from order entered 7 May 1999 by Judge Martin J. Gottholm in Iredell County District Court. Heard in the Court of Appeals 8 May 2000.

Homesley, Jones, Gaines, Homesley & Dudley, by Edmund L. Gaines and J. Franklin Mock, II, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Jennifer A. Youngs, for defendant-appellant.

LEWIS, Judge.

Plaintiff and defendant were married 24 July 1989. On 27 February 1997, plaintiff filed a complaint seeking divorce from bed and board and an equitable distribution of the parties' marital property. Defendant counterclaimed for divorce from bed and board and for equitable distribution as well. A dispute thereafter arose as to the date of the parties' separation for purposes of equitable distribution. Plaintiff contends the parties separated 30 December 1997; defendant argues they separated 27 November 1998. Defendant then filed a motion for jury trial as to the date of separation. The trial court denied this motion, and defendant now appeals.

[1] At the outset, we must determine whether this appeal is properly before us. An order denying a motion for jury trial is not a final judgment, but is interlocutory in nature. *In re Ferguson*, 50 N.C. App. 681, 682, 274 S.E.2d 879, 879 (1981). Generally speaking, interlocutory orders are not immediately appealable to this Court unless they affect a substantial right of the appellant. *In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985). Our courts have long held that orders either denying or granting a party's motion for a jury trial do affect a substantial right and are thus immediately appealable. *See, e.g., Faircloth v. Beard*, 320 N.C. 505, 506-07, 358 S.E.2d 512, 513-14 (1987); *In re McCarroll*, 313 N.C. at 316, 327 S.E.2d at 881; *Dick Parker Ford, Inc. v. Bradshaw*, 102 N.C. App. 529, 531, 402 S.E.2d 878, 880 (1991); *In re Ferguson*, 50 N.C. App. at 682, 274 S.E.2d at 879. Defendant's appeal is properly before us. Plaintiff's motion to dismiss this appeal is therefore denied.

[2] We now consider the merits of defendant's appeal. Specifically, we consider whether, in the context of equitable distribution, defendant has a right to jury trial on the issue of the date of separation. We hold that he does not.

The sole substantive *constitutional* guarantee of the right to trial by jury is found in article I, section 25 of our State Constitution: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." This provision has been interpreted to mean that a *constitutional* right to jury trial only exists if such a right existed either by statute or in common law at the time our Constitution was adopted in 1868. *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989). Because the right to equitable distribution was not statutorily created until 1981, "there is no constitutional right to trial by jury on questions of fact arising in a proceeding for equitable distribution of marital assets." *Id.* at 508, 385 S.E.2d at 490.

Because no constitutional right exists, we must next look to whether our legislature *statutorily* provided for such a right when it drafted the equitable distribution statutes. Our Supreme Court has previously answered this question in the negative; our legislature did not provide for a right to jury trial in the equitable distribution statutes. *Id.* at 509, 385 S.E.2d at 490. We acknowledge that the date of separation was not specifically at issue in *Kiser*. Rather, the only factual issues before the court were the value of certain property, the acquisition of certain property, the intent to make certain property a gift, and the dissipation of certain marital assets. *Id.* at 504, 385 S.E.2d at 487. But the holding in *Kiser* is clear: no right to a jury trial exists on *any* issue of fact in equitable distribution proceedings. *Id.* at 509, 385 S.E.2d at 490. Accordingly, the trial court correctly denied defendant's motion for a jury trial.

In essence, defendant's argument is premised upon concerns of collateral estoppel. He correctly points out that our statutes do allow for trial by jury on issues of fact within the divorce context. N.C. Gen. Stat. § 50-10(a), (c) (1999). The date of separation is one of those triable issues. *See, e.g., Lockhart v. Lockhart*, 223 N.C. 123, 124, 25 S.E.2d 465, 465 (1943); *Reynolds v. Reynolds*, 210 N.C. 554, 556, 187 S.E. 768, 769 (1936). Furthermore, any jury determination as to the date of separation in the divorce context would arguably then collaterally estop a party from relitigating it in the equitable distribution context. *Stafford v. Stafford*, 133 N.C. App. 163, 167, 515 S.E.2d 43, 46

(Greene, J., dissenting), *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999). Because a determination in one setting would have preclusive effect in the other, defendant contends that the same body, namely a jury, should determine the issue in each setting.

Defendant's argument, however, is largely in the abstract. The divorce action here is one for divorce from bed and board, not absolute divorce. As such, no finding with respect to the date of separation is even required, and his collateral estoppel concerns would not even come into play. Furthermore, just because a determination in one setting is preclusive in another does not mean that the body who makes that determination must be the same in each setting. At best, collateral estoppel concerns will only affect the *order* in which the proceedings are tried (i.e. the jury trial should precede the bench trial); they in no way affect *who* must make that determination.

Affirmed.

Chief Judge EAGLES and Judge EDMUNDS concur.

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FILED 5 JULY 2000

EASTERN VA. QUADRENNIAL CONF. v. CHAPPELL No. 99-644	Perquimans (97CVS54)	Affirmed
ELLWOOD v. HEILIG-MEYERS FURN. CO. No. 99-1084	Duplin (99CVS45)	Affirmed
HARDIN v. BUNCOMBE COUNTY DSS No. 99-1440	Buncombe (97J195197)	Affirmed
IN RE ELLIOTT No. 99-1192	Cumberland (95J90) (95J91) (95J92) (95J93) (95J94)	Affirmed
IN RE PARKER No. 99-1328	Wilson (98J123)	Affirmed
JOHNSON v. NATIONWIDE MUT. INS. CO. No. 99-939	Cumberland (97CVS7894)	Affirmed
LANDEX COMMERCIAL DIV. v. WATAUGA COUNTY No. 99-854	Watauga (98CVS688)	Reversed and remanded with instructions
RICE v. RICE No. 99-513	New Hanover (95CVD1923)	Reversed and remanded for findings and conclusions consistent with this opinion
STATE v. BUSTON No. 98-800	Forsyth (98CRS46887) (98CRS51157)	No Error
STATE v. FARMER No. 99-806	Cumberland (94CRS6493) (94CRS15446) (95CRS55784) (96CRS5953) (95CRS55786)	No Error
STATE v. GRAHAM No. 99-1193	Rowan (98CRS5256) (98CRS5257)	No Error

STATE v. HILL No. 99-1389	Rutherford (98CRS9161)	No Error
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STATE v. RICE No. 99-118	Rutherford (97CRS9470)	No Error
STATE v. STONE No. 99-470	Cabarrus (97CRS18241)	No Error
STATE v. TAYLOR No. 99-1098	Craven (78CVS280) (78CVS804) (78CVS394) (88E60)	No Error
STATE v. WHITAKER No. 99-1246	Pitt (96CRS27325) (96CRS27552) (96CRS28236)	Affirmed
STATE v. WHITE No. 99-865	Hertford (97CRS2297) (97CRS2689) (97CRS3616)	No Error
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ADMINISTRATIVE LAW

Certificate of need—standard of review by trial court—The trial court applied the correct standards of review when considering a petitioner's contention that a declaratory agency ruling was affected by an error of law and was arbitrary and capricious in that the court applied a de novo standard to the contention that the ruling was affected by an error of law, and considered the agency record in determining that there was no rational basis for the ruling. **Christenbury Surgery Ctr. v. N.C. Dep't of Health & Human Servs., 309.**

AIDING AND ABETTING

Burglary—kidnapping—Blankenship rule—specific intent—Since the crimes with which defendant was charged occurred prior to the *Barnes* decision and *Blankenship* governs, the trial court committed reversible error by failing to include within its jury charge the substance of defendant's written instruction requiring a showing of specific intent for the convictions of first-degree burglary and second-degree kidnapping. **State v. Lucas, 226.**

APPEAL AND ERROR

Appealability—county—juvenile proceeding—A county's appeal from orders requiring it to pay $658.74 for the mental health evaluation of a juvenile under N.C.G.S. § 7A-647 is dismissed. **In re Voight, 542.**

Appealability—motion for jury trial—An appeal from the denial of a motion for a jury trial in an action for equitable distribution and divorce from bed and board was not interlocutory; orders either denying or granting a party's motion for a jury trial affect a substantial right and are appealable. **McCall v. McCall, 706.**

Preservation of issues—appeal from order—Plaintiff preserved for appeal the issue of whether summary judgment was properly granted on a claim for interference with prospective advantage arising from two of plaintiff's employees leaving and starting a rival business where plaintiff failed to appeal from a ruling by one judge on a motion to dismiss interference with contractual and business relations claims, but did appeal from an order from another judge regarding the claim for interference with prospective advantage. **Dalton v. Camp, 201.**

Preservation of issues—failure to object—Although defendant contends the trial court erred in a first-degree murder case by admitting the opinion testimony of an oral pathologist who testified that the bite marks on the victim were consistent with defendant's dentition, defendant failed to object to this opinion at trial and has therefore waived review of this issue. N.C. R. App. P. 10(b)(1). **State v. Krider, 37.**

Preservation of issues—failure to object—Although defendant assigns error to the admission of testimony regarding videotapes and a camcorder, he has waived this argument because he permitted prior and subsequent admission of evidence regarding the videotapes and camcorder without objection. N.C. R. App. P. 10(b)(1). **State v. Doisey, 620.**

Preservation of issues—order not in record—Defendant's argument concerning his motion for appropriate relief is not properly before the Court of

APPEAL AND ERROR—Continued

Appeals because there is no order in the record from which to appeal. N.C. R. App. P. 9(a). **State v. Brooks, 185.**

Remand—issue not raised on first appeal—The trial court did not err on remand of a declaratory judgment action arising from a dispute between the members of the Pinehurst Country Club and the owner of the club by not ruling on an issue which was not raised in the first appeal and which was controlled by language upheld elsewhere in this opinion. **Bicket v. McLean Sec., Inc., 353.**

ARBITRATION AND MEDIATION

Mistakes of law—motion to vacate denied—The trial court did not err by denying plaintiff's motion to vacate an arbitration award where plaintiff alleged that the arbitrator made mistakes of law but did not allege that the award was tainted by corruption, partiality, or abuse of power. An arbitrator is not bound by substantive law or rules of evidence. **Sholar Bus. Assocs. v. Davis, 298.**

Rules—specified by contract—The trial court did not err by failing to vacate an arbitration award where plaintiff alleged that the arbitrator failed to rule on estoppel, election, and parol evidence issues and failed to make findings or conclusions. The interpretation of the terms of an arbitration agreement is governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted. **Sholar Bus. Assocs. v. Davis, 298.**

Securities agreement—termination at death of party—The trial court properly denied defendant's motion to compel arbitration under a securities agreement with a deceased account holder because the agreement and its arbitration clause terminated at her death. **Ragan v. Wheat First Sec., Inc., 453.**

Securities agreement with estate—not applicable to deceased's account—The trial court did not err by concluding that an estate's capital resources account agreement with defendant securities broker was not a basis to support a motion to compel arbitration where the dispute concerned defendant's alleged negligence and conversion in unilaterally selling securities in an account which the deceased opened before her death. **Ragan v. Wheat First Sec., Inc., 453.**

ARSON

Second-degree not submitted—continuous transaction with murder—The trial court did not err in a prosecution for first-degree arson and first-degree murder by denying defendant's request for second-degree arson to be submitted as a possible verdict where, during the time between the murder and the arson, defendant and an accomplice disposed of the murder weapon, burned their bloody clothes, purchased gasoline to ignite the fire at the victim's house, and set the house on fire. These undisputed facts show that the murder and arson were so joined by time and circumstances as to be part of one continuous transaction so that the house was "occupied" when it was set on fire. **State v. Holder, 89.**

ASSAULT

Accidental shooting—civil action in negligence—The trial court erred by granting summary judgment in favor of defendant Burnette in an action which arose when defendant intended to shoot at plaintiff's tire but shot him in the neck and plaintiff filed a civil action for negligence rather than the intentional tort of battery. Under a line of cases including *Vernon v. Barrow*, 95 N.C.App. 642, plaintiff may sue in negligence and therefore rely upon the three-year statute of limitations for personal injury rather than the one-year period for battery. **Lynn v. Burnette, 435.**

Deadly weapon—inflicting serious injury—separate charges—three bullet wounds—The trial court erred in denying defendant's motion to dismiss the second charge of assault with a deadly weapon inflicting serious injury because there is no evidence of a distinct interruption in the original assault followed by a second assault. **State v. Brooks, 185.**

BANKS AND BANKING

Joint bank account—wrongful conversion—The trial court did not err by denying defendants' motion for partial summary judgment on the conversion claims relating to the transfer of funds located in two joint bank accounts of decedent and his stepdaughter attorney-in-fact. **Hutchins v. Dowell, 673.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

First-degree burglary—dwelling house of another—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the first-degree burglary charge and by denying his request to submit to the jury the issue of whether defendant had a claim of right to enter his grandmother-victim's residence. **State v. Blyther, 443.**

Sexual intent—evidence insufficient—A burglary conviction based upon the intent to commit a sexual offense was vacated where the complainant heard a noise from her son's bedroom, she found the screen missing from the window when she went to investigate, the lock on the window was broken and items from the sill were on the floor, and defendant grabbed the complainant through the window from the outside. The fact that a defendant has broken into and entered a dwelling at night permits an inference of intent to commit felonious larceny, but the State must prove sexual intent when it proceeds on that theory. **State v. Cooper, 495.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—change of circumstances—remarriage of parent—relocation of parent—best interests of child—Even though defendant mother planned to relocate with her child to live with her new husband in Maryland and the trial court found the proposed relocation would adversely affect the relationship between plaintiff father and his child, the trial court erred by modifying the parties' custody decree based on a change of circumstances. **Evans v. Evans, 135.**

Custody—modification—best interests—home schooling—The trial court did not err in a custody modification action by looking at the child's home schooling situation in addressing his best interests. **Metz v. Metz, 538.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Custody—modification—substantial change of circumstances—best interests—The trial court did not abuse its discretion in modifying custody by awarding permanent custody to plaintiff-father based on his showing of a substantial change of circumstances involving the father's reformed lifestyle. **Metz v. Metz, 538.**

Custody—retention of jurisdiction—The trial court erred in a child custody case by attempting to retain exclusive jurisdiction over future hearings because the legislature has not acted to grant authority to the trial court to retain jurisdiction in a domestic relations case. **Evans v. Evans, 135.**

Support—guidelines—credit to gross income—pre-existing court order or separation agreement—Although the Child Support Guidelines provide that a party is entitled to a credit to gross income for any child support paid pursuant to a pre-existing court order or separation agreement, the trial court did not err in adjusting defendant's gross income for the amount of monies he actually paid under the 1996 orders for the benefit of children other than the children subject to the specific claim at issue. **Buncombe County ex rel. Blair v. Jackson, 284.**

Support—guidelines—findings—A child support order for five children amounting to 66% of defendant's gross income is reversed and remanded because the trial court does not reveal any findings as to whether the support set pursuant to the Guidelines would exceed, meet, or fail to meet the reasonable needs of the children, or whether support set pursuant to the Guidelines would be "unjust or inappropriate." **Buncombe County ex rel. Blair v. Jackson, 284.**

Support—guidelines—multiple children from multiple mothers—The trial court did not err in concluding that the Child Support Guidelines apply to a situation where one individual might father multiple children from multiple mothers. **Buncombe County ex rel. Blair v. Jackson, 284.**

Support—health insurance—The trial court erred in ordering defendant father to carry health insurance for his minor children without first determining its availability at a reasonable cost. N.C.G.S. § 50-13.11(a1). **Buncombe County ex rel. Blair v. Jackson, 284.**

Support—increase—consent of parties—The trial court erred in a temporary memorandum order by increasing child support to $300 per month because although the order indicates on its face that it was entered on the basis of the consent of both parties, that consent does not appear in this record and there is no other basis to support the order. **Buncombe County ex rel. Blair v. Jackson, 284.**

Support—wage withholding—current and past-due amounts—The trial court erred by directing that child support payments received through wage withholding be prorated between an order for current support and one for past-due support where the amounts withheld had not been sufficient to fully pay the amounts due under both orders. Priority must be given to the order for current support under the clear legislative mandate of N.C.G.S. § 110-136.7. **Guilford County ex rel. Gray v. Shepherd, 324.**

Visitation by grandparent—deceased mother—intact family—standing of grandparent—The trial court did not err by granting defendant's Rule 12(b)(6)

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

motion to dismiss an action by a grandmother seeking visitation with her grandchildren after her daughter was killed in an automobile accident. The children and defendant father must be considered as living in an "intact family," and plaintiff thus has no standing to seek visitation with her grandchildren under N.C.G.S. § 50-13.1(a). **Price v. Breedlove, 149.**

Visitation by grandparent—parent deceased after custody order—subject matter jurisdiction—The trial court properly concluded that it lacked subject matter jurisdiction over a claim for visitation by a grandmother under N.C.G.S. § 50-13.5(j) where it was undisputed that defendant-father was awarded legal custody of the children in a 1995 court order in a proceeding contested by plaintiff's daughter, now deceased, who was defendant's former wife and the mother of the children. The trial court's jurisdiction over the issues of visitation and custody terminated upon the death of plaintiff's daughter in 1997. **Price v. Breedlove, 149.**

CITIES AND TOWNS

Automobile accident—stop sign knocked down—public duty doctrine inapplicable—Plaintiff's claims against the City of Jacksonville for damages sustained in an automobile accident at an intersection where the stop sign normally controlling the street was knocked down fifteen hours earlier in a prior accident is not barred by the doctrine of governmental immunity based on the public duty doctrine. **Cucina v. City of Jacksonville, 99.**

CIVIL RIGHTS

1983 action—city's unwritten policy on governmental immunity—substantive due process—equal protection—The trial court erred in granting summary judgment in favor of defendants on the issue of defendant city's alleged violations of plaintiffs' substantive due process and equal protection rights under 42 U.S.C. § 1983 and Article I, Section 19 of the North Carolina Constitution, based on the city's unwritten policy of waiving governmental immunity and paying claims for damages to tort claimants similar to plaintiffs while asserting immunity and refusing to pay plaintiffs' claims. **Dobrowolska v. Wall, 1.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel—issue of first impression—unfair debt collection practices—Although defendants assert that collateral estoppel bars plaintiffs' claim for unfair debt collection practices premised upon defendants having sought too much in attorney fees when plaintiffs never contested the amount of attorney fees recoverable in the first case, the Court of Appeals chose not to apply the doctrine in this situation because the issue is one of first impression. **Reid v. Ayers, 261.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Miranda warnings—booking process—statutory rape—defendant's date of birth—The trial court erred in a first-degree statutory rape case under N.C.G.S. § 14-27.7A(a) by admitting the investigating officer's testimony of defendant's statement of his date of birth during the booking process without the benefit of the Miranda warnings. **State v. Locklear, 549.**

CONSPIRACY

Civil—employees founding rival business—The trial court properly entered summary judgment for defendants on a civil conspiracy claim arising from defendants Camp and Menius leaving plaintiff's employment to start a rival business. **Dalton v. Camp, 201.**

Criminal—sufficiency of evidence—passive cognizance—The trial court erred by denying defendant's motion to dismiss the charge of conspiracy to commit murder where the evidence showed only passive cognizance or acquiescene in the conduct of others. **State v. Merrill, 215.**

CONSTITUTIONAL LAW

Double jeopardy—convictions for second-degree murder and impaired driving—no violation—The trial court did not violate defendant's double jeopardy rights by sentencing him for second-degree murder under N.C.G.S. § 14-17 and impaired driving under N.C.G.S. § 20-138.1. **State v. McAllister, 252.**

Double jeopardy—first-degree burglary—first-degree murder under felony murder rule—no violation—Defendant's double jeopardy rights were not violated by his convictions of first-degree murder under the felony murder rule and first-degree burglary based on defendant's claim of an alleged inconsistency in the finding of specific intent to murder as one of the elements of burglary, without a finding of premeditation and deliberation required for first-degree murder. **State v. Blyther, 443.**

Privilege against self-incrimination—Bar investigation—The trial court did not err in a perjury prosecution by admitting into evidence statements made by defendant to State Bar investigators of his own volition. **State v. Linney, 169.**

Right to counsel—forfeiture—pro se representation—The trial court did not violate defendant's constitutional right to counsel by holding that defendant forfeited his right to counsel and by requiring defendant to proceed pro se. **State v. Montgomery, 521.**

Right to counsel—pro se representation—The trial court did not err by allowing a criminal defendant to proceed pro se. **State v. Brooks, 185.**

Right to presence at trial—first-degree murder—excusal of jurors—A first-degree murder defendant's constitutional right to be present at every stage of his trial was not violated where jury selection commenced on 27 July; prospective jurors summoned for that date who had not been called into the courtroom were kept in a separate room; an additional panel was summoned on 29 July; the court heard in open court requests to be excused; and the court stated for the record that one juror held over who had called the clerk's office with an illness in the family would be excused. **State v. Holder, 89.**

CONSTRUCTION CLAIMS

Negligent construction of house—contractor's license—The trial court properly denied defendants' motion for a directed verdict on the issue of defendant Bryant Roberts' negligence in an action arising from the construction of a house where the single issue regarding Bryant Roberts' negligence was whether Bryant Roberts was the general contractor for the construction of the house (and

CONSTRUCTION CLAIMS—Continued

thereby had a duty to supervise construction) and there was testimony that Bryant Robert's general contractor's license was used to build plaintiff's house. **Allen v. Roberts Constr. Co., 557.**

CONSUMER PROTECTION

Debt Collection Act—federal act—homeowners' association—The trial court properly dismissed defendants' unfair debt collection counterclaim against a homeowners' association under the federal Fair Debt Collection Practices Act. **Davis Lake Community Ass'n v. Feldmann, 292.**

Debt Collection Act—state act—action against homeowners' association—The trial court erred in dismissing defendants' unfair debt collection counterclaim against a homeowners' association under the North Carolina Debt Collection Act. **Davis Lake Community Ass'n v. Feldmann, 292.**

Debt Collection Act—state act—no action against attorneys—Although plaintiffs' complaint met the three threshold requirements to state a claim under The North Carolina Debt Collection Act in Chapter 75, Article 2 of the General Statutes, this Act does not allow a cause of action against attorneys engaging in collecting debts on behalf of their clients. **Reid v. Ayers, 261.**

CONTRACTS

Action for breach—no meeting of the minds—The trial court did not err by entering summary judgment in favor of defendants on a breach of contract claim in a case where a written instrument containing the exact terms of the parties' understanding was never executed. **Miller v. Rose, 582.**

Breach—liability of spouse—The trial court erred by granting a directed verdict in favor of defendant-Mrs. Hill on a breach of contract claim arising from the failure of a real estate transaction to close where Mr. Hill testified that he and Mrs. Hill did business and sold lots in Sea Gate under the name Sea Gate Enterprises; that the Sea Gate Enterprises operating account, into which plaintiffs' earnest money payments had been deposited following withdrawal from defendants' trust accounts, was maintained in the name of Mr. and Mrs. Hill; both Mr. and Mrs. Hill were required to obtain quitclaim deeds from Weyerhaeuser; and Weyerhaeuser ultimately conveyed its interest in the three lots to both Mr. and Mrs. Hill. **Poor v. Hill, 19.**

Breach—real estate closing—readiness to perform—The trial court did not err by denying defendant's directed verdict and JNOV motions on defendant-Mr. Hill's breach of contract claims arising from the failure of a real estate transaction to close where the evidence, taken in the light most favorable to plaintiffs, indicates that plaintiffs were ready and willing to perform at all times and the defendants breached the contracts. **Poor v. Hill, 19.**

Breach—real estate sales contract—damages—The trial court erred in a claim for unfair and deceptive trade practices arising from a real estate transaction which did not close by setting aside the jury's Chapter 75 damage award and substituting the sum imposed for breach of contract upon a finding that a portion of the verdict was against the greater weight of the evidence. **Poor v. Hill, 19.**

COSTS

Attorney fees—North Carolina Wage and Hour Act—The trial court did not abuse its discretion by awarding plaintiff attorney's fees under N.C.G.S. § 95-25.22(a) and (d) for a violation of the North Carolina Wage and Hour Act. **Fulk v. Piedmont Music Ctr., 425.**

Attorney fees—notice—prejudgment interest—The trial court erred in granting summary judgment in favor of plaintiff for its claim for attorney fees because the forecast of evidence does not establish whether plaintiff complied with the statutory notice requirement in N.C.G.S. § 6-21.2(5), and therefore, the trial court's grant of prejudgment interest is also improper. **Davis Lake Community Ass'n v. Feldmann, 292.**

Attorney fees—substantial justification—The trial court did not err in awarding petitioner $19,623.02 in costs and attorney fees under N.C.G.S. § 6-19.1 based on respondent not being substantially justified in denying petitioner her retirement benefits. **Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys., 489.**

CRIMINAL LAW

Guilty plea—incomplete inquiry by judge—There was no prejudicial error in a prosecution for larceny and other offenses where the trial judge did not personally address defendant for all of the statutorily required inquiries and the prosecutor covered the areas omitted by the judge. **State v. Hendricks, 668.**

Instructions—burden of proof—correct charge—fundamental right—Although the trial court's erroneous reference in a second-degree murder case to the greater weight of the evidence in the jury instructions on circumstantial evidence appears among nearly twenty references to the correct burden of proof of guilt beyond a reasonable doubt, the Court of Appeals emphasizes that a correct charge is a fundamental right of every accused. **State v. Blue, 404.**

Joinder of defendants—motion to sever—no abuse of discretion—The trial court did not abuse its discretion by granting the State's motion for joinder of defendant and her brother for trial on charges arising from the brother's killing of defendant's former husband and by denying defendant's motion to sever. **State v. Merrill, 215.**

Joinder of offenses—no prejudice—The trial court did not err by joining for trial 3 counts of embezzling and 3 counts of perjury against an attorney arising from a guardianship where defendant did not show that the offenses were so separate in time and place or so distinct in circumstances as to render a consolidation unjust, and did not show that consolidation prejudiced his ability to present a defense and receive a fair trial. **State v. Linney, 169.**

Limiting instruction—prior traffic violations—The trial court did not err in a second-degree murder case by its jury instruction limiting the use of evidence of defendant's prior traffic violations under N.C.G.S. § 8C-1, Rule 404(b). **State v. Fuller, 481.**

Motion for appropriate relief—recanted testimony—The trial court did not abuse its discretion in a first-degree sexual offense case by denying defendant's motion for appropriate relief (MAR) under N.C.G.S. § 15A-1420, based on the trial

CRIMINAL LAW—Continued

court's finding that it was not reasonably well satisfied that the minor child's testimony at the original trial was false. **State v. Doisey, 620.**

Motion for mistrial—treated as motion to set aside verdict—one-year delay—In an assault with a deadly weapon case where both parties and the trial court considered defendant's motion for a mistrial to also constitute a motion to set aside the verdict, the trial court abused its discretion by denying defendant's motion to set aside the verdict following a delay of over one year because the trial judge had vague recollections of the trial. **State v. Smith, 605.**

Motion to poll jury—waiver—The trial court did not err in a first-degree murder case by failing to offer defendant an opportunity to poll the jury after the guilty verdicts were entered and in denying defendant's motion to poll the jury the next morning. **State v. Clark, 392.**

Prosecutor's argument—arson—continuous transaction—no plain error—There was no plain error in a prosecution for first-degree murder and first-degree arson where the court did not correct a statement by the prosecutor in her closing argument that the judge was going to instruct the jury that this was a continuous transaction. **State v. Holder, 89.**

Prosecutor's argument—intent to kill—The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the prosecutor's closing argument stating that defendant may say he did not mean to kill the victim because he did not shoot him in the head, but intent to kill is found if defendant intentionally shoots the victim or intentionally inflicts serious bodily harm on him. **State v. Harshaw, 657.**

Prosecutor's argument—lapsus linguae—The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the prosecutor's closing argument misstating that a witness heard defendant make threats in reference to the victim "a couple of weeks" before the shooting, instead of "several months" before the shooting. **State v. Harshaw, 657.**

Requested instructions—accident—The trial court did not err in a first-degree murder case by denying defendant's request for a jury instruction on the issue of an "accident." **State v. Clark, 392.**

Sentencing—judge's statement—not a pro-victim bias—A trial court judge did not exhibit a pro-victim bias during a sentencing hearing when he said, at the conclusion of a victim impact statement, "Today is a classic example of why victims need to be recognized and the court system needs to become their friends, not their enemy." At most, the statement illustrates an affinity for victim impact statements, which are specifically endorsed by statute. **State v. Hendricks, 668.**

Voluntary intoxication—specific intent crimes—issue for the jury—The trial court did not err by submitting assault and robbery charges to the jury even though defendant contends his voluntary intoxication negated the specific intent elements required for each charge. **State v. Robertson, 506.**

DAMAGES AND REMEDIES

Employees founding rival business—evidence not speculative—A plaintiff in an action which arose from employees beginning a rival business presented

DAMAGES AND REMEDIES—Continued

sufficient evidence of damages to survive a motion for summary judgment where an expert testified as to losses suffered as a result of defendant's conduct, basing her conclusion on revenues earned prior to the conduct of defendants and on evidence of anticipated revenues from the parties' tax returns and accounts receivable summaries. This evidence was not overly speculative. **Dalton v. Camp, 201.**

Wrongful death of children—lost income of parents—The portion of a wrongful death judgment awarding plaintiffs sums for income they might reasonably have expected to receive from their deceased daughters was remanded where there was no evidence tending to show that the deceased had ever expressed an intent to provide any of their income to their parents. **Bahl v. Talford, 119.**

DISCOVERY

Due process—detonation of percussion grenade—failure to disclose—materiality—Defendant's due process rights were not violated in a first-degree murder case by the prosecutor's failure to disclose evidence that a percussion grenade was set off in defendant's apartment by the police before the criminal investigation began because the evidence was not material. **State v. Harshaw, 657.**

DIVORCE

Alimony—dependency—findings not specific—An order finding defendant not to be a dependent spouse and denying her claim for alimony was remanded where the court's findings were insufficiently detailed or specific. The court must provide sufficient detail to satisfy a reviewing court that it has considered all relevant factors and it is not enough that there is evidence in the record from which such findings could have been made. **Rhew v. Rhew, 467.**

Alimony—pending equitable distribution claim—The trial court erred in an alimony action by speculating about the results of a pending equitable distribution between the parties. The issues of amount and whether a spouse is dependent may be reviewed after the conclusion of the equitable distribution claim. N.C.G.S. § 50-16.3A(a). **Rhew v. Rhew, 467.**

Alimony—standard of living—savings and retirement contribution—The trial court erred in an alimony action by failing to consider the parties' contributions to savings and retirement in determining accustomed standard of living where evidence was presented that established a historical pattern of such contributions. **Rhew v. Rhew, 467.**

Motion for jury trial—equitable distribution—divorce from bed and board—The trial court did not err by denying a motion for a jury trial on the issue of the date of separation for purposes of equitable distribution in an action for divorce from bed and board. **McCall v. McCall, 706.**

Separation agreement—no material breach—The trial court did not err by concluding that plaintiff-husband did not commit a material breach of the separation agreement by failing to disclose the fact that he belonged to his current employer's retirement plan. **Lancaster v. Lancaster, 459.**

DIVORCE—Continued

Separation agreement—property settlement—alleged mutual mistake of fact—Although defendant-wife contends there are four mutual mistakes of material fact comprising the essence of the parties' separation agreement, the trial court did not err by failing to alter the parties' agreement. **Lancaster v. Lancaster, 459.**

Separation agreement—property settlement—confidential fiduciary relationship—adversaries—The trial court did not err by declaring the separation agreement and property settlement valid based on the confidential fiduciary relationship terminating between the husband and wife when the parties became adversaries. **Lancaster v. Lancaster, 459.**

Separation agreement—property settlement—validity—The trial court did not err by declaring the separation agreement and property settlement valid. **Lancaster v. Lancaster, 459.**

DRUGS

Trafficking in cocaine—possession—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss the charge of trafficking in cocaine, based on the State's failure to prove defendant possessed the cocaine during a sting operation, because defendant's handling of the cocaine for the sole purpose of inspection before he decided not to buy it did not constitute possession within the meaning of N.C.G.S. § 90-95(h)(3). **State v. Wheeler, 163.**

EASEMENTS

Recorded plat—right of way—patently ambiguous description—failure to establish location—parties' usage—The trial court did not err by granting summary judgment in favor of defendants on the issue of whether plaintiffs acquired the right to use the original right of way shown in the plat book. **Parrish v. Hayworth, 637.**

EMBEZZLEMENT

Indictment—identity of owner of property—An indictment for embezzlement was fatally defective where it alleged that defendant embezzled rental proceeds from an estate. An estate does not constitute a legal entity capable of owning property; the identity of the owner or person in possession should be named in the indictment with certainty to the end that another prosecution cannot be maintained for the same offense. **State v. Linney, 169.**

EMINENT DOMAIN

Condemnation for highways—equal protection—general benefits—unconstitutional statute—Since there is no compelling governmental interest to allow property owners who have part of a tract of land condemned for highway purposes to be denied just compensation received by other property owners also subjected to condemnation proceedings, N.C.G.S. § 136-112(1) violates the equal protection clause. **Department of Transp. v. Rowe, 329.**

Condemnation for highways—just compensation—fair market value of remainder tract—setoff with general benefits—unconstitutional—

EMINENT DOMAIN—Continued

Although the "special benefits" rule under N.C.G.S. § 136-112(1) is constitutionally sound, the provision allowing the fair market value of the remainder tract of land to be setoff with any "general benefits" resulting from the utilization of the part taken for highway purposes violates the constitutional requirement of providing just compensation in condemnation proceedings. **Department of Transp. v. Rowe, 329.**

Condemnation for highways—size of taking—no common plan or scheme—no unity of use—The trial court erred in finding that tracts C and D were part of the area affected by the condemnation proceeding for highway purposes involving tracts A and B because: (1) the tracts were not being held for development under a common plan or scheme; and (2) no unity of use exists. **Department of Transp. v. Rowe, 329.**

EMPLOYER AND EMPLOYEE

Amendment—after judgment entered—North Carolina Wage and Hour Act—The trial court did not abuse its discretion by allowing plaintiff to amend his pleadings under N.C.G.S. § 1A-1, Rule 15 to reflect a claim pursuant to the North Carolina Wage and Hour Act of N.C.G.S. §§ 95-25.6 and 95-25.7 after judgment had been entered in the case. **Fulk v. Piedmont Music Ctr., 425.**

Breach of loyalty—forming rival company—The trial court correctly granted summary judgment for defendant Menius but erred by granting summary judgment for defendant Camp on a breach of loyalty claim arising from defendants leaving plaintiff's employment and starting a rival company. Menius's activities while employed by plaintiff may be best described as mere preparations to compete, which is not a breach of the duty of loyalty; however, it appears from plaintiff's forecast of the evidence that defendant Camp went beyond merely preparing to compete. **Dalton v. Camp, 201.**

Employment compensation—breach—judgment notwithstanding the verdict—The trial court did not err by denying defendants' motion for judgment notwithstanding the verdict in a case awarding plaintiff unpaid commissions earned under an alleged employment contract with defendants. **Fulk v. Piedmont Music Ctr., 425.**

Negligent hiring—independent contractor—In a negligent hiring case against defendant Regional Acceptance Corporation (RAC) based on defendant Lancaster's alleged assault of plaintiff in the course of repossessing plaintiff's automobile, the trial court did not err in granting summary judgment under N.C.G.S. § 1A-1, Rule 56(e) in favor of defendant RAC. **Jiggetts v. Lancaster, 546.**

Non-compete agreement—client-based—unreasonable—The trial court correctly granted defendant's motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of an action arising from a non-compete agreement where the client-based territorial restriction and the five-year time limitation in the agreement were unreasonable. **Farr Assocs. v. Baskin, 276.**

ESTATE ADMINISTRATION

Qualification—willful misconduct—In this declaratory judgment action where plaintiff sought a determination that defendant has forfeited any right to

ESTATE ADMINISTRATION—Continued

inherit from decedent or to administer her estate based on abandonment, the trial court did not err in granting summary judgment in favor of defendant because plaintiff cannot produce evidence to support the essential element of willful conduct. **Meares v. Jernigan, 318.**

EVIDENCE

Affidavits—summary judgment—not based on personal knowledge—Affidavits were not admissible as evidence at a summary judgment hearing in a medical malpractice action where the assertions in the affidavits (with one exception) did not reveal that they were based on the witness's personal knowledge. Affidavits supporting a motion for summary judgment must be made on personal knowledge and affirmations based on personal awareness, information and belief, and what the affiant thinks do not comply with the personal knowledge requirement. N.C.G.S. § 1A-1, Rule 56(e). **Hylton v. Koontz, 629.**

Defendant's state of mind when giving statement—There was no plain error in a first-degree murder and first-degree arson prosecution where the trial court allowed an officer to testify to defendant's state of mind when he gave his statement. **State v. Holder, 89.**

Expert testimony—contradictions—resolved by jury—Although a testifying witness did not use the same terms as contained in her autopsy report's finding of no "tonsillar herniation," the trial court did not err in a first-degree murder case by failing to intervene when the witness testified that the cause of the minor victim's death was blunt force injury to the head. **State v. Clark, 392.**

Expert testimony on opposing expert's methodology—excluded—no abuse of discretion—The trial court did not abuse its discretion in a negligence action by precluding a defense expert from testifying about the methodology used by plaintiff's expert in evaluating plaintiff's vocational rehabilitation prospects. **Kilgo v. Wal-Mart Stores, Inc., 644.**

Expert testimony—particular violation of fiduciary standards—clerk of court—There was prejudicial error in an embezzlement and perjury prosecution against an attorney arising from a guardianship in the admission of testimony from the clerk and an assistant clerk as to whether an undocumented loan met the reasonable and prudent standard, whether the failure to list the loan as an asset on the guardian's report would constitute a breach of fiduciary duty, whether it would violate the law for the administrator of an estate to rent property without first obtaining permission from the clerk, and whether it would be illegal to deposit the proceeds into the administrator's personal account. **State v. Linney, 169.**

Gunshot residue test—obtained without nontestimonial identification order—probable cause and exigent circumstances—right to counsel—The trial court did not err in a noncapital first-degree murder prosecution (second-degree murder conviction) by denying defendant's motion to suppress a gunshot residue test conducted without a nontestimonial identification order, even though the test lies within the purview of N.C.G.S. § 15A-271. Gunshot residue evidence may be properly admitted if it was obtained by some other lawful procedure; here, there were findings of fact to support the conclusion of probable cause and exigent circumstances. **State v. Coplan, 48.**

EVIDENCE—Continued

Hearsay—state of mind exception—The trial court did not err by admitting, under the state of mind exception to the hearsay rule, the testimony of several witnesses describing the victim's demeanor or attitude when she made statements prior to her death. **State v. Lathan, 234.**

Hearsay—state of mind exception—motive—The testimony of defendant's brother concerning whether the victim forced defendant to have sex in order to visit her children was not hearsay because the testimony was introduced in an attempt to illustrate the brother's state of mind regarding the victim, and to show the brother's motive for killing the victim. **State v. Merrill, 215.**

Hearsay—state of mind exception—no prejudicial error—Although the trial court erred in admitting the hearsay testimony of four witnesses under the state of mind exception since their testimony was not accompanied by descriptions of the victim's emotions or mental state, but were instead only statements regarding past factual events, there was no prejudice. **State v. Lathan, 234.**

Impeachment—collateral issue—no prejudicial error—Although the trial court erred in a prosecution for statutory rape and sexual activity by a custodian when it allowed the impeachment of defendant's wife through the use of extrinsic evidence concerning a collateral issue, defendant has failed to establish prejudice in light of the extensive evidence of defendant's guilt. **State v. Crockett, 109.**

Incident report—hearsay and opinion—admissible—In an negligence action arising from freight falling from a trailer when the rear door was opened, an incident report was not inadmissible because it contained hearsay and opinion where the person making the report was the manager of the store where the injury occurred, his job responsibilities called for him to complete a form incident report, and the form report called for basic information and asked for comments on how the incident occurred. **Kilgo v. Wal-Mart Stores, Inc., 644.**

Lay opinion—multiple personality disorder—Although the trial court erred by admitting the testimony of defendant's husband that defendant suffered from a multiple personality disorder, it was not prejudicial error in light of the other evidence properly admitted at trial showing defendant's guilt as an accessory after the fact. N.C.G.S. § 8C-1, Rule 701; N.C.G.S. § 15A-1443(a). **State v. Merrill, 215.**

Marijuana in purse—collision scene—guilt of another—irrelevancy—The trial court did not err in a second-degree murder case by excluding evidence of marijuana found in a purse at the scene of the automobile collision. **State v. Fuller, 481.**

Other crimes—void statutory rape charge—intent—knowledge—plan—Defendant is not entitled to a new trial on the charges for sexual activity by a custodian, even though evidence was admitted on a void statutory rape charge, because the evidence was relevant under N.C.G.S. § 8C-1, Rule 401 to show defendant's intent, knowledge, and plan. **State v. Crockett, 109.**

Photographs—defective construction of house—cracks in other houses—not unfairly prejudicial—The trial court did not abuse its discretion in an action alleging defective construction of a house by finding that the probative value of photographs of cracks in the foundations and floors of other houses con-

EVIDENCE—Continued

structed by defendant Roberts Construction in the same subdivision was not outweighed by the danger of unfair prejudice. Plaintiffs' use of the photographs was not so expansive as to be unfairly prejudicial. **Allen v. Roberts Constr. Co., 557.**

Photographs and slides—extent of victim's injuries—The trial court did not abuse its discretion in a first-degree murder case by admitting photographs and slides of the minor victim at the time of his death. **State v. Clark, 392.**

Prior bad acts—child abuse—intent—The trial court did not err in a first-degree murder case by admitting testimony of defendant's prior bad acts regarding her treatment of the minor victim. **State v. Clark, 392.**

Prior bad acts—driving while impaired—prior conviction—pending charge—malice—The trial court did not err in a prosecution for second-degree murder and driving while impaired by admitting evidence of defendant's prior conviction and pending charge for impaired driving for the purpose of showing malice. **State v. McAllister, 252.**

Prior bad acts—relevancy—The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury on his second wife by allowing the State to present evidence of defendant's prior bad acts through the testimony of his first wife that defendant sneaked into her residence during a time of marital separation, hid in her attic, and stabbed her while she slept. **State v. Brooks, 185.**

Prior convictions—traffic violations—The trial court did not commit plain error in a second-degree murder case by admitting defendant's prior traffic convictions for the previous eight years. **State v. Fuller, 481.**

Report—unredacted version admitted after redacted version—The trial court did not abuse its discretion in a negligence action involving Wal-Mart's practices in loading trailers by admitting an unredacted incident report produced pursuant to a subpoena duces tecum after a redacted version had been admitted. **Kilgo v. Wal-Mart Stores, Inc., 644.**

Similar occurrences after accident—not too remote—In a negligence action arising from an injury suffered by plaintiff when freight from a trailer fell on him when he opened the rear door, the trial court did not err by allowing testimony that, within 18 months after plaintiff's injuries, the witness had observed the method used by Wal-Mart to pack and load its merchandise into trailers and had observed merchandise fall out of the trailers when the rear doors were opened. **Kilgo v. Wal-Mart Stores, Inc., 644.**

Suppression hearing—presumption judge disregards improper evidence—The trial court did not err in a driving while impaired case by admitting testimony at the suppression hearing concerning events subsequent to the stop of defendant's vehicle. **State v. Covington, 688.**

Videotapes and camcorder—no plain error—Although the trial court erred in a first-degree statutory sex offense case by admitting testimony under N.C.G.S. § 8C-1, Rule 404(b) regarding videotapes and a camcorder defendant used to record activities in a bathroom since this evidence did not tend to show defendant's plan or scheme to sexually assault the minor victim, defendant failed to show plain error. **State v. Doisey, 620.**

EVIDENCE—Continued

Witness testimony—personal knowledge or personal perception required—Although the trial court erred in a first-degree murder case by permitting a witness to testify without a foundation establishing that the witness either had personal knowledge or a personal perception as required by N.C.G.S. § 8C-1, Rule 602, there was no reasonable possibility that a different result would have been reached absent this error. **State v. Harshaw, 657.**

FRAUD

Defective construction of house—cracks in other houses—knowledge of defects—The trial court properly denied defendants' motion for a directed verdict on the issue of fraud in an action arising from the allegedly defective construction of a house where there was evidence of cracks in the floors and foundations of approximately thirty other houses constructed by defendants using the same slab on grade method and that these houses did not meet building code standards. A reasonable person could find based on this evidence that Roberts Construction had actual knowledge of structural defects in plaintiffs' house at the time plaintiffs' purchased their home. **Allen v. Roberts Constr. Co., 557.**

HOMICIDE

Deadly weapon—hands—The trial court did not err in denying defendant-mother's motion to dismiss a first-degree murder charge, while committing felonious child abuse with the use of defendant's hands as a deadly weapon, because when a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons. **State v. Krider, 37.**

Felony murder—child abuse—motion to dismiss—sufficiency of evidence—The trial court did not err in denying defendant-mother's motion to dismiss a first-degree murder charge, while committing felonious child abuse with a deadly weapon. **State v. Krider, 37.**

Felony murder—child abuse—not ex post facto law—Although defendant argues that her conviction for first-degree murder while committing felonious child abuse with the use of defendant's hands as a deadly weapon should be overturned since the first case establishing felony child abuse as first-degree murder was decided after the victim's death in this case and should be inapplicable due to the prohibition of ex post facto laws, the Court of Appeals has previously noted that hands were treated as deadly weapons well before the date of this offense, and there was nothing to preclude its use for that purpose, nor does this use expand the felony murder statute in any way. **State v. Krider, 37.**

First-degree murder—battered child—sufficiency of evidence—The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss where the State's evidence revealed that the minor victim was a battered child who died as a result of injuries inflicted by defendant. **State v. Clark, 392.**

First-degree murder—motion to dismiss—sufficiency of evidence—Although defendant contends the State failed to present substantial evidence of premeditation and deliberation since the killing of the victim occurred during a quarrel, the trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. **State v. Farmer, 127.**

HOMICIDE—Continued

First degree murder—requested instruction—prior threats by victim—The trial court did not commit plain error in a non-capital first-degree murder case by denying defendant's request for jury instructions on the effect of evidence of threats by the victim against defendant. **State v. Farmer, 127.**

First-degree murder—short-form indictment—The trial court did not err in a first-degree murder prosecution by entering judgment on a short-form indictment. **State v. Holder, 89.**

First-degree murder—specific intent to kill—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge based on the alleged insufficient evidence to establish that defendant formed a specific intent to kill the victim when the victim was shot in the hip. **State v. Harshaw, 657.**

Premeditation and deliberation—sufficiency of evidence—conviction of second-degree murder—Any error was not prejudicial in a first-degree murder prosecution where the court denied defendant's motion to dismiss based upon insufficient evidence of premeditation and deliberation. There was substantial evidence that the killing was premeditated and deliberated and the jury returned a verdict of second-degree murder, which does not require premeditation and deliberation. **State v. Coplen, 48.**

Second-degree murder—driving while impaired—malice—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder based upon evidence that defendant, who was driving while impaired, struck and killed the victim while she was riding her bicycle. **State v. McAllister, 252.**

Second-degree murder—driving while impaired—malice—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the two charges of second-degree murder based on substantial evidence revealing that defendant had malice of the type manifesting a mind utterly without regard for human life and social duty where he struck a truck and killed two passengers therein while driving while impaired and fleeing from a highway patrolman. **State v. Fuller, 481.**

Second-degree murder—motion to dismiss—intent—Although defendant contends his motion to dismiss the charge of second-degree murder should have been granted since the trial court's instruction required the jury to find that defendant intentionally killed the victim, the instructions are irrelevant to the motion to dismiss. **State v. Lathan, 234.**

Second-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder based upon evidence that defendant pointed a rifle at the victim or in her direction and fired it. **State v. Lathan, 234.**

Second-degree murder—shaken baby syndrome malice—sufficiency of evidence—The trial court erred in denying defendant's motion to dismiss the charge of second-degree murder in a shaken baby syndrome case based on a failure to show malice. **State v. Blue, 404.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—ambulatory surgical facility—second site—The trial court correctly reversed the Department of Health & Human Services' ruling requiring petitioner to obtain a new certificate of need before developing ambulatory surgical facilities at a second site within its service area. The relocation and expansion of a portion of petitioner's ambulatory surgical program to a second location within the service area for which petitioner already holds a certificate of need does not fall within the definition of a "new institutional health service" as contained in N.C.G.S. § 131E-176(16) and does not require a second certificate of need. **Christenbury Surgery Ctr. v. N.C. Dep't of Health & Human Servs., 309.**

Certificate of need—nursing facility beds—summary judgment by ALJ—A certificate of need case involving nursing facility beds was remanded for a full adjudicatory hearing by OAH where an administrative law judge granted motions for summary judgment and the Department issued its final agency decision without hearing new evidence. A full adjudicatory hearing is appropriate in a certificate of need contested case involving two or more applicants; there will always be genuine issues of fact as to who is the superior applicant where two or more applicants conform to the majority of the criteria in N.C.G.S. § 131E-183 and are reviewed comparatively and it is imperative that the record contain all evidence at the OAH level. **Living Centers-Southeast, Inc. v. N.C. Dep't of Health & Human Servs., 572.**

Medical malpractice—agency of anesthesiologist—Summary judgment was properly granted for defendant hospital in a medical malpractice action where the hospital presented evidence of the agreement between it and the medical practice to which defendant anesthesiologist belonged which satisfied the hospital's initial burden of showing that it had no right to control the manner or method of the doctor's work at the hospital. The burden shifted to plaintiff to present evidence showing a genuine issue of fact on the agency question; while plaintiff presented hospital policies, the duties outlined therein were general in nature and do not reveal any control by the hospital over the manner and method of how the doctor performed his duties. **Hylton v. Koontz, 629.**

Medical malpractice—agency of doctor—summary judgment—Summary judgment for a hospital in a medical malpractice action based on Dr. Koontz's alleged negligence was reversed where the hospital presented no competent evidence of the nature of its relationship with Dr. Koontz. **Hylton v. Koontz, 629.**

IMMUNITY

Governmental—police officer—automobile accident—excess liability fund—not local government risk pool—The trial court did not err in granting summary judgment in favor of defendants and concluding defendants did not waive governmental immunity for damages of $350,000 incurred by plaintiffs in an auto accident with a police officer while the officer was driving defendant city's van back to work after taking the van for repairs because the city's participation in the Local Government Excess Liability Fund was not participation in local governmnent risk pool. **Dobrowolska v. Wall, 1.**

Governmental—police officer—automobile accident—governmental function—The trial court did not err in granting summary judgment in favor of

IMMUNITY—Continued

defendants on the basis of governmental immunity for damages incurred by plaintiffs in an automobile accident with a police officer while the officer was driving defendant city's van back to work after taking the van for repairs since the officer was performing a governmental function. **Dobrowolska v. Wall, 1.**

Governmental—waiver—liability insurance—The trial court erred in granting summary judgment in favor of defendant City of Jacksonville because although the maintenance of stop signs constitutes a discretionary function entitling the City to the defense of governmental immunity, the City waived this immunity since it was covered by a liability insurance policy at the time of this collision. N.C.G.S. § 160A-485(a). **Cucina v. City of Jacksonville, 99.**

INDIGENT DEFENDANTS

Assistance of experts—failure to establish particularized need—The trial court did not err in a first-degree murder case by denying defendant's motion for the assistance of experts in pathology and dentistry because defendant failed to establish a particularized need for a forensic pathologist or forensic dentist. **State v. Krider, 37.**

INSURANCE

Automobile—excess insurance clauses—The trial court did not err by granting summary judgment for defendant Universal in a declaratory judgment action to determine the responsibilities of the two insurers in a claim arising from an automobile accident where both policies contained "other insurance" provisions. **UGAA Casualty Co. v. Universal Underwrites Ins. Co., 684.**

Automobile—uninsured motorist coverage—Although plaintiff's automobile insurance policy issued by Farm Bureau included an uninsured motorist coverage with policy limits of $50,000 per injured person and plaintiff only received $32,500 in an arbitration with Farm Bureau, the trial court erred in dismissing plaintiff's claim for damages arising out of an automobile accident against defendants who were insured by an insolvent carrier in South Carolina. **Patel v. Stone, 693.**

Homeowner's—firing to frighten prowler—exclusion for intended acts—The trial court did not err by granting plaintiff's motion for summary judgment in a declaratory judgment action to determine insurance coverage where plaintiff provided homeowner's insurance to defendant Mizell, who was sued by defendant Austin for personal injuries arising from Mizell's discharge of a firearm. When a person fires multiple shots from a rifle at night in the direction of a prowler who is fifty feet away, that person could reasonably expect injury or damage to result from the intentional act. **N.C. Farm Bureau Mut. Ins. Co. v. Mizell, 530.**

JUDGMENTS

Consent—construction—The trial court on remand of a declaratory judgment construing a consent judgment between the members of Pinehurst Country Club and the owner of the club correctly removed a sentence which was a limitation on the Board of Directors' power to approve or disapprove membership requests, as required on the first remand. The court also correctly deleted from the

JUDGMENTS—Continued

declaratory judgment a paragraph dealing with the continued existence of amenities because the provisions of the original consent judgment were unambiguous. **Bicket v. McLean Sec., Inc., 353.**

Consent—interpretation—findings—A remanded declaratory judgment arising from a dispute over membership privileges for the Pinehurst Country Club was again remanded for inclusion of a specified corrected paragraph where the trial court found that a paragraph of a consent judgment in the original action prohibited increasing initiation fees above the amount charged in 1982. **Bicket v. McLean Sec., Inc., 353.**

Consent—remand—findings—reaffirmation—A trial court on remand correctly interpreted the term "Resort Guests" in a dispute between Pinehurst Country Club members and the owner of the club where the court, after hearing evidence and making findings of fact, reaffirmed its earlier findings. The court's findings of fact are supported by competent evidence and support the court's conclusions. **Bicket v. McLean Sec., Inc., 353.**

Default—deficiency action—good cause not shown—The trial court did not abuse its discretion by failing to grant defendant Shaut's motion to set aside an entry of default almost six months after its entry because defendant failed to show good cause. **First Citizens Bank & Tr. Co. v. Cannon, 153.**

Default—entry set aside for remaining defendants—The trial court erred by extending the default judgment it entered for the non-responding defendants to the remaining defendants in an action to quiet title to plaintiff's property. **Little v. Barson Fin. Servs. Corp., 700.**

Law of the case—prior declaratory judgment—A remanded declaratory judgment arising from a dispute between the owners of Pinehurst Country Club and its members was remanded again with instructions to delete all language from the declaratory judgment that purported to give class protection to any person who received membership by transfer after 1 October 1980. **Bicket v. McLean Sec., Inc., 353.**

Law of the case—remanded declaratory judgment—construction of consent judgment—The trial court did not err on remand of a declaratory judgment action to construe a consent judgment between the members of Pinehurst Country Club and the owners of the club by not determining whether a new class of membership had been established. However, the declaratory judgment was remanded for modification to delete restrictions that new classes of membership must have substantially different rights, privileges, and obligations. **Bicket v. McLean Sec., Inc., 353.**

Motion to amend denied—joinder of alternative claims—same transaction—joint and several liability—same question of law or fact—The trial court did not abuse its discretion by refusing to allow defendants' motion to amend the judgment to allocate the damages among defendants, based on alternative claims being joined under N.C.G.S. § 1A-1, Rule 20(a) in a case awarding plaintiff unpaid commissions earned under an alleged employment contract with defendants. **Fulk v. Piedmont Music Ctr., 425.**

JURISDICTION

Forum selection clause—sureties—Virginia law—The trial court properly denied defendants' notice of defenses to entry of a foreign judgment arising from an equipment lease where the document signed by defendants was titled "Guaranty," but the content reveals that defendants were directly responsible to plaintiff as soon as the principal debtor defaulted and, as sureties, were bound to the agreement entered into by the principal debtor and the forum selection clause it contained. Defendants failed to establish that the forum selection clause was unfair, unreasonable, or affected by fraud or unequal bargaining power. **United Leasing Corp. v. Plumides, 696.**

Personal—contract for services within North Carolina—failure to support allegations—An order denying defendant MAC's motion to dismiss for lack of personal jurisdiction was reversed where plaintiffs alleged that MAC had engaged plaintiff Bruggeman to procure real estate in North Carolina and that N.C.G.S. § 1-75.4(5)(a) conferred jurisdiction, defendants denied this allegation by means of an affidavit, and plaintiffs made no attempt to support their allegation with affidavits or otherwise. **Bruggeman v. Meditrust Acquisition Co., 612.**

Personal—minimum contacts—contract to locate golf courses—The trial court properly denied MCLLC's motion to dismiss for lack of personal jurisdiction in an action arising from the a contract with a realtor to locate golf courses for investment. **Bruggeman v. Meditrust Acquisition Co., 612.**

JURY

Juror contact with victim's family—no further inquiry by trial court—The trial court did not abuse its discretion in a first-degree murder case by failing to conduct a further inquiry into a juror's possible contact with a member of the victim's family. **State v. Clark, 392.**

Peremptory challenge—racial discrimination—failure to make prima facie showing—The trial court did not err in concluding that defendant failed to make a prima facie showing that the State's use of its peremptory challenges was based on purposeful discrimination. **State v. Crockett, 109.**

JUVENILES

Delinquency—wanton and willful conduct—There was sufficient evidence in a juvenile proceeding to support findings that the juveniles acted wantonly and willfully in damaging a vehicle, thus supporting findings of delinquency. **In re McKoy, 143.**

Restitution—means to pay—The trial court erred by ordering juveniles to pay restitution for throwing rocks at a car where there was insufficient evidence that the juveniles had or could reasonably acquire the means to pay $539.50 each within twelve months. **In re McKoy, 143.**

Restitution—parents' ability to pay—N.C.G.S. § 7A-649(2) does not authorize the juvenile court to consider the parents' ability to pay restitution when ordering juveniles to make restitution to the victim as a condition of probation. **In re McKoy, 143.**

KIDNAPPING

Indictment—facilitating commission of a felony—The trial court committed plain error in allowing defendant to be convicted of first-degree kidnapping under the theory that defendant unlawfully restrained the victim and removed her from one place to another without her consent and for the purpose of facilitating the commission of a felony where the confinement and restraint occurred after defendant shot the victim. **State v. Brooks, 185.**

MEDICAL MALPRACTICE

Expert witness—standard of care—general practitioner—The trial court did not err in a medical malpractice action by ruling that plaintiff's expert witnesses were not qualified to testify as to the applicable standard of care, resulting in a proper directed verdict for defendant, where defendant was a general practitioner and all three of plaintiff's witnesses were specialists as that term is used in the statute. N.C.G.S. § 8C-1, Rule 702 requires that an expert witness against a general practitioner must be a general practitioner; doctors who are either board certified in a specialty, who hold themselves out to be specialists, or who limit their practice to a specific field of medicine are properly deemed specialists. **FormyDuval v. Bunn, 381.**

Rule 9 certification—telephone conversation—The trial court erred by dismissing a medical malpractice action where plaintiff's counsel represented to his medical expert in a telephone conversation certain facts about the care provided by defendant and the expert opined that defendant breached the standard of care. This procedure was in full compliance with N.C.G.S. § 1A-1, Rule 9(j). **Hylton v. Koontz, 629.**

MORTGAGES

Foreclosure sale—purchase by lender—deficiency judgment—value of secured property—In a case where mortgaged property was purchased at a foreclosure sale by the lender, the trial court did not err by concluding defendant Cannon was not indebted to plaintiff after the foreclosure sale because the property was worth the amount of the debt and the amount bid by plaintiff at the foreclosure sale was substantially less than its true value. **First Citizens Bank & Tr. Co. v. Cannon, 153.**

MOTOR VEHICLES

Automobile accident—contributory negligence—summary judgment improper—The trial court erred in an automobile accident case by granting summary judgment in favor of defendants on the basis that plaintiff was contributorily negligent as a matter of law by failing to take precautionary measures at an intersection when she knew a stop sign had been knocked down in an earlier accident. **Cucina v. City of Jacksonville, 99.**

Automobile accident—negligence—proper lookout—summary judgment improper—The trial court erred in an automobile accident case by granting summary judgment in favor of defendant Pickett because there are genuine issues of material fact concerning Pickett's negligence and Pickett's maintenance of a proper lookout. **Cucina v. City of Jacksonville, 99.**

MOTOR VEHICLES—Continued

Motorcycle safety helmets—failure to wear—standing to challenge approved type requirement—The trial court did not err by refusing to dismiss respondents' citations for failing to wear a safety helmet while riding a motorcycle where respondents were not wearing helmets of any type when cited. Even assuming that the statutory requirement that the helmet be of a type approved by the Commissioner of Motor Vehicles is vague, a person of reasonable intelligence would understand that a failure to wear some type of safety helmet would be prohibited. N.C.G.S. § 20-140.4(a). **State v. Barker, 304.**

NEGLIGENCE

Accidental shooting—civil action in negligence—The trial court erred by granting summary judgment in favor of defendant Burnette in an action which arose when defendant intended to shoot at plaintiff's tire but shot him in the neck and plaintiff filed a civil action for negligence rather than the intentional tort of battery. Under a line of cases including *Vernon v. Barrow*, 95 N.C. App. 642, plaintiff may sue in negligence and therefore rely upon the three-year statute of limitations for personal injury rather than the one-year period for battery. **Lynn v. Burnette, 435.**

PARTIES

Motion to amend—joinder of counsel—no valid claim—The trial court did not err in denying defendants' motion to amend in order to join plaintiff's counsel for purposes of defendants' counterclaims under the N.C. Debt Collection Act. **Davis Lake Community Ass'n v. Feldmann, 292.**

PERJURY

Instructions—materiality of misstatement—The trial court erred in a perjury prosecution by giving instructions based on the pattern jury instructions, which resolved the issue of materiality for the jury and removed the question from their consideration. The language of the pattern jury instructions must yield to the holding in *United States v. Gaudin*, 515 U.S. 506, that the defendant had a constitutional right to have the jury decide materiality. **State v. Linney, 169.**

90-day estate inventory—misstatement of bank account value—The trial court did not err by denying defendant's motion to dismiss a charge of perjury arising from his listing of a guardianship bank account's value on a 90-day estate inventory. **State v. Linney, 169.**

PLEADINGS

Amendment—after judgment entered—North Carolina Wage and Hour Act—The trial court did not abuse its discretion by allowing plaintiff to amend his pleadings under N.C.G.S. § 1A-1, Rule 15 to reflect a claim pursuant to the North Carolina Wage and Hour Act of N.C.G.S. §§ 95-25.6 and 95-25.7 after judgment had been entered in the case. **Fulk v. Piedmont Music Ctr., 425.**

Amended complaint—new claim against defendant in individual capacity—new party—no relation back—An amended complaint did not relate back to the original and was barred by the statute of limitations where the original

PLEADINGS—Continued

claim was against defendant in his official capacity and the amended complaint named defendant in his individual capacity. The amended complaint had the effect of adding a new party and therefore did not relate back. **White v. Crisp, 516.**

Rule 11 sanctions—delay of litigation—dismissal without prejudice—no abuse of discretion—The trial court did not abuse its discretion by dismissing a defamation action without prejudice but with an assessment of costs to plaintiff as a Rule 11 sanction for intentionally delaying litigation. **Melton v. Stamm, 314.**

Rule 11 sanctions—frivolous motion—The trial court did not err in assessing $400 in sanctions under N.C.G.S. § 1A-1, Rule 11(a) against defendants' counsel based on defendants' filing of a frivolous N.C.G.S. § 1A-1, Rule 13(h) motion to join plaintiff's counsel as a party. **Davis Lake Community Ass'n v. Feldmann, 322.**

Rule 11 sanctions—motion to vacate arbitration award—The trial court did not err by denying a motion for Rule 11(a) sanctions arising from a motion to vacate an arbitration award. **Sholar Bus. Assocs. v. Davis, 298.**

POWER OF ATTORNEY

General—attorney-in-fact—conveyance of real property—In a case where decedent exercised a general power of attorney naming his stepdaughter as his attorney-in-fact, the trial court did not err by granting partial summary judgment in favor of plaintiff-executrix, setting aside the 1993 conveyance of decedent's real property by the stepdaughter to herself and her brother. **Hutchins v. Dowell, 673.**

PREMISES LIABILITY

Slip and fall—constructive knowledge—The trial court did not err in a slip and fall case by allowing defendant-store's motion for a directed verdict. **Thompson v. Wal-Mart Stores, Inc., 651.**

PRODUCTS LIABILITY

Contract and negligence basis—summary judgment—Summary judgment for defendants in a products liability action arising from a fire that damaged a hosiery mill was affirmed in part and reversed in part where there was conflicting evidence as to whether the fire began in the ballast within a flourescent light fixture manufactured by defendants. A products liability recovery is premised on either negligence or contract principles of warranty and, on either theory, a product defect may be inferred from evidence of the product's malfunction if there is evidence that the product had been put to its ordinary use (but it is not permissible to infer manufacturer negligence from a product defect inferred from a product malfunction). **Red Hill Hosiery Mill, Inc. v. Magnetek, Inc., 70.**

PUBLIC OFFICERS AND EMPLOYEES

Action against Board of Education employee—official capacity only—The trial court did not err by granting summary judgment for defendant in his individual capacity in an action arising from a motor vehicle accident involving a van owned by the Board of Education and driven by defendant within the scope of his employment where defendant filed a motion for summary judgment on the basis that the complaint sued defendant only in his official capacity and that he was immune; the trial court allowed an amendment but stated that the statute of limitations was not being addressed; summary judgment was granted for defendant in his official capacity; and claims against defendant in his individual capacity were dismissed as barred by the statute of limitations. The original complaint contains numerous allegations indicating that plaintiffs were suing defendant in his official capacity and there was an absence of any clear indication that defendant was sued in his individual capacity. **White v. Crisp, 516.**

RAPE

Statutory—conviction vacated—prior to amended statute—Defendant's conviction for statutory rape in case 97 CRS 20047 must be vacated because defendant was convicted for having sex with a fourteen-year-old on 26 November 1995, and the statutory rape law under N.C.G.S. § 14-27.2(a)(1) in effect at the time of the crime stated the victim had to be under thirteen years of age. **State v. Crockett, 109.**

Statutory—sufficiency of evidence—exact date immaterial—Although defendant's conviction for statutory rape in case 97 CRS 20048 must be remanded for resentencing since it was consolidated for the purpose of judgment with a vacated conviction in 97 CRS 20047, the conviction in 97 CRS 20048 is affirmed because the indictment charging that defendant committed the offense during the period from 22 November 1995 to 19 February 1996 is sufficient and the exact date is immaterial. **State v. Crockett, 109.**

ROBBERY

Purse snatching—force—sufficiency of evidence—The trial court erred by failing to dismiss a charge of common law robbery based on the State's inability to produce sufficient evidence as to the requisite element of force where the evidence showed only a purse-snatching incident. **State v. Robertson, 506.**

SEARCHES AND SEIZURES

Traffic stop—impaired driving checkpoint not required—Although defendant contends an officer's stop of his vehicle was illegal based on an alleged failure to establish a valid checking station for impaired driving checks as required by N.C.G.S. § 20-16.3A, it was reasonable for an officer to briefly stop and detain defendant to ascertain defendant's identity and his possible involvement in criminal activity or to warn him as a resident. **State v. Covington, 688.**

Traffic stop—officer in place or position to apprehend or warn—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress all evidence obtained as a result of the stop of his vehicle. **State v. Covington, 688.**

SENTENCING

Aggravating factor—property taken of great monetary value—There was sufficient evidence in a sentencing hearing for felonious larceny to find the aggravating factor that the larceny involved taking property of great monetary value. **State v. Hendricks, 668.**

Aggravating factor—second-degree murder—knowingly created a great risk of death—The trial court did not err in a second-degree murder case by finding as an aggravating sentencing factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person under N.C.G.S. § 15A-1340.16(d)(8). **State v. Fuller, 481.**

Aggravating factor—statutory rape—sexual activity by a custodian—position of trust or confidence—The trial court did not err in finding as an aggravating factor for the statutory rape charges that defendant took advantage of a position of trust or confidence. **State v. Crockett, 109.**

Victim impact statement—unsworn—There was no error in a sentencing hearing for felonious larceny and other offenses where the trial court permitted an unsworn victim impact statement. The rules of evidence to not apply for purposes of sentencing hearings and defendant never objected to the testimony at the hearing. **State v. Hendricks, 668.**

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First-degree sexual offense—indecent liberties—burden of proof—beyond a reasonable doubt—The juvenile court did not err in finding that the State had proven the charges of first-degree sexual offense and indecent liberties beyond a reasonable doubt. **State v. Pugh, 60.**

First-degree sexual offense—indecent liberties—motion to dismiss—sufficiency of evidence—The juvenile court did not err by denying the juvenile's motions to dismiss first-degree sexual offense and indecent liberties charges. **State v. Pugh, 60.**

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Transfer of hospital facility—two- or three-year limitations period—Plaintiff's action seeking a declaratory judgment and injunctive relief voiding the transfer of a hospital facility was barred by the statute of limitations where the deed to the hospital tract was executed on 28 March 1994, a quitclaim deed to personal property within the hospital was recorded on 20 February 1995, and the action was brought on 21 August 1998. Although plaintiff argued for the ten-year limitations period of N.C.G.S. § 1-56, the causes of action against the County and the county commissioners require the use of the two-year period of N.C.G.S. § 1-53(1) for actions against a local unit of government arising from a contract (a deed is a contract), while the three-year period of N.C.G.S. § 1-52(1) applies to claims against the defendants which are not local units of government. **Hamlet v. HMA. Inc. v. Richmond County, 415.**

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Privilege—dealing in installment paper—intent to profit immaterial—Although the trial court did not err by granting summary judgment for Chrysler Financial on a claim for refund of privilege taxes assessed against its wholesale financing business, Chrysler Financial was engaged in the business of dealing in installment paper under the plain meaning of N.C.G.S. § 105-83; it is immaterial whether Chrysler Financial's engagement in this business was intended for or resulted in making a profit. **Chrysler Fin. Co. v. Offerman, 268.**

Privilege—wholesale automobile financing—activity not in North Carolina—The trial court did not err by granting summary judgment for Chrysler Financial in an action for a refund of privilege taxes assessed against its wholesale financing business under N.C.G.S. § 105-83. The agreement with Chrysler Corporation to purchase installment paper was executed in Michigan and the buying and selling of the paper takes place entirely in Michigan. **Chrysler Fin. Co. v. Offerman, 268.**

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Attorneys' fees—prevailing party—actual damages—The portion of a judgment awarding counsel fees on a claim for unfair and deceptive trade practices was vacated where a new trial was ordered on the issue of damages. Attorneys' fees may be allowed to a prevailing party under N.C.G.S. § 75-16.1 in a Chapter 75 claim, but one must suffer actual damages to be a "prevailing party." **Poor v. Hill, 19.**

Breach of contract—insufficient—The trial court did not err by dismissing defendants' claim for unfair and deceptive trade practices based on plaintiff's alleged failure to keep his promise to assist defendants in purchasing a beach condominium. **Miller v. Rose, 582.**

Defective construction of house—fraud—failure to obtain contractor's license—The trial court did not err in an action arising from the allegedly defective construction of a house by entering judgment against defendant Roberts Construction and Bobby Roberts for unfair and deceptive trade practices where the court based its conclusion regarding Roberts Construction on a judgment for fraud against Roberts Construction, and the conclusion as to Bobby Roberts upon three conclusions, only one of which (failure to obtain a general contractor's license) was appealed. **Allen v. Roberts Constr. Co., 557.**

Employee founding rival business—conduct after leaving plaintiff's employment—The trial court correctly granted summary judgment for defendant Menius on an unfair and deceptive trade practices claim arising from defendants leaving plaintiff's employment and starting a rival business. Plaintiff showed that Menius formed a competing business, obtained financing for that business, and began to solicit plaintiff's clients after she left plaintiff's employment, conduct that does not amount to an unfair and deceptive trade practice on the facts presented. **Dalton v. Camp, 201.**

Employee founding rival business—deceptive use of position of confidence—The trial court erred by granting summary judgment for defendant Camp on an unfair and deceptive trade practices claim arising from defendants leaving plaintiff's employment and starting a rival business where plaintiff presented evidence that defendant Camp deceptively used a position of confidence to solicit the plaintiff's customers and compete with plaintiff while still in his employment, concealing his behavior from plaintiff. **Dalton v. Camp, 201.**

Real estate sale—failure to close—The trial court did not err by denying defendants' JNOV motion on an unfair and deceptive trade practice claim arising from the failure of a real estate transaction to close and the resale of the property by defendants where it was undisputed that quitclaim deeds from another

UNFAIR TRADE PRACTICES—Continued

party were not signed until December 1994, providing support for the jury's answer that defendant-Mr. Hill knew he was not in a position to perform the contract with plaintiffs on 22 September, when defendants declared plaintiffs in default on their offer, having already resold the property at a higher price. **Poor v. Hill, 19.**

Real estate sale—failure to close—liability of spouse—The trial court erred by granting a directed verdict for defendant-Mrs. Hill on an unfair and deceptive trade practices claim arising from the failure of a real estate sale to close where defendants contended that the evidence focused upon the actions of Mr. Hill, but the evidence, taken in the light most favorable to plaintiffs, tended to show that Mr. Hill was at all times acting as agent for Mrs. Hill during the course of his dealings with plaintiffs regarding the lots at issue. **Poor v. Hill, 19.**

Real estate sale—failure to close—resale—The trial court did not err by determining that defendants' acts surrounding a real estate transaction which failed to close constituted an unfair or deceptive trade practice, given the deceptive nature of the male defendant's letter to plaintiffs, his imposition of an increased price upon the lots and entry into sales contracts with third parties, and his retention of plaintiffs' earnest money deposits. **Poor v. Hill, 19.**

Solicitation of rival's business—deceptive—employment relationship not a bar—The trial court erred by awarding summary judgment to defendant Millennium Communications Concepts, Inc. (MCC) on an unfair and deceptive trade practices claim arising from defendants Camp and Menius leaving plaintiff's employment and founding MCC. According to plaintiff's forecast of evidence, MCC acted through Camp in deceptively soliciting plaintiff's business. In light of *Sara Lee Corp. v. Carter*, 351 N.C. 27, Camp's employment relationship is no longer a bar to plaintiff's unfair and deceptive trade practice claim. **Dalton v. Camp, 201.**

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Fraudulent automobile leases—convenience of witnesses—There was no abuse of discretion in the trial court's denial of defendant Miller's motion for a change of venue in an action arising from alleged fraudulent automobile lease scheme where defendant contended that the motion should have been granted for the convenience of witnesses and to promote the ends of justice. **Centura Bank v. Miller, 679.**

Fraudulent automobile leases—leased property not sold—not an action to recover a deficiency—The trial court did not err by denying defendant Miller's motion for a change of venue in an action arising from an alleged fraudulent automobile lease scheme where defendant contended that the action was to recover a deficiency owed on a debt, but the leased property had not been sold. N.C.G.S. § 1-76.1 did not apply. **Centura Bank v. Miller, 679.**

Fraudulent automobile leases—place of business versus principal office—The trial court did not err by denying defendant Miller's motion for a change of venue in an action arising from an alleged fraudulent automobile lease scheme where defendant contended that Guilford County is an improper forum because plaintiff's principal office is in Nash County, although it maintains a place of business in Guilford County. **Centura Bank v. Miller, 679.**

VENUE—Continued

Fraudulent automobile leases—primary purpose of complaint—recovery of money damages—The trial court did not err by denying defendant Miller's motion for a change of venue in an action arising from an alleged fraudulent automobile lease scheme where defendant contends that plaintiff's action is primarily to recover personal property and must be tried in the county where two of the three vehicles are located, but the primary purpose of the complaint is to recover money damages, with surrender of personal property ancillary to that purpose. N.C.G.S. § 1-76(4) did not apply. **Centura Bank v. Miller, 679.**

Motion for change—witnesses afraid—pretrial publicity—The trial court did not abuse its discretion in a non-capital first-degree murder case by denying defendant's pretrial motion to change venue based on a broad statement by his investigator that certain witnesses were afraid to testify for the defense. **State v. Farmer, 127.**

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Express—defective construction of house—written notice—complaint—The trial court erred by denying defendant Roberts Construction a directed verdict on the issue of breach of express warranty arising from the house not being constructed in substantial conformity with the plans and specifications approved for the house where the terms of the warranty required written notice of the breach. Assuming that service of a complaint is sufficient to give written notice, as plaintiffs contend, this complaint did not allege that Roberts Construction failed to construct the house in substantial conformity with the plans and specifications which were approved for the house and therefore did not provide Roberts Construction with written notice of the alleged breach. **Allen v. Roberts Constr. Co., 557.**

Implied warranty of habitability—cracks in house—The trial court properly denied defendants' motion for a directed verdict on the issue of breach of implied warranty of habitability in a case arising from cracks in plaintiff's house where there was testimony regarding numerous cracks in the interior and exterior of plaintiff's house, including the floor, foundation wall, and sheetrock; that plaintiffs' foundation did not conform to the minimum requirements of the building code and plans; and the construction of the foundation created a major structural defect. Based on this evidence, a reasonable juror could find that plaintiffs' house was not free from structural defects and that the foundation was not constructed in a workmanlike manner. **Allen v. Roberts Constr. Co., 557.**

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Concurrent life estate and dower—ambiguous—presumption against intestacy—Testatrix's devise of real property to her niece and the niece's children for the niece's natural life is held to be a devise to her niece for her natural life and then to her children where the will did not have a residuary clause since a concurrent life estate with the children's interest terminating at the niece's death would result in an intestacy. **Watson v. Smoker, 158.**

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WORKERS' COMPENSATION

Back injury—existing condition—compensability—medical testimony—The Industrial Commission did not err in a workers' compensation proceeding by concluding that plaintiff's back injury was compensable where defendants contended that the medical testimony upon which the conclusion rested was based upon an inaccurate medical history. The record is not replete with evidence that plaintiff had an existing degenerative back condition and the medical testimony that plaintiff's impairment was caused by his work-related injuries was in consideration of defendants' assertions as to a pre-existing condition. **Demery v. Converse, Inc., 243.**

Causation—work-related accident—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff established his herniated disc was caused by a work-related incident. **Peagler v. Tyson Foods, Inc., 593.**

Compromise settlement agreement—health insurer not included—real party in interest—settlement void—A compromise settlement agreement in a workers' compensation case was void where a health insurer which had filed a claim for reimbursement did not consent to the settlement. In a case of first impression, the Court of Appeals held that the Industrial Commission had subject matter jurisdiction over the claim because a health insurer may intervene as a real party in interest when it alleges that it has paid medical expenses due to an employee's compensable injury and is entitled to reimbursement and liability is disputed by the employer. **Hansen v. Crystal Ford-Mercery, Inc., 369.**

Disability—maximum medical improvement—inability to earn any wages—evidence insufficient—The Industrial Commission erred in a workers' compensation action by concluding that plaintiff was entitled to total and permanent disability benefits where plaintiff had no presumption of total disability because a Form 21 was not completed and plaintiff did not meet the burden of showing that he is totally disabled and unable to earn any of the wages he was receiving at the time of his injury in the same or any other employment. Findings that plaintiff is restricted in his work after reaching maximum medical improvement do not necessarily support the finding that he is totally disabled. **Demery v. Demery v. Converse, Inc., 243.**

Disability payments—employer's entitlement to a credit—The Industrial Commission erred in a workers' compensation case by concluding that defendant-employer was not entitled to a credit for disability payments to plaintiff-employee under N.C.G.S. § 97-42. **Peagler v. Tyson Foods, Inc., 593.**

Jurisdiction—work-related injury—The trial court did not err by dismissing plaintiff's complaint for personal injuries based on lack of subject matter jurisdiction because claims for work-related injuries are within the exclusive jurisdiction of the Industrial Commission. **Reece v. Forga, 703.**

WORKERS' COMPENSATION—Continued

Loss of earning capacity—insufficiency of evidence—An Industrial Commission decision in a worker's compensation action was reversed and remanded as premature where the Commission stated that plaintiff was incapable of earning his pre-injury wage at the same or other employment but the opinion and award lacked findings to support that conclusion. **Olivares-Juarez v. Showell Farms, 663.**

Notice of accident—failure to give timely written notice—reasonable excuse—no prejudice—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's failure to give timely written notice of the accident was reasonable, and in concluding that defendant-employer was not prejudiced by the delay. **Peagler v. Tyson Foods, Inc., 593.**

Second deputy commissioner's opinion—first not res judicata—The Industrial Commission erred by concluding in a workers' compensation action on appeal from the second deputy commissioner's opinion that a claim by plaintiff that post-traumatic stress arising from his job as a prison guard aggravated his diabetes was res judicata. **Lewis v. N.C. Dep't of Correction, 526.**

Subrogation lien—employer's negligence—Although an employer whose workers' compensation subrogation lien was eliminated contended that it was free from culpability in the accident and was therefore entitled to a lien on the third-party tortfeasor settlement proceeds, the employer's negligence becomes relevant only when the third-party tortfeasor asserts that the employer's negligence joined or concurred with the negligence of the third party in causing the injury. **In re Biddix, 500.**

Subrogation lien—third-party tortfeasor—elimination of lien—The trial court did not abuse its discretion by ordering that the employer (Wal-Mart) have no lien upon the proceeds of the employee's settlement with a third-party tortfeasor where the court made findings with respect to the extent of the employee's injuries, her ongoing pain and suffering, her medical expenses paid by Wal-Mart, her compensation for temporary disability, the amount of the settlement, and the fact that the third-party tortfeasor had no additional assets from which she could recover, and concluded that the amount of the settlement inadequately compensated plaintiff for her injuries. **In re Biddix, 500.**

Subrogation lien—third-party tortfeasor settlement—Constitutional challenges to N.C.G.S. § 97-10.2(j) arising from the elimination of a workers' compensation subrogation lien have been rejected previously or were not preserved for review in that the employer presented no evidence in support of these contentions to the trial court during the hearing. **In re Biddix, 500.**

Temporary total disability—diminished earning capacity—unable to perform work of any kind—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff-employee temporary total disability based on its conclusion that plaintiff was unable to perform work of any kind. **Peagler v. Tyson Foods, Inc., 593.**

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mony of defendant-employer's witnesses in a workers' compensation case regarding plaintiff's failure to report the work-related injury and his wife's statement to one witness that the injury may have been caused by plaintiff's work at home. **Peagler v. Tyson Foods, Inc., 593.**

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Interference with prospective advantage—employees founding rival business—continuing relationship—summary judgment—The trial court erroneously granted summary judgment for defendants on a claim for tortious interference with prospective advantage arising from defendants leaving plaintiff's employment and starting a rival business publishing employment magazines. **Dalton v. Camp, 201.**

Interference with prospective advantage—employees founding rival business—deceptive use of confidential relationship by business—The trial court erred by granting summary judgment for defendant MCC on a claim for interference with prospective advantage in an action arising from defendants Camp and Menius leaving plaintiff's employment and starting a rival business (MCC). **Dalton v. Camp, 201.**

Interference with prospective advantage—employees founding rival business—right to compete—The trial court improperly granted summary judgment for defendant Camp but properly granted summary judgment for defendant Menius on a claim for interference with prospective advantage arising from defendants leaving plaintiff's employment to start a rival business. The argument that Camp had an unqualified right to compete ignores Camp's ongoing duty to plaintiff as general manager of plaintiff's company. Menius could freely compete because she did not act adversely to plaintiff's interests until after she left his employment. **Dalton v. Camp, 201.**

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Nonconforming use—expansion—geographical area—The trial court did not err by affirming respondent's decision that petitioner was not permitted to construct an RV park on an existing nonconforming campground. The relevant ordinance restricts the enlargement and increase of a nonconforming use and the extension of any nonconforming use to a greater area of land; the phrase "enlargement and increase" applies to any enlargement or increase within the geographical area originally covered by the permitted nonconforming use. **Kirkpatrick v. Village Council, 79.**

Nonconforming use—expansion—reliance on building permits—good faith—The trial court correctly affirmed respondent's decision that the conversion of a campground to an RV park was an expansion of a nonconforming use even though petitioner argued that it had relied upon building permits. Respondent's finding that petitioner did not proceed in good faith because it knowingly took actions and made expenditures after it knew the project might not be permitted was supported by the evidence. **Kirkpatrick v. Village Council, 79.**

Nonconforming use—meaning of enlarge—Although petitioner contended that "renovations" of a campground did not constitute enlargement of a noncon-

ZONING—Continued

forming use, the evidence supported the finding that the existing campground contained 50 identifiable sites and petitioner wished to construct an RV park capable of accommodating 150 vehicles. The plain meaning of "enlarge" is to become bigger, and respondent's finding supported the conclusion that the establishment of more than 50 total sites constitutes an enlargement of the pre-existing use. **Kirkpatrick v. Village Council, 79.**

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